REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

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Case of the Gassner claim (the motor yacht *Gerry*), decision of 11 December 1954

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Admissibility of claim—waiver of rights under the Peace Treaty must be unequivocal to be recognized—distinction between claims made under municipal law and claims made under international law—remedies for loss or damages to property.

Treaty interpretation—interpretation of the Declaration of 6 February 1948—literal interpretation—intention of the Parties.

Admissibilité de la réclamation—une renonciation aux droits découlant du Traité de Paix doit être sans équivoque afin d'être reconnue—distinction entre les réclamations présentées en vertu du droit national et celles présentées en vertu du droit international—réparation pour les biens perdus ou endommagés.

Interprétation des traités—interprétation de la Déclaration du 6 février 1948—interprétation littérale—intention des parties.

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[It is contended on behalf of the Italian Government] in the first place that the claimants have waived their rights and that the claim is therefore not admissible. That contention is based on a declaration in the *procès verbal* of February 6, 1948, hereinbefore mentioned. The Commission cannot uphold this contention. A waiver cannot be assumed unless the intention of the claimants to waive their rights under the Treaty is quite unequivocal. For interpreting the scope of the declaration in the *procès verbal* of February 6, 1948, it is necessary to consider the declaration in its connection with the correspond-

* Reproduced from *International Law Reports* 22 (1955), p. 972.

** Reproduit de *International Law Reports* 22 (1955), pp. 972

ence which prior to it was exchanged between Mr. Neill and the Comando Marina Militare of Genoa.

A claim had been made by the salvors to Mr. Neill to pay the salvage expenses and, in the letter in which the Comando Marina Militare requested Mr. Neill to take over the yacht, the Comando Marina had asked for payment of the watchman's expenses. In his reply dated December 13, 1947, Mr. Neill pointed out that he would not be able to take possession of the wreck on behalf of the owner until he was able to pay the salvors the charges due to them for the refloating of the yacht and that he would be able to do that only after the sale of the vessel and the collection of the proceeds. The same was to be said for the watchman's expenses. He further wrote that he would be grateful to the Comando if they would clarify whether their intervention was due to the fact that the yacht at the time it was sunk was under requisition by the Italian Navy, in order that he might know how to act with regard to the submission of a claim for compensation for damage in accordance with the Peace Treaty.

In their answer dated December 27, 1947, the Comando explained that the *Gerry* was held in custody by the Naval authorities, that the Comando Marina had intervened because the Salvage Company had asked for help in tracing the owner, that the vessel was never requisitioned by the Italian authorities, that the Comando was not in a position to furnish any further information, and that if Mr. Neill failed to take over the vessel for the owners by January 14, 1948, the Comando would be obliged to abandon the custody of the yacht.

In view of this correspondence it is a reasonable assumption that Mr. Neill made a distinction between the claims lying against the vessel under municipal law for salvage and other charges for custody and maintenance and the claims which his clients were entitled to make under international law in accordance with the Peace Treaty; that he intended to settle the former separately, reserving the latter to be dealt with later; and that in the declaration of February 6, 1948, he envisaged only the claims under municipal law. Such a conclusion is supported by the fact that a local branch of the Italian naval administration was not the proper authority with whom to settle a claim under the Peace Treaty; moreover, no reason has been advanced why Mr. Neill should give up his clients' rights under the Treaty, nor can it be said that it was made clear that the treaty rights were envisaged. As in these circumstances the declaration of February 6, 1948, cannot be regarded as meaning that Mr. Neill intended to waive his client's rights under the Treaty, the objection raised by the Italian Government fails and the Commission declares the claim admissible.

On the merits of the case it is contended on behalf of the Italian Government that as it has not been proved that the yacht was brought into Italian waters by Italian authorities or subjected to control measures taken by Italian authorities, the case cannot come under Article 78, para. 9(*c*). It is further contended that the general rules of Article 78 are likewise not applicable since,

according to para. 1 of this Article, which governs the whole Article, they require that the property should have existed in Italy on June 10, 1940.

On behalf of the British Government it was originally alleged that the seizure of the vessel was made by the Italian authorities in the port of Cannes in 1943 and that therefore Article 78, para. 9(*c*), was applicable. There were also reasons to presume that the seizure was made by the Italian authorities at the time, since the Italian forces occupied the city of Cannes. At the hearing, the Italian Government Agent produced certain correspondence which was exchanged between the German and Italian authorities before the seizure. Briefly, this correspondence showed that, at the request of the German authorities, the Italian authorities declared that they had no objection to the German Navy seizing the *Gerry* in order to use her as an auxiliary vessel. This destroys the force of the aforementioned presumption and creates, on the contrary, a presumption that the seizure was made by the German Navy. It has not therefore been proved that conditions existed which could bring the case under Article 78, para. 9(*c*). It must consequently be examined whether the case falls within the general rules of Article 78 as they are laid down. This paragraph reads in the English text as follows:

> 1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

The Commission has already had the opportunity (see its decision of March 4, 1952, in *The Gin and Angostura*) to consider the implications of the date of June 10, 1940, mentioned in para. 1, especially in connection with para. 9(*c*). In that case also, the Italian Government pleaded, in so far as is here of interest, that Article 78, para. 1, had in view only such property of the United Nations or their nationals as existed in Italy on June 10, 1940, and that, since the field of application of Article 78 was precisely determined in its first paragraph, para. 9(*c*), which merely defines some expressions used in the preceding paragraph, could not have effect in respect of property which, like the yacht *Gin and Angostura*, was not in Italy on June 10, 1940. The Commission did not consider that it could accept these arguments, at any rate not to the extent to which the Italian Government maintained them. In developing its views, the Commission pointed out, inter alia, that the date June 10, 1940, literally referred only to the restoration of legal rights and interests but did not refer to the restitution of property; that it is permissible to assume that the date of June 10, 1940, in para. 1 is only the starting-point of the period of Italian responsibility; that there was no reason whatsoever why the Treaty should exclude Italy's responsibility for property acquired in Italy by the United Nations or their nationals after June 10, 1940; that the United Nations could not allow one United Nations national to be treated worse than a fellow national who possessed property in Italy on June 10, 1940; that the inclusion of the words "in Italy", which occur in the two parts of para. 1 of Article 78 as

well as in the title of Section 1 of Part VII of the Treaty, could not be taken to preclude [the interpretation] that in the following paragraphs the Treaty puts Italy under an obligation with regard to property existing originally outside Italy in so far as such property, having been brought to Italy before the Treaty came into force, acquired the character of property "*appartenant en Italie*" to the United Nations and their nationals. The Commission therefore concluded that, within the framework of para. 1 of Article 78, a special provision dealing with property not existing in Italy on June 10, 1940, but brought there after such date, would not have been necessarily required in the succeeding paragraphs. However the Commission found that such a special provision is given in the second part of para. 9(*c*) relating to ships, and the Commission further went on to analyze the meaning of that provision.

There is no reason why the Commission should depart from the general views on para. 10f Article 78 thus taken by them in *The Gin and Angostura*. The only question that requires further examination is whether the fact that in Article 78, para. 9(c), there is a special provision regarding property brought into Italy after June 10, 1940, or any other provision of the Treaty, can have the effect of giving to Article 78, para.1, the limited scope which is claimed for it on behalf of the Italian Government.

It seems very unlikely that para. 9(c), which, though in the form of a definition, is in fact a provision for a very special case, should have been meant to have this effect; and that meaning seems quite excluded by the fact that the provision is preceded by the express reservation: "Without prejudice to the generality of the foregoing provisions". Had the meaning claimed for it been intended, that would have had to be specially stated. In this connection it has been suggested that Article 78 could not be applied because the restitution of the property in question could have been claimed under Article 75, which refers to "all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations". The Commission cannot accept this view, either. A claim made under Article 75 might have had the effect of preventing a claim under Article 78 while the former was pending, but if such a claim has not been made within the time-limit fixed in Article 75, para. 6, or if the claim has been abandoned, there is nothing in the text either of Article 75 or of Article 78 which has the effect of excluding a claim under Article 78. On the other hand, to exclude, contrary to the quite general wording of Article 78, para. 1, such a claim on the assumption that the governing idea of the framers of the Peace Treaty was to submit property removed from the territory of any of the United Nations and property existing in Italy on June 10, 1940, to two different, mutually exclusive, sets of rules, it would have been necessary for this idea to be manifested in a sufficiently clear way to be accepted. As has already been explained, however, no clear distinction is made between these two groups of property, since Article 78 neither refers expressly only to property existing in Italy on June 10, 1940, nor can it be interpreted in that sense. Moreover, the

fact that Article 75 refers to a special kind of property and outlines a special procedure for its recovery is not in itself a reason for excluding another procedure in respect of property which meets the conditions required to come under that procedure. The framers of the Treaty may very well have wished to provide several remedies for the recovery of property. In this case that is to be regarded as being so much more likely seeing that when the property clauses of the Treaty were being drafted it must have been the general and dominating tendency to give the interests of the United Nations and their nationals satisfactory protection. In the light of this general tendency there is no reason why property removed by the Axis Powers to Italy from the territory of any of the United Nations should not come within the scope of Article 78, para. 1, at least when a claim under Article 75 has not been made or has been abandoned.

It can, no doubt, be said that with such an interpretation the Treaty will, in respect of certain cases, seem to be illogical or irrational, but that would be the case with any other interpretation that might be placed upon the text. Such deficiencies in the system of the Treaty are not surprising in view of the circumstances in which the Treaty was made and they can in any case not be allowed to import into the Treaty principles which are warranted neither by the text nor by other relevant data of interpretation.

On the grounds hereinbefore developed, the Commission considers that in respect of the yacht *Gerry* a claim under Article 78 of the Treaty lies against the Italian Government. The owner is entitled under para. 4(*a*) of that Article to restoration to complete good order of the yacht, and as in the circumstances of the case it must be assumed that the yacht was damaged and sunk as a result of bombardment from the air, he can claim redress under the second sentence of this paragraph. In respect of that remedy, however, it is rightly contended on behalf of the Italian Government that the latter is responsible only for the damage which actually occurred in Italy. As liability under the Treaty is based on the existence of the property in Italy, it cannot extend to loss or damage suffered before the property came to Italy.

Case of the Raibl-Società Mineraria del Predil S.p.A. *v.* Italy (Raibl Claim), decision of 19 June 1964[*]

Affaire relative à Raibl-Società Mineraria del Predil S.p.A. c. Italie (requête Raibl), décision du 19 juin 1964[**]

Treaty interpretation—interpretation of Article 78 of the Treaty of Peace between Italy and Great Britain—reference to other languages—reference to other international arbitral decisions and jurisprudence—reference to general principles of law recognized by civilized nations.

[*] Reproduced from *International Law Reports* 40 (1970), p. 263.

[**] Reproduit de *International Law Reports*, 40 (1970), p. 263.