

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

---

**RECUEIL DES SENTENCES  
ARBITRALES**

**Rudloff Case (on merits)**

1903-1905

VOLUME IX pp. 255-261



NATIONS UNIES - UNITED NATIONS  
Copyright (c) 2006

Whereas, even admitting the facts as stated by the Government of Venezuela, this argument does not seem to go against the provisions of the protocol, which states that the Commission shall decide all claims without regard to the provisions of local legislation and which at all events does not except claims in litigation, when it speaks about "All claims owned by citizens, etc.;" whilst it should be borne in mind that this protocol is the fundamental law for this Commission and the only source of its jurisdiction; and in which way soever the provisions of the protocol might be discussed in view of the principles of right — international as well as right in general — the adage should not be forgotten, "*dura lex sed lex*," and it must be remembered that this protocol under what circumstances soever originated, is an agreement between two parties, and that the Commission, whose whole jurisdiction is only founded on this agreement, has certainly above all to apply the great rule, "*pacta servanda*," without which international as well as civil law would be a mere mockery; whilst, on the other hand, it is not to be forgotten that this Commission, in the practice of its judicial powers, may find that the *absolute equity*, which according to that same protocol has to be the *only* basis for its decision, forces it to take into consideration, whether conflict with the provisions of local legislation as well as with previous agreements between parties, may infect the claim with that *vitium proprium* in consequence of which that same absolute equity prevents the Commission from making use of the jurisdiction as to the decision:

Whereas, therefore, the arguments opposed do not seem to impeach the *prima facie* arguments that speak for the jurisdiction of the Commission under the protocol, this jurisdiction has to be maintained and the claim has to be submitted to it.

(DECISION OF CLAIM ON ITS MERITS)

BAINBRIDGE, *Commissioner*:

On the 1st day of February, 1893, a contract was entered into by and between the minister of public works and the governor of the Federal district, sufficiently authorized thereto by the chief of the Executive power, parties of the first part; and Henry F. Rudloff, civil engineer, a citizen of the United States of America, residing in Caracas, party of the second part, whereby:

Rudloff agreed to construct for his own account or through a company, either national or foreign, a building of iron and masonry, principally for a public market on the place where then stood the market of "San Jacinto," including the park "El Venezolano," and the grounds and buildings annexed to said market. He was to construct the building for the market according to the plans presented by him to the minister of public works; he was to commence the work of construction eleven days after the signing of the contract, and to finish the work within two years; he was granted the buildings and grounds above referred to; he was to take exclusive charge of the management and collecting of the proceeds of the market, and the policing of the same from the day on which he commenced the work; the duration of the contract was to be eighteen years.

Rudloff agreed to pay to the municipality of Caracas the following sums: From the first to the fourth year, 75,000 bolivars per year, or for the four years 300,000 bolivars; and from the fifth to the eighteenth year 120,000 bolivars per year, or for the period of fourteen years the sum of 1,680,000 bolivars; a total for the eighteen years of 1,980,000 bolivars. Rudloff agreed to pay these sums to the municipality on daily payments of 205 bolivars and 50 centimos; he agreed to offer yearly at public auction the localities of the market, and the buildings with all its fixtures and utensils was to belong to the municipality

without the necessity of any legal transfer, upon the expiration of the eighteen years; free entry through the custom-house of La Guaira was granted for all the materials, fixtures, and tools necessary for the construction of the market, and free use of water for the construction and for the use of the building. The enterprise was not to be subject to any kind of taxes, ordinary or extraordinary, by whatever terms they may be denominated, during the term of the contract, and neither the National Government nor the municipality was to construct or allow to be constructed any other public market in Caracas. Article 12 of the contract provided that the doubts or controversies that may arise on account of the contract shall be decided by the competent tribunals of the Republic, in conformity with the laws, and shall not give reason for any international reclamation.

The foregoing contract was published in the Official Gazette, No. 5717, dated February 8, 1893.

On February 11, 1893, pursuant to the contract, the market to "San Jacinto" and the grounds and buildings appertaining thereto were ceded and delivered to Rudloff by public functionaries thereunto authorized, and the work of construction of the new building was begun.

The evidence shows that on April 30, 1893, the governor of the Federal District entered Rudloff's office, took possession of his books, and made an examination of them, contrary to the provisions of the constitution and laws of Venezuela. Against this unlawful act Rudloff protested to the minister of the interior on the following day.

The fifth article of the contract provided that Rudloff should take exclusive charge of the market and the policing of the same from the day on which he commenced work. Trouble arose with reference to this provision of the contract almost immediately, Rudloff contending that it meant simply that he was to see that the market was kept clean and in a sanitary condition; the municipality, that Rudloff was to pay the salary and rations of the police guards detailed in the market. This controversy was finally referred to the Executive, who decided that Rudloff must pay, which, under protest, he did; whereupon the force of policemen at the market was largely increased.

On July 15 the governor of the Federal District personally ordered the workmen engaged upon the building to suspend the work, threatening with arrest anyone who dared to continue. Through his representative, Mr. Rudloff immediately protested to the minister of public works against the governor's action.

On September 9 the governor informed Mr. Rudloff that the municipal council in its last meeting had declared void the contract for the market and that he would take possession the next day, as in fact he did take possession by armed force on September 10, 1893. The work which had been done by Rudloff was subsequently demolished.

On September 26, 1893, Rudloff addressed himself to the Government of the United States through the Department of State and presented his claim against the Government of Venezuela. In its reply, dated December 22, 1893, through the United States minister at Caracas, the Department of State was of the opinion that the action of the Venezuelan authorities was arbitrary and unjust; but the claimant was advised that before he could invoke the official intervention of the United States it should he made to appear that he had sought redress in the courts of Venezuela and that justice had been there denied him.

On May 8, 1901, the claimants, as successors in interest to Henry Rudloff, began suit against the Government of Venezuela in the chamber of first instance of the Federal court. A decision was rendered on the 14th of February, 1903, favorable to the claimants so far as the existence and validity of the contract

and the liability of the Government were concerned; but holding that the amount to be adjudged should be determined by the just estimate of experts, pursuant to the provision of the Civil Code. An appeal was taken from this decision by the parties litigant on the 16th of February, 1903.

In consequence of the protocol signed at Washington on February 17, 1903, for the submission to arbitration of all unsettled claims owned by citizens of the United States against the Republic of Venezuela, the claimants have presented their claim to this Commission.

Before proceeding to answer the claim upon its merits here, the learned counsel for Venezuela entered a plea to the jurisdiction of the Commission upon the following grounds:

First. That the action was still pending in the tribunals of the Republic.

Second. That article 12 of the contract stipulates that the doubts and controversies which might arise by reason of it should be decided by the local courts, and that the contract could never give rise to an international reclamation.

A *difference of opinion* existing between the Commissioners, the question of jurisdiction was duly submitted to the umpire, who, in an interlocutory decision, sustained the jurisdiction of the Commission to examine the claim.

Answering to the merits, the honorable agent for Venezuela denies the claim in all its parts for the following reasons:

First. Because the nation was not a party to the contract entered into by the predecessor in interest of the claimants.

Second. Because the acts which they say were committed in violation of such contract were done by municipal authorities.

Third. Because in federal republics municipalities are autonomous entities and juridical personalities, capable of contracting rights and obligations, and for whose acts in the matter of contracts the State can not be responsible.

Fourth. Because the damages claimed are in the greater part remote, unascertained, and indirect damages for the recovery of which the civil law gives no right.

Fifth. Because the contractor violated the contract made with the municipality in the first place, disposing during the time when he was in charge of the market of the whole of its rents.

The objection that the National Government was not a party to the contract can hardly be sustained in view of the fact that the contract itself shows that it was entered into by the minister of public works and the governor of the Federal District sufficiently authorized by the chief of the Executive power. It is indeed contended that the extent of the national interest consisted in the cession of certain Government lands to the contractor, Rudloff. But the general tenor of the agreement indicates the active participation of the executive authority therein, granting the right of free entry of all materials and tools through the Federal custom-house of La Guaira and the guaranty that neither the National Government nor the municipality would allow any other market to be constructed in Caracas.

It would seem that a sufficient answer to the first as well as to the second and third objections raised by the Government of Venezuela lies in the fact that the Federal District was not at the time of this contract an autonomous entity, but rather a political subdivision of the State directly subject to the executive authority. The decision of the chamber of first instance of the Federal court is, of course, not conclusive upon the Commission, but upon this question of fact it may be cited as authoritative. The court says:

With reference to the authority which the Chief of the Executive power of the nation had to enter by himself into the contract with Rudloff, it is unquestionable

that it was sufficient through the ample powers which it exercised by virtue of the triumph of the revolution of 1892, of which Gen. Joaquin Crespo was the chief, so that in signing the contract by the minister of public works and the governor of the Federal District, these functionaries were the simple agents of the Chief of the Republic who was at the same time, according to the Federal system, the superior chief of the Federal District; [and further] that at the date of the signing of the contract the Federal District had no autonomy, the functions thereof being filled by the Chief of the Republic, who, by appointing discretionally the ministers, the governor of the Federal district, and the members of the executive council, made all these functionaries dependent on his authority, and therefore without any power to control his acts.

In view of the foregoing the responsibility of the National Government for the acts of the governor of the Federal District and of the municipal council is clear. It is equally clear that those acts were wrongful, arbitrary, and unjust. If any consideration of public policy required the abrogation of the Rudloff concession, the proper judicial proceedings should have been taken to that end, and in conformity with law. The seizure of Rudloff's books and correspondence the imprisonment of his manager, the interference with his workmen, and other hostile acts, were wholly unjustifiable and lawless. Moreover, it is not apparent by what right the National Government, acting through the governor of the Federal District, could annul the contract with Mr. Rudloff. The jurisprudence of civilized states and the principles of natural law do not allow one party to a contract to pass judgment upon the other, but guarantee to both the hearing and decision of a disinterested and impartial tribunal. These encroachments upon the legal rights of their predecessor in interest entitle the claimants herein to a just indemnification.

The claim is summarized as follows:

	<i>Bolivars</i>
Estimated income from rentals for eighteen years . . . . .	8,168,500
Amount spent in construction and expense . . . . .	78,232
Amount paid for policemen's wages . . . . .	8,645
Damages to credit . . . . .	600,000
	<hr/> 8,855,377
Less cost of building, interest, maintenance, and payment of municipal rents, as per contract . . . . .	5,156,576
	<hr/> 3,698,801
Total damages . . . . .	3,698,801

The amount claimed is the sum of 3,698,801 bolivars, equivalent to the sum of \$ 711,307.90 in United States gold.

The learned counsel for Venezuela contends, not without reason, that the damages thus claimed are in their greater parts remote, unascertained, and indirect.

The contract provided that Rudloff should have during the period of eighteen years therein designated the exclusive management and the collection of the proceeds of the market, and that he was to offer yearly at public auction the localities. It contained no agreement for the payment to him by the Government or the municipality of any sum whatever. The adventure was on his part wholly speculative, and his income therefrom was dependent upon the sale of localities, the payment of the rentals by the lessees, the success or failure of his management, and other indeterminate contingencies. Under these circumstances any estimate of the pecuniary advantages derivable from the contract is necessarily conjectural. Damages to be recoverable must be shown with a reasonable degree of certainty, and can not be recovered for an uncertain loss. All that the claimants pretend to prove here, all indeed that from the

nature of the case it is possible for them to prove, is that their predecessor in interest might have obtained the income claimed if the Government had not broken the contract. They are necessarily unable to prove with reasonable certainty that he could or would have obtained it. The case presented here is not that of the loss of the prospective profits of an established business, nor is it that of the loss of the ascertained profits derivable from a contract unperformed. It is simply that of the loss of the expected profits of a business venture wrongfully prevented of fulfillment by the defendant Government, and for these expected profits the claimants can not recover, because they are wholly unable to show that a profit would have been made. It is true the general rule of damages for the deprivation of real property is the value of its use — the rental value. But it has been held by respectable authority that when the defendant destroyed a building in course of construction by the plaintiff, the prospective profits which the plaintiff might have made by renting the building are not recoverable. (*Bingham v. Walla Walla*, 3 Wash., 68.) The damages claimed in this item are speculative and contingent, and can not form the basis of an award.<sup>1</sup>

The claim for "loss of credit" is not supported by sufficient evidence, and indeed the damages alleged in that respect, as involving the intervention of the will of the other parties, are too remote and consequential.

But it by no means follows from the foregoing considerations that these claimants are remediless. The evidence is perfectly clear that Rudloff possessed, in virtue of his contract, valuable property rights; that he entered upon the performance of the contract; acted in all matters relating thereto in conformity with its terms, invested upon the faith of it a considerable amount of capital and was apparently ready and willing to comply fully with its obligations. The evidence is also clear that he was denied the protection of the law, was ruthlessly interfered with and harassed, and finally, without a hearing, or judicial procedure of any sort, was by force of arms deprived of his property and of the rights vested in him under the contract. These acts of hostility and oppression were committed by the constituted authorities of the Government and evidently in the execution of its plans. In the commission of this wrong against an alien resident, the Government of Venezuela must be held to have assumed the responsibility of making just reparation; and for the wrong thus committed against one of its citizens the Government of the United States, on behalf of the claimants, is entitled to an award justly commensurate with the injuries sustained.

GRISANTI, *Commissioner* (for the commission):

On the 1st of February, 1893, the minister of public works and the governor of the Federal District entered into a contract, sufficiently authorized therefore by the Chief of the Executive Power on one part, and on the other with Henry F. Rudloff, civil engineer, citizen of the United States of America, in virtue of which contract Rudloff undertook —

"to construct on his own account or through a company, either national or foreign, a building of masonry and iron, principally for a public market, on the same place which is at present occupied by the market called "San Jacinto," including the square called "El Venezolano," and the grounds and buildings adjoining the actual market, the properties of the municipality (or the Government).” (Art. I.)

<sup>1</sup> See discussion as to speculative damages in *Oliva Case* (Italian - Venezuelan Commission) and *Sanchez Case* (Spanish - Venezuelan Commission), Volume X of these *Reports*.

The building ought to have been constructed according to the three plans which the contractor had already presented to the minister of public works. (Art. 2.)

Rudloff undertook to commence the construction of the building eleven days after signing the contract, and to finish the work within the following two years of the same date, allowing him an extension of time of six months. (Art. 3.)

The National Government and the city of Caracas granted to the contractor the buildings and the grounds mentioned in article 1 for the time fixed for the duration of the contract. (Art. 4.)

The contractor should take exclusive charge of the management and collection of the proceeds of the market and management of the police of the same from the day of commencing the work. (Art. 5.)

The duration of the contract was fixed for eighteen years, counting ten days after being signed. (Art. 6.)

The contractor bound himself to pay the municipality of Caracas 1,980,000 bolivars during the eighteen years mentioned, as follows: From the first to the fourth year, inclusive, 75,000 bolivars par annum, and from the fifth to the eighteenth year 1,680,000 bolivars, at the rate of 5,000 bolivars fortnightly. (Art. 7.)

It is evident that on February 11, 1893, Rudloff was placed in possession of the market of San Jacinto and other premises mentioned in Art. 1, and that on that same day he commenced the construction works.

On the 11th of the following May the governor of the Federal District demanded of Rudloff payment for the police which rendered services at the market, adducing therefore the referred-to contract, said payment having been satisfied by Rudloff, compelled to it by the mentioned authority, and having previously protested against the same.

In September, 1893, the governor of the Federal District submitted the mentioned contract entered into with Rudloff, to the consideration of the municipal council, and said corporation in an accord, issued on the 8th of the month and year just mentioned, resolved:

First. That the aforementioned contract be declared void; second, that the governor be authorized to take possession forthwith of the market and organize it in conformity with the provisions of the ordinance of February 20, 1884, in force with regard to markets, and with the others agreeing therewith; third, to accord for the demolishment of the works carried out in the Plaza de El Venezolano.

This resolution was complied with in all its parts; that is to say, the contract was annulled and the construction of works done by Rudloff was demolished.

The non-jurisdiction of the Commission was alleged by the honorable agent for Venezuela and held by the honorable Commissioner for Venezuela, Doctor Paúl, and the honorable umpire, in his decision of October 24, decided in favor of the jurisdiction of the Commission, and consequently the case was submitted to it.

In view of the aforementioned statement, perfectly in accordance with convincing documents and proved facts, the Venezuelan Commissioner proceeds to draw his conclusions.

The market is a work belonging to the municipality, but the national Executive appears as contracting it, represented by the minister of public works, together with the governor of the Federal District.

The municipal council of the Federal District had no right to annul of its own free will the referred-to contract in the resolution of November 13, 1895; because, as the municipality was one of the contracting parties, it could not at

the same time judge as to the validity or nullity of the same. To obtain said nullity the municipality should apply for a lawsuit to the competent tribunals.

The contract was not submitted to the National Congress in its regular sessions of 1894, for its approval or disapproval, as required by the constitution then in force, and required also by the one actually in force; but it is not just that said omission should be ascribed to the contractor, Rudloff, but to the national Executive, to whom the compliance of said formality corresponded.

It is evident that the Government of Venezuela owes the claimants an indemnification for having suddenly put a stop to a contract which their legator, Henry F. Rudloff, was carrying out; but the undersigned thinks that the amount they demand, of 3,698,801 bolivars, is exceedingly exaggerated, and he agrees to grant them an indemnification of \$75,745 United States gold.

TURNBULL, MANOA COMPANY (LIMITED), AND ORINOCO COMPANY  
(LIMITED) CASES

(By the Umpire:)

A party to a contract containing a covenant obligating the other party to perform certain obligations, has no right to declare the contract null and void, and must apply to the courts to have it set aside.

In order that a party to a contract containing the clause that "any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic" may make a claim before an international tribunal for damages for its breach, he must first go before the local courts and obtain a judgment that this breach of the contract took place.

A contract containing the clause "any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic," can not be declared void by one of the parties thereto for the nonfulfillment of any of the covenants, and it remains legally existing until so declared by the local tribunals, and another contract made with another party to take effect in case the first contract should become void has no value unless the first contract has been declared by the local tribunals to be inoperative, and no damages will lie for the supposed breach of the second contract.

A claim based upon the payment to the government of a sum of money for rights which the government could not concede, and which rights the claimant was prevented from enjoying by said government, will be allowed for the sum so paid with legal interest from the date of payment.

(These claims were filed separately but grouped in the decision.)

BAINBRIDGE, *Commissioner* (claim referred to umpire):

On the 22nd day of September, 1883, a contract was celebrated in the city of Caracas, Venezuela, in the words and figures following, to wit:

[Translation]

The minister of fomento of the United States of Venezuela, duly authorized by the President of the Republic, of the one part, and Cyrenius C. Fitzgerald, resident of the Federal territory Yuruari, of the other part, have concluded the following contract:

ARTICLE I. The Government of the Republic concedes to Fitzgerald, his associates, assigns, and successors for the term of ninety-nine years, reckoning from the date of this contract, the exclusive right to develop the resources of those territories, being national property, which are hereinafter described.