295-180

LAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** AWARD - Type of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

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** SEPARATE OPINION of _____

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** DISSENTING OPINION of Mrs Bahrein

- Date 27-oct 86

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In His Exalted Name

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 295
CHAMBER TWO
AWARD NO. 257-295-2

THE AUSTIN COMPANY,

Claimant,

and

MACHINE SAZI ARAK and
MACHINE SAZI PARS,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 27 OCT 1986 تاریخ
۱۳۶۵/۸/۵
No. 295 شماره

DISSENTING OPINION OF HAMID BAHRAMI-AHMADI

As I stated in the deliberative sessions, I do not concur in the majority's Award in Case No. 295, other than with respect to the dismissal of the Claimant company's claim against Machine Sazi Pars. However, as I do not wish to enter into a lengthy discussion in the present Dissenting Opinion, I shall only treat two issues in the said Award, briefly setting forth my opinion in that connection.

The first issue is the payment in full of the invoiced amounts. It would appear that the majority failed to give due attention to the case file in this connection, and that it has disregarded the Claimant's explicit statements at the Hearing. It is clear that Iran's obligation to pay the invoiced amounts related to works which Austin was to carry out for it. The reciprocal nature of the obligations of the Parties to the contract has not been the subject of doubt; nor is it necessary

for me to argue and discuss the matter in order to prove it. The issue has also been expressly set forth in Article 1 to the contract, for the said Article declares that Austin is entitled to receive fees in consideration of services rendered by it to Iran.[1] Those services which Austin was to render to the Respondent were no other than to prepare and submit certain drawings and documents. How, then, can the Respondent be expected to make a unilateral payment of fees to the Claimant, without having received the drawings and documents and without having ascertained whether they were sound or defective? In paragraph 29 of its Award, the majority states,

> "...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." (2)

It would appear that the majority has not taken into account the principle of law that where a contract makes no other provisions regarding the sequential order of performance on reciprocal obligations, the subject of the obligation must be delivered to the workplace of the obligee; and it is from that time that the obligee's obligation to pay the price thereof materializes.[3] Therefore, Austin was not entitled to send invoices or to demand payment of fees until it had delivered the drawings to the Respondent. Thus the Claimant breached the contract by virtue of its failure to submit the drawings (assuming that they actually existed).

Aside from the fact that accepting Machine Sazi Arak's obligation to pay the fees as being independent of delivery of copies of the documents involved constitutes an exercise of interpretation in the face of an express text and would not seem to be permissible-- in view of general rules and particu-

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(1) "In consideration of the services rendered you are to pay us the sum of the following..."

(2) (emphasis added)

(3) Section 2-301-(a) of the US Uniform Commercial Code sets forth express provisions on this point, in the chapter on selling.

larly in light of the above-mentioned Article 1 of the contract--it must also be said that the majority has itself admitted in this very paragraph of its Award, that Machine Sazi's obligation to pay the fees arose in the event that the Claimant fulfilled its own obligations. Where performance of services consisted of preparing the drawings contracted for, how could the Respondent possibly be assured, without having received or at least examined these drawings, that the services contracted for had been performed? After stating in paragraph 31 of the Award that Machine Sazi Arak had not made any prior objections as to the quality and timeliness of /Austin's/ work and performance on the contract, the majority states in paragraph 32 of the Award that "furthermore, it is clear to the Tribunal that there was ample opportunity for MSA to make such objections." And then, in the same paragraph, the majority cites Machine Sazi Arak's efforts to re-engage Austin to complete the project as evidence of MSA's satisfaction with Austin's work.

What the majority has cited in this connection as its reason for the Award does not relate to the basic point of contention in this case. The basic point is, that the Respondent could not be certain that Austin had fulfilled its obligation, so long as it had not received and examined the drawings; moreover, until Austin delivered the said drawings to Iran, it had not in actuality carried out its obligation. In addition to the foregoing, how could Iran possibly have ascertained the quality of the said drawings, or made any objections on this account, prior to having received them? How can the Respondent be taken to task for failing to object to these drawings and documents before it received and examined them? The Respondent became aware of the shortcomings in the drawings at the time that the Claimant delivered them to the Registry of the Tribunal in accordance with an order by the Tribunal. It was always the Respondent's position (first), that it must study the drawings to ascertain whether they were sound, which is the very practice that the Parties had followed in their past dealings; and (second) that these drawings must be delivered to it, in order for it to pay the fees as consideration therefor. On its part however, the Claimant avoided performing on this obligation through various pretexts, and it became clear

in the Hearing conference that it would never be able to carry out its obligation.

I shall now clarify the matter by summarizing the facts relating to this issue:

By its telex to the Claimant dated 10 May 1980, Machine Sazi Arak requested that the contract be terminated and stated that the fees would be paid in exchange for delivery of the documents and drawings (Attachment H-1 to the Claimant's Statement of Claim). For its part, Austin agreed to this request by its telex dated 30 May 1980, stating that the documents, drawings and calculations would be delivered upon receipt of payment (Attachment H-2 to the Claimant's Statement of Claim).

Subsequently, Machine Sazi Arak informed the Claimant by its telex of 22 June 1980 (firstly), that the invoices sent it were not original copies and lacked stamps and endorsements, and (secondly) that in Bank Markazi Iran's opinion there would be complications if the fee payments were sent prior to receipt of the drawings and documents. It therefore requested the Claimant to send signed and stamped original copies of the invoices, together with the drawings and documents (Attachment S to the Claimant's Statement of Claim). On 28 July 1980, Austin stated that it was sending six corrected invoices, adding that it was trying to find some way to send MSA the technical and engineering drawings and documents.

Then, in responding to Machine Sazi Arak's telex dated 23 February 1981 requesting the detailed engineering drawings and documents, Austin submitted an itemized list of the documents, stating that those documents would be exchanged upon the opening of an irrevocable letter of credit with an English bank (Attachment V to the Claimant's Statement of Claim).

In meetings between the Parties, and in the telexes that were subsequently exchanged between them, the Claimant repeatedly asserted that the said documents existed in final form (inter alia, in the telex dated 1st February 1983).

However, at the Hearing conference both Mr. Fenn and Counsel for the Claimant acknowledged that they had not sent the Tribunal certain of the drawings, documents and calculations, and that there were numerous shortcomings in those documents submitted. They also admitted that many of the documents and drawings which the Claimant was obligated to prepare and deliver did not exist at all, and that those nonexistent documents were rather numerous.

It is therefore clear that the Claimant was unable from the very outset to perform on its obligation to deliver the drawings, since it had not prepared them and did not have them at its disposal; and thus, it is the Claimant that failed to perform on its obligations. It has also become clear that the Claimant would have been unable to deliver the drawings and documents, had the Respondent paid all the invoices before receiving those drawings and documents. It is, furthermore, manifest that the Claimant's assertion that it was keeping the drawings in order to be assured that the invoices would be paid, was no more than a pretext;[1] and it has also become clear that Iran had every right to insist on delivery of the drawings before making payment on the invoices. It is thus astounding that in paragraph 35 of the Award the majority states, notwithstanding the explicit admission of the Claimant and without taking into account the above-mentioned facts, that

> "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."

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(1) If the Claimant actually had the drawings and documents at its disposal from the outset but was doubtful of being paid for them by the Respondent, it could have sent its working papers "cash against document" on the basis of rules which are accepted under the common law, and in this way fulfilled its contractual obligation.

That is to say, the Tribunal has awarded against the Respondent for payment of 100% of the fees claimed, vis-à-vis the Claimant's failure to perform on its obligations or to deliver the drawings, documents and calculations which, as the Claimant itself admits, had to be delivered. The reason for this decision is not at all clear to me.

The second issue is that of interest. While I regard the taking of any decision in this respect to be inappropriate until after the Full Tribunal has completed examination of this issue and issued its decision thereon, I would like in this instance to address this issue not in connection with the principle of interest and the rate thereof, to which I at any event object, but rather on other grounds.

Firstly, when it is clear that the Claimant's drawings and documents are deficient, and that it did not deliver the documents relating to the calculations at all, it becomes obvious that Iran was entitled to withhold payment on the invoices-- although Machine Sazi Arak had a right of lien even if the drawings and documents had been complete, and could have refused to make payment until it received the said documents. Therefore, the award of interest in this case is on principle unjustified.

Secondly, even supposing that the majority intended by disregarding the facts to find Iran to be at fault for nonpayment on the invoices, it has also ignored certain other facts in assigning a starting date for the calculation of interest. In paragraph 45 of its Award, the majority has awarded interest amounting to $6,672.38 on invoices which became outstanding on a number of different dates, up to and including 2 March 1979, on the one hand; while on the other, in paragraph 48 of its Award it has also awarded interest at 11.25% on the total amount of the invoices plus the abovementioned interest, from 3 March 1979 up to and including the date on which the Escrow Agent instructs payment to be effected, whereas according to available documents in this case, to which reference has been

made above, the invoices sent by the Claimant were merely duplicate copies lacking seals and signatures and were thus invalid, wherefore the Claimant accepted this objection by its telex of 28 June 1980 to Machine Sazi Arak, stating that it was sending Machine Sazi Arak sealed and endorsed original copies of the said invoices; and it was in its telex dated 5 November 1980, that Iran notified the Claimant that it had received the corrected invoices. Therefore, while the Tribunal has taken 3 March 1979 as the starting date for calculation of interest, even the Claimant has acknowledged that the invoices originally sent by it were invalid, whereby Iran was justified in withholding payment thereon until such time as the deficiencies in the invoices were removed.

In view of the foregoing, I dissent to the majority's Award with respect to those matters set forth in this Opinion.

The Hague,

Datd 27 October 1986/5 Aban 1365

Hamid Bahrami-Ahmadi