

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Currie Case—Decision No. 21**

13 March 1954

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2. The sum will be paid free of any levy, tax or other form of fiscal imposition.
3. The present Decision is definitive and binding.

Drawn up at Rome the 9th November 1953.

*The Third Member*

*The Representative of H.B.M.  
Government before the Anglo-Italian  
Conciliation Commission*

*The Representative of the Italian  
Government before the Anglo-Italian  
Conciliation Commission*

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CURRIE CASE—DECISION No. 21  
OF 13 MARCH 1954

Claim for compensation under Article 78 of Peace Treaty—Damages sustained by property in Italy belonging to United Nations nationals—Damages resulting from aerial bombardments—Damages due to discriminatory measures—Whether measures taken against property discriminatory—Sequestration—Negligence of sequestrator—State responsibility for—Responsibility for effect of delay in repairing damaged property—Interpretation of treaties—Rules of—Interpretation by reference to decision of another Conciliation Commission—Meaning of “Injury or damage suffered as a result of the war”—Measure of damages.

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Demande d'indemnisation au titre de l'article 78 du Traité de Paix — Dommages subis par des biens en Italie appartenant à des ressortissants d'une Nation Unie — Dommages résultant de bombardements aériens — Dommages résultant de mesures discriminatoires — Question de savoir si les mesures prises à l'encontre des biens avaient un caractère discriminatoire — Séquestre — Responsabilité de l'Etat — pour faute de l'administrateur séquestre — pour conséquences du défaut de réparation des biens endommagés — Interprétation des traités — Règles d'interprétation — Interprétation par référence à une décision d'une autre Commission de Conciliation — Signification de l'expression « atteinte ou dommage subi du fait de la guerre » — Détermination du montant de l'indemnité.

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Given on 13 March 1954 at Morcote (Switzerland) by the Anglo-Italian Conciliation Commission, instituted in accordance with Article 83 of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers on the one hand, and Italy on the other, and composed of Dott. Plinio Bolla, former President of the Swiss Federal Court, at Morcote (Ticino, Switzerland), third member designated by mutual agreement by the Government of the United Kingdom of Great Britain and Northern Ireland and by the Government of the Italian Republic, Colonel Guy G. Hannaford of the British Embassy in

Rome, representative of the Government of the United Kingdom of Great Britain and Northern Ireland, and Avv. Antonio Sorrentino, Honorary Section President of the Council of State, at Rome, representative of the Italian Government, in the dispute between the British Government, represented by its agent, Mr. Michael Adams, Secretary of the British Embassy in Rome, and the Italian Government, represented by its agent, Dott. Avv. Stefano Varvesi, of the State Attorney's Office in Rome, regarding a claim of Mr. Percy Currie and his wife, Ernestina Pretolani, of 45, Via Camillo Hajeck, Milan

#### CONSIDERATIONS OF FACT:

A. At the time when Italy declared war on Great Britain (10 June 1940), the married couple Percy Currie and Ernestina Pretolani, British citizens, were the owners in Milan, 45, Via Camillo Hajeck, of buildings which included premises used as a workshop and a private dwelling, occupied by the owners themselves.

The assets of Mr. and Mrs. Currie at Milan were sequestered by the decrees of the Prefect of the Province of Milan dated 18 September 1940 and 13 January 1941. The sequestrator nominated was the *Ente di Gestione e liquidazione immobiliare* (E.G.E.L.I.) which appointed the *Credito Fondiario della Cassa di Risparmio delle Provincie Lombarde* to act for it. Included amongst the assets sequestered was also a Fiat car of the "Balilla" type, built in 1938, number-plate No. MI 47868 which, according to the reading on the speedometer had done 5,083 kilometres. The car was in the courtyard of the building covered by a tarpaulin, and jacked up as Mr. Currie had left it.

During the air-raid which took place during the night 12-13 August 1943, a piece of metal of considerable weight, having detached itself from an aircraft in flight which had been hit by anti-aircraft fire, fell from a considerable height on to the main building owned by Mr. and Mrs. Currie and penetrated the roof and the ceiling of the fourth floor. Other damage was caused to the buildings as a whole by incendiary bombs and by the blast of explosive bombs which fell close by.

Owing to the fact that the necessary repairs were not carried out in time, the conditions of the buildings worsened as a result of the weather.

On 4 August 1945 the *Credito Fondiario della Cassa di Risparmio delle Provincie Lombarde* handed back the sequestered property to Mr. and Mrs. Currie, who made the fullest possible reservations in regard to the damage sustained. According to the instrument of reconsignment the motor-car was still in the courtyard, as it had been left by the owner, whilst the furniture, during the prolonged absence of the aforementioned married couple, had been placed in the cellar and was therefore in need of repair, recovering and overhaul.

Invoking Article 78 of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy (hereinafter called the Peace Treaty), Her Britannic Majesty's Embassy in Rome, on 10 February 1949, presented Mr. and Mrs. Currie's claim to the Italian Ministry of Foreign Affairs which requested payment of:

- (a) L. 2,728,718 for the repair of the damage caused to buildings;
- (b) L. 680,000 for repairs to the movable property and to the car;
- (c) L. 194,000 for the replacement of the furnishings which had got lost;
- (d) L. 170,452 for expenses connected with the preparation of the claim;
- (e) L. 60,574 in respect of the refund of the extraordinary tax on total wealth.

On the advice of the Interministerial Committee set up in accordance with Article 6 of Law No. 908 of 1 December 1949, the Italian Ministry of the

Treasury awarded Mr. and Mrs. Currie L. 480,000, the equivalent of two-thirds of the damage admitted as being compensatable of L. 720,000 as well as L. 20,000 in respect of expenses incurred in the preparation of the claim, making a total of L. 500,000, with the invitation to apply to the competent authorities for the refund of the extraordinary tax on total wealth.

The British Government did not accept this settlement and referred the dispute to the Conciliation Commission contemplated by Article 83 of the Peace Treaty. The two members of the Commission designated by the British and Italian Governments having failed to reach agreement, the Governments concerned designated as third member, in accordance with Article 83, paragraph 1, of the Peace Treaty, Dott. Plinio Bolla, former President of the Swiss Federal Court, of Morcote, who agreed to accept the appointment.

On 16 March 1953 the Agents of the two Governments discussed the case before the Conciliation Commission thus composed.

The Agent of the British Government pleaded that the Conciliation Commission should:

- (a) Confirm the liability of the Government of Italy to:
  - (i) Restore to complete good order the immovable property of the claimants and also such of their movable property as was returned to them in a damaged state capable of repair;
  - (ii) Pay two-thirds of the sum necessary at the date of payment to purchase property similar to the movable property of the claimants which could not be returned to them, or was returned to them in a damaged state incapable of repair;
- (b) Fix the amount of the liability of the Government of Italy:
  - (i) under (a) (i) at L. 2,728,718 in respect of the immovable property and L. 300,000 in respect of furniture and household effects, or at such larger sums as are necessary in order to adjust building costs and prices of furniture and household effects ruling in November 1948, to those ruling in the month in which this Honourable Commission pronounces its decision.
  - (ii) under (a) (ii) at two-thirds of the sums of L. 380,000 for the motor-car and L. 114,000 for furniture and household effects or of such larger sums as are necessary in order to adjust the prices of such property ruling in November 1948, to those ruling in the month in which this Honourable Commission pronounces its decision, or at such other sums as may be just and equitable.
- (c) Order that the amount of such liability so ascertained be paid by the Government of Italy to the claimants.
- (d) Order that the sum of L. 170,452 for expenses incurred by the claimants in establishing the claim be paid to them by the Government of Italy.
- (e) Reserve all questions in respect of *Imposta straordinaria proporzionale sul patrimonio*.
- (f) Order that, if any payment ordered by this Honourable Commission's decision to be paid by the Government of Italy shall not be paid within 60 days from the date of this Honourable Commission's decision, the Government of Italy shall pay the claimant interest thereon at the rate of 8% per annum from the date of such decision to the date of payment, or at such other rate as this Honourable Commission shall deem just.
- (g) Provide for the costs of and incidental to this claim.
- (h) Give such further or other relief as may be just and equitable.

The Agent of the Italian Government pleaded for the rejection of the claim. The arguments of the parties are summarized, as far as necessary, in the following legal considerations.

## CONSIDERATIONS IN LAW:

(1) The Commission is unanimous in considering it desirable, by means of a preparatory decision, to fix the rules which will have to be followed for the assessment of the damage in the present case and to invite the parties to proceed in accordance with the rules to fix the amount of the indemnity by common accord; should the parties fail to agree, the Commission, by a final decision, and, if necessary, after having sought the advice of experts, would fix the amount due.

(2) The first point on which the parties disagree is whether the Italian Government is responsible, in accordance with Article 78, paragraph 4, of the Peace Treaty, not only for the damage caused to buildings by aerial bombardment, but also for the increase of such damage due to delay in carrying out the necessary repairs.

The Italian Government argues that it is responsible only within the limits of paragraphs 4 (a) and 4 (d) of Article 78 of the Peace Treaty: paragraph 4 (a) covers damage derived from a specific event of war, such as, in the present instance, aerial bombardment, and paragraph 4 (d) covers those damages due to discriminatory measures taken against enemy subjects; the sequestration of enemy property in accordance with the war law does not by itself involve the responsibility of the Italian Government which, on the contrary, is responsible whenever it is proved that the sequestrator caused damage deliberately or by negligence; in the case under review one cannot blame the sequestrator for the fact that, during the war the damage caused by bombing was not immediately repaired; in reality the omission complained of was due to the fact that the sequestrator was unable to make such arrangements; taking into due account the state of war, the shortage of raw materials and manpower, and the general difficulties prevailing at the time.

In fact, there is no need to decide whether this inability existed *in casu*.

In fact, even if one were to accept the interpretation which the Italian Government places upon paragraph 4 (a) and 4 (d) of the Peace Treaty, the responsibility of the Italian Government would still exist in either case, i.e., whether the sequestrator were able or unable to make arrangements in good time for the necessary repairs to be carried out.

If the situation was such as to prevent the sequestrator from being able to take in good time the necessary measures to prevent the inclemency of the weather increasing the initial damage caused by the bombardment, then the Italian Government is responsible for such increase foreseeable and unavoidable just as in the case of the initial damage, in accordance with Article 78, paragraph 4, letter (a), of the Peace Treaty. The "loss suffered", according to the terms of this provision, is not only that arising directly and immediately "as a result of injury or damage" but also that arising indirectly and subsequently as a result of the impossibility of arranging for the repairs to be carried out in good time; also in this case the link of causation exists between the "injury or damage" and the "loss suffered" that ceases only from the moment in which it would have been materially possible to take action with a view to preventing a further increase in the loss itself.

If, on the other hand there was nothing to prevent such action from being taken immediately after the bombardment, the sequestrator is at fault for having failed to do so and the responsibility for the damage caused by delay lies with the Italian Government, in accordance with Article 78, paragraph 4, letter (d).

The extent of the responsibility is identical in both hypotheses, i.e., the one

based on the application of Article 78, paragraph 4, letter (a), and the one based on Article 78, paragraph 4, letter (d).

(3) The amount claimed from the Italian Government in respect of damages to buildings also includes:

(a) The cost of restoring to its normal condition the cellar which, in accordance with the safety laws, by the sequestrator, who also had the materials removed, in order not to increase the risk of fire in the event of incendiary bombs being dropped.

The British Government argues that this work would not have been carried out, nor would it have been necessary, had it not been for the war.

The Italian Government objects that in accordance with a decision given on 8 March 1951 by the Italo-French Conciliation Commission in connexion with a claim of the Società Mineraria e Metallurgica di Pertusola, and of the Société Minière et Métallurgique de Penarroye<sup>1</sup>, the obligation of partial indemnity created by Article 78, paragraph 4(a) of the Peace Treaty does not extend to all losses which the war has caused to a citizen of the United Nations as the owner in Italy, on 10 June 1940, of movable or immovable property, corporeal or incorporeal, but only to a specific category of such losses, i.e., to those which are the direct consequence of events of war.

There is no need here to examine and solve the question of principle which was decided by the Italo-French Conciliation Commission in the aforementioned decision of 8 March 1951. In fact, in the case under review the cellar was turned into an air-raid shelter and the dividing walls on the fourth floor removed in compliance with provisions laid down in time of war and aiming at reducing the risk of death and damage due to aerial bombardments. The said provisions form part of those "measures adopted during the war" mentioned in paragraph 4, letter (d), of Article 78 of the Peace Treaty. But this provision involves the responsibility of the Italian Government only when the measures were of a special character and were not applied to Italian property. Here, on the other hand, we are faced with measures of a general character which were applied without discrimination to all buildings in Italy, irrespective of the nationality of their owners and which, therefore, lack the quality of discrimination required by Article 78, paragraph 4, letter (d), of the Peace Treaty as a condition for the Italian Government's responsibility.

(4) The sum of L. 2,728,718 claimed by Mr. and Mrs. Currie for damages to the building is in keeping with the conclusions reached by a private survey which the owners had carried out by Dott. Ugo Montana.

An examination of the survey reveals that Ing. Montano has calculated the cost which is necessary in order to restore the property to a new and technically up-to-date condition, leaving aside its condition on 10 June 1940.

This point of view cannot be shared by the Conciliation Commission.

True, paragraph 4(a) of Article 78 makes Italy responsible for the "restoration to complete good order", (*"remise en parfait état"*—*"rimessa in ottimo stato"*) of the property which is returned to citizens of the United Nations, in accordance with paragraph 1 of the Article.

But this initial affirmation must be connected with the second sentence of paragraph 4 (a), and with paragraph 4 (d), which impose upon the Italian Government the obligation to make good only up to a limit of two-thirds the losses sustained "as a result of injury or damage arising out of the application of discriminatory measures". It cannot be admitted that the initial sentence of paragraph 4 (a) was meant to lay down a liability and a full liability, on the

<sup>1</sup> Vol. XIII of these *Reports*, decision No. 95.

part of Italy in respect of damages different from those contemplated under the said two special provisions, and particularly in respect of damages different from those contemplated under the said two special provisions, and particularly in respect of damage arising out of the passage of time and out of normal wear and tear during the war; as, in the latter hypothesis, the reasons for a limitation to two-thirds would be far more cogent than in the qualified cases contemplated in the second sentence of paragraph 4, letter (a) and in paragraph 4 (d). The first sentence of paragraph 4, letter (a) can therefore only mean

where the special conditions mentioned in the second sentence of paragraph 4 (a) or in paragraph 4 (d) do not occur, the restitution of the property must be made in complete good order, i.e., as though arrangements for its normal maintenance had been made during the period in which the owner was dispossessed of it—

where the special conditions mentioned in the second sentence of paragraph 4 (a) or in paragraph 4 (d) do occur, the compensation of two-thirds shall be calculated by taking into account that the property would have to be restored, if restitution had been possible, to complete good order, i.e., as though arrangements for normal maintenance had been made during the period in which the owner had been dispossessed of it.

*In casu*, the indemnity must be two-thirds of the cost required to restore the buildings to the condition in which they would have been at the time of the hand-over if the damages by bombing had not happened, including in those damages the damages caused by the failure to effect the repairs in good time, and if the sequestrator had carried out normal maintenance. If such expenditure were to result in the improvement or increase in value of the buildings (as, for example, by the replacement of the destroyed or damaged sanitary installations by more up-to-date installations), this would justify a reduction equal to two-thirds of the excess value, in order to avoid undue profit, which Article 78, paragraph 4, letter (a) of the Peace Treaty certainly did not contemplate.

(5) Finally, the parties disagree in regard to the method of calculating the amount of compensation for the car.

It is not disputed that when the sequestration was lifted, the car was found to be reduced to scrap without value. Compensation must therefore be calculated as though it had been impossible to effect restitution and must therefore be equal to two thirds of the sum necessary at the date of payment, to purchase similar property.

According to the Italian Government, compensation as determined by the Peace Treaty is a substitute for restitution, and not compensation for loss, and cannot therefore take into account depreciation due to the passage of time, whether as a result of age or of technical obsolescence. The Italian Government should therefore make good the loss which citizens of the United Nations have suffered as a result of non-restitution, and not the loss suffered by each of them at the moment when the event occurred which today prevents restitution. *In casu* compensation should be equal to two-thirds of the sum required to purchase now a Fiat car of the Balilla type built in 1938 which has run approximately 5,000 kilometres.

Even without taking into consideration the practical difficulties of finding such a motor-car on the market today, the Conciliation Commission cannot agree to the Italian Government's line of argument. If the property cannot be restored, the Peace Treaty (Article 78, para. 4 (a)) intends that the owner should receive, not compensation equal to two-thirds of what would have been the value of the returned property (if restitution had been possible), but two-

thirds of the sum necessary at the date of payment, to purchase an equivalent article.

In 1953, a motor-car can be said to be equivalent to the one sequestered in 1940 from Mr. and Mrs. Currie, when the following conditions are fulfilled: (a) that it is of the "Fiat" make; (b) that it belongs to the type of Fiat car, about two years old, which resembles as closely as possible the 1938 Balilla type; (c) that it has run about 5,000 kilometres.

It is probable that a motor-car of this type is technically superior to the 1938 Balilla. In that case, in order to avoid undue profit, the sum necessary for the purchase must be adequately and fairly reduced.

#### DECISION

1. The parties are given a period of three months in which to reach agreement on the amount of compensation due to Mr. and Mrs. Currie on the basis of the principles laid down in the considerations of Law in the present decision.

2. In the event of no agreement being reached within the time-limit states, the Commission, after all necessary investigations, shall itself proceed to determine the amount of compensation due.

3. The present decision is final and obligatory.

(Sgd.) G. G. HANNAFORD

F. to Plinio BOLLA

F. to Antonio SORRENTINO

#### CASES OF DUAL NATIONALITY—DECISION

No. 22 OF 8 MAY 1954

Dispute of general nature—Question whether in Article 78 of Peace Treaty there is any limitation to right of an United Nations national possessing also Italian nationality to present claim under said Article—Objection to admissibility—Jurisdiction of Conciliation Commission—Article 83 of Peace Treaty—Jurisdiction to interpret Peace Treaty provisions in an abstract and general manner with obligatory effect for all future cases—Nature of Conciliation Commission—Interpretation of treaties—Rules of interpretation—Existence of—Peace Treaties—Interpretation of—Governed by general rules of interpretation of treaties—Interpretation of clear and precise provisions—Intention of the parties—Comparison of texts in different languages—Conformity with rules of international law—Restrictive interpretation.

Différend de nature générale — Question de savoir si l'article 78 du Traité de Paix comporte des limitations au droit d'un ressortissant d'une Nation Unie possédant également la nationalité italienne de se prévaloir des dispositions de cet article — Exception d'irrecevabilité — Compétence de la Commission de Conciliation —