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\*\* DECISION - Date of Decision \_\_\_\_\_  
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\*\* CONCURRING OPINION of \_\_\_\_\_

- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* SEPARATE OPINION of \_\_\_\_\_

- Date \_\_\_\_\_  
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\*\* DISSENTING OPINION of \_\_\_\_\_

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## IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داری دعاوی ایران

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
Date	30 SEP 1986
	۱۳۶۵ / ۷ / ۸
No.	295

CASE NO. 295

CHAMBER TWO

AWARD NO. 257-295-2

THE AUSTIN COMPANY,  
Claimant,  
and  
MACHINE SAZI ARAK and  
MACHINE SAZI PARS,  
Respondents.

AWARDAppearances:

For Claimant:

Mr. Barry Cohen  
Counsel for Claimant,  
Mr. Richard Fenn,  
Witness.

For Respondents:

Mr. Mohammad K. Eshragh,  
Agent of the Government  
of the Islamic Republic  
of Iran,  
Dr. Jafar Niaki,  
Mr. Seyed-Mostafa Dorchezadeh,  
Legal Advisers to the  
Agent,  
Mr. Changiz Ahmaripour,  
Mr. Houshang Faryabi,  
Representatives of  
Machine Sazi Arak.

Also Present:

Mr. John R. Crook,  
Agent of the United  
States of America,  
Mr. Sam Witten,  
Adviser to the Agent.

## I. INTRODUCTION

1. The Claimant, THE AUSTIN COMPANY ("Austin") seeks damages plus interest and costs arising under two contracts it entered into with two Iranian companies, the Respondents MACHINE SAZI ARAK ("MSA") and MACHINE SAZI PARS ("MSP"). Austin seeks damages of U.S.\$239,070.43, arising from the first contract (with MSA) for the provision of engineering services for the construction of a steel products plant at Arak in Iran. It also seeks damages of U.S.\$1,294.27, arising from the second contract (with MSP) to supply equipment and spare parts for a mobile crane. Both MSA and MSP filed counterclaims.

2. A Hearing was held on 17 June 1986.

## II. PROCEDURAL MATTERS

### (a) Amendment of Austin's Statement of Claim

3. In its original Statement of Claim, Austin mistakenly identified MSA as the Respondent to both Claims. In its Statement of Defence, filed on 26 July 1982, MSA disclaimed all knowledge of the second contract for the spare parts. Subsequently, on 30 August 1982, Austin filed an Amendment to its Statement of Claim and, pursuant to Article 20 of the Tribunal Rules, sought to name MSP as the proper Respondent.

4. MSP argues that the proposed Amendment introduces a new Respondent and is therefore an attempt to introduce a new claim after the deadline prescribed in Article III, paragraph 4, of the Claims Settlement Declaration. See Refusal to Accept the Claim of Raymond International (U.K.) Ltd., Decision No. DEC 18-Ref 21-FT (8 December 1982); and Universal Enterprises, Ltd. and National Iranian Oil Company et al., Decision No. DEC 38-246-2 (23 July 1985).

5. The Tribunal notes that although MSP is not named as the Respondent in the original Statement of Claim, the supporting documentary evidence attached to the Statement of Claim, including the telex order from MSP to Austin requesting the spare parts, and the invoice from Austin to MSP requesting payment of the amount claimed, clearly identifies the other contracting party as MSP. In these circumstances, the Tribunal determines that the Claimant's filing of 30 August 1982 is not an impermissible amendment seeking to introduce a Respondent, but is a permissible clarification of the identity of the proper Respondent. See Refusal to File Claim of AMF Overseas Corporation, Decision No. DEC 17-Ref 20-FT (8 December 1982).

6. The Tribunal therefore decides that MSP is the proper Respondent with respect to the Claim relating to the order for spare parts.

(b) MSA's Counterclaims

7. MSA counterclaimed for damages for non-performance of the contract, for taxes, and for social security premiums. These counterclaims were introduced by MSA in its Reply to Austin's Final Brief filed on 30 March 1984. In this filing MSA acknowledged that the counterclaims were late-filed and it cited the disruption caused by the Revolution as the reason for the late filing.

8. On 16 April 1984, the Tribunal refused to accept these late-filed counterclaims, stating:

Pursuant to Article 19(3) of the Tribunal Rules, as long as the Tribunal has not been informed of any adequate justification for the delay in presenting this counterclaim, the Tribunal, in this advanced stage of the proceedings, cannot agree to accept this counterclaim.

9. During the subsequent proceedings no further reasons or justification have been offered for the delay in presenting these counterclaims. In these circumstances there is no basis for any reconsideration of this matter.

### III. JURISDICTION

#### (a) The Parties

10. Austin submits a certificate from the Secretary of the State of Ohio, as evidence that it is a United States company incorporated in Cleveland, Ohio. Austin also presents an affidavit from its Corporate Secretary attesting that at least 98 per cent of Austin's stock was owned by United States citizens from 1978, when the Claims arose, through 1982. The Respondents have submitted no evidence in rebuttal.

11. The Tribunal is satisfied on the basis of the evidence submitted, that the Claimant is a United States national within the meaning of the Claims Settlement Declaration.

12. Neither MSP nor MSA contest that they fall within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration. Furthermore, the Tribunal has previously held that both MSA and MSP fall within that definition of "Iran". See Harnischfeger Corporation and Ministry of Roads and Transportation et al., Award No. 144-180-3, p. 13 (13 July 1984).

#### (b) The Claims

13. It is not disputed that both Claims arise out of "contracts" as required by Article II, paragraph 1, of the Claims Settlement Declaration; that the Claims were owned continuously during the relevant period as required by

Article VII, paragraph 2, of the Claims Settlement Declaration; and, that both Claims were outstanding at the date of the Claims Settlement Declaration. Therefore the Tribunal is satisfied that it has jurisdiction over these Claims.

(c) MSP's Counterclaim

14. MSP counterclaims for social security premiums. It submits a letter from the Social Security Organization ("SSO"), dated 26 January 1982, containing some rudimentary calculation of the amounts allegedly owing, and seeking payment of 2,035,930 Rials plus late payment penalties.

15. The Tribunal notes that the SSO's letter identifies social security debts allegedly owed by Austin for services performed in 1978 and related to the building of a new factory for MSP at Karaj in Iran. This is clearly not "the same contract, transaction or occurrence that constitutes the subject matter of [Austin's] claim", as required by Article II, paragraph 1, of the Claims Settlement Declaration. Accordingly, MSP's counterclaim is dismissed for lack of jurisdiction.

IV. THE CLAIMS

1. The MSA Contract

(i) Background to the Claim

16. In 1977, Austin contracted with MSA to provide engineering services in connection with the construction of a steel products plant at Arak in Iran. Work commenced on the project in October 1977 pursuant to a letter of intent which was eventually superseded by a three-phase engineering services contract, dated 23 January 1978.

17. Under Phase I of the contract, Austin prepared a preliminary study of the project to determine the engineering work required for the erection of the steel products plant. This work was completed in 1977 (before the formal contract was signed), and the agreed price of U.S.\$25,000 was paid. Austin commenced work on Phase II of the project in December 1977. Work ceased in December 1979 during Phase III, with approximately 55% of the work completed.

18. Pursuant to the contract, MSA was to reimburse Austin for time charges plus a percentage for overheads and profit. The specific provisions for payment included reimbursement for employees' salaries and allowances, overheads, and reimbursement of "any Iranian taxes required on this project" unless a Bilateral Tax Agreement between the United States and Iran would provide for elimination of "double taxation". In conjunction with these provisions the contract included an addendum containing, inter alia, an estimate of expenses, stated at U.S.\$20,000, for each of Phases II and III. Payment for the preceding month's work was to be made by MSA within two weeks of receiving Austin's invoice.

19. After commencement of Phase II of the project in December 1977, Austin submitted monthly invoices to MSA. All were paid up to and including the July 1978 invoice. Thereafter payment ceased, but Austin continued to perform services under the contract and to submit its invoices in the normal way. Pursuant to an arrangement between the Parties, MSA withheld 5.5% of each payment for Iranian taxes until such time as the Parties could establish the existence or otherwise of a bilateral tax agreement between the United States and Iran.

20. In November and December 1978, Austin advised MSA that it would have no alternative but to cease work on the project if payment of the outstanding invoices was not

forthcoming. MSA made no further payments, and Austin ceased work on the project in January 1979.

21. Late in 1979, the Parties discussed the possibility of a resumption of work on the project, and a revised draft contract was prepared. However, on 10 May 1980, MSA wrote to Austin advising that MSA wished to terminate the contract and requesting Austin to forward to it certain engineering documents completed by Austin. MSA stated that as soon as the documents were received, payment would be made. Austin replied on 30 May 1980 stating that it would forward all the documents after it had received payment of the outstanding invoices. During July and August 1980, the Parties exchanged communications concerning the establishment of a letter of credit to secure payment of the amount owing, payment to be made upon receipt of certification that the documents had been shipped. However, this arrangement never eventuated. Austin acknowledges that it is in effect asserting a lien on the engineering documents pending payment of the outstanding invoices.

22. Austin claims from MSA the amount of its monthly invoices from August 1978 through January 1979, totalling U.S.\$223,396.03, and the 5.5% withholding tax on the invoices from December 1977 to July 1978, totalling U.S.\$15,674.40 making an overall total of U.S.\$239,070.43.<sup>1</sup> The method by which these amounts have been computed is not in dispute between the Parties.

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<sup>1</sup>In its Statement of Claim, Austin claimed U.S.\$234,416.37 for six outstanding invoices plus U.S.\$20,324.87 as the balance due on previous invoices, comprising a total of U.S.\$254,741.24. These figures included the compensatory (but unauthorized) 5.5% Austin added to its invoices commencing from and including the June 1978, invoice because of the 5.5% deductions MSA had made from its invoice payments. Subsequently, in Schedule I to its Final Brief, Austin adjusted the amount of its claim and deducted the additional 5.5% from the unpaid invoice amounts  
(Footnote Continued)



23. MSA, in its Statement of Defence, acknowledged that in its letter of 10 May 1980 it had agreed to settle outstanding accounts. It states that this settlement did not occur because Austin unjustifiably refused to forward to it the engineering documents.

24. Subsequently, in its Reply to Austin's Final Brief and Rebuttal, MSA raised substantive objections to Austin's claim in the form of allegations of defective and incomplete performance of the contract and of cost overruns.

25. Following a request from MSA, the Tribunal, on 5 December 1984, ordered Austin to produce one copy of the documents still in its possession, for the "purposes of inspection only". On 7 March 1986, MSA filed its comments taking exception to the quality, quantity, and presentation of the documents filed. Generally, these allegations are that the completion of documents was not in keeping with a time schedule prepared by Austin, and a reiteration of the earlier allegation that the documents produced were incomplete or in a preliminary or unfinished state.

26. As to the allegations of defective performance, Austin states that it performed its work in a satisfactory way, and that there was never any contemporaneous complaints on its performance, despite numerous opportunities for MSA to do so. It asserts that MSA's failure to pay resulted from problems in obtaining foreign exchange, not from any dissatisfaction with Austin's work.

27. Austin also rejects MSA's allegations concerning untimely or incomplete performance of the contract. It states that the time schedule to which MSA refers was only an estimate of work progress, and was not included in the

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(Footnote Continued)

claimed and also made an appropriate deduction for the June and July invoices (which had been paid by MSA).

contract. As to the related allegations that the drawings were incomplete, Austin states that this is indicative only of the fact that the contract was terminated before the work was completed.

28. As to the allegation of cost overruns, Austin states that MSA has mistakenly included in its calculations the expenses of a Mr. LaBarbara, a special consultant with expertise in the field of pressure vessels. It is contended that this consultant was retained with MSA's authorization and that the value of his services was included in the general estimate for Phase III. In short, Austin rejects all of MSA's allegations propounded as justification for its non-payment of the outstanding amounts.

(ii) Reasons for the Award

29. As a starting point in consideration of the Claim, the Tribunal determines Austin was justified in suspending work in January 1979. MSA's continuing inability to make payment on the invoices submitted in accordance with the contract was clearly a material breach of its contractual obligations. Under the contract, MSA's obligation to pay arose as Austin performed services and within two weeks of receipt by MSA of the invoices. It was independent of Austin's obligation to forward copies of the documents produced.

30. Following on from this finding, it is necessary to determine whether any of MSA's allegations as to defective performance of the contract justify MSA's refusal to make payment.

31. The Tribunal finds that the crucial factor in its examination is the lack of any evidence that MSA made any objections prior to 1983 (long after Austin's involvement in

the project ceased), as to the quality and timeliness of Austin's performance.

32. Furthermore, it is clear to the Tribunal that there was ample opportunity for MSA to make such objections. MSA has not disputed Austin's evidence that during all stages of the project there was close contact and co-operation between the Parties including face to face meetings at crucial stages of the project. Mr. Fenn, Austin's manager for the project, gave evidence of a major review meeting in September 1978 when the manager of MSA visited Austin's office in Cleveland. The Tribunal finds the evidence before it points to a close and harmonious working relationship between the Parties which continued after the suspension of work in 1979. Such a finding is supported by the efforts made by MSA to re-engage Austin to complete the project. MSA's delay in making complaints as to the quality and timeliness of Austin's performance undermines the credibility of these complaints.

33. The Tribunal also finds that MSA repeatedly acknowledged its intention to settle the outstanding amounts. This is evidenced by the Statement of Defence itself and by various telexes from MSA officials. On 28 November 1978, MSA's financial director (mistakenly) informed Austin that payment of the August and September invoices had been made. On 3 March 1979 Mr. Hatami, MSA's project-manager, requested Austin to resume work on the project and advised that efforts were being made to finalise payment of all outstanding dues. Further, by a telex dated 3 March 1979, Mr. Hatami informed Austin that outstanding dues would be paid and stated "you can rest assured that our contractual commitments to you will be fully honoured, as soon as possible." These matters provide further evidence of MSA's satisfaction with the work performed.

34. MSA's contentions as to cost overruns must also be rejected. The Tribunal notes that Clause 1(c) of the

Contract provides that Austin be reimbursed for the costs of "outside Consultants recommended by Austin and approved by [MSA]". In evidence that was not contested by MSA, Mr. Fenn, Austin's manager for the project, testified that Mr. LaBarbara was present at the September 1978 review meeting. Although only summaries of the paid invoices were submitted, it is not contested by MSA that Mr. LaBarbara's fees were paid as a separate item in the eight invoices MSA paid. It is reasonable to surmise, given the evidence as to the scrutiny given to the project at the September 1978 meeting, that Mr. LaBarbara's position and function were understood as between the Parties and the Tribunal accepts that his costs are properly charged to MSA as a separate fee. MSA's objections as to cost overruns are therefore denied.

35. The Tribunal is satisfied that Austin performed its work properly and is entitled to payment of the amounts owing on its outstanding invoices. The Tribunal therefore awards U.S.\$223,396.03 accordingly.

36. In view of this finding, the Tribunal instructs the Co-Registrars to deliver to the Agent of the Islamic Republic of Iran for transmittal to MSA the documents deposited by Austin with the Tribunal on 16 January 1985.

37. When considering the part of the Claim relating to the withheld taxes, it is necessary to examine Clause 1(c) of the contract. This expressly provides that MSA will reimburse Austin for "[a]ny Iranian taxes required on this project... unless the Bilateral Tax agreement between the U.S.A. and Iran provides for elimination of double taxation." MSA accepted in a telex dated 16 November 1978, from its Financial Director, that, in the absence of such agreement, Austin would be entitled to the taxation deductions made on the paid invoices. Austin presented the affidavit of a United States taxation specialist who deposed that no bilateral tax agreement was ever concluded between the United States and Iran. This evidence is not disputed

by MSA. Therefore, the Tribunal is satisfied that the amount of U.S.\$15,674.40 claimed for withheld taxes should be awarded to Austin.

2. The MSP Contract

38. Austin's claim against MSP is based on an undisputed order for spare parts for a mobile crane. MSP acknowledges receipt of the spare parts and does not dispute the figures evidencing the total contract price of U.S.\$1,294.27, representing U.S.\$978.11 for the cost of the spare parts and U.S.\$316.16 for shipping costs.

39. As to the U.S.\$978.11 claimed for the spare parts, MSP states it paid that amount and presents in evidence a debit advice from Bank Mellat (formerly Foreign Trade Bank of Iran) evidencing that MSP's current account with that bank had been debited by U.S.\$978.11. It subsequently acknowledges that this payment may have been made directly to Galion Manufacturing Company ("Galion"), the original supplier of the goods. As to the shipping charges of U.S.\$316.16, MSP acknowledges that this amount is due and owing.

40. Austin disputes that there is sufficient evidence to establish that a payment was made, even to Galion, and, in any event, it argues that MSP does not dispute that Austin has not received payment. Austin asserts that it paid Galion, but it submitted no evidence to support that assertion.

41. It is clear from the evidence that MSP instructed Bank Mellat to make payment of U.S.\$978.11 to Morgan Guaranty Trust Company of New York for the benefit of Galion. The Tribunal was advised at the Hearing that because of the sum involved and the length of time which has elapsed since the supposed transfer, it has not been possible to obtain from

Galion confirmation that payment was made, or to arrange any financial adjustment between Austin and Galion.

42. The Tribunal decides that, in the absence of any evidence before it that Austin subsequently paid the amount of U.S.\$978.11 to Galion, thereby incurring a loss for which it can properly seek damages, Austin has not satisfied the burden of proof required to establish its claim for U.S.\$978.11, which is dismissed accordingly. However, as MSP has acknowledged that the shipping costs are due and owing the Tribunal awards the amount claimed, i.e. U.S.\$316.16.

#### V. COSTS

43. The Tribunal awards Austin the sum of U.S.\$15,000 as costs with respect to its Claim against MSA.

#### VI. INTEREST

44. In order to compensate Austin for the elements of its Claim to which it is entitled, the Tribunal considers it reasonable to award simple interest at the annual rate of 11.25 per cent.

45. As to the Claim against MSA for payment of outstanding invoices, because the invoiced amounts were due on a number of different dates, the Tribunal has calculated interest from thirty days after the date of each invoice up to and including 2 March 1979, thirty days subsequent to the last invoice, in order to provide the Escrow Agent with a common date from which to calculate the additional interest. This interest amounts to U.S.\$6,672.38 and when added to the amount awarded on the outstanding invoices (U.S.\$223,396.03, see paragraph 35 infra) totals U.S.\$230,068.41.

46. As to the amount of U.S.\$15,674.40 awarded for withheld taxes, Austin has claimed interest on the total amount from a common date, 1 September 1978, 30 days after the date of the last paid invoice. The Tribunal awards interest on this amount from 1 September 1978 accordingly.

47. As to the Claim against MSP, the Tribunal determines that interest should be paid from 30 days after the date of the invoice, i.e. from 15 September 1978.

## VII. AWARD

48. For the foregoing reasons,

### THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent MACHINE SAZI ARAK is obligated to pay the Claimant THE AUSTIN COMPANY the sum of two hundred and thirty thousand and sixty eight United States dollars and forty one cents (U.S.\$230,068.41), representing U.S.\$223,396.03 in principal awarded plus U.S.\$6,672.38 in simple interest up to and including 2 March 1979, plus additional simple interest on the amount of U.S.\$223,396.03 at the rate of 11.25 per cent per year (365-day basis) from 3 March 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

(b) The Respondent MACHINE SAZI ARAK is obligated to pay the Claimant THE AUSTIN COMPANY the sum of fifteen thousand six hundred and seventy four United States dollars and forty cents (U.S.\$15,674.40), plus simple interest at the rate of 11.25 per cent per year (365-day basis) from 1 September 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

(c) The Respondent MACHINE SAZI PARS is obligated to pay to the Claimant THE AUSTIN COMPANY the sum of three hundred and sixteen United States dollars and sixteen cents (U.S.\$316.16), plus simple interest at the rate of 11.25 per cent per year (365-day basis) from 15 September 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

(d) The Respondent MACHINE SAZI ARAK is obligated to pay to the Claimant THE AUSTIN COMPANY the sum of fifteen thousand United States dollars (U.S.\$15,000), as costs of arbitration.

(e) These obligations shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Government of Algeria of 19 January 1981.

(f) The Co-Registrars are hereby ordered to deliver to the Agent of the Islamic Republic of Iran for transmittal to MACHINE SAZI ARAK all documents deposited with the Registry by the Claimant on 16 January 1985 (Document 130).


(g) The counterclaims brought by MACHINE SAZI ARAK are dismissed for untimely filing.

(h) The counterclaim brought by MACHINE SAZI PARS is dismissed for lack of jurisdiction.



(i) This Award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

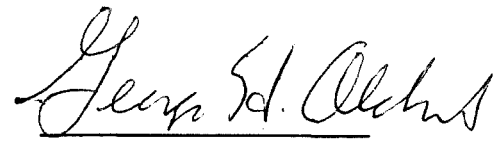
Dated, The Hague,  
30 September 1986

  
\_\_\_\_\_  
Robert Briner  
Chairman

In the name of God



\_\_\_\_\_  
Hamid Bahrami-Ahmadi  
Dissenting in part,  
Concurring in part  
The separate opinion  
will be submitted.

  
\_\_\_\_\_  
George H. Aldrich