

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

**Administrative Decision No. VIII (Claims of the Association of American
Holders of Foreign Securities, Inc., and its Members)**

27 May 1925

VOLUME VII pp. 252-255



NATIONS UNIES - UNITED NATIONS
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Whenever either Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington May 25, 1925.

Edwin B. PARKER
Umpire

ADMINISTRATIVE DECISION No. VIII

(Claims of the Association of American Holders of Foreign Securities, Inc., and its Members, May 27, 1925, pp. 347-352.)

PROCEDURE, PRESENTATION OF CLAIMS: TIME-LIMIT, IDENTIFICATION OF CLAIM.—JURISDICTION.—LAW OF TREATIES: (1) DIPLOMATIC CORRESPONDENCE PART OF TREATY, (2) EVASION OF TREATY THROUGH MUNICIPAL LAW.—INTERPRETATION OF TREATIES: (1) PURPOSE, RULE OF EFFECTIVENESS, (2) CIRCULAR LETTER FROM STATE DEPARTMENT. Time-limit set by Commission's Rules (Rule IV (*d*)) for notice of claims which will be submitted. Notice given within time-limit on behalf of security holders association and its unidentified members (some of whom ratified their election after time-limit expired) that group of unidentified claims will be presented. *Held* that notice not sufficient: (1) Rule IV (*d*) based on agreement embodied in diplomatic correspondence relating to Agreement of August 10, 1922, which confers jurisdiction upon Commission, (2) Rule IV (*d*), accordingly, is part of Agreement and has force of jurisdictional limitation; purpose, effectiveness of Rule (reference made to circular letter from State Department), (3) municipal law technicalities cannot help evade international agreement.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 202-206; Kiesselbach, *Probleme*, pp. 427-430 (German text); Witenberg, Vol. II, pp. 160-164 (French text).

Bibliography: Borchard, pp. 79-80.

By THE COMMISSION:

The Agents of the two Governments have requested a ruling by the Commission as to its jurisdiction over certain claims on the following Agreed Statement of Facts:

The above named Association, an American corporation, organized and existing under the laws of the State of Rhode Island (Exhibit 1, filed with Statement of Facts), on April 9, 1923, filed with the American Agency notice of claim on behalf of said Association and its members against the Government of Germany, which notice was transmitted by the American Agency to the Department of State and referred by said Department to the American Agency. Notice of the claim was given to the Commission and to the German Agent under the Rules of the Mixed Claims Commission IV (*d*) on April 9, 1923. The said Association, as such, does not own or claim to own any of the securities involved in the claims herein referred to. At the time of the filing of the notice, as aforesaid, the American Agent had no information regarding the names of the members of said Association, or as to the amount of damage, if any, said to have been suffered by each of the members. On or about May 12, 1924, the said Association submitted to the American Agent a list purporting to contain the names of the members of the Association as of April 9, 1923, which list also showed the amount of damage alleged to have been suffered by each member (said list is filed as Exhibit 12, and accompanies the

Statement of Facts). On or about November 11, 1924, the said Association filed a corrected list in four parts purporting to contain the names of parties elected to membership under the provisions of the by-laws, in the said Association at meetings of the stockholders thereof held on April 2 and April 4, 1923. Part 1 comprises a list purporting to contain the names of customers of the firm of Zimmerman and Forshay submitted by Lewis A. McGowan on April 2, 1923, and elected members of the Association under the provisions of Article 3, Section 3 of the by-laws; Part 2 comprises a list purporting to contain the names of firms and individuals submitted by Lewis A. McGowan on April 2, 1923, and elected to membership in the Association in accordance with the provisions of Article 3, Section 5, of the by-laws thereof; Part 3 comprises a list purporting to contain the names of individuals submitted by Lewis A. McGowan on April 2, 1923, and elected as members of the Association under the provisions of Article 3, Section 3, of the by-laws thereof; Part 4 comprises a list purporting to contain the names of customers of the firm of George F. Redmond and Company submitted by William R. Turner on April 2, 1923, and elected as members of the Association under the provisions of Article 3, Section 3, of the by-laws thereof (See for the four parts of this list Exhibit 25, accompanying the Statement of Facts). It is the understanding of the American Agent that the names of the individuals appearing on Part 4 of the list of members comprise such members as were holders of securities acquired subsequent to November 11, 1918. According to the proof submitted by the firm of Zimmerman and Forshay of New York, acting through John S. Scully, one of the members of the firm, prior to April 9, 1923, conferred with Lewis A. McGowan and authorized him to have such customers whose names appear on Part 1 elected as members of the Association. This action was taken voluntarily by said firm for the benefit of such customers, without their knowledge or consent; said customers were, however, subsequently notified of the action so taken (Exhibits 19, 20 and 24, accompanying Statement of Facts). The names appearing on Part 2 of the list of members comprise, in the main, names of firms dealing in German securities. Part 3 of the list of members comprises two individuals who, prior to April 9, 1923, authorized, according to evidence submitted, Lewis A. McGowan to take the necessary steps to secure their election as members of the Association (Exhibit 17, accompanying Statement of Facts). Subsequent to April 9, 1923, Lewis A. McGowan submitted sworn statements covering claims on behalf of four firms and/or individuals whose names appear on list Part 1. The American Agent is advised that Lewis A. McGowan has secured, but not as yet filed with the Agency, ratifications by at least five hundred parties whose names appear on the list of members of the Association. He is further advised that similar ratifications by the others appearing on the list of members of the Association are being submitted to Lewis A. McGowan daily (Form of ratification, together with form of Power of Attorney, will be found attached to Exhibit 20, accompanying Statement of Facts). The American Agent was furnished on or about December 4, 1924, by Lewis A. McGowan, with thirty-three Powers of Attorney duly executed by parties whose names appear on said lists.

On these facts the Agents of the two Governments request an administrative ruling on the question "whether, under clause (d) of Rule IV of this Commission, the ratification subsequent to April 9, 1923, of the election of said parties in the list of members filed with the Statement of Facts herein constitutes the parties so ratifying such election members of said Association as of the date of their election prior to April 9, 1923, so as to enable said parties to present in their own behalf or through said Association proof of claims for the consideration of this Commission under the notice of claim filed herein (Exhibit 1, filed with the Statement of Facts)".

The provisions of Rule IV (d) referred to in the foregoing question are as follows:

(d) Within six months after October 9th, 1922, the American Agent shall give notice of all claims which will be submitted to the Commission and not already filed, by delivering to the Secretaries a list or lists of such claims, and a copy thereof to the German Agent.

This Rule is based on a stipulation agreed to by the two Governments in entering into, and as part of, their Agreement of August 10, 1922, under which this Commission is organized. This stipulation in the form finally agreed upon is set out in the note of August 10, 1922, from the American Ambassador at Berlin to the German Chancellor as follows:

With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my Government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

For the reasons above stated, this stipulation became a part of, and must be read into, the Agreement which confers jurisdiction upon this Commission, and it accordingly has the force of a jurisdictional limitation upon the claims which this Commission is authorized to pass upon. The purpose of this stipulation is expressed by the German Chancellor in his note of the same date, to which the American Ambassador's note is a reply. The German Chancellor says:

In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible.

The purpose of this stipulation could not be fulfilled by the filing of a general blanket notice that a group or class of claims would subsequently be presented. Moreover, if such a notice were held to be sufficient, the stipulation would be meaningless, because the general classification of claims to be considered by the Commission is embodied in the three categories of claims in Article I of the Agreement of August 10, 1922. In order to give meaning to the stipulation, therefore, it is necessary that the notice should identify the claims more specifically than merely as claims within these categories which are to be presented on behalf of unnamed claimants. This view is confirmed by a statement made in a circular letter issued by the Department of State, which was given wide publicity, announcing the organization of this Commission and calling attention to the time limit within which notice of claims must be given. This circular letter states:

In order that the desired notice can be given to the commission within the required time, it is important that claims be presented to the Department at as early a date as possible so that they may be examined and prepared for notification to the commission.

In other words, before the notice can be given, the claims notified had to be "presented to the Department" and "examined and prepared for notification to the commission". It is essential, therefore, that the notice given of a claim to be presented should identify it as a claim which had been previously submitted to the Department of State and also examined and prepared for notification.

It is contended on the part of the claimants in this case that the notice given as described in the above-quoted Agreed Statement of Facts complies with this requirement.

The Agreement of August 10, 1922, including the stipulation of the same date, which, as above stated, is embodied in it, fixes the jurisdiction of this Commission, and its application is governed by public and international law.

The real parties to the Agreement are the two Powers concerned and no contractual relation, either under municipal law or under international law,

exists between the persons on behalf of whom the United States, being the only claimant existing,¹ is presenting claims and the German Government as the defendant.

The much disputed doctrine with regard to the legal effect of a ratification of contracts between private persons *under municipal law* has therefore no bearing here.

The real purpose of fixing a certain period within which the claims must be notified has been stated above.

To evade this legal effect of an international agreement recourse cannot be had to technicalities of municipal law.

Even if it be proved that the "members" of the claiming Association were "elected" to their membership before April 9, 1923, it is undisputed that such "members", with possibly some exceptions which do not concern the Commission in this decision, did not know about their "election" and neither were bound to accept it nor did they accept it before April 9, 1923.

If, nevertheless, these "members" should now be allowed to bring their claims before the Commission by accepting the "membership" after the expiration of the time agreed upon between the two Governments, this would mean that the time for filing claims with the Commission was kept open, beyond the time fixed by the stipulation, for the benefit of certain claimants who were unknowingly elected to the membership of the claimant Association before April 9, 1923. Such result would clearly be contrary to the real purpose and meaning of the stipulation as above defined.

Therefore the question submitted to this Commission under the foregoing Agreed Statement must be answered in the negative, since a ratification subsequent to April 9, 1923, of the election of parties in the list of members filed with the Statement of Facts does not enable the parties so ratifying such election to present proof of claims in their own behalf or through the claiming Association for the consideration of this Commission.

Although this decision deals only with the jurisdiction of this commission under the Agreement of August 10, 1922, and not with the liability of Germany under the Treaty of Berlin, nevertheless it is appropriate to point out that under certain other recent decisions of this Commission a large portion of the claims under consideration would not be sustained as financial obligations of Germany within the terms of the Treaty of Berlin, even if they were allowed to be presented to this Commission on their merits.

Done at Washington May 27, 1925.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

¹ See Administrative Decision No. II, page 8. (*Note by the Secretariat*, this volume, p. 26 *supra*.)