REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Union Bridge Company (United States) v. Great Britain

8 January 1924

VOLUME VI pp. 138-142

NATIONS UNIES - UNITED NATIONS

It is possible, perhaps, to argue that the meaning of section 4 of the Alien Law of 1887 is that the title to such property is good until forfeited by proper process. It appears to the Tribunal that, if that meaning was intended, the words would have been "shall be subject to forfeiture", and not "shall be forfeited". However that may be, by section 1 the acquisition of real estate or any interest therein by the persons mentioned is made "unlawful". Such acquisition, therefore, cannot found any claim for compensation.

The result, therefore, is that the English company took no valid rights whatever under the lease from the American company, and possesses no interest on which a claim such as this can be founded.

A very large part of the arguments addressed to the Tribunal on both sides was directed to the transactions relating to the debentures issued by the English company and the nationality of the debenture holders. Having regard to the view which the Tribunal takes of the position of the English company under the alien law, discussion of these points is unnecessary.

Another ground urged before us by the Government of the United States was the breach of the rules of procedure which, it was alleged, His Britannic Majesty's Government had committed in the presentation of the claim. On this point, it is sufficient to say that, while recognizing that there were defects in the memorial in this case, the Tribunal does not think, in all the circumstances, that those defects were such as to furnish, in themselves, adequate ground for allowing a preliminary motion of this character.

In conclusion, we desire to say that, in our opinion, even had the lease from the American company been valid, a formidable point, arising out of the English company's relations with the Rio Grande Investment Company, might still have lain in the way of His Britannic Majesty's Government.

Now, therefore:

The award of the Tribunal is that the claim of His Britannic Majesty's Government be disallowed.

UNION BRIDGE COMPANY (UNITED STATES) *v.* GREAT BRITAIN

(January 8, 1924. Pages 376-381.)

AMENDMENT OF PLEADINGS.—INTERNATIONAL TORT.—NEUTRAL PROPERTY.—LIABILITY FOR ACTS OF OFFICIALS, WAR CIRCUMSTANCES, INTENTION. Purchase in January-March, 1899, by Orange Free State from American company of materials for steel road bridge f.o.b. New York. Outbreak of war between Great Britain and Orange Free State on October 12, 1899. Arrival of materials in Port Elizabeth on October 25 and November 12, 1899. Refusal by agents of Orange Free State to pay. Annexation of Orange Free State by Great Britain on May 24, 1900. Transport of materials in August, 1901, from Port Elizabeth to Bloemfontein by order of Storekeeper of Cape Government Railways at Port Elizabeth and without notice to agents of company. Storage at Bloemfontein by Imperial Railway authorities. No request for return made by agents of company who since October, 1901, were aware of transport to Bloemfontein. No answer to letters written in 1907 by Central South African Railways to company concerning return of materials. Materials put up to auction and bought by Central South African Railways on July 22, 1908.

United States claim before Tribunal originally based upon State succession, conquest, annexation, subsequently on wrongful interference by British officials.

Held that transport of materials, the company's title to which Great Britain does not deny, was international tort committed in respect of neutral property; that Great Britain liable since Storekeeper acted within scope of his duty; and that liability not affected either by Storekeeper's mistake as to neutral character and ownership of materials, or by pressure and confusion caused by war, or by lack of intention on the part of British Authorities to appropriate materials.

DAMAGES: PRINCIPLE OF INTERNATIONAL LAW, FAIR COMPENSATION, CONTRACT VALUE, FAILURE OF PLAINTIFF TO ACT.—INTEREST. According to principle of international law fair compensation due, not contract value of materials. Owner's failure to act to be taken into account. No interest allowed.

Cross-references: Am. J. Int. Law, vol. 19 (1925), pp. 215-219; Annual Digest, 1923-1924, pp. 170-171.

Bibliography: Nielsen, pp. 371-375.

In this case, the Government of the United States of America prefers a claim for damages, arising out of alleged wrongful interference with certain bridge material, which belonged to the Union Bridge Company, an American firm, by officials in South Africa, for whose action His Britannic Majesty's Government is said to be responsible. This is the form of the claim as now made; but, originally, as presented in the United States memorial (p. 6), it was put forward against His Britannic Majesty's Government, as successors in contractual liability, by virtue of conquest and annexation, to the Orange Free State.

Having regard to the contents of the answer, this ground was recognized by the United States to be unmaintainable, and was abandoned, on the occasion of the first argument at Washington, on June 12th and 13th 1913 (oral argument, p. 1).

The case now comes before us for further hearing under a direction given by the Tribunal on that occasion (supp. pap., p. 3), with the addition of some supplementary papers which were filed on February 17th, 1914, by His Britannic Majesty's Government, in response to a request made by the Tribunal for further documents *(ibid.)*. This change of attitude, taken together with considerable *lacuna* in the correspondence and in the evidence on certain points of importance—explicable, perhaps by the outbreak of war in South Africa at a crucial date in the history of the case—has somewhat embarrassed the Tribunal. The evidence, however, has sufficed to enable us to arrive at a decision.

The material facts are these:

By a contract in writing, contained in two tenders and acceptances, dated in January, February, and March, 1899 (mem., app. exhibits 3-6), the Union Bridge Company agreed with the Orange Free State, acting through its general agents, Messrs. William Dunn & Co. of 43 Broad Street Avenue, London E.C., to supply and deliver for the sum of £ 2,200 and in accordance with a specification (mem., app., p. 10) the material for a wrought steel road bridge. The material was bought f.o.b. New York (see clause 16, "General conditions", app. mem., p. 19 and exhibit 4, p. 23, *ibid)* and was delivered in two consignments, on board the steamers *Kurrachee* and *Clan Robertson* which sailed from New York for Algoa Bay, South Africa, on September 18th and September 27th, 1899, respectively. The consignments were addressed as follows: "In Dienst, Inspector-General of Public Works, Orange Free State Government, Bloemfontein, South Africa" (mem., app., pp. 40-43). A certificate of acceptance of the material and of the absence of unnecessary delay in the manufacture of the

finished material (ans., annex. 30) was given by Messrs. R. W. Hunt & Co. who were appointed (mem., app., exhibit 7) for that purpose under clauses 5 and 9 of the general conditions (mem., app., p. 17).

During the voyage from New York to Algoa Bay, viz., on October 12th, 1899, war broke out between Great Britain and the Orange Free State. The two steamers referred to arrived at Port Elizabeth on October 25th and November 12th, 1899 (mem., p. 33 and 38), respectively. The bridge material was unloaded at that port, and stored on depositing ground belonging to the Harbour Board. Meanwhile, in accordance with clause 22 of the general conditions of the contract (mem., app., p. 20), the bills of lading had been presented for payment in London on October 27th, 1899, to Messrs. William Dunn & Co., who refused payment (mem., p. 51).

On May 24th, 1900, the Orange Free State was, by proclamation, annexed to Great Britain (ans., p. 40, annex 31).

In June, 1900, a firm of agents, Messrs. Mackie, Dunn & Co., who described Messrs. William Dunn & Co., as "our London friends" (ans., annex 1) took steps to get into communication with the Inspector-General of Public Works at Bloemfontein, with a view to selling the bridge material to the British authorities (ans., annex 1-16). Throughout this correspondence the firm in question assert the property of the Union Bridge Co., in the bridge material, by whom they are instructed to sell and on whose behalf they hold the documents of title (ans., annex 7). On his side the Inspector of Public Works, acting on behalf of the Military Governor, accepts Messrs. Mackie, Dunn & Co's statement of the position and discusses the price to be paid for the material and the reductions to be made (ans., annex 6). Finally, on January 10th, 1901, an offer of £ 3,000 is made by the Inspector of Public Works, to remain open for acceptance till January 28th (ans., annex. 12). By a letter dated January 31st (ans., annex 14) acceptance of this offer is intimated by Messrs. Mackie, Dunn & Co., but is rejected on February 18th (ans., annex 15) by the British anthorities as being out of time and because of the unsettled state of the country. To this letter Messrs. Mackie, Dunn & Co. reply on February 23rd (ans., annex 16) regretting the decision come to, and suggesting that the matter may be reopened and another offer made by the British authorities at a more opportune moment.

The question has been much discussed both at Washington (oral argument, pp. 14-16) and before us (transcript, pp. 18-23) as to how the property in this material could be in the Union Bridge Co. having regard to the fact that it was bought by the Orange Free State f.o.b. New York. We think it sufficient to say that the matter is not in issue before us. The learned agent of His Britannic Majesty's Government is not concerned to dispute the point (oral argument p. 62). His position would appear to be that the contract for purchase f.o.b. New York and the negotiations between the British authorities and Messrs. Mackie, Dunn & Co. on the footing that the title to this material was in the Union Bridge Co., are elements for the consideration of the Tribunal; but that, from the point of view of his Government, now that State Succession has been abandoned, the f.o.b. contract is *res inter alios acta*, while the negotiations for sale in South Africa make it very difficult, if not impossible, for him to deny that the title was, as at that time, in the Union Bridge company (transcript pp. 43-47). But further, it seems to us that having regard to the refusal of the Orange Free State to pay for the material, and to the subsequent disappearance of the Orange Free State in consequence of conquest and annexation, a claim in equity to the property in the material could have been maintained by the Union Bridge Company.

In our view, the real defences are that, assuming the property to be in the Union Bridge Co.:

(1) His Britannic Majesty's Government is not liable on any principle of law or equity;

(2) If there be liability, no damage has, in fact, been suffered by the Union Bridge Company.

The material continued to lie at Port Elizabeth till August 1901, when, without inspection and without notice to Messrs. Mackie, Dunn & Co (supp. pap., p. 10) it was forwarded by the order of Mr. W. H. Harrison, the Storekeeper of the Cape Government Railways at Port Elizabeth, by rail to the charge of the District Storekeeper, Bloemfontein—a distance of 400 miles (ans., annex 17). There are several contradictory accounts of this removal. In our view the result of the evidence is that Mr. Harrison purported to act upon instructions given to him, shortly after the outbreak of war, when he was storekeeper at East London, to forward all bridge material intended for the Orange Free State railways, to the Imperial Military Railways, Bloemfontein (ans., annex 17). In so forwarding this material, therefore, he made two mistakes, inasmuch as it (1) was neutral property; and (2) was intended for a road, and not a railway bridge *(ibid.)*. The Cape Government Railways were distinct from and independent of the Imperial Railways (supp. pap., p. 21); but the British Agent disclaims any intention to deny responsibility for the action of the Cape Government Railways (transcript, pp. 79-80). The Imperial Railway authorities were much annoyed by the arrival of this material at Bloemfontein and refused at first to receive it (supp. pap. pp. 5-18); but it was eventually unloaded and stored at Bloemfontein by the railway authorities (ans., annex 26, p. 40) where it lay till September 1909.

Messrs. Mackie, Dunn & Co. were aware early in October, 1901, that the material had been unloaded at Bloemfontein and would remain there for the present (supp. pap. "B", p. 31); yet during the eight years that it lay there, the Imperial Railway authorities at Bloemfontein received from that firm neither protest nor demand that it should be returned to Port Elizabeth or sent to any other destination. Finally, in 1907, two letters dated, respectively, February 18th and June 24th (supp. ans., annexes 32 and 33) were written by the General Manager of the Central South African Railways to the Union Bridge Company offering to return them the material on certain terms as to payment of charges and indemnity, and intimating that, in default of instructions, the railways would sell it by public auction to defray the expenses already incurred by them in the matter. These letters were unanswered. Accordingly, the material was put up to auction, under the by-laws of the railways on July 22nd, 1908, at Bloemfontein (supp. ans., Annex 35) and bought in for £ 545 *(ibid.*, annex 37). A year later, on August 4th, 1909, the material was sold to the Crown Mines Ltd. for £ 1,500 (supp. ans., annex 40 and 41). The Union Bridge Company have received nothing by way of payment for the material.

On these facts, the question arises: is there any liability on His Britannic Majesty's Government?

In our opinion, the answer to this question is in the affirmative.

The consignment of the material to Bloemfontein was a wrongful interference with neutral property. It was certainly within the scope of Mr. Harrison's duty as Railway Storekeeper to forward material by rail, and he did so under instructions which fix liability on His Britannic Majesty's Government.

That liability is not affected either by the fact that he did so under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question. The knowledge of Messrs. Mackie, Dunn & Co., in October, 1901, that the material was at Bloemfontein, coupled with

their failure for eight years to make any protest or demand for its return is relevant, in our view, only to the question of quantum of compensation, and does not qualify the intrinsic wrongfulness of Mr. Harrison's action. In this aspect of the case, that action constitutes an international tort, committed in respect of neutral property, and falls to be decided not by reference to nice distinctions between trover, trespass and action on the case, but by reference to that broad and well-recognized principle of international law which gives what, in all the circumstances, is fair compensation for the wrong suffered by the neutral owner. This, and not the contract value of the material is, in our opinion, the true measure of damages.

There is evidence that in October, 1907, the material had deteriorated by reason of rust, corrosion, and bending (ans., annex 19); but this deterioration would have resulted, perhaps to an even greater degree, had the material lain near the sea at Port Elizabeth; and it is a reasonable inference that it was because of their inability to find a purchaser that Messrs. Mackie, Dunn & Co. let the material lie in store for so many years. In other words, in our view, the consignment to Bloemfontein did not cause the deterioration. Taking, therefore, £ 1,500 as the value of the material in 1909, and deducting therefrom the sums of £ 249 and £ 17 10s. for charges at Port Elizabeth (supp. pap., pp. 31 and 16) and £123 for marine freight due to the *Clan Robertson* (supp. pap., p. 33), which the Union Bridge Co. would have to pay in any case, and making some allowance for storage at Bloemfontein, we think that justice will be met by an award of £ 750 without interest.

Now, therefore:

The Tribunal decides that His Britannic Majesty's Government shall pay to the Government of the United States of America the sum of £ 750 sterling.

SEVERAL CANADIAN HAY IMPORTERS (GREAT BRITAIN) *v.* UNITED STATES

(Canadian Claims for Refund of Duties. March 19, 1925. Pages 364-370.)

EXHAUSTION OF LOCAL REMEDIES.—MUNICIPAL LAW: KNOWLEDGE OF ALIENS OF PRESUMPTION.—IMPLIED WAIVER OF DEFENCE. Collection between 1868 and 1882 of too high customs duties on importations of baled hay from Canada into United States. Failure of claimants to avail themselves of legal remedies secured by United States legislation. No reimbursement of claimants made. *Held* that legal remedies were adequate and that importers are presumed to know customs laws of countries with which they are dealing; plea that claimants at time of collections were unaware, until too late, that duties paid were in excess of those imposed by law therefore rejected. *Held* also that submission of claims to Tribunal by United States constituted no implied waiver of defence under municipal law. Claims disallowed.

Cross-references: Am. J. Int. Law, vol. 19 (1925), pp. 795-800; Annual Digest, 1925-1926, p. 230.

Bibliography: Nielsen, pp. 347-363.

This proceeding involves five claims which have been argued, submitted, and considered together for duties paid to the Government of the United States