REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Louis John Hois (United States) v. Austria and Wiener Bank-Verein

24 July 1928

VOLUME VI pp. 260-266

NATIONS UNIES - UNITED NATIONS

and Hungary on account of damages alleged to have resulted from the occupancy of claimant's lands and three houses located in Italy and the seizure of claimant's livestock and personal property by the Austro-Hungarian army.

From the meager record submitted it appears:

(1) That claimant, a native of Italy, became through naturalization a citizen of the United States on April 14, 1902.

(2) Thereafter he returned to Italy. The date of his return is not disclosed by the record, but it is apparent that he was living in Italy in 1914.

(3) On September 5, 1916, he purchased 17 acres of land in the town of Annone Veneto, Italy, upon which were located three houses. Claimant with his wife and children resided on this property as did also claimant's aged parents. There appears to have been a vineyard located on the property and it was well stocked with poultry.

(4) It is alleged that the Austro-Hungarian army occupied and damaged these premises and confiscated livestock, poultry, feed, wine, and other personal property belonging to claimant. The only statement in the record with respect to the time the acts complained of occurred is that "it was in the latter part of November 1918, that is, from the 11th to the 21st of November".

(5) From the record it appears that the Austro-Hungarian troops occupying the Italian territory began a hasty retreat on October 29, 1918, so that when the Armistice of November 3, 1918, was signed no Austro-Hungarian troops remained on Italian territory save those who had been taken prisoners by the pursuing Italian armies.

(6) At some time after 1918 not disclosed by the record claimant returned to the United States to reside.

On the record submitted the Commissioner holds that the claimant has failed to discharge the burden resting upon him to prove that his property was appropriated or damaged by Austro-Hungarian troops or that he was otherwise damaged as a consequence of hostilities or of any operations of war bringing his claim within the terms of the Treaty of Vienna or the Treaty of Budapest.

For the reasons set forth in the opinion this day handed down in the case of Henry Rothmann, claimant, docket No. 8, the Commissioner further holds that the claimant has failed to prove that his claim, if any he ever had, was impressed with American nationality at the time it arose.

Wherefore the Commission decrees that neither the Government of Austria nor the Government of Hungary is obligated under the Treaty of Vienna or of Budapest to pay to the Government of the United States any amount on behalf of Louis Zecchetto, claimant herein.

LOUIS JOHN HOIS (UNITED STATES) *v.* AUSTRIA AND WIENER BANK-VEREIN

(July 24, 1928. Pages 37-45.)

DEBTS, APPLICABLE LAW, *LEX LOCI SOLUTIONIS*. INTERPRETATION OF MUNICIPAL LAW.—DISCHARGE OF DEBT: EFFECT OF COURT DEPOSIT, LEGAL TENDER.—INTERPRETATION OF CONTRACTS: INTENTION OF PARTIES.—INTERPRETATION OF TREATIES: CLEAR LANGUAGE. General checking account, established by claimant on August 15, 1916, with Vienna bank. Conditions *inter alia:* (1) right of bank to cancel account at any time; (2) place of performance: Vienna; (3) applicability of Austrian law. Offer by bank on October 24, 1919, to repay pre-war credit balance. Failure of claimant to reply. Court

deposit by bank on November 14, 1919, in accordance with section 1425, Austrian General Civil Law Code, of balance in old kronen unstamped banknotes. *Held* that in the absence of agreement to the contrary applicable law is *lex loci solutionis:* intention of parties, basis of construction of all contracts. *Held* also that under terms of contract and under Austrian law bank's debt to claimant definitely and completely discharged and extinguished as of November 14, 1919, and that not then Austrian State or those acting for it became debtor to claimant. *Held* further that Court deposit not void because aimed at protection of bank against Clearing Office provisions of Treaty of St. Germain: (1) Court deposit made before date of coming into force of Treaty, from which date (and not from date of signing) Clearing Office provisions effective: clear language of Treaty; (2) United States no party to Treaty, and Clearing Office provisions not incorporated into Treaty of Vienna. *Held* finally that under Austrian law bank entitled to pay in old kronen unstamped banknotes, though at time of Court deposit German-Austrian stamped banknotes were legal tender in Austria.

Cross-references: Am. J. Int. Law, vol. 23 (1929), pp. 187-193; Friedensrecht, VII. Jahr (1928), Nr. 6, pp. 46-49.

Bibliography: Prossinagg, pp. 35-38; Bonynge, pp. 31-32.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II, the United States on behalf of the claimant, Louis John Hois, an American national, seeks an interlocutory judgment for 11,012 kronen, the amount with interest of the credit balance of an account opened by claimant on August 15, 1916, in the Wiener Bank-Verein, a corporate Austrian national (hereinafter designated bank).

The uncontroverted facts briefly stated are:

(1) On December 10, 1912, the claimant through naturalization became and has since remained a citizen of the United States.

(2) On August 15, 1916, the claimant, who then and has since resided in Milwaukee, Wisconsin, established in his own name with the bank in Vienna a general checking account in the amount of 10,000 kronen which bore interest at the rate of 3% per annum.

(3) On January 1, 1917, and at semi-annual intervals thereafter the bank sent to the claimant, who received and retained without objections, regular statements of account calling the claimant's attention to the general conditions governing the relations between the bank and claimant printed on the statement, among these being the following:

"Unless otherwise agreed upon we are entitled to cancel existing connections at any time and according to our free decision.

"The relations existing between us and our business friends are in general being governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the city of Vienna is to be considered the place where payment is to be made or where obligations are to be met as the case may be."

(4) On July 21, 1919, the claimant in addressing the bank by letter with respect to his deposit of 10,000 kronen wrote: "I presume that the Austrian Government has sequestrated this sum and, as in this case I will apply to the American Government for indemnification, I ask you to kindly inform me how this matter stands."

(5) To this inquiry the Austrian bank replied under date of August 18, 1919, assuring the claimant that his account had not been subject to sequestration, but that with accumulated interest he then had a credit balance with the bank of 10,846 old kronen which he was at liberty to dispose of in any way he saw fit.

(6) Section 1425 of the Austrian General Civil Law Code, which has been continuously in effect since the date of its enactment in 1812 provides:

"If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligations and places the subject matter delivered at the risk of the creditor."

(7) On October 24, 1919, the bank cabled the claimant: "Offer you prompt repayment of your pre-war credit balance. Cable immediately to avoid depositing to law courts as trustee."

(8) Receiving no reply from the claimant, the bank on November 14, 1919, in pursuance of section 1425 of the Austrian General Civil Law Code, quoted above, deposited in the office of the Circuit Court of Vienna (which was the appropriate court in which to make this deposit, pursuant to this section of the code) old kronen unstamped banknotes in the amount of 11,012 kronen, being the full amount of claimant's deposit with the bank with accrued interest, which notes were received at the deposit office, put in an envelope, sealed and earmarked as held for claimant's account. These notes have since been and now are held in the physial custody of the deposit office of the court. Due notice of the fact of such deposit was promptly given to the claimant by the bank as well as by the court, and was received by claimant during December, 1919. The claimant was advised that these banknotes were at his free disposal and held subject to his order.

(9) From the letters of the bank to the claimant of December 3, 1919, and January 20, 1920, it is apparent that the action taken by the bank in seeking to discharge its indebtedness to the claimant through making this court deposit was taken to protect itself against the terms of the Clearing Office provisions of the Treaty of St. Germain which was signed on September 10, 1919, and which became effective on July 16, 1920.

(10) From claimant's letter to the bank of December 29, 1919, it is apparent that the claimant received the bank's cable of October 24 offering prompt repayment of claimant's pre-war credit balance and advising that if not accepted by claimant it would be deposited in the law courts, but in claimant's own language as he "did not know how to act intelligently . . . I refrained from taking any action".

The deposit established by the claimant with the bank on August 15, 1916, constitutes a debt within the meaning of the Treaty unless it has been discharged and extinguished. The sole question for decision in this case is; on the facts stated what if any debt is due and owing by the bank or other Austrian national to the claimant within the meaning of the Treaty of Vienna?

The contract which established the relation of creditor and debtor between claimant and the bank expressly stipulated that "the City of Vienna is to be considered the place where payment is to be made, or where obligations are to be met, as the case may be," and that the contract should be "governed by the laws in force in Austria."

These stipulations express the rule which would obtain in this case in the absence of any express agreement of this nature. Its basis is that governing the construction of all contracts—the intention of the parties, who when they stipulate that transactions shall occur in a particular place manifestly intend, in the absence of an agreement to the contrary, that their performance shall be governed by the laws of that place. In considering contract claims, international tribunals have applied and given effect to the law of the place of

performance. [1] This rule has been adopted and applied by the several Mixed Arbitral Tribunals constituted and functioning under the Treaty of Versailles, the Treaty of St. Germain, and similar treaties of peace. [2] It is recognized as the law by publicists and jurists, including those of Austria and of the United States, [3] and by the highest courts of both. [4] Effect will be given to this rule, where applicable, in all cases coming before this Commission.

The relation of creditor and debtor was established between the claimant and the bank on August 15, 1916. At that time section 1425 of the Austrian General Civil Law Code, quoted above had been in effect and constantly availed of for more than a century. It was in full force and effect so far as concerns this claimant and the bank on November 14, 1919. when the court deposit above mentioned was made. The bank was entitled at any time by payment to terminate the relation of debtor and creditor which existed between it and the claimant. To its offer so to do the claimant made no reply. Following this default by claimant the statute authorized the bank to make the deposit in court, for the creditor cannot by remaining passive deprive the debtor of a legal right. [5] In making this deposit all of the requirements of the statute were fully met by the bank. It follows that in pursuance of the provisions of the applicable Austrian law the bank's debt to claimant was discharged and extinguished and the relation of debtor and creditor terminated [6] as of November 14, 1919. [7]

---

[1] Puerto Cabello & Valencia Railroad Co. (Venezuelan Arbitrations Mixed Claims Commission, Ralston's report, Senate Document 316, 58th Congress, 2nd session, p. 455); Pacific Mail Steamship Company (Convention between the U. S. and New Grenada), Moore's Arbitrations, p. 1412; Henry Woodruff *v.* Venezuela, Morris' report, 1904, p. 321-3; "Manoa Cases," Morris' report, 1904, p. 451; Henry Woodruff and Flannagan, Bradley, Clark & Co. (United States and Venezuelan Claims Commission, 1889-1890, p. 425).

[2] Wolf *v.* Morley, 5 M.A.T. 670; Haeraeus *v.* Griffin, 5 M. A. T. 675; Gruening *v.* Frankel Brothers before the Anglo-German Mixed Arbitral Tribunal (1 M. A. T. 726).

[3] Savigny, System of the Present Roman Law, 8, 200 *et seq.*; Unger, System of Austrian General Civil Law, I, 179; Story, Commentaries on the Conflict of Laws, 7th edition, section 342, p. 279; Wharton, A Treatise on the Conflict of Laws, 3rd edition, section 401, p. 862 and 3; Phillimore, Commentaries on International Law, etc., 3rd edition, p. 525; Westlake, A Treatise on Private International Law, 7th edition, section 212, p. 302; Foote, A Concise Treatise on Private International Law, 5th edition, p. 429; Dicey, Conflict of Laws, 3rd edition, p. 602; Dernburg, The Civil Law of the German Empire, I, 103.

[4] Zimmermann & Forshay *v.* Wiener Bank-Verein, 274 U. S. 253; London Assurance *v.* Companhia de Moagens, 167 U. S. 149; Austrian Supreme Court, S. Z. III No. 79, IX No. 56, No. 152 (Spr. Rep. No. 13), V No. 30, Slg XVI No. 6352 (Spr. Rep. No. 219).

[5] Hasenoehrl, Austrian Law of Obligations, 2nd vol., 1898, p. 498 and 510; Ehrenzweig. System of Austrian General Private Law, 2nd vol., 1st half, 6th edition, 1920, section 347, p. 302.

[6] Zimmermann & Forshay *v.* Wiener Bank-Verein, 274 U. S. 253; Bamberger *v.* Steinhauser, decided by the Supreme Court of Austria, Dec. 14, 1927; Hasenoehrl, Austrian Law of Obligations, 2nd edition, section 94, p. 510; Schey, Concept and Substance of the *mora creditoris* in Austrian and in General Law (1884, p. 39); Frind, Austrian Court Journal for 1911, No. 8, p. 62; Decision of Supreme Court of Austria, June 28, 1921, Ob II 425; Marelli *v.* Haas, Italo-Austrian Mixed Arbitral Tribunal, 7 M. A. T. 249; Efisio Paris *v.* Impresa Auteried & Co., Austrian-Italian Mixed Arbitral Tribunal, 6 M. A. T. 436.

[7] Hasenoehrl, Z, Sec. 94, p. 498; Krainz-Pfaff, System, 2nd vol., 4th ed., 1907, sec. 344, p. 161; Ehrenzweig, System, 2nd vol., 6th ed., sec. 347, p. 305; Czyhlarz, Gruenhut's Zeitschrift, 6 (1879), p. 669.

On behalf of the claimant it is contended that even if the bank's indebtedness to him was discharged by the court deposit the same debt is still due him by an Austrian national, viz.: the Government of Austria, or the Austrian Court, or the clerk or other officer having the custody of the court deposit. This contention is rejected. The deposit office in receiving and holding the deposit for and subject to the order of the claimant acted in strict accordance with the Austrian statute. In so doing it performed a governmental function. In no sense did the Austrian State or those acting for it become debtor to the claimant. The kronen deposited never became the property of the State, which had no pecuniary interest therein. The State and all those acting for it, in receiving and holding the deposit, acted in a public and not a private capacity, and what they did in pursuance of the Austrian statute did not operate to keep alive the indebtedness which had been due the claimant and which was terminated as definitely and completely as if payment had been made directly to the claimant and full acquitance executed and delivered by him. [1]

On behalf of claimant it is further contended that by the "device" of a court deposit made by the bank in pursuance of the municipal law in effect in Austria, for the express purpose of protecting itself against the terms of the Clearing Office provisions of the Treaty of St. Germain, which had been signed but had not then come into force, the debtor is seeking to defeat the very purpose of that Treaty, and Austria is seeking to evade the burden of valorization of debts which the terms of that Treaty place upon her, and that all acts taken in furtherance of these purposes are void. Paraphrasing the language of Mr. Justice Holmes of the Supreme Court of the United States, [2] the short answer to this contention is that claimant's rights against the bank were ended before the Treaty became effective.

But there are other answers. Assuming that the bank did make the court deposit in question for the express purpose of protecting itself against the terms of the Clearing Office provisions of the Treaty of St. Germain, neither the United States nor its nationals can complain of its so doing, for the reasons, amongst others, that the United States declined to become a party to the Treaty of St. Germain, and while the provisions of that Treaty, here under consideration, were incorporated into the Treaty of Vienna, the United States by deliberate inaction, refused to adopt the Clearing Office plan, and by so doing refused to put into effect the provisions against which the bank sought to protect itself. It is manifest that neither the United States nor its nationals can complain that the bank took measures to protect itself against treaty provisions which never became effective as between the United States and Austria.

Section III of part X (Economic Clauses) of the Treaty of St. Germain provided for the *reciprocal* settlement of "debts" between the nationals of the opposing powers through the intervention of Clearing Offices. Each of the Allied and Associated Powers had the option to adopt or not the Clearing Office plan. Paragraph *(a)* of article 248 of the Treaty provided that:

"*(a)* Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through Clearing Offices."

It is clear that these provisions prohibiting payment of debts were as between Austria and other nations applicable only to those nations adopting

[1] Tannenbaum *v.* The Prussian Treasury, 5 M. A. T. 632; Solomon & Co. *v.* Staatsanwalt, etc., Anglo-German Mixed Arbitral Tribunal, case No. 2214, decided Sept. 30, 1924.

[2] Zimmermann & Forshay *v.* Wiener Bank-Verein, 274 U. S. 253.

the Clearing Office plan; that they were to be effective, if at all, only as from July 16, 1920, the date of "the coming into force of the present Treaty;" and that they were reciprocal, applying alike to the United States and to Austria. The treaty makers could readily have stipulated that the prohibition-of-payment provisions should be effective as from the date of the *signing* of the Treaty; or could have gone further and provided that all such payments made after the Armistice of November 3, 1918, should be void [1]—but they did not do so. On the contrary in this respect they left nothing to construction but *expressly* stipulated that these prohibitory provisions should be effective "as from the coming into force of the present Treaty". It is not permissible for the Commissioner to speculate with respect to what the treaty makers might or could or should have provided when their language is clear.

While the United States signed the Treaty of St. Germain, it never through ratification became a party to it. However, all of the provisions of the Treaty of St. Germain here under consideration were carried into and became a part of the Treaty of Vienna between the United States and Austria signed August 24, 1921, which became effective November 8, 1921. But the United States did not, as it had the right to do, adopt the Clearing Office provisions of the Treaty of Vienna and consequently did not enact any legislation to make effective the reciprocal prohibition-of-debt-payment provisions above referred to. Of the extent to which American nationals, in the absence of any legislation prohibiting their so doing, used depreciated kronen currency in voluntarily discharging their kronen obligations to Austrian nationals, the Commissioner is not advised. But the records of this Commission disclose that such transactions took place without impediment. Obviously the United States and its nationals were not in a position to demand that Austria should prohibit its nationals from paying or discharging, according to the law in effect at the contract place of payment, the debts owing by them to American nationals.

Austria could not foresee that the United States would not ultimately become a party to the Treaty of St. Germain which it had signed and within one month thereafter elect to adopt the Clearing Office plan. Therefore, the prohibition-of-payment decrees which Austria was required to and did enact, in pursuance of the provisions of the Treaty, by their terms prohibited Austrian nationals from paying debts owing by them to American nationals. The Supreme Court of Austria has held [2] that these Austrian prohibition-of-payment decrees presented no impediment to an Austrian debtor discharging his indebtedness to an American creditor through a court deposit made in pursuance of section 1425 of the Austrian General Civil Law Code. The basis of this holding is that while the decrees in question nominally forbade payment, in any form, of debts due by Austrian to American nationals, nevertheless the reason for their enactment was the carrying out of the Clearing Office provisions of the Treaty, and as the United States rejected the Clearing Office plan the reason for the decrees failed in so far as they applied to American nationals, and hence the letter of the decrees will not be applied and enforced as between the United States and Austria and their respective nationals.

The Commissioner declines to deal with the effect, if any, of these Austrian decrees, on their coming into force, on the right of an Austrian national through a court deposit to discharge a debt owing by him to an American national,

---

[1] A precedent for such a stipulation is found in the last sentence of paragraph 1 of the annex to section IV of part X of the Treaty making void all exceptional war measures taken by Austria and Austrian authorities since November 3, 1918.

[2] Bamberger *v.* Steinhauser, decided by the Supreme Court of Austria, December 14, 1927.

as a decision of this question is not necessary to a disposition of this case. The decrees prohibiting payment had not been passed and could not therefore have presented any impediment to the bank's action when the debt due by the bank to the claimant was lawfully discharged.

The further contention is made on behalf of the claimant that the court deposit made by the bank is without legal effect because made in old unstamped kronen, not legal tender, instead of "German-Austrian stamped kronen", then legal tender in Austria where payment was made. It would not be profitable to examine here in detail the Treaty provisions and the several decrees passed in pursuance thereof bearing on the question here raised. The Commissioner holds that while at the time the court deposit was made German-Austrian stamped banknotes were the legal tender in Austria, nevertheless under the provisions of section 6 of the Austrian decree of March 25, 1919, it was permissible for the bank to use old kronen unstamped banknotes in the payment of its debt direct to claimant or in discharging this debt through a court deposit.

The Commissioner holds that the debt due by the bank to claimant was lawfully discharged and extinguished through the court deposit made by the bank on November 14, 1919, approximately two years before the coming into force of the Treaty of Vienna on November 8, 1921, under the terms of which Treaty this claim is asserted. It follows that no debt exists upon which the interlocutory judgment prayed for can be based.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of Louis John Hois, claimant herein.

THE FIRST NATIONAL BANK OF BOSTON (UNITED STATES) *v.* AUSTRIA AND WIENER BANK-VEREIN

(November 9, 1928. Pages 89-91.)

DEBTS, APPLICABLE LAW, *LEX LOCI SOLUTIONIS*, INTERPRETATION OF MUNICIPAL LAW.—DISCHARGE OF DEBT: EFFECT OF COURT DEPOSIT, EXCEPTIONAL WAR MEASURES.—INTERPRETATION OF CONTRACTS: INTENTION OF PARTIES.—INTERPRETATION OF TREATIES: CLEAR LANGUAGE. Open account, established by claimant with Vienna bank. Court deposit by bank, in accordance with section 1425, Austrian General Civil Law Code, of balance in banknotes. Notice of deposit to claimant on December 3, 1919. *Held* that Court deposit operated as discharge for reasons stated in Louis John Hois award (p. 260 *supra*), and because, prior to Court deposit, claimant's balance not subjected to exceptional war measures of general applicability to property, rights, and interests of American nationals in territory of former Austrian Empire (reference made to Administrative Decision No. II, p. 212 *supra*), the existence of which measures claimant failed to prove.

Cross-reference: Am. J. Int. Law, vol. 24 (1930), pp. 186-188.

Bibliography: Prossinagg, pp. 27-29; Bonynge, p. 24.

The United States on behalf of the claimant, The First National Bank of Boston, an American corporate national (hereinafter designated "American bank"), seeks an interlocutory judgment for kronen 100,952, the balance alleged to have been due it on open account on December 7, 1917, from the