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**Pensions of officials of the Saar Territory (Germany, Governing Commission of
the Saar Territory)**

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PENSIONS OF OFFICIALS OF THE SAAR TERRITORY¹.

PARTIES: Germany, Governing Commission of the Saar Territory.

SPECIAL AGREEMENT: Baden-Baden Agreement, December 21, 1925.

ARBITRATOR: Dr. Robert Fazy (Switzerland).

AWARD: Lausanne, September 4, 1934.

Powers of government.—Transfer.—Pension Fund.—Old pensioners.—Territorial principle applicable.—Officials becoming pensioners after transfer of government.—Pensions taken over by administration of origin.—Pension paid by administration actually served.

Baden-Baden Agreement.—Pensions exceeding payments into the fund.—Withdrawals from the fund.—Validity.—Doubtful clause.—Interpretation against the party drafting it.—Silence interpreted as consent.—Law applicable.—Error in the legal effects of an act.—Error in factual effects.—Clause *rebus sic stantibus*.—Performance claimed in bad faith.—Considerations of equity.—Powers of the Arbitrator.—Position of German nationals in the administration of the League of Nations with regard to the German Government.—Date of the right to protest.

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Agreement.

[See under I below.]

PENSIONS OF OFFICIALS OF THE SAAR TERRITORY.

ROBERT FAZY, ARBITRATOR.

*Decided, Lausanne, September 4, 1934*¹.

The arbitrator, Dr. Robert Fazy, Judge of the Swiss Federal Court, Lausanne,

in the case of

the German Reich, represented by Dr. (Hon.) Froelich, Judge of the German Supreme Court, Leipzig, plaintiff,

against

the Governing Commission of the Saar Territory, represented by Herr Allenbach, President of the High Court at Saarlouis, defendant,

concerning

Article 10 of the Agreement of Baden-Baden concerning German officials, dated December 21st, 1925,

at the request:

of the German Government, that it be decided: that, in accordance with Articles 10, 11, of the Baden-Baden Agreement concerning officials, dated December 21st, 1925, the Governing Commission is entitled, from the moment that its liabilities in respect of pensions of officials exceed 17.5% of their total emoluments, to abstain from making payments into the Pensions Reserve Fund; but that it is further bound to administer the Fund as a special concern to maintain it in its entirety until the Commission's work is terminated and to refrain from reducing it by withdrawals of capital or of income; and that it is likewise bound to restore to the Fund sums previously withdrawn from it;

of the Government of the Saar Territory, that it be decided that the Commission is entitled to withdraw from the reserve (capital and income) of the Pensions Reserve Fund such part of its liabilities in respect of officials' pensions as exceeds 17.5% of their total emoluments;

Finds:

I.

1. Article 14 of the Baden-Baden Agreement between the German Government and the Governing Commission of the Saar Territory concerning officials, dated December 21st, 1925, provides that:

“The German Government and the Governing Commission shall retain complete freedom as regards rights concerning which no provision had been made in this Agreement.

¹ Translation from the German by the Registry of the International Court of Justice.

Any serious differences of views which may arise in regard to the interpretation or application of this Agreement shall be settled by a joint committee which, for each particular case, shall be composed of one member appointed by the German Government and one by the Governing Commission. The Committee shall meet at a place to be decided on by these two persons.

All cases in which this Committee cannot agree shall be referred for decision to an arbitrator appointed by the Committee....”

In accordance with this provision, a joint committee was appointed to decide the above-mentioned dispute as to whether the Governing Commission was entitled to employ the Pensions Reserve Fund provided for in Article 10 of the Baden-Baden Agreement to meet the cost of pensions of its officials. The members of the Committee were:

Dr. (Hon.) Froelich, Judge of the German Supreme Court in Leipzig, representing the German Government;

Herr Allenbach, President of the High Court in Saarlouis, representing the Governing Commission of the Saar Territory.

After the failure of attempts at agreement, the Joint Committee, in letters of April 18th and 28th, 1934, requested the undersigned, Dr. Robert Fazy, Judge of the Swiss Federal Court, Lausanne, to decide as sole arbitrator as to the claims of the parties and to hear the members of the Committee as representatives of the parties.

2. In proceedings before the arbitrator held at Basle on July 7th, 1934, the representatives of the parties declared:

(a) that the dispute fell to be decided by German law and that, in accordance with § 1034 of the German Civil Procedure Code, the arbitrator himself should make the necessary orders as regards procedure, and

(b) that their Governments would recognize the award without confirmation by a Swiss court.

3. The representatives of the parties respectively filed the Claim and the Reply on June 26th and July 2nd, 1934, and their final submissions on July 18th and 27th, 1934, in accordance with the order made by the arbitrator at Basle on July 7th, 1934.

The representatives of the parties also filed affidavits as ordered by the arbitrator at Basle on July 7th, 1934.

4. At the same sitting in Basle, on July 7th, 1934, the arbitrator asked the parties to approach their Governments with a view to reaching a settlement on the following lines:

“The capital of the fund and the interest accruing thereto to remain in its entirety.

On the other hand, sums paid by the Governing Commission in excess of 17.5% of the total emoluments may henceforth be covered primarily by the current assets of the fund in the year in question. This shall be done retrospectively as from the moment when a deficit first occurred.”

According to the declarations made in the final submissions, this proposal for a compromise was rejected by both parties; the Governing Commission of the Saar Territory added that it was prepared to accept a compromise to

the effect that the Commission should be authorized "to employ for the payment of pensions the total assets of the Pension Fund that had accrued since its foundation, and without any deduction for losses due to the devaluation of the dollar".

The attempt at a compromise failed. By an Order of August 7th, 1934, the arbitrator declared the procedure instituted in accordance with the Order of July 7th, 1934, to be closed.

II.

It appears from paragraph 1 of the Reply to the Claim, that the parties are in general agreement as to the facts underlying the dispute.

1. As from January 10th, 1920, when the Treaty of Versailles and the Statute of the Saar Territory therein contained (Annex to Article 50) came into force, the powers of government over the Saar Territory passed from the German Reich and the States of Prussia and Bavaria, for the period of duration of the Statute, to the Governing Commission of the Saar Territory.

The Commission also obtained thereunder the exclusive right to raise taxes and to appoint and dismiss the officials of the territory (paragraph 19 of Saar Statute). So far as existing officials of the Reich (and of the States of Prussia and Bavaria) entered the service of the Commission, they left their previous posts and were paid out of the funds of the Saar Territory.

The Statute contains no provision as to pensions payable to former officials and their dependants whose last official residence was in the Saar Territory. This resulted in differences of opinion between the German Government and the Governing Commission, which were the subject of negotiations from May 27th to June 5th, 1921, in Berlin, from April 10th to 13th, 1922, in Heidelberg, and, in particular, from October 13th to 27th, and in December, 1925, at Baden-Baden. Information is given as to these negotiations (apart from those of December, 1925) in the German minutes of the meetings.

2. *During the Berlin negotiations*, the German delegation first put forward the view that a distinction must be made between pensioners (and dependants) who, on the appointed day (January 10th, 1920), were already pensioned (old pensioners) and those who were pensioned later (new pensioners). To old pensioners the territorial principle must be applied, i.e., pensions of officials living in the Territory on the appointed day must be paid by the Governing Commission. Pensions of new pensioners, on the other hand, should, in the case of officials coming from German administrations, be taken over by these administrations; for this purpose the Saar Territory should pay the administrations a premium of 25% of the total sums paid by the Commission in respect of salaries. The Governing Commission would thus in some measure serve the German Reich (or Prussia and Bavaria) as a pensions insurance institution.

On the other hand, the representatives of the Governing Commission of the Saar Territory considered that the guiding principle to be followed was not that of territoriality but of duties performed. Each Government should care for the officials that had been in its service. Following this principle, the representatives distinguished four categories of officials:

(a) Those who had been exclusively in German service up to the moment of being pensioned. The pensions of these officials should be paid wholly by the German administration concerned. The Governing Commission

was prepared to place its services at the disposal of the German administration for the payment of these pensions;

(b) Officials who had been solely in the service of the Governing Commission; the pensions of these persons would be a matter for the Governing Commission;

(c) Officials who had previously been in the German service and had then been employed by the Governing Commission up to the time of their pensioning. In these cases the pension liability should be divided according to a scale to be determined in proportion to the length of service in each administration;

(d) Officials who had been first in the German service and later in that of the Governing Commission, but who had returned to the German service before being pensioned. To these, the same method of settlement should be applied as under (c).

Later in the discussions in Berlin, the German delegation had expressed the readiness of the German Government to take over the old pensioners; but as regards the new pensioners it maintained its former view. The delegation of the Governing Commission did likewise, claiming that its rights and its obligations required that it should itself provide for the pensions of officials who had been in its service. Such a responsibility was a part of the Governing Commission's duties as a Government. It could not hand them over to the German Government, even if that Government were, so to speak, to be regarded as a pensions guarantee institution.

In the negotiations at Heidelberg, the main subject of the discussion was still the German proposal that new pensioners should be taken over by the German administrations in return for the lump sum premium of 25% to be paid them by the Governing Commission. The German delegation insisted on this, because the Governing Commission would then only have to pay pensions to its own officials (or their dependants) during the existence of the Saar Statute, and would afterwards be unfairly relieved from responsibility for them. On the other side, the representative of the Governing Commission announced that the Commission had in view the setting up of a Pensions Reserve Fund, on a certain model. This idea was not rejected by the German delegation as a basis for discussion. But no agreement was reached, because the parties' views differed, both before and after, on the question whether the pensions of the new pensioners should be paid by the Governing Commission or by the Reich (or Prussia and Bavaria).

During the negotiations at Baden-Baden in October, 1925, the representative of the Governing Commission made the following proposal "in a spirit of conciliation": "The old pensions shall continue to be charged to the German Government. The Governing Commission for its part undertakes to pay the pensions granted by it", with the addition that: "This is based on the principle that the Saar territory, despite its provisional character, must pay out of its own funds for liabilities that have arisen during the course of its existence. After 1935 these charges must be borne by the subsequent government of the Territory." (Translation in the German minutes of the Baden-Baden negotiations, p. 32.) The German Government considered this proposal insufficient. They stated that, as the Governing Commission's proposal rightly pointed out, a pension was, so to speak, part of the salary and was not acquired only at the moment when it is granted, but existed in the form of an expectation throughout the period of service.

These expectations were not taken into account in the proposal. Rather the Governing Commission was handing over their subsequent fulfilment to another government. The German delegation therefore proposed that: "The Governing Commission shall establish a Pensions Reserve Fund into which it will at once pay a sum equivalent to 25% of the payments made by it since January 10th, 1920, to German officials for their total emoluments. In future, the Governing Commission will pay into this Fund at the moment of each periodical payment of salaries, 25% of the total sums paid to officials in its service." The German delegation subsequently agreed that the Fund should remain in the Saar Territory. For there were in reality only two essentials, the maintenance of its value and the possibility of its realization in its entirety, in the event of the Governing Commission ceasing to exist.

But no agreement was reached at that moment, nor until December of that year. There are no minutes of this meeting. The parties assert in particular that the total amount of the payments to be made by the Governing Commission into the Fund was discussed. After the German delegation in the October negotiations had put forward a compromise, the delegation of the Governing Commission proposed 12% to 15% of the total emoluments, instead of 25%. Finally, the German delegation agreed that:

1. Payments into the Pensions Reserve Fund shall begin as from April 1st, 1926, instead of January 10th, 1920;

2. The amount of the payments shall be 17.5% of the total emoluments, in the same way as the Prussian law on the upkeep of the police, dated June 3rd, 1908, provides in § 2 that parishes must pay 17.5% of the salaries paid to the police to cover the cost of pensions to staff and dependants (cf. final submissions of German Representatives in these proceedings).

The negotiations in December, 1925, led to the conclusion of the Baden-Baden Agreement of December 21st, 1925. Article 10 of this Agreement provides that:

"I.

In conformity with the provisions relating to pensions in force in the Saar Territory, the Governing Commission will continue to be responsible for the payment of:

- (a) The pensions of officials whom it has placed or may hereafter place on the retired list;
- (b) Allowances to surviving dependants of the officials referred to in (a) above, and surviving dependants of German officials dying while in the service of the Governing Commission.

The Governing Commission shall communicate to the German Government all pension awards made under paragraph 1, together with the necessary documents.

II.

The Governing Commission shall create, as from April 1st, 1926, a reserve fund for pensioners and surviving dependants. It shall pay into this fund 17.5% of the total emoluments (at present the basic salaries cost-of-living bonus and social allowance) of all budgetary and non-budgetary officials in its service covered by the pension regula-

tions in force in the Saar Territory. However, from this shall be deducted the amount of the payments to be made by the Governing Commission after April 1st, 1926, to pensioners and surviving dependants under the pension regulations in force in the Saar Territory.

The payments into the Fund, with effect from April 1st, 1926, shall be made in the first occasion not later than July 9th, and subsequently within nine days after the salaries fall due, or at the latest on October 9th and April 9th for the preceding six months.

The date on which salaries fall due shall be regarded as the first of the month in respect of which the salaries are paid. If payment is not made within nine days of the date on which the salaries fall due, the amount must be calculated at the gold value of the balance due. This gold value shall be based on the American dollar at the average rate quoted on the New York Exchange during the eight days preceding, on the one hand, the date when the salaries fell due and, on the other hand, the date of payment.

III.

The Fund shall be administered as follows:

(a) The Fund shall be managed by the Governing Commission and, regard being had to the normal rates of interest ruling in the Saar Territory, shall be invested in stable securities. By stable securities are meant mortgages in stable values, gold loans and loans in stable currencies, new dwelling-house construction and other immovable property. The interest and other net receipts shall be paid into the Fund. The Governing Commission shall arrange for the essential documents to be placed in safe keeping and further for the accounts to be kept in such a way that, in any case, on the conclusion of the activities of the Governing Commission, the books shall clearly show the ratio of contributions from the salaries of German officials to contributions from the salaries of other officials.

(b) The Fund shall be managed separately from the other funds of the Governing Commission, as a special concern, so that, on the conclusion of the Governing Commission's activities, it can be transferred in its entirety—in accordance with the decision to be taken by the Council of the League of Nations under paragraph 39 of the Annex to Articles 45 to 50 of the Treaty of Peace of Versailles—to the Government which will thenceforward have to bear this portion of the pension charges.

(c) Side by side with the authorities administering the Fund, a Committee shall be constituted, whose President shall *ex officio* be the President of the District Court at Saarbrück; the composition of the Committee shall be determined by the Governing Commission and the other members appointed by it. It shall be the duty of the Committee to satisfy itself generally that the Fund is being administered in accordance with the provisions of this Agreement, and, in particular, that all the receipts appertaining to the Fund are paid into it, that the investments are made in accordance with the Agreement, and that the maintenance of the fund is ensured. It shall be empowered to examine the books and papers at any time. Its further powers and duties shall be defined in the regulations to be drawn up by the Governing Commission.

(d) The Governing Commission shall devote in its periodical report to the League of Nations a section dealing with the administration of the Fund. The balance-sheet to be drawn up yearly shall be attached to the next following report of the Governing Commission."

3. In accordance with this provision the Fund was established as from April 1st, 1926. To administer it, the Governing Commission set up a special Committee for the Administration of the Pensions Fund, consisting of a representative of each of the five members of the Governing Commission. The decisions of a majority of the Committee must be endorsed by the member of the Governing Commission in charge of finance. In accordance with the Statutes of the Pensions Fund for officials, drawn up by the Governing Commission on July 13th, 1926, in pursuance of Article 10 of the Baden-Baden Agreement, the Committee consists of the President of the Saarbrück District Court as president and of a representative of each of the five members of the Governing Commission, together with the controller general of finance and of an official in the service of the Governing Commission and appointed by it (27th periodical report of the Governing Commission to the League of Nations, pp. 14-17).

4. According to the periodical reports of the Governing Commission to the League of Nations, it appears that up to October 1st, 1930, sums of three to four million French francs were paid into the Fund each six months and were entered as bearing interest.

After December 1st, 1930, owing to the greatly increased number of officials of the Governing Commission that were placed on pension (3,283 officials from 1926 to June 1934), these payments to the Fund diminished.

From October 1st, 1930, to March 31st, 1931 (12th Principal Report)	Fr. fr. 2,438,157.13
From April 1st, 1931, to September 30th, 1931 (13th Principal Report)	Fr. fr. 1,426,157.28
From October 1st, 1931, to March 31st, 1932 (14th Principal Report)	Fr. fr. 123,430.38

were paid in.

But according to the 14th Principal Report, these last payments were only made in October, November and March, whilst in the other months the payments made to pensioners and to dependants were considerably greater than 17.5% of the total emoluments (to the amount of French francs 511,732.42), and the deficit was covered by a withdrawal from the Fund. This withdrawal was not opposed by the Committee. In the 14th Principal Report on the administration of the Fund it is referred to as follows:

"During the other months the cost of payment of pensions exceeded receipts from the Pension Fund by French francs 511,732.42, so that fr. 418,297.04 had to be paid out of the capital of the Pension Fund." (Difference between fr. 511,732.42 and the fr. 123,430.38, paid in October, November, 1931, and March 1932.)

The deficits grew larger in the course of the next six months. In the period:

April 1st to September 30th, 1932, they were	Fr. fr. 1,070,681.97
October 1st, 1932, to March 31st, 1933,	Fr. fr. 1,814,066.50

On each occasion they were covered by withdrawals from the Fund, without objection on the part of the Committee, as appears in Principal Reports 15 and 16 for these two half years.

5. The first mention of deficits and of their being met by withdrawals from the Reserve Fund appears in the 50th Periodical Report of the Governing Commission to the League of Nations for the period April 1st to June 30th, 1932. The 52nd Report states that:

“The liabilities of the Pensions Fund have increased to such an extent that the allocation to the Fund of 17.5% of the amount of salaries paid is no longer sufficient; the amount outstanding has had to be taken from the other receipts and also from the reserves of the Pensions Fund. During the period October 1st to December 31st, 1932, expenditure in respect of pension payments exceeded, by approximately 840,000 francs, the sums obtained from the contribution to the Fund of 17.5% on salaries.”

In a *note verbale* of April 10th, 1933, the German Government informed the Governing Commission of the Saar Territory that it did not share the view that the Commission was entitled to withdraw from the Pensions Reserve Fund the amount by which the pensions charges exceeded 17.5% of the current emoluments. The Governing Commission, however, in its *note verbale* of December 19th, 1933, persisted in its view and, at the same time, referred to the procedure provided for in Article 14 of the Baden-Baden Agreement for the settlement of disputes. As a result, the joint committee was appointed, and that committee appointed the arbitrator.

6. In a preliminary exchange of notes called for by the arbitrator, the parties set out their contentions as follows:

The German Government, in its *Claim*, bases itself solely on the terms of Article 10 of the Baden-Baden Agreement. According to No. I of this Article, the cost of pensions for new pensioners should be borne by the Governing Commission and not by the Fund. No. III of the Article clearly prohibits the use of this Fund for the payment of pensions when the total amount of the pensions exceeds 17.5% of the total emoluments of officials. For, according to the Article, the Fund must be managed as a special concern and handed over in its entirety to the Government which will have to bear the cost of pensions after the plebiscite of 1935. No doubt it was not foreseen when the Baden-Baden Agreement was concluded that 17.5 % of the total emoluments would not be sufficient for the payment of officials' pensions, as has in fact been the case since 1931. But the German delegation had always maintained that a higher percentage was necessary, and only gave way in the end as a result of pressure by the delegation of the Governing Commission. If, as that delegation proposed, a still lower percentage had been fixed, the deficit would have occurred much sooner. The consequence would have been the speedy exhaustion of the Fund, a thing which is quite contrary to its purpose. This shows how unfounded the Governing Commission's contention is.

In their *Reply*, the Governing Commission interpret Article 10, No. II, of the Baden-Baden Agreement as meaning that their obligation is laid down *once for all* as being a payment of 17.5% of the total emoluments into the Fund. Periodical balancing of accounts is not provided for in the Agreement. Only the final surplus must, by Article 10, No. III, of the Agreement, be handed over undiminished to the successor State. The word

Sondermasse means only a special concern for the purpose of meeting pensions liabilities. The emphasis lies on the purpose of the Fund. The history of its formation also contradicts the German contention. For, in the first German proposal, the duty of the Governing Commission was merely to pay a certain percentage once for all. Only the amount of this percentage was subsequently changed. The successor State was granted the additional advantage of receiving interest from the Fund. No change was made in the principle whereby the duties of the Governing Commission were limited to the payment of the fixed percentage.

7. In their *final Submissions* the parties supplemented their first pleadings, on the lines of their oral arguments of July 7th, 1934, and further made the following statements in reply to questions put by the arbitrator:

The German Government: If the word "undiminished" in Article 10, II, really were to have the meaning attributed to it by the Governing Commission, this should have been clearly stated. This was not done and the prohibition to diminish the Fund is equivalent to a prohibition to withdraw *any* sum from it. Throughout the negotiations and up to the conclusion of the Baden-Baden Agreement, the Governing Commission regarded itself as being responsible for pensions. The Commission cannot now maintain that the payments into the Fund of 17.5% of the total emoluments constitute a fulfilment of its whole responsibility in the matter. To assert that periodical balancing of accounts is not provided for, so that, in theory, until the moment of handing over the Reserve Fund to the successor State, it could not be determined if and how far the Fund had been used up by successive pensions payments, is to run counter to Article 10, II, paragraphs 2 and 3, wherein provision is clearly made for the yearly payments into the Fund. These payments became definitely a part of the Fund on the dates prescribed, and there could be no question of any withdrawals.

The Governing Commission of the Saar Territory: The parties agreed that the Pensions Reserve Fund should serve to pay the normal pensions liabilities. The provision to the effect that the total of all monthly payments to pensioners and dependants should be deducted from the transfers to the Pensions Fund, was added to Article 10, paragraph II, because, at the time of the conclusion of the Agreement, the value of French currency was fluctuating seriously, and the Fund had to be rendered stable by being invested in dollars. For this reason dates of conversion were fixed. The provision in dispute can only have the meaning attributed to it by the Commission. But, in accordance with the recognized rules of interpretation, if there were any doubt it must be given the meaning unfavourable to the party that drafted it—namely Germany.

The reason for the increase of pensions liabilities above the quota agreed on of 17.5% of the total emoluments was that the officials placed at the disposal of the Commission had, for the most part, been many years in the German service. From 1926 to June 1934, 3,013 of these officials were pensioned; but of officials appointed by the Governing Commission itself, the corresponding number was only 270.

The Principal Reports on the Pensions Fund were made available to the League of Nations. When the deficits occurred, Germany was still a Member of the League and was represented on its committees. If, in spite of this, the German Government did not protest against the withdrawals, its silence gave consent.

Moreover, the attitude of the Committee set up under Article 10, III, of the Baden-Baden Agreement shows that it agreed with the interpretation of the Governing Commission. For its duty was to satisfy itself that the Fund was being administered in accordance with the provisions of the Agreement. The Committee held meetings at which minutes were taken. These minutes were submitted to the member of the Governing Commission in charge of finance. In accordance with these documents, the half-yearly balances and profit and loss statements are ascertained and the accounts checked by the Committee in conformity with its Statute. The Committee never at any time objected to the withdrawal of funds which were shown clearly in the accounts.

And

Whereas

1. The dispute falls to be decided by *German law*. For throughout the duration of the Saar Statute the Saar Territory remained part of the German State—and of the territory under German law—only with the exception that the powers of government were, by Article 49 of the Treaty of Versailles, transferred to the League of Nations as trustee, and that the Governing Commission that was to be set up by the League (§ 16 of the Saar Statute) was entitled to modify German law in so far as required in the execution of the Treaty of Versailles (§ 23 of the Saar Statute). It is thus a dispute between the German Reich and an autonomous part of the Reich. Moreover, the parties agree that German law is applicable to the case.

2. *The terms of Article 10 of the Baden-Baden Agreement* of December 21st, 1925, support the interpretation here put forward by the German Government. No. I of the Article provides that the Governing Commission of the Saar Territory shall be responsible for the pensions of officials in its service and for their dependants; and No. II that the Governing Commission shall further establish a Fund on behalf of the government to which pensions liabilities will be transferred on the expiry of the Saar Statute. Payments into the Fund are to be 17.5% of total emoluments, with the deduction of the amount paid for pensions. But it does not follow from No. II, and it is plainly contradictory with No. I, to assert that, with the payment of 17.5% of the total emoluments, partly direct to the pensioners and partly to the Pensions Fund, the Governing Commission has fulfilled all its duties as regards pensions, towards officials in its service and towards their dependants. This is confirmed by No. III, which provides that the Fund must be transferred “in its entirety” to the successor Government. For the Fund only remains “entire” if sums that have been paid into it, and, above all, the interest on these sums, are not removed from the Fund. So that any exceptions to the duty of the Governing Commission to maintain the Fund “entire” must have been specially provided for; and this was not done.

3. Again, *by way of interpretation*, no other meaning can be given to Article 10 than that given by the German Government. The rule that in case of doubt, the text of a treaty is to be interpreted against the party which drafted it can only be applied when, as in the case of the Treaty of Versailles, one of the parties handed a prepared text to the other party for signature. The Baden-Baden Agreement was the subject of lengthy negotiations, precisely in regard to the question of officials' pensions, and the parties came to mutual agreement on their proposals step by step. In such a case,

which party it was that drafted the final text is, from the standpoint of this rule of interpretation, irrelevant, quite apart from the fact that—as has been stated and will be further demonstrated—neither in the letter nor in the spirit of Article 10 can there be any doubt as to the rule contained in it.

The origin of Article 10 does not give any support to the Governing Commission's contentions, but rather to those of the German Government. In any case, in the negotiations with the Commission, the German Government maintained that the pensions of officials who have been in the service of the Governing Commission and of their dependants should be paid by the German Administrations (of the Reich, or of the States of Prussia or Bavaria), and that the Governing Commission should pay these administrations a lump sum as premium. But the Governing Commission rejected this proposal from the outset, because it claimed for itself the right and the *duty* to bear these pensions liabilities. Acceptance of its claim was at length secured in the Baden-Baden Agreement, with the addition that, besides having to provide for the payment of pensions to officials pensioned by it, and for the dependants of officials who died in its service, for so long as the Statute remained in force, the Governing Commission had also to ensure that a fund was handed over to the successor State, to meet the capital cost of further payments of these pensions. Thus, the establishment of the Pensions Fund involved an increase, not a decrease, of the pensions obligations undertaken by the Commission, seeing that these obligations had been limited to 17.5% of the total emoluments. The Governing Commission endeavours to support its arguments by declarations made by the German delegation during the negotiations; but these declarations related only to the original German proposals to the effect that new pensioners would be taken over by the German Administrations in return for a lump sum to be paid by the Governing Commission. During the negotiations in regard to the Fund, the German delegation also laid continual stress on the point that the Fund must be handed over to the successor State "in its entirety", without any reservation being made by the Governing Commission (German Minutes of Berlin negotiations, pages 5 to 8 and 76; Heidelberg negotiations, pp. 46 *et seq.*; Baden-Baden negotiations, pp. 32, 43, 112).

4. It is correct that, as stated in the Claim, the parties did not consider the possibility of an increase in pension charges above 17.5% of the total emoluments. But this can only help the Governing Commission if the Commission can establish it as a substantial error, or rely on the *clausa rebus sic stantibus*. But neither of these courses is possible.

In accordance with § 119 of the German Civil Code, a party can impeach a declaration which was a mistake at the moment it was made, if it is to be supposed that he would not have made it if he had had proper knowledge of the facts and an intelligent appreciation of the situation. A mistake as to the content of a statement will, according to the jurisprudence of the German Supreme Court, only be taken into consideration if something essentially different, or more than was intended, has been stated, e.g., a mistake as to the legal consequences which the juristic act may have by reason of its content and of the legal effects it produces (Commentary of the Judges of the Supreme Court on § 119, 3, German Civil Code). In particular, a mistake as to the legal consequences of an act is only ground for its impeachment "if, owing to a misapprehension as to its purport, a juristic act has been performed which has a legal effect essentially different from that which was intended and not when a declaration alleged and intended to be free

from error, produces an effect other than that intended, or subsidiary results that were not known or desired" (RGZ. Vol. 134, No. 34, and quotation). In Article 10 of the Baden-Baden Agreement, the Governing Commission of the Saar Territory did not state more, or anything else than what it intended, namely, to take over the payment of pensions to the new pensioners and, further, to pay into a reserve fund any difference that there might be between these amounts paid for pensions and 17.5% of the total emoluments. The Commission's statement produced no legal effect different from that desired. It had no subsidiary and unintended results of a legal nature, but only results of a factual nature that were not foreseen, i.e., that the pensions payments might be greater than 17.5% of the total emoluments. But, according to the jurisprudence of the German Supreme Court, that is not a mistake within the meaning of § 119, German Civil Code (see Commentary of Judges of the German Supreme Court, *l. c.*).

The clause *rebus sic stantibus* could only be invoked in this case if the right of withdrawal, owing to an unexpected and prejudicial change of circumstances, were reserved in the Agreement (Commentary of the Judges of the Supreme Court on § 119, German Civil Code, No. 2, page 148, bottom), or in accordance with § 242, German Civil Code, on a plea of fraud, if subsequently and unexpectedly circumstances had so changed that the performance of the contract would no longer reasonably correspond to what was originally intended, and if, accordingly, it would be contrary to good faith to uphold the claim (Commentary of Judges of Supreme Court on § 242, German Civil Code, No. 1, page 319, bottom). But no reservation was made in the Agreement, and the Governing Commission cannot raise the plea of fraud against the claim of the German Government for performance of the contract. The agreement as to the *opening* of the Pensions Reserve Fund related only to the period 1926-1935, and the Fund will subsequently pass to the successor Government for the *purposes* for which it was intended. But in this relatively short time, no unexpected changes have occurred of such a nature as to render the insistence of the German Government on the Agreement contrary to good faith. No doubt the number of pensioners increased considerably in these years according to the figures given by the Governing Commission. But it has not been asserted that, in the negotiations with the German Government, the Governing Commission put forward calculations of probability that are now for any reason contrary to reality. This increase was not "unexpected", in the only sense in which it could form a ground for a plea of fraud, not to mention the fact (to be dealt with in No. 5) that the increase in the number of pensioners has not changed the conditions so much that the fulfilment of the contract at the present time would not reasonably correspond to what was originally intended.

5. The Arbitration Agreement does not authorize the arbitrator to act as "mediator". Neither is there any need to enquire whether he may *ex officio* have regard to considerations of equity. As has already been said, the German Government was very conciliatory towards the Governing Commission during the negotiations, and a considerable reduction of the Commission's pensions liabilities has thus been effected. The German Government cannot be compelled to make further concessions on grounds of equity, nor on the lines of the compromise proposals put forward by the Governing Commission. Finally, it must not be forgotten that the Governing Commission declared itself bound to provide for its former officials and their

dependants not only by payment of their pensions so long as the Saar Statute continues in force, but also by supplying an appropriate capital sum as cover for the government that will later take over the pensions liabilities. The increase in the pensions liabilities of the Commission will now necessitate the taking over by the successor Government of a correspondingly higher pensions liability, so that, in the intention of the Baden-Baden Agreement, the appropriate capital sum (the Fund) to be transferred should be correspondingly high. Instead of this, owing to the increased pensions liability, all payments into the Fund are suspended. (?) This is at any rate a ground for maintaining the Fund, without fail, "in its entirety".

6. The right of Germany to protest against the removal of sums from the Pensions Fund is not forfeited because neither that Government nor the Committee of the Fund have so far protested. The accounts were in fact submitted to the League of Nations and showed withdrawals from the Fund at a time when the German Reich was still a Member of the League and was represented by German nationals in the League's administration. But, at that time, these officials had knowledge of the withdrawals, if at all, only as officials of the League and not as plenipotentiary representatives of the German Government. The right of that Government to protest was acquired only at the moment when it knew of the facts. The Committee of the Fund is composed of officials of the Governing Commission of the Saar Territory, and of persons appointed by the Commission. It is an organ of the Governing Commission and it is not necessarily its business to act for the German Government.

Accordingly, the claim of the German Government is upheld.

7. *Costs.* The costs of the arbitration are Swiss francs 4,850, being:

Arbitrator's fee	Fr. 4,000.—
3,000 of which are already paid . .	
Costs of oral proceedings	300.—
Chancery costs	150.—
Drafting of Award	400.—
	<hr/>
Swiss francs:	4,850.—
	<hr/> <hr/>

In a dispute involving at least 600,000 dollars these costs are low. In strict justice, they should be borne by the losing party. But the matter must be considered in equity: a better drafting of Article 10 of the Baden-Baden Agreement, in particular the adoption of an express provision that pensions liabilities above 17.5% of the total salaries were to be covered by the ordinary funds of the Governing Commission, would have prevented the dispute. Accordingly, the costs must be borne equally by the parties.

Awards that

1. In the event of the pensions liabilities of the Governing Commission of the Saar Territory exceeding 17.5% of the total pensions emoluments, the Commission is entitled to abstain from payments into the Pensions Reserve Fund; but the Commission is also bound to administer the Fund as a special concern, to maintain it in its entirety until the Commission ceases to operate and to prevent any diminution by withdrawals of capital or interest from the Fund.

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The Commission must restore sums hitherto withdrawn from the Fund.

2. The costs amounting to Swiss francs 4,850 will be borne by both parties in equal shares.

3. This Award is to be communicated to the parties in writing.

Lausanne, September 4th, 1934.

(Signed) ROBERT FAZY,
Arbitrator.
