

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Robert E. O'Rourke, as Receiver of the Mississippi Valley, South American &  
Orient Steamship Company (United States) v. Germany**

25 May 1926

VOLUME VII pp. 328-330



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January 14, 1916, and for several days prior and subsequent thereto. Yet apparently it did not occur to the claimant or its counsel to attribute the loss of the *Orleanian* to the *Moewe* until several years thereafter.

From this same communication from claimant's counsel dated January 11, 1919, it appears that the owner collected insurance for the loss of the *Orleanian* in the amount of \$100,000. The proof of loss upon which such insurance was paid to the claimant should throw some light on the time and place and cause of the loss and whether it was due to the ordinary marine risks or to risks of war. Though requested so to do, the claimant has failed to furnish full information with respect to the nature and amount of this insurance and the evidence upon which \$100,000 was paid. Excepting that letter, there is no word in the record about the *Orleanian* having been insured.

In this state of the record the Umpire finds that the claimant has failed to discharge the burden resting upon it to prove that the *Orleanian* was destroyed by an act or acts of Germany or her agents in the prosecution of the war.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein because of any loss or damage alleged to have been sustained by it connected with or growing at of the destruction of the Steamship *Orleanian*.

Done at Washington May 14, 1926.

Edwin B. PARKER  
Umpire

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ROBERT E. O'ROURKE, AS RECEIVER OF THE  
MISSISSIPPI VALLEY, SOUTH AMERICAN & ORIENT  
STEAMSHIP COMPANY (UNITED STATES) *v.* GERMANY

(May 25, 1926, pp. 702-704.)

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PROCEDURE: PRELIMINARY QUESTION.—JURISDICTION: DEBTS, TORT. *Held* that claim based upon alleged wrongful acts of German nationals, outside of Germany and prior to war, falls outside terms of Treaty of Berlin.

BY THE COMMISSION:

This claim has been submitted to the Commission for the determination, as a preliminary question, of whether or not on the facts alleged in this case it comes within the jurisdiction of the Commission as a debt for which the Government of Germany is financially obligated under the terms of the Treaty of Berlin.

The essential facts alleged, as presented in an agreed statement signed by the Agents of the two Governments, are as follows:

"The Mississippi Valley, South American and Orient Steamship Company is an American corporation organized under the laws of the State of Louisiana (Exhibit 1). The claimant, Robert E. O'Rourke, is receiver of said Company, appointed such receiver by the United States District Court for the Southern District of New York (Exhibit 2). This claim is based upon the allegation that the Hamburg-American Line, and the North German Lloyd Lines, German nationals, with nationals of other countries, did some time in 1911, contrary to the provisions of the law of the United States known as the Sherman Anti-Trust Act of July 2,

1890, enter into a conspiracy to control American shipping and stifle American competition with the alleged conspirators, or either of them, whereby it is alleged, as set forth in the petition filed by claimant (Exhibit 2), that the claimant suffered damages in the sum of \$250,000.00, and claimant asks for an award under the provisions of the Sherman Anti-Trust Act against the Government of Germany, as a debt, for treble the amount of said damages, to wit, the sum of \$750,000.00. The claimant herein, on or about June 2, 1920, commenced an action in the District Court of the United States for the Southern District of New York against Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft and Hamburg-Südamerikanische Dampfschiffahrts-Gesellschaft, for treble damages for the alleged violation of provisions of the Sherman Anti-Trust Law, which said action is pending and undetermined in said court, and a copy of the complaint in said action is hereto attached."

On the facts above stated this is not a claim arising since July 31, 1914, in respect of damage to or seizure of the claimant's property, rights, and interests within German territory as it existed on August 1, 1914. Consequently the claim does not come within the first category of claims submitted to this Commission under Article I of the Agreement of August 10, 1922, between the United States and Germany, under which this Commission was organized.

It further appears from this statement of facts that this is not a claim for loss or damage to which the claimant has been subjected with respect to injuries to persons, or to property, rights, and interests, since July 31, 1914, as a consequence of the war, within the meaning of the Treaty of Berlin under the decisions of this Commission. Consequently the claim does not come within the second category of claims submitted to this Commission under the Agreement of August 10, 1922.

It further appears that this is not a claim for damages suffered through acts of Germany or its agents since July 31, 1914, and therefore it does not come within the provisions of the Knox-Porter Resolution, which are embodied in the Treaty of Berlin, and furthermore as the claim did not arise during the period of the belligerency of the United States it does not come within the provisions of the reparation clauses of the Treaty of Versailles, which are embodied in the Treaty of Berlin.

Apparently it is admitted by the claimant that this claim does not come within any of the above-mentioned categories or provisions, because the claim as presented is described as a debt owing to an American citizen by a German national for the purpose of bringing the claim within the third category of claims submitted to this Commission under Article I of the Agreement of August 10, 1922, above-mentioned. Article I of that Agreement provides:

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

" \* \* \*

"(3) Debts owing to American citizens by the German Government or by German nationals."

It remains to be considered whether this claim comes within this category.

This claim, although termed a debt by the claimant, is actually a claim for damages arising from alleged wrongful acts of German nationals, outside of Germany and prior to the beginning of the war, the liability for which acts depends upon an Act of the Congress of the United States.

The Commission has been unable to find any authority under the Treaty

of Berlin, as interpreted by this Commission, for taking jurisdiction over this claim and holds that it must be dismissed for lack of jurisdiction.

Done at Washington May 25, 1926.

Edwin B. PARKER

*Umpire*

Chandler P. ANDERSON

*American Commissioner*

W. KIESSELBACH

*German Commissioner*

## ADMINISTRATIVE DECISION NO. VII — A

*(Claims of American Charterers of Foreign Ships and American Owners of Ships Chartered to Aliens [Tanker Cases], August 7, 1926, pp. 704-715.)*

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE(S): FACTORS FOR DETERMINATION OF MARKET VALUE OF VESSELS AND OF VALUE OF CHARTERER'S INTEREST IN VESSEL; MARKET VALUE OF CHARTERS.—EVIDENCE: LAW OF AVERAGES, BURDEN OF PROOF. *Held* that, to measure estate or interest of charterer in vessel at time and place of destruction (*cf.* Administrative Decision No. VII, see p. 203 *supra*), Commission must: (1) ascertain reasonable market value of vessel as *free* ship at time and place of destruction: (*a*) relative importance of general averages; (*b*) normal and war-time factors in arriving at market value (availability, cargo capacity, nationality of registry, of ownership and of charterer, class, original and reproduction costs, speed, age, draft, adaptability for particular trades); and (2) determine relative interest of owner and charterer: (*a*) burden of proof: Germany must ordinarily establish foreign interest in American-owned vessels, claimant American interest in foreign-owned vessels; (*b*) no market value of charter exists: charters ordinarily not sold and purchased; (*c*) value of charterer's estate or interest in vessel: ordinarily represented by excess, if any, of current charter hire over stipulated hire, measured over period (not exceeding charter term) that vessel would have survived and also escaped requisition frustrating charter (law of averages), and subject to certain other limiting factors as may obtain in each particular case.

*Cross-references:* A.J.I.L., Vol. 20 (1926), pp. 782-789; Annual Digest, 1925-26, pp. 249-251; Kiesselbach, *Probleme*, pp. 431-439 (German text); Witenberg, Vol. II, pp. 148-159 (French text).

*Bibliography:* Annual Digest, 1925-26, p. 251; Kiesselbach, *Probleme*, pp. 118, 119.

PARKER, *Umpire*, rendered the decision of the Commission.

Numerous cases have been submitted to the Commission by American charterers of foreign ships and several by American owners of ships chartered to aliens. In each case of both of these classes it becomes necessary to ascertain what, if any, estate or interest the charterer had in the vessel at the time she was destroyed and the value of such estate or interest in order to determine the value of the American interest therein, whether such interest be that of owner or charterer.