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RECUEIL DES SENTENCES ARBITRALES

Arbitral Tribunal for the Agreement on German External Debts, signed at London on 27 February 1953

Case of the Swiss Confederation v. the German Federal Republic (No. I), award of 3 July 1958

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PART XXI

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[*] Reproduced from *International Law Reports* 25 (1958-1), p. 33.

[**] Reproduit de *International Law Reports* 25 (1958-1), p. 33.

du "caractère étranger spécifique"—référence à la jurisprudence de la Cour internationale de Justice—l'interprétation doit être fondée sur le sens habituel et naturel des termes.

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The Aargauische Hypothekenbank, a company limited by shares *(Aktiengesellschaft),* whose head office is at Brugg in Switzerland, had acquired a plot of land situated in Stuttgart at a forced auction sale in order to safeguard a mortgage on this land registered in its name. It then sold the land by a contract dated July 31, 1931 to the merchants Max and Moriz Lindauer in Stuttgart. A postponement of the payment of the balance of the purchase price amounting to Goldmarks 300,000 was granted to the purchasers; in order to secure this claim a mortgage on the purchased land was registered in favour of the "Aargauische Hypothekenbank, Aktiengesellschaft, at Brugg, Switzerland". The provisions of the contract of sale which are relevant for the present dispute read as follows:

§1. The Aargauische Hypothekenbank, with its head office at Brugg, remained the highest bidder at the forced auction sale of the land located within the boundaries of Stuttgart and entered in the Land Register, Stuttgart, Volume No. 1996, Part I, No. 1, in the name of the firm J. Mack, Stuttgart,

Boundaries of Stuttgart			
Building No. 65 Konigstrasse			
Dwellinghouse	—:	2 a	17 qm
Yard	—:		14 qm
Corner shared with Building No. 2 Poststrasse	—:		07 qm
	—:	2 a	38 qm

and the said land was allotted to it by a decision announced on July 14, 1931, by Bezirksnotar Küstner, Stuttgart.

§2. The Aargauische Hypothekenbank with its head office at Brugg hereby sells the land described in §1 of this minute to Messrs. Max Lindauer, merchant of Stuttgart, and Moriz Lindauer, merchant of Stuttgart, who acquire the land to hold jointly in undivided moieties.

§5. Interest is payable on the total purchase price from October 1, 1931, at 6½ per cent, annually. The interest is to be paid at the end of each calendar quarter and for the first time on December 31, 1931, free of charge to the vendor or to a pay office *(or* "payee", in German "*Zahlstelle")* to be specified by it; the same applies to the payment of the purchase price and the several instalments.

The creditor has not specified a pay office.

The merchants Lindauer sold the land by contracts of sale and transfer of November 16, 1937, to the Kommanditgesellschaft Conrad Tack & Cie, shoe factory, with its seat then at Berlin-Tempelhof, now at Weinheim a. d. Bergstrasse. The Tack firm took over as debtor the mortgage claim entered on behalf of the Aargauische Hypothekenbank as a set-off against the purchase price. Conrad Tack & Cie, GmbH, at Weinheim a. d. Bergstrasse, is also liable for the mortgage claim; it has been entered in the Land Register as owner since May 9, 1956. After repayment of an instalment on November 26, 1940, the mortgage debt has amounted to Goldmarks 220,000.

After the Agreement on German External Debts of February 27, 1953 (hereinafter referred to as "the Debt Agreement"), came into force, the creditor requested the firm of Tack & Cie to settle the mortgage debt as a debt with a specific foreign character on the basis of a conversion rate of 1 : 1. The firm of Tack & Cie thereupon addressed themselves, in a correspondence extending over years in which the creditor also intervened, to the authorities competent to pass upon such an agreement for settlement (Bank deutscher Länder, now Deutsche Bundesbank, Oberfinanzdirektion Karlsruhe, Ministry of Finance of Baden-Württemberg) in order to secure the indemnity envisaged in §§ 52 *et seqq.* of the Federal Law of August 24, 1953, for the Implementation of the Agreement of February 27, 1953, on German External Debts *(Bundesgesetzblatt,* I, p. 1003) in case of an admission of the conversion rate of 1 : 1. The Deutsche Bundesbank refused to take position on the question of the conversion rate so long as an agreement for settlement had not been reached between the creditor and the debtors. The Finance Authority did not maintain its original objection that the amount owed, being a debt for a balance of purchase money, did not have a specific foreign character, but it expressed the opinion that the contract of July 31, 1931, did not contain an express agreement on a place of payment abroad and that the Goldmark claim secured by mortgage did not have a specific foreign character.

On February 27, 1957, the Swiss Legation at Cologne addressed the following *Note Verbale* to the Foreign Office at Bonn:

> Differences have arisen between Swiss creditors and German Finance Authorities with regard to the fundamental question whether the so-called unpaid balance of a purchase price arising out of the purchase of German land, when postponed over many years and secured by mortgage, can be considered a debt resulting from a financial transaction of the nature of a loan. Thus the Aargauische Hypothekenbank, of Brugg/Switzerland, is of the opinion that its claim against the firm of Tack, of Weinheim a.D. Bergstrasse, for the balance of purchase money is of a specific foreign character within the meaning of Annex II in conjunction with Annex VII to the London Debt Agreement. The enclosed Opinion of *Rechtsanwalt* Miller [of] Düsseldorf, contains exhaustive information regarding the facts of the case and the legal position.
>
> The negotiations undertaken up to now by the creditor with the debtors, the Bank deutscher Länder, as well as with the Finance Authorities of the *Land*

of Baden-Württemberg, have been without result. Pursuant to the letter of December 13, 1956, a photostat copy of which is enclosed, the Ministry of Finance at Stuttgart have finally adopted the view "that the claim of the Aargauische Hypothekenbank of Brugg/Switzerland against the firm of Tack is not of a specific foreign character within the meaning of the London Debt Agreement and that, therefore, the firm of Tack is not entitled to claim compensation from the *Land,* in pursuance of the Law implementing the London Debt Agreement".

As, on the one hand, the Aargauische Hypothekenbank is not prepared to accept the negative decision quoted and, on the other hand, the Swiss Federal Council are prepared to accept the creditor's legal interpretation as their own, the Legation request the Foreign Office to obtain, as soon as possible, the comments of the Government of the Federal Republic of Germany on the point in dispute.

On July 22, 1957, the Foreign Office, in a *Note Verbale,* informed the Swiss Embassy of the following:

The Foreign Office have the honour to refer to their *Note Verbale* No. 72/57 of 30. 4. 1957 regarding the liability of the firm of Tack & Cie GmbH, towards the Aargauische Hypothekenbank at Brugg, and to confirm to the Swiss Embassy that the Federal Minister of Justice supports the view expressed in the letter from the Oberfinanzdirektion, Karlsruhe, dated 12. 4. 1957, with regard to the opinion on the specific foreign character of the disputed Goldmark claim. The Federal Minister of Justice bases his view—agreeing, in essence, with the other Authorities concerned—on the wording of § 5 of the contract of sale, which reads as follows:

> The interest is to be paid at the end of each calendar quarter and for the first time on December 31, 1931, free of charge to the vendor or to a pay office (*or* payee) to be specified by it; the same applies to the payment of the purchase price and the several instalments.

As this clause determines merely to whom but not where the payments are to be made, it cannot be regarded as an agreement on the place of payment. In a case like this, the question of the place of payment (place of performance—*Leistungsort)* can be determined only in accordance with legal provisions. Even if this should mean a place of payment abroad—which would not be the case if German law were applied—it would not suffice, in view of Annex VII, Section I, para. 2 *(a),* to affirm the specific foreign character. Even if interpretation were to show that the clause of agreement mentioned contains a stipulation of the place of payment, this could, in any case, not be regarded as an "express" agreement within the meaning of Annex VII to the Debt Agreement. This being the position in law, the Federal Minister of Justice has not examined further the question whether, in the case presented, the claim for an unpaid balance of purchase price is of a specific foreign character within the meaning of Annex VII to the Debt Agreement.

In August 1957, the Tack firm brought an action against the *Land* Baden-Württemberg before the *Landgericht,* Karlsruhe, by submitting the application:

> that the Plaintiff, in the settlement of its debt owed to the Aargauische Hypothekenbank, Brugg/Switzerland, amounting to GM 220,000, which is entered in the Land Register of Stuttgart, Volume No. 1996, Part III, No. 19, as a mortgage charge in favour of the Aargauische Hypothekenbank, is entitled to an indemnity under §§ 63 and 66 of the Law implementing the London Debt Agreement.

This proceeding was suspended *sine die* upon the request of both parties at the hearing of November 12, 1957 "because of the proceeding pending before the Arbitral Tribunal at Koblenz".

The Swiss Confederation, whose Government is a Party to the Debt Agreement, has now resorted to the Arbitral Tribunal requesting that

> the Arbitral Tribunal render the following decision:
>
> > that, within the meaning of Annex VII, Section I, para. 2 *(a),* to the Agreement on German External Debts of February 27, 1953, it has expressly been agreed by the contract of July 31, 1931, between the Aargauische Hypothekenbank Aktiengesellschaft and Messrs. Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the contract was situated abroad.

The Federal Republic of Germany, whose Government is also a Party to the Debt Agreement, requested as Respondent that the Application of the Swiss Confederation be dismissed as inadmissible.

In case this request should not be complied with, the Respondent has requested that the Application of the Swiss Confederation be rejected as unfounded.

The contract of July 31, 1931, concerns, as is undisputed, a debt relationship which is subject to settlement pursuant to Annex II to the Debt Agreement. According to Article V, para. 3, of said Annex, "such financial debts and mortgages, expressed in Goldmarks or in Reichsmarks with a gold clause, as had a specific foreign character shall be converted into Deutsche Mark at the rate of 1 Goldmark, or 1 Reichsmark with a gold clause, = 1 Deutsche Mark."

The criteria constituting a specific foreign character in the case of such pecuniary debts are determined pursuant to Annex VII to the Debt Agreement. The provision of Annex VII which is relevant in this connection is the provision contained in Section I, para. 2 *(a),* which, in so far as it has bearing on the present dispute, reads as follows:

> In respect of the claims and rights specified below it is recognized that they have a specific foreign character within the meaning of the above-mentioned provisions:
>
> 1. . . .

> 2. Claims expressed in Goldmarks, or in Reichsmarks with a gold clause or a gold option, arising from other loans or advances resulting from financial transactions and raised abroad by German debtors, including claims of this kind secured by mortgage charges; if
>
> > *(a)* it was expressly agreed under the original written debt arrangements that the place of payment or the competent court is situated abroad or foreign law is applicable.

The introductory sentence of this quotation refers to the provisions now contained in Sub-Annex D to Annex I, No. 2, in Article V, para. 3, of Annex II and in Article 6, para. (2), of Annex IV.

In order to substantiate their submissions, the parties used the following arguments.

The Applicant expressed the opinion that §§ 1, 2 and 5 of the contract of July 31, 1931, contained an express agreement, within the meaning of Annex VII, Section 1, para. 2 (*a*), to the Debt Agreement, that the place of payment was to be situated abroad, *viz.* in Brugg/ Switzerland, the head office of the creditor. It was the general legal opinion that the conception of an express agreement of a place of payment abroad within the meaning of Annex VII, as well as the remaining provisions of that Annex, must be given a wide interpretation according to the sense emerging from the text and from their origin. With regard to the conception of an express agreement of a place of payment abroad within the meaning of Annex VII to the Debt Agreement, the Applicant invoked Section 244, para. 1, of the German Civil Code as well as a number of legal opinions and court decisions, including the decision of the Mixed Commission of November 27, 1956, in the case of *Bodenkreditbank in Basel* v. *Gebrüder Rohrer GmbH*. The Applicant furthermore pointed out that the "head office at Brugg" was mentioned twice in the contract; it maintained that it emerged from this fact as well as from the provision of the contract that the purchase price, the instalments thereof and interest were to be paid free of charge to the vendor or to a pay office (*or* payee) to be specified by it, that Brugg had been expressly agreed upon as the place of payment.

In the opinion of the Applicant, the Arbitral Tribunal has jurisdiction under Article 28, para. (2), of the Debt Agreement because the dispute which had arisen between the Applicant and the Respondent concerning questions of interpretation of Annex VII could not be settled by negotiation. Nor, in the opinion of the Applicant, was the jurisdiction of the Arbitral Tribunal excluded in the present case by Article 28, para. (5), of the Debt Agreement since the Arbitration and Mediation Committee envisaged under Article IX of Annex II to the Debt Agreement had not yet been established.

The Respondent in the first place contested the competence of the Arbitral Tribunal and argued as follows:

The prerequisites for a resort to the Arbitral Tribunal did not exist in the present case if only because, according to a generally accepted rule of

international law, the private parties whose interests are involved in the case must themselves first have exhausted unsuccessfully the remedies open to them before the courts competent under national law for the prosecution and enforcement of their interests, before resort can be had to an international arbitral tribunal competent to decide disputes between States. The Respondent pointed out in this connection that the private party in question in the present case, *viz.,* a Swiss bank as creditor, had not only not exhausted the remedies before the courts at its disposal but had not even begun to do so. It relied in this connection on a number of decisions of international courts and on the views of certain authors.

The Respondent furthermore expressed the opinion that the competence of the Arbitral Tribunal could not be deduced from Article 28 of the Debt Agreement in cases like the present. The nature of the Applicant's request alone excluded the jurisdiction of the Arbitral Tribunal under Article 28 of the Debt Agreement, since it could not be the task of the Arbitral Tribunal to decide a dispute which, by its nature, was a dispute between two private parties, merely because it had been clothed with the appearance of an international dispute between States by the Application of the Applicant. The Respondent argued that the jurisdiction of the Arbitral Tribunal, as set out in Article 28, para. (2), of the Debt Agreement and in so far as it concerned the application of the Agreement, covered only claims against a Party to the Agreement, as, *e.g.,* claims resulting from the obligations which the Federal Republic of Germany had assumed in Articles 7, 8 and 10 of the Debt Agreement. Furthermore, the jurisdiction of the Arbitral Tribunal which might exist was excluded by Article 28, para. (2), if the dispute concerned a question of interpretation or application of an Annex to the Debt Agreement, and an arbitral body established pursuant to such Annex was competent to decide a dispute concerning the interpretation or application of that Annex. In the present case the dispute concerned the interpretation or application of Annex VII to the Debt Agreement which, in so far as it was applicable to the present case, was relevant only in conjunction with Annex II to the Debt Agreement and constituted only a Sub-Annex to that Annex. The arbitral body competent to decide disputes concerning the interpretation or application pursuant to Annex II to the Debt Agreement, *viz.,* the Arbitration and Mediation Committee envisaged in Article IX of Annex II to the Debt Agreement, had in the meantime been established and was able to take up its functions at any time.

In order to substantiate its alternative request that the Application of the Swiss Confederation be rejected as unfounded, the Respondent maintained that with regard to the debt in question there was no agreement at all on the place of payment. It contradicted the opinion of the Applicant according to which such an agreement could be deduced from the mention of the "head office at Brugg" or from the provision of § 5 of the contract of July 31, 1931. It went into lengthy explanations regarding the conception of the place of payment in general and, in particular, within the meaning of Annex VII to the

Debt Agreement. Setting out from the principle that the place of payment is the place where the debtor has to take the action necessary for the satisfaction of the pecuniary debt, the Respondent explained Sections 269 and 270 of the German Civil Code to mean that, according to German law, pecuniary debts are either callable debts (place of payment is the residence of the debtor) or deliverable debts (place of payment is the residence of the creditor) or transmissible debts (place of payment is the residence of the debtor who is, however, obliged to transmit the money owed at his cost and risk to the creditor). A number of foreign legal opinions were also cited in this connection which, the Respondent maintained, showed that this legal situation had also been recognized abroad. The Respondent argued that in the present case the debt was transmissible (place of payment is the residence of the debtor) and that § 5 of the contract of sale of July 31, 1931, did not contain a place-of-payment clause but a typical transmission clause. The place of payment therefore was, in any case, Stuttgart. The fact that the place of payment must be determined according to German law resulted also from the rule of German private international law, which was generally accepted in legal science and jurisprudence, and according to which the applicable law was determined by the centre of gravity of the debt relationship. This centre of gravity was situated in Germany, for the case concerned the sale of land situated in Germany to a German. The sale was authenticated by a German notary public, the purchase price was specified in German currency and secured by a mortgage on a German plot of land.

The applicant made detailed observations in reply to the objections of the respondent to the admissibility of the proceeding and to the competence of the Arbitral Tribunal. It argued, in particular, that in the present case the dispute concerned the interpretation of not only one, but several, Annexes to the London Debt Agreement and that, therefore, the Arbitral Tribunal was competent under Article 28, para. (2), of the Agreement, irrespective of the establishment of the Arbitration and Mediation Committee under Annex II. Nor was it a private dispute disguised as a dispute between States, because the individual foreign creditor was confronted not by the individual German debtor but by the latter's State and its authorities as his true opponents whenever these authorities denied the specific foreign character of the debt, so that every such case became a "State affair". The Applicant countered the objection of the non-exhaustion of local remedies by arguing that the Debt Agreement, as a self-contained *lex specialis,* did not permit the application of the rule of the exhaustion of local remedies. Furthermore, pursuant to Article 17, para. 1 (*a*), of the Debt Agreement in conjunction with § 2, para. 1, of the German Law implementing the Debt Agreement, the foreign creditor had the right, but not the duty, to resort to German courts and to submit himself definitively to this jurisdiction.

In the substantive dispute concerning the question of the place of payment abroad the applicant argued in detailed observations that the conception of the place of payment within the meaning of the Debt Agreement could only be taken from the Agreement itself, and in accordance therewith the place of

payment was the place where, pursuant to the written arrangements, the creditor was actually to receive payment of his pecuniary claim, *i.e.,* in the present case Brugg (Switzerland). Moreover, the express agreement on the place of payment abroad resulted both from the document of July 31, 1931, and from the attendant circumstances.

The parties set out their contradictory legal opinions, the principal points of which have been reproduced above, in exhaustive pleadings, basing themselves on numerous decisions, legal opinions and statements of public authorities.

The question asked by some members of the Arbitral Tribunal as to how the respective debtors had effected the interest payment due on December 31, 1931, and all subsequent interest payments was answered by the parties as follows:

The Applicant submitted: The debtors Lindauer had transferred interest for the total debt of Goldmarks 300,000 in quarterly instalments to the head office of the creditor at Brugg (Switzerland) in the period from December 31, 1931, to September 30, 1933. After September 30, 1933, only the interest on the free capital part of Goldmarks 220,000 had been transferred by the debtors Lindauer in quarterly instalments directly to the head office of the creditor, while the interest on the capital part of Goldmarks 80,000 had been transferred to the creditor through the German-Swiss clearing system *via* the Conversion Office for German External Debts. The Tack firm had continued this mode of payment. They had also transferred the interest on the free capital part of Goldmarks 220,000 through their bank connection, the Deutsche Bank at Berlin, freely and directly, and the interest on the remaining part through the Conversion Office for German External Debts to the head office of the creditor. After repayment of a capital part of further Goldmarks 79,089.84 to a blocked account of the creditor with the Deutsche Bank at Berlin, interest payment on the remaining capital part of Goldmarks 220,000 had continued to be effected in quarterly instalments to the head office of the creditor. The last interest payment before the end of the war had been made on June 30, 1944. Additional interest payments which had been made had not been received by the creditor.

The Respondent submitted: No statements could be made regarding the manner of interest payment for the time prior to November 16, 1937, the day of the purchase of the land by the Kommanditgesellscahft Conrad Tack & Cie. So far as the time after November 16, 1937, was concerned, interest had been transferred either through the bank connection of the debtor or, in so far as the amounts due were not freely convertible, through the Conversion Office. The transfers had been effected in such a manner that the Deutsche Bank had received orders to transfer the transferable interest to a Swiss bank at Basle or Zurich for the account of the creditor or to pay the amounts in question to the Conversion Office.

On the merits (by five votes to four—Barandon, Wolff and von Caemmerer, Members, and Makarov, Additional Member, dissenting): that the request of the applicant must succeed. The term "place of payment" as used in Annex VII to the Agreement on German External Debts "should be inter-

preted as denoting the place where the creditor was entitled actually to receive his money, whether directly from the debtor or by transmission through the post or by any other agency". In the present case the creditor was entitled to receive payment in Switzerland. Thus it must be concluded that "within the meaning of Annex VII, I, 2 (*a*), to the Agreement on German External Debts of February 27, 1953, it was expressly agreed in the contract of July 31, 1931, between the Aargauische Hypothekenbank AG. and Herren Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the said contract was situated abroad."

I. On the question of Competence

I

Pursuant to Article 6 of the Charter of the Arbitral Tribunal (Annex IX to the Debt Agreement), the Arbitral Tribunal must, in the interpretation of the Agreement and the Annexes thereto, apply the generally accepted rules of international law. There can be no doubt that the rule of the exhaustion of local remedies *(Grundsatz der Erschöpfung der landesrechtlichen Instanzen; règle de l'épuisement des instances internes)* is also a generally accepted rule of international law and must, therefore, be applied by the Arbitral Tribunal in its decisions concerning the interpretation of the Debt Agreement and the Annexes thereto. The rule of the exhaustion of local remedies, as a generally accepted rule of international law, is applicable to the interpretation of an international treaty also in cases in which that treaty does not expressly stipulate the observation of this rule (see the criticism voiced in Guggenheim, *Lehrbuch des Völkerrechts,* Basle 1951, Vol. II, in Note 2 on p. 531, of the opinion expressed by Judge van Eysinga in his Dissenting Opinion to the decision of the Permanent Court of International Justice in the case of the *Panevezys-Saldutiskis Railway).* It is true, however, that the application of the rule of the exhaustion of local remedies may also be expressly excluded in a bilateral or multilateral agreement, which is not the case here.

The question is, however, whether in view of the internationally generally accepted content of the rule of the exhaustion of local remedies the Respondent can in the present case invoke this rule in order to prove its contention that the Arbitral Tribunal is not competent to deal with and to decide this case.

In legal text-books and decisions by the Permanent Court of International Justice and the International Court of Justice, as well as in treaty practice, the application of the rule of the exhaustion of local remedies has always been taken into consideration only in connection with a discussion of the question of the international responsibility of a State for an unlawful act *(Unrecht; L'acte contraire au droit)* committed on its territory against a national of another State and for a refusal to grant reparation of this unlawful act, *viz.,* a denial of justice *(Rechtsverweigerung; déni de justice).* The invocation of the rule of the exhaustion of local remedies as a generally accepted rule of international law is justified only if a claim is made against a State, in particular a claim for reparation or

damages, and such claim is based on the fact that a national of the State which makes the claim has been impaired in his rights in violation of international law, if the State against which the claim is made can be held responsible therefor under international law and the person whose rights have been infringed has not exhausted the remedies legally available to him in the State against which the claim is made, in order to assert the infringement of his rights.

As far as legal text-books are concerned, special reference may be made in this connection to Dionisio Anzilotti, *Corso di Diritto Internazionale* (Volume I of the complete edition of the works), Padua 1955, pp. 384 *et seqq.,* 423; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* London 1953, pp. 163 *et seqq.,* 170 *et seqq., 177 et seqq.;* Frede Castberg, *Folkerett,* Oslo 1948, pp. 150 *et seqq.*; Louis Cavaré, *Le droit international public positif,* Paris 1951, Volume II, pp. 270 *et seqq.,* 292 *et seqq.;* J. E. S. Fawcett in *The British Year Book of International Law,* 1954, pp. 452 *et seqq.,* Note: 'The Exhaustion of Local Remedies: Substance or Procedure?'; Paul Guggenheim, *Traité de Droit international public,* Genève 1954, Volume II, pp. 1 *et seqq.,* 12 *et seq.,* 21 *et seqq.;* Charles Cheney Hyde, *International Law,* Boston 1951, Volume II, pp. 909 *et seqq.;* Franz von Liszt, *Das Völkerrecht,* 12th edition, edited by Max Fleischmann, Berlin 1925, pp. 279 *et seqq.,* 283; Lord McNair, *International Law Opinions,* Cambridge 1956, pp. 293 *et seqq.,* 311 *et seqq.;* L. Oppenheim, *International Law,* 8th edition, edited by Sir H. Lauterpacht, London, New York, Toronto 1955, Volume II, p. 361; Alf Ross, *Lehrbuch des Völkerrechts,* German translation of the Danish original, Stuttgart and Cologne 1951, pp. 231 *et seq.,* 240 *et seqq.,* 250 *et seqq.;* Georg Schwarzenberger, *International Law,* 2nd edition, London 1949, Volume I, pp. 233 *et seq.,* 235 *et seq.;* Paul Schoen, "Haftung, völkerrechtliche der Staaten", in Strupp's *Wörterbuch des Völkerrechts und der Diplomatie,* Volume I, Berlin and Leipzig 1924; Halvar G. F. Sundberg, *Folkrätt,* Stockholm 1950, pp. 211 *et seqq.*; Alfred Verdross, *Völkerrecht,* 3rd edition, Vienna 1955, p. 308, p. 329.

Nor does a different interpretation of the rule of the exhaustion of local remedies emerge from the Judgments of the Permanent Court of International Justice cited by the Respondent in the proceeding instituted by Estonia against Lithuania concerning the *Panevezys-Saldutiskis Railway,* of the International Court of Justice in the proceeding instituted by France against Norway concerning *Certain Norwegian Loans*, or from the decision of the Arbitrator, Algot Bagge, in the dispute between Finland and Great Britain concerning the use of various *Finnish ships* during the First World War.

So far as the Lithuanian-Estonian dispute is concerned, the issue was that the Lithuanian Government was charged with having refused to recognize rights of the owners and concessionaries of the railway line Panevezys-Saldutiskis and to grant compensation for the illegal seizure and use of this railway line. Consequently, a claim for damages was made against the Lithuanian Government. The Permanent Court of International Justice decided in its Judgment of February 28, 1939, that the application submitted by the Estonian

Government was inadmissible and that the objection of the non-exhaustion of local remedies raised by the Lithuanian Government was well founded. See . . . "Publications de la Cour Permanente de Justice Internationale" Serie A/B No. 6, in particular p. 5 and p. 22.

In the dispute between France and Norway the question was whether the gold clause contained in certain loans which had been issued by the Norwegian State and by two Norwegian banks, for which the Norwegian State had assumed a full guarantee, should continue to be observed. The French Government supported this view by reasoning that the loans in question were international loans and that it followed from the nature of such loans that payments to the foreign owners of bonds of such loans had to be effected without any discrimination. The Norwegian Government, on the other hand, relied primarily on the declarations made by the litigating parties of November 16, 1946, and of March 1, 1949, which contained a restriction of the obligatory jurisdiction of the International Court of Justice. It, furthermore, invoked a Norwegian Law of December 15, 1923, by virtue of which the servicing of loans expressed in gold had been modified in a certain manner—further details are not interesting in this connection. Lastly, it also argued that the bondholders, on whose behalf the French Government thought it was justified in resorting to an international court, had not exhausted local remedies in Norway. The decision of the International Court of Justice is dated July 6, 1957. The Court considered itself not competent, in view of the declaration of the French Government of March 1, 1949, which, in the opinion of the Court, contained a reservation with regard to the obligatory jurisdiction of the Court and upon which the Norwegian Government could rely from the point of view of reciprocity. The Court, therefore, did not deem it necessary to deal with the further objections raised by the Norwegian Government. For details, see "Report of Judgments, Advisory Opinions and Orders", Judgment of July 6th, 1957; "Recueil des Arrêts, Avis Consultatifs et Ordonnances", Arrêt du 6 Juillet 1957, in particular pp. 13, 16, 17, 19 and 27.

Consequently, there is in this case no decision of the International Court of Justice concerning the applicability of the rule of the exhaustion of local remedies. It is true, however, that the Judge Sir Hersch Lauterpacht dealt with the question of the applicability of this rule in his very exhaustive Separate Opinion, which differs from the decision of the Court. With reference to the rule in question, he said: "It is a rule which international tribunals have applied with a considerable degree of elasticity". (Page 39 of the publication of the decisions of the International Court of Justice in the above-mentioned official Reports.) But whether this opinion is correct or not, the fact remains that the observations of Sir Hersch Lauterpacht refer only to the dispute submitted to the International Court of Justice in which the French Government charged the Norwegian Government with an infringement of rights and made a claim based on this alleged infringement because Norway had not treated the owners of an international loan impartially. Moreover, Sir Hersch Lauterpacht's

observations on the "elasticity" in the application of the rule of the exhaustion of local remedies do not concern the question whether and when this rule is applicable, but the question of the method of its application, *i.e.,* the question how the rule is to be applied in each case.

The dispute between Finland and the United Kingdom of Great Britain and Northern Ireland, which was decided by the Arbitrator, Algot Bagge, in 1931, concerned a claim for damages made by Finland against the United Kingdom. This claim was based on the fact that during the First World War Finnish ships had first been requisitioned by Russia and had then been taken to British ports where they were taken over by British authorities. The Finnish shipowners had requested compensation for this (see Schwarzenberger, *op. cit.* p. 235, as well as Bin Cheng, *op. cit.* p. 911, Note 9, and p. 917). In this case, too, the claim for damages was based on the contention that there had been an infringement of rights for which the State against which the action was brought was legally responsible.

It is in accord with the opinion of the various international arbitral bodies, as reflected in the above-mentioned decisions, that in the *Ambatielos* case (Greece versus the United Kingdom of Great Britain and Northern Ireland), the Commission of Arbitration which had been established pursuant to an agreement between the litigants, in its decision of March 6, 1956 (Her Majesty's Stationery Office, London, 1956, see in particular p. 27), formulated the rule of the exhaustion of local remedies as follows:

> It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State.

In international treaty practice, too, the rule of the exhaustion of local remedies has always been applied only in the same sense in which legal textbooks and international decisions termed it a generally accepted rule of international law. The more recent treaties cited by the Respondent do not speak against the assumption, as remains to be shown in a different context.

But the opinions quoted by the Respondent, as they have of late been expressed in international bodies on the rule of the exhaustion of local remedies, also merely confirm that the rule can only be valid as a generally accepted rule of international law as formulated above and in connection with the responsibility of States for infringements of rights. The Respondent itself mentions that the Rapporteur of the International Law Commission of the United Nations, Garcia Amador, made his observations on the problem of the Exhaustion Rule in connection with the question of "International Responsibility". The resolution adopted at the meeting of the Institut de Droit International at Granada (April 1956) also proceeds from the assumption that a State contends "*que la lésion subie par un de ses ressortissants dans sa personne ou dans ses biens a été commise en violation du droit international*" and that in that case any diplomatic or judicial intervention is inadmissible if the national

legislation of the State which is alleged to have committed the injury provides remedies which had been available to the injured person and which would probably also have been effective and sufficient, and if and so long as the use of these remedies has not been exhausted. In connection with this resolution, reference may also be made to the *travaux préparatoires* of the Granada meeting and to the particularly illuminating remarks on the questionnaire of the Rapporteur, J. H. W. Verzijl, by the Rapporteur himself as well as by Alf Ross, Roberto Ago, Paul Guggenheim and Alfred Verdross *(Annuaire de l'Institut de Droit International,* Session de Granade 1956, pp. 14 *et seqq.,* 21 *et seqq.,* 24 *et seqq.,* 31 *et seqq.,* 47 *et seq.).*

This is not a case in which the rule of the exhaustion of local remedies, in so far as it is to be considered a generally accepted rule of international law in accordance with the above observations, could be applied.

In certain circumstances, however, the rule of the exhaustion of local remedies could also be effectively invoked in a proceeding concerning the interpretation or application of the Debt Agreement or the Annexes thereto before the Arbitral Tribunal. This would be the case if a creditor country alleged that one of its nationals had been refused the enforcement of his rights pursuant to Article 17 of the Debt Agreement before the German courts by not having his complaint entertained at all; this could then constitute a dispute which would be subject to the jurisdiction of the Arbitral Tribunal. In that, presumably purely theoretical, case the Arbitral Tribunal could only be resorted to once the creditor country had proved that its national had tried in vain, by exhausting all the remedies at his disposal, to bring an action against the debtor which was admissible under Article 17 of the Debt Agreement. If, however, the German courts have dealt with the action in due form and if only the creditor's contention that the debt due to him had a specific foreign character within the meaning of Annex VII to the Agreement has remained unsuccessful after he has exhausted all remedies at his disposal under German law, the State of which the creditor is a national could nevertheless not resort to the Arbitral Tribunal and possibly bring an action for damages against the Federal Republic. For the declaration of the German courts that a claim does not have a specific foreign character would, at the most, represent a legal error for which the Federal Republic would not be responsible under international law, and it would never be a violation of international law or a denial of justice for which the Federal Republic would have to bear the international responsibility. The present case, however, as has been said before, is not such as to make possible the application of the rule of the exhaustion of local remedies, at any rate not in so far as it has been generally accepted as a binding rule of international law in what may be termed its classical form, as described above. The Applicant has not made a claim for damages against the Federal Republic. The Applicant makes no claim whatsoever, but merely requests a decision of the Arbitral Tribunal on the interpretation and application of Annex VII in conjunction with Annex II to the Debt Agreement in a particular dispute.

In the present case, therefore, the lack of jurisdiction of the Arbitral Tribunal cannot be alleged by invoking the rule of the exhaustion of local remedies in the form more precisely defined above—and only in that form, as has been explained previously has it been recognized as a generally binding rule of international law.

The Respondent, however, as can be deduced in particular from its arguments in the oral proceedings, also tried to show that there are obvious tendencies in the more recent development of international law which amount to an extension of the applicability of the rule of the exhaustion of local remedies. In this connection, the Respondent refers in particular to the observations made by the Judge Sir Hersch Lauterpacht in his Separate Opinion to the decision of the International Court of Justice in the dispute between France and Norway concerning *Certain Norwegian Loans* of July 6, 1957, as well as to some recent treaties in which, in the opinion of the Respondent, the rule has been applied in a wider sense than hitherto. It mentions, in this connection, the Pact of Bogotá of April 30, 1948—American Treaty on Pacific Settlement—(printed in *United Nations Textbook,* Leiden 1954, p. 385), the Agreement between the Federal Republic of Germany and the Austrian Republic concerning the Facilitation of Frontier Clearance for Transport by Rail, Road and Waterways of September 14, 1955 *(Bundesgesetzblatt,* 1957, II, Vol, I, p. 582), the Agreement between the Federal Republic of Germany and the Austrian Republic concerning the Regulation of the Frontier Crossing of Railways of October 28,1955 *(Bundesgesetzblatt,* 1957, II, Vol. I, p. 599), and the Agreement between the Federal Republic of Germany and the Kingdom of Sweden concerning German Property in Sweden of March 22, 1956 *(Bundesgesetzblatt,* II, Vol. I, p. 811).

The observations by Lauterpacht to which the Respondent refers have already been dealt with above. They are also based on the opinion that the invocation of the rule of the exhaustion of local remedies is, at any rate, subject to a claim having been made by one State against another which is based on an infringement of rights. This follows also from the formulation which Sir Hersch Lauterpacht himself has given of the rule in the newly edited textbook on International Law by Oppenheim (Oppenheim-Lauterpacht, *International Law,* 8th edition, 1955, London, New York, Toronto). It is said therein on p. 361 in § 162 a:

> It is a recognised rule that an international tribunal will not entertain a claim put forward on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available to him in the State concerned.

In the Pact of Bogotá which, as is made clear by its official title, "American Treaty on Pacific Settlement", was a political treaty, the rule of the exhaustion of local remedies is to be found in Article 7. According to the formulation of this provision, the impression might be created that a somewhat more extensive applicability of the rule of the necessity to exhaust local remedies before taking diplomatic steps or resorting to international jurisdiction was to be

admitted in inter-American relations, as compared with the former practice of international law. In the opinion of the Arbitral Tribunal, however, this is not the case either. On the contrary, the words used in Article 7 of the Pact of Bogotá "in order to protect their nationals" make it clear that the American States, too, which concluded the Pact, proceeded from the assumption that it is possible to invoke the rule of the exhaustion of local remedies only if the State which wishes to invoke this rule is held responsible for an unlawful act committed on its territory and if claims resulting therefrom are being made against it. Nor is it to be assumed that precisely when concluding a purely political treaty concerning the general relationship of the American States to one another, such as the Pact of Bogotá, the contracting Parties had the intention of creating an extension, binding on the Contracting States, to the field of applicability of the rule in question.

Nor can it be deduced from the Agreements which the Federal Republic recently concluded with Austria and Sweden that international law is about to admit the possibility of applying the rule of the exhaustion of local remedies also in cases in which no claim based on an infringement of rights is made against the State which wishes to invoke this rule. The Treaties cited merely contain the provision customary in recent treaties that in the case of differences of opinion between the Contracting Parties resort shall be had to an arbitral tribunal, and they lay down details as to the composition of this arbitral tribunal. The Treaties do not say anything about the question under what further conditions the arbitral tribunal can be resorted to in the case of disputes concerning their interpretation and application.

Nor is it evident from international decisions that there might be tendencies in international law from which an application of the rule of the exhaustion of local remedies more extended than hitherto practised could be concluded. It is certainly true that the International Court of Justice has, with regard to the establishment of its jurisdiction, always adopted a very cautious attitude towards the objection that local remedies had not been exhausted. This attitude, however, does not concern the substantive prerequisites for the application of the rule of the exhaustion of local remedies in accordance with the general principle of international law, but merely the question whether, assuming the applicability of this rule, the local courts had, in fact, rendered a final decision or not (see Sir Hersch Lauterpacht, *The Development of International Law by the International Court,* London 1958, pp. 100 to 102). Consequently, the International Court of Justice also remains of the opinion that the above-mentioned rule can be applied only "in the field of State responsibility" for an international unlawful act (see Sir Hersch Lauterpacht, *op. cit.,* p. 350).

But even if the recent development of international law showed the tendencies alleged by the Respondent with regard to the application of the rule of the exhaustion of local remedies, this would nevertheless not mean that a generally accepted rule of international law has already evolved which the Arbitral Tribunal, too, would have to take into account when rendering its decisions.

Under Article 6 of its Charter (Annex IX to the Debt Agreement), it is bound only by the generally accepted rules of international law. The rule of the necessity to exhaust local remedies before the opening of diplomatic negotiations or the resort to international jurisdiction is valid as a generally accepted rule of international law only in the formulation contained in the resolution of the Institut de Droit International as adopted at the Granada meeting in April 1956, which was also quoted by the Respondent. (See *Annuaire de l'Institut de Droit International,* 1956, p. 358.)

If, therefore, the resort to the Arbitral Tribunal in disputes like the present is not subject to a prior exhaustion of the remedies which were available for the settlement of the civil suit forming the basis of the dispute, it is not necessary to examine what possibilities the creditor would have had of enforcing its claims against the debtor; whether, *e.g.,* the special requirements for a resort to the German courts by a foreign creditor laid down in Articles 15 and 17 of the Debt Agreement existed in the present case. Nor is it relevant, therefore, whether, as the Applicant contends, the debtor made an offer of settlement pursuant to Article 15 of the Debt Agreement and was willing to recognize the specific foreign character of the debt in question provided the indemnity to which it is entitled under §§ 63 *et seqq.* of the German Law implementing the Debt Agreement and which is to be paid by the *Land* [of] Baden-Württemberg was secured, or whether, as the Respondent contends, an agreement between creditor and debtor regarding the terms of settlement had not, in fact, been reached.

II

If, therefore, the objection of the Respondent which is based on the rule of the exhaustion of local remedies fails, the question must now be examined whether any other circumstances following from the Debt Agreement itself might exclude the jurisdiction of the Arbitral Tribunal in the dispute pending before it.

The decisive point, consequently, is what, according to the wording, sense and context, Article 28, para. (2), in conjunction with Article 28, para. (5), of the Debt Agreement provides with regard to the jurisdiction of the Arbitral Tribunal. The jurisdiction of the Arbitral Tribunal pursuant to Article 28, para. (3) (jurisdiction of the Arbitral Tribunal to decide questions regarding Annex IV which are of fundamental importance for the interpretation of that Annex and which are submitted to it by any Party to the Agreement), and pursuant to Article 28, para. (4) (jurisdiction of the Arbitral Tribunal in appeals from decisions of the Mixed Commission), may be disregarded in this connection.

According to Article 28, para. (2), in conjunction with Article 28, para. (5), of the Debt Agreement, the Arbitral Tribunal has exclusive jurisdiction in all disputes between two or more of the Parties to the Agreement regarding the interpretation or application of the Agreement, or the Annexes thereto, which the Parties are not able to settle by negotiation, unless a dispute concerns solely

the interpretation or application of an Annex to the Agreement if an arbitral body established pursuant to such Annex is competent to decide the question of interpretation or application concerned.

The jurisdiction of the Arbitral Tribunal under these provisions is exclusive. This means that, for a decision in disputes between two or more of the Parties to the Debt Agreement regarding the interpretation or application of the Agreement or the Annexes thereto, no resort can be had to other international arbitral bodies, such as the International Court of Justice at The Hague or the Arbitration Tribunal established under Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany of May 26, 1952 (in the version of the Protocol of October 23, 1954). The term "exclusive" in Article 28, para. (2), of the Agreement has obviously no other meaning.

According to Article 28, para. (2), of the Debt Agreement, the dispute must be one which the Parties concerned have not been able to settle by negotiation. By means of the above-mentioned exchange of Notes, an attempt has been made to settle by negotiation a dispute which had arisen between the Swiss Confederation and the Federal Republic of Germany out of an individual case regarding the interpretation of Annex VII to the Debt Agreement. Originally, the dispute concerned only the question whether claims for a balance of purchase money must also be considered "loans or advances resulting from financial transactions" within the meaning of the provision contained in Section I, para. 2, of Annex VII to the Debt Agreement or whether they must at least be placed on the same footing as such loans or advances. In the *Note Verbale* of the Foreign Office of July 22, 1957, however, it was then said that the Federal Minister of Justice had not further examined this point at issue; for he was of the opinion that the specific foreign character of the claim of the Swiss creditor had to be negatived if only for the reason that no place of payment abroad had been expressly agreed in the relevant contract of sale of July 31,1931. The Swiss Embassy did not reply to this *Note Verbale* but instead submitted to the Arbitral Tribunal the Application of October 19, 1957, concerning which a decision must now be reached. The Respondent thinks that the diplomatic exchange of views as to the question what the requirement of an express agreement on a place of payment abroad must be taken to mean, according to the sense and purpose of Annex VII to the Debt Agreement, might possibly have led to agreement if it had been continued. The Arbitral Tribunal, however, is not of the opinion that, in order to establish its competence to decide a dispute between two or more of the Parties to the Agreement, diplomatic negotiations must always have reached a point where the litigating Parties have stated expressly that they have not succeeded in settling the dispute by negotiation. It suffices, on the contrary, that it can be assumed from the circumstances that a continuation of the diplomatic exchange of letters will not make possible the settlement of the dispute. This is the case here. As follows from the subsequent attitude of the litigants, the legal opinion held by the Federal Minister of Justice with regard to the meaning of the clause contained

in Annex VII to the Debt Agreement concerning the necessity of an express agreement on a place of payment abroad, which was communicated to the Swiss Embassy in the *Note Verbale* of the Foreign Office of July 22, 1957, was of such fundamental importance precisely for the Swiss creditors that it was not to be expected that the Swiss side would eventually adopt this legal opinion. It is thereby established, within the meaning of Article 28, para. (2), or the Debt Agreement, that the dispute which has arisen between the Parties out of the present case between individuals concerning the interpretation of Annex VII to the Debt Agreement could not be settled by negotiation.

If the Arbitral Tribunal is to be competent to decide a dispute between two or more of the Parties to the Debt Agreement, the subject of the dispute, according to Article 28, para. (2), of the Debt Agreement, must be the interpretation or application of the Debt Agreement or the Annexes thereto. This could also apply if a claim is made against the Federal Republic of Germany on the basis of the Debt Agreement, *e.g.,* on the basis of Article 2 or Article 10. This would, in fact be a case in which there is a dispute concerning the application of the Debt Agreement.

However, as follows also from Article 28, para. (2), of the Debt Agreement, the jurisdiction of the Arbitral Tribunal is not limited to disputes in which a claim of some kind is made against the Federal Republic of Germany. But, irrespective of the cause of the dispute and irrespective of whether a claim is made against the Federal Republic of Germany or not, the Arbitral Tribunal is, in any event, competent, only if the interpretation or application of the Agreement or the Annexes thereto is in question.

The dispute to be decided in this case concerns primarily a question of the interpretation of the Debt Agreement and the Annexes thereto within the meaning of Article 28, para. (2), of the Agreement, *viz.,* a question of the interpretation of Annex VII in conjunction with Annex II. The question for decision is what this Annex means when it provides that, for the recognition of the specific foreign character of a claim in cases like the present, a place of payment abroad must have been expressly agreed in the original written debt arrangements. It is only in the second place, *i.e.,* after the question of interpretation as formulated above has been decided, that the question arises whether an express agreement on a place of payment abroad has been made within the meaning of this decision in the relevant contract of sale of July 31, 1931. It is, therefore, not correct that the real subject of the dispute is merely the interpretation of a contract under private law and that, as the Respondent contends, the Arbitral Tribunal is thus not competent because it could not be its task to decide a dispute which, by its nature, is a dispute between two private parties, *viz.,* between a Swiss bank as creditor and a German firm as debtor, but which the Applicant had clothed in the appearance of an international dispute between States by the Application it submitted to the Arbitral Tribunal. On the contrary, in the circumstances of the case this is a dispute between States

which can be decided only by the Arbitral Tribunal pursuant to Article 28, para. (2), of the Debt Agreement.

Nor can it be deduced from Article 28, para. (5), of the Debt Agreement that the Arbitral Tribunal is not competent to decide the present dispute. The said provision excludes the jurisdiction of the Arbitral Tribunal only if a dispute concerns exclusively the interpretation of an Annex to the Debt Agreement and if an arbitral body established pursuant to such Annex is competent to decide the question of interpretation concerned. It is true that the dispute has arisen out of a private dispute which was concerned with the claim of a Swiss creditor falling under the settlement provided in Annex II to the Debt Agreement. However, the dispute does not concern a question of the interpretation of provisions of Annex II itself, but a question of the interpretation of Annex VII which (the Respondent is quite right on that point) also constitutes a Sub-Annex supplementing Annex II. At the same time, however, it is a Sub-Annex which supplements Annexes I and IV, as is shown by the editorial remark on the letter addressed by the head of the German Delegation for German External Debts, Hermann J. Abbs, and the chairman of Negotiating Committee B at the Conference on German External Debts, N. Leggett, to the chairman of the Tripartite Commission on German External Debts of November 21, 1952. The provisions of Annex VII are, therefore, relevant for the settlement of Goldmark loans of German municipalities under Annex I to the Debt Agreement (see Sub-Annex D to Annex I) as well as for the settlement of debts expressed in Goldmarks or in Reichsmarks with a gold clause or a gold option, which fall under Annex II and Annex IV. Moreover, as results from their wording and context, the Annexes to the Debt Agreement cannot be interpreted separately but must be interpreted in the light of their interrelation and in conjunction with the Debt Agreement itself so that this will, in many cases, restrict the jurisdiction of the arbitral bodies provided [for] in the various Annexes. Annex VII, in particular, concerns several Annexes, *viz.*, as has already been mentioned, Annexes I, II and IV, and it is, consequently, also of importance for the whole Debt Agreement. Therefore, this is not a case envisaged in Article 28, para. (5). On the contrary, the Arbitral Tribunal is competent without restriction under Article 28, para. (2).

For this reason, too, it is therefore irrelevant whether the attitude of the debtor towards the creditor after the coming into force of the Debt Agreement must be considered to reflect a readiness in principle to settle the claim on the basis of Annex II to the Debt Agreement.

It also follows therefrom that the Arbitral Tribunal is competent to decide the present dispute irrespective of whether the Arbitration and Mediation Committee under Annex II has been established or not.

If it were otherwise, there would be no judicial body the resort to which could eliminate the possibility of conflicting decisions on the interpretation of Annex VII by the arbitral bodies established pursuant to Annexes II and IV. Nor would there be anything to prevent the Arbitration and Mediation

Committee competent under Annex II from answering the question of the specific foreign character of a claim owned by a foreign creditor in the negative, while the Mixed Commission competent under Annex IV affirms the question of the specific foreign character of another claim, owned by the same creditor, although this claim had been created in the same manner and in the same conditions as the claim the character of which had to be decided by the Arbitration and Mediation Committee. Such differences in the appreciation of identical legal situations would result, in particular, from the fact that the line of demarcation between claims which must be settled under Annex II and those which are subject to settlement under Annex IV has been drawn more or less arbitrarily in Article III of Annex II and in Article 2 of Annex IV, and in many cases depends on purely external circumstances (amount of the original debt, period of the loan). However, once conflicting decisions have been rendered by the two arbitral bodies competent under Annexes II and IV, respectively, it would no longer be possible to restore uniformity. It is true that a Party to the Debt Agreement could appeal to the Arbitral Tribunal from a decision pursuant to Article 31, para. (7), of the Debt Agreement if it were of the opinion that the Mixed Commission was wrong in assuming the specific foreign character of the claim, by basing this appeal on the ground that the decision concerned a question of general or fundamental importance. If the Arbitral Tribunal then confirmed the decision of the Mixed Commission, the decision of the Arbitral Tribunal would, pursuant to Article 28, para. (10), of the Debt Agreement, thenceforth be binding also on the Arbitration and Mediation Committee competent under Annex II to the Debt Agreement. However, the decision of the latter, which is final and binding on the private litigants according to Article IX, Section 1, para. (2), first sentence, of Annex II to the Debt Agreement, would not have been annulled.

The conflict between the two decisions of the Mixed Commission and the Arbitration and Mediation Committee would, therefore, continue to exist. It must therefore be possible, by means of a resort to the Arbitral Tribunal, to prevent conflicting decisions by the arbitral bodies in question concerning the interpretation of an Annex to the Debt Agreement even before such decisions have been pronounced, thus guaranteeing a uniform and identical treatment of a disputed question of interpretation. This was obviously also the tendency in the discussions which the Tripartite Commission for German Debts had with the German Delegation for External Debts in London in the period from September 16, 1952, to February 26, 1953, regarding the formulation of the various provisions of the Debt Agreement (see the minutes of the meetings of December 12, 1952, No. 1 *et seqq.,* p. 112, and of February 11, 1953, No. 9 *et seqq.,* p. 171, as well as No. 32 *et seqq.,* p. 173).

However, even if it were assumed that in the present case only the interpretation of one Annex to the Debt Agreement, *viz.,* the interpretation of Annex VII in conjunction solely with Annex II, was at issue, the Arbitral Tribunal would be competent to pronounce a decision on the Application

submitted by the Swiss Confederation. At the institution of the proceeding, the Arbitration and Mediation Committee under Annex II was undoubtedly not yet established. The Respondent submitted only shortly before the beginning of the oral proceedings that it had now been established. According to the principle of *perpetuatio fori,* the jurisdiction of the Arbitral Tribunal in the present case remains unaffected by the establishment, after the institution of the proceeding, of the Arbitration and Mediation Committee under Annex II to the Debt. Agreement to which the creditor might have resorted. In the *Nottebohm* case (dispute between Liechtenstein and Guatemala) the International Court of Justice made the following observations on the validity of the principle of *perpetuatio fori* in its decision of November 18, 1953 *{Reports of Judgments, Advisory Opinions and Orders* [1953, p. 111]—see in particular pp. 122 and 123):

> . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.

This refers to the principle, which is generally valid, at any rate in proceedings before international arbitral bodies, that, once the competence of the arbitral body has been established by the submission of the application for a decision, extrinsic facts and circumstances no longer affect this competence. This principle must also be valid for the competence of the Arbitral Tribunal in the present case, which has already been established by the submission of the Application of the Swiss Confederation. Therefore, the invocation by the Respondent of Article 28, para. (5), of the Debt Agreement is unfounded also in this respect.

Nor is it correct that, as the Respondent maintains, a jurisdictional rule, as deduced from Article 28 of the Debt Agreement according to the above observations, would establish the competence of the Arbitral Tribunal also for the decision of disputes between individuals, for which the Debt Agreement precisely envisages special arbitral bodies, *viz.,* those of Annexes II and IV. Nor can it be said that the Debt Agreement does not, under any circumstances, offer a choice between a creditor bringing an action against his debtor before the competent ordinary German court or the arbitral bodies provided in the Debt Agreement for disputes between creditors and debtors and the creditor country as such, *i.e.,* as a Party to the Debt Agreement, making the case the subject of a dispute between States before the Arbitral Tribunal. It is true that in general there will be no such alternative. According to the text and meaning of Article 28 of the Debt Agreement, the Arbitral Tribunal is, of course, not qualified to decide disputes between creditors and debtors. However, in certain circumstances a dispute may exist which either the private parties concerned

would have to resolve by resorting to one of the arbitral bodies provided in Annexes II and IV to the Debt Agreement (in the case of a resort to the Mixed Commission pursuant to Article 16 of Annex IV in conjunction with Article 31 of the Debt Agreement, possibly with the participation of the Government of the creditor country or of the debtor country or both) or which would have to be taken to the Arbitral Tribunal as a dispute between Parties to the Debt Agreement. This would be the case in particular if, as in the present dispute, the question at issue is not how a contract is to be interpreted in the light of an Annex to the Debt Agreement, but two Parties to the Debt Agreement have entered into a dispute regarding the interpretation of a provision which is contained in several Annexes; that is, in particular if, again as in the present case, the point at issue is the interpretation of Annex VII, which contains several provisions supplementing other Annexes. In such cases it is possible, pursuant to Article 28, para. (2), of the Debt Agreement, for a Party to the Agreement to resort to the Arbitral Tribunal, primarily in order to secure uniform decisions by the arbitral bodies which are competent for the interpretation or application of the Annexes in question. In those cases, the dispute need not first be submitted by the private party to one of the arbitral bodies provided for in the relevant Annex. On the contrary, such a case will then call for a decision in a dispute between two Parties to the Debt Agreement as defined in Article 28, para. (2), of that Agreement, although it will have arisen out of a dispute between individuals, which will be the rule, at least when the decision of the Arbitral Tribunal is requested concerning the interpretation of Annexes to the Debt Agreement. But even if a Party to the Debt Agreement formulated its Application for a decision by the Arbitral Tribunal in a theoretical form, *i.e.,* without naming the private parties concerned, the dispute would have arisen out of an individual case or a group of individual cases and the Arbitral Tribunal would have to examine the disputed question of the interpretation of the Annexes in the light of this individual case or group of individual cases, according to the jurisdiction conferred upon it by the Debt Agreement.

Lastly, it is also not correct that, as the Respondent contends, the provision of Article 28, para. (11), of the Debt Agreement, according to which the Arbitral Tribunal can be requested to render advisory opinions regarding the interpretation or application of the Debt Agreement (except with respect to the interpretation or application of Article 34 of the Agreement), also reflects the obviously highly restrictive view of the Debt Agreement in the question of the jurisdiction of the Arbitral Tribunal. This contention fails to recognize the relation existing between the provisions of paras. (2) and (11) of Article 28 of the Debt Agreement. The fact that the Arbitral Tribunal is competent to decide disputes between two or more of the Parties to the Debt Agreement not only in the case of international disputes in the traditional sense, follows already from the above observations. Disputes between Governments which have arisen out of private disputes can also be the subject of the jurisdiction of the Arbitral Tribunal and, as has already been remarked, will normally be its subject if the dispute, as defined in Article 28, para. (2), of the Debt Agreement, concerns the

interpretation or application of the Debt Agreement or the Annexes thereto, and if Article 28, para. (5), of the Debt Agreement does not exclude the jurisdiction of the Arbitral Tribunal. The request that the Arbitral Tribunal render a non-binding advisory opinion pursuant to Article 28, para. (11), will be made only as long as there is, as yet, no dispute between two or more of the Parties to the Debt Agreement, in particular, *e.g.,* if a Party to the Debt Agreement makes this request in order to come to a conclusion on the question whether it wishes to raise an issue of interpretation or application which it will then submit to the Arbitral Tribunal for its decision.

For these reasons the Arbitral Tribunal unanimously declares: The Arbitral Tribunal is competent to adjudicate upon the present dispute.

2. *On the Merits*

The question which has been submitted by the Swiss Federal Council for decision by the Tribunal, is whether, within the meaning of Section I, 2 (*a*) of Annex VII to the Debt Agreement, it was expressly agreed under the original written debt arrangements *(i.e.,* the contract of sale of July 31, 1931) that the place of payment is situated abroad.

This question is twofold:

(a) What meaning is to be assigned to the words in Annex VII "it was expressly agreed under the original written debt arrangements that the place of payment . . . is situated abroad ?"

(b) Is this requirement fulfilled in the contract of sale between the Aargauische Hypothekenbank and Max and Moriz Lindauer?

In order to answer question *(a)* it is necessary first to ascertain what method of interpretation should be employed. The problem is of especial relevance in connection with the meaning to be assigned to the term in Annex VII, I, 2 *(a)* "place of payment" (in the German text "*Zahlungsort*", in the French text "*que le paiement serait fait à l'étranger*") which has a significance varying according to the rule of interpretation which is applied.

It has been contended by the Respondent, that the correct method is to find the proper law applicable to each contract and then to interpret the above-cited provision of Annex VII in accordance with this law.

It is the opinion of the Tribunal that the use of this method presents certain grave inconveniences. In the first place, contracts of precisely the same wording would be interpreted differently according to the law which is applicable to them. In the second place—and this is a more serious objection—there would in every case be a preliminary problem requiring solution before the criteria contained in Section I, 2 *(a)* of Annex VII could be applied, namely, the ascertainment of the proper law of the contract. This is often a matter of great complexity giving rise to protracted legal proceedings. Indeed, the very method to be employed for its ascertainment has been the subject of conflicting legal theories and judicial decisions. On the one hand it has been laid down that the law which the parties intended to apply must be sought for; on the

other hand it has been decided that the proper criterion is what law the parties, as reasonable men, should have intended to apply, had they addressed their minds to the question. That law has been held to be the law of the country with which the contract has the more substantial links. See "The Significance of *The Assunzione*" by G. C. Cheshire, *(British Year Book of International Law,* 1955/56, page 123). The solution of this problem might require a resort to one of the arbitral bodies set up under the Agreement or to a German court or other tribunal, and might give rise to a subsidiary dispute as to what tribunal is competent to decide the question of the proper law of the contract.

The possibility of such controversies arising would frustrate the object which the parties to the agreement contained in Annex VII had in mind, which was to provide a guide to the easy recognition of a claim with a specific foreign character as referred to in Annexes I, II and IV of the Debt Agreement. For these reasons, preference should be given to a method of interpretation which can be simply and uniformly applied.

The rule commonly applied to the interpretation of Treaties should be applied to the interpretation of Annex VII. According to the practice of the International Court of Justice, words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur.

The practice of the International Court of Justice coincides with the resolution of the Institut de Droit International passed at Granada at the Session of April 1956 *(Annuaire,* p. 349):

Article premier

1) L'accord des parties s'étant realisé sur le texte du traité, il y a lieu de prendre le sens naturel et ordinaire des termes de ce texte comme base d'interprétation. Les termes des dispositions du traité doivent être interpretés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international.

2) Toutefois, s'il est établi que les termes employés doivent se comprendre dans un autre sens, le sens natural et ordinaire de ces termes est ecarté.

The word "*Zahlungsort"* in the German text of Annex VII is not to be found in sections 269 and 270 of the German Civil Code *(Bürgerliches Gesetzbuch,* BGB). According to the dictionary "*Der Grosse Brockhaus",* the word "*Zahlungsort"* signifies "*Erfüllungsort für eine Geldschuld"* (the place of liquidation of a money debt).—Section 270, first paragraph, of the German Civil Code provides: "*Geld hat der Schuldner im Zweifel auf seine Gefahr und seine Kosten dem Gläubiger an dessen Wohnsitz zu übermitteln."* The English translation is: "In case of doubt the debtor has to send the money at his own risk and expense to the creditor at the latter's residence."—However, the fourth paragraph of Section 270 provides: "*Die Vorschriften über den Leistungsort bleiben unberhürt."* In English: "The provisions relating to the place of performance remain unaffected."

The fourth paragraph of Section 270 signifies that the provisions of Section 269 of the German Civil Code concerning the place of performance of obligations in general, "*Leistungsort",* are to be applied when nothing to the contrary has been agreed. It is not necessary to examine the wording of Section 269 as according to German jurisprudence and nearly unanimous German theory the word "*Leistungsort"* means the place of performance also for money debts, where nothing else has been agreed, and is the place of the residence of the debtor, also when the residence of the creditor is at another place. According to German law, however, this does not signify that the creditor has got what is due to him and that the money debt has been extinguished if the creditor has not actually received the money. If through no fault of the creditor he does not actually receive the money, the debtor has to pay again. However, the debtor is not liable in damages for delay or failure on the part of his bank or the postal service in transferring the money for him to the creditor, since, strange as it may look, the bank and the post are not, according to German conception, considered as the debtor's representatives (agents) in the abovementioned cases.

What is of importance for the Tribunal is that, in spite of the particular technical meaning of the word "*Leistungsort",* even under German law the creditor is not considered as having actually received what is due to him and the debt is therefore not extinguished until the creditor has actually received the money or, in case of postal or bank transfers, until his account has been finally credited with the remittance. (Palandt: *Bürgerliches Gesetzbuch,* 17th edition, p. 221, Erman: *Handkommentar zum Bürgerlichen Gesetzbuch,* 2nd edition, 1958, p. 333).

The word "*Zahlungsort"* in the German text of Annex VII is not necessarily synonymous with the word "*Leistungsort"* used in Sections 269 and 270 of the BGB. The word "*Leistungsort"* is a more general term than the word "*Zahlungsort"* —the latter concerning only money debts—and has in German law a particular and absolutely technical meaning.—Some German jurists are even of the opinion that according to Section 270 of the German Civil Code the place of performance ("*Leistungsort")* of money debts may be at the residence of the debtor; but that this does not affect the "place of payment" or "place of fulfilment" ("*Zahlungsort"* or "*Erfüllungsort"),* which is determined by the residence of the creditor, because no payment has been finally executed and the debt extinguished before the creditor has actually received the money due to him (either in cash or by final statement of credit from the creditor's bank or his post office). (Franz Leonhard: *Schuldort und Erfüllungsort* (1907), and *Allgemeines Schuldrecht des BGB* (1929), p. 232; Arwed Koch: *Die Allgemeinen Geschäftsbedingungen der Banken* (Jena, 1932), p. 241.)

On the other hand, in English and American law the term "place of payment" is not a term of art; it is interpreted in its natural meaning, namely, the place where the creditor is entitled actually to receive payment.

The difference between the German and the English and American conceptions is well illustrated by the following passages from pp. 174 and 175 of the second edition of *The Legal Aspect of Money, with Special Reference to Comparative, Private and Public International Law,* by F. A. Mann:

> 2. It is not unlikely that the meaning to be attached to the term "place of payment" may not be the same in all countries. Although there is no direct English authority on the point, it is suggested that in English law the place of payment is the place where, according to the express or implied terms of the contract, payment ought to be made, not the place where payment is actually made. Moreover, in English law the conception "place of payment" connotes the place at which the creditor is entitled actually to receive the money due to him, not the place from which the money is to be dispatched to him or at which any other step preparatory to payment must be taken.
>
> It it is desired to ascertain the equivalent, in a foreign legal system, of the place of payment in the English sense, it is, accordingly, necessary to ask where, in the eyes of the foreign law, the creditor is entitled to the money contractually due to him. It would be dangerous to stop short at what the foreign law calls the place of payment.
>
> It is the function, not the terminology, that matters. Thus, German law provides that the place of the debtor's residence at the time of the contract usually is the place of performance, but the debtor must transmit the money at his risk and expense to the place where the creditor resides. This, therefore, is the place where, under German law, the creditor is entitled to be paid, and is the equivalent of the English conception of the place of payment. It is irrelevant that German law calls it the place of destination or delivery and describes the place of the debtor's residence at the time of the contract as the place of performance.

The following passage from Nussbaum, "*Money in the Law, National and International",* at pages 147 *et seqq.* is also relevant:

> The Central European Codes therefore distinguish between the place of performance ("*Erfüllungsort")* or more specifically place of payment *("Zahlungsort"),* which in case of doubt is the place of the debtor's domicile, and the "place of destination" ("*Bestimmungsort")* which ordinarily is the place of the creditor's domicile. Normally the debtor has to "pay" at his own domicile with the concomitant obligation of sending the money at his cost and risk to the creditor's domicile. By this artificial device the law favours the debtor with regard to jurisdictional and Conflict-of-Laws requirements, but favours the creditor with regard to the risks of payment. The price paid for this solution, which to a certain extent may be explained historically, is a complete distortion of the place-of-payment conception, nothing being actually "paid" at the place since the real payment is made at the place of "destination". This has led to considerable confusion.
>
> While the Latin legal systems, by contrast with the Central European, have refrained from overemphasizing the place-of-payment concept, they still cling to the traditional rule that the debtor's domicile is in doubtful cases

> the proper place of payment. This adherence to tradition, however, has not prevented the French *Cour de Cassation* from imposing upon the debtor the risk involved in sending money to a creditor abroad.
>
> In more recent times both common law and civil law courts have resorted, in Conflict-of-Laws situations, to the criterion of the place of payment. The results reached are frequently, if not in the majority of cases, unsound. As long as money was actually transported for outside payments, the place of payment carried a certain weight. But under modern banking conditions this is no longer true. Suppose a London debtor has to pay a New Yorker in dollars. If for one reason or another (probably jurisdictional) London was stipulated as the place of payment the debtor will send the creditor a check on London or make a remittance on a London bank unless he simply pays by check on New York.
>
> All [things] considered, the place of payment is in our day no more than a matter of postal or banking facilities. While in some situations it furnishes a helpful criterion, its value has been greatly exaggerated in the practice and doctrine of private international law.

The French text of Annex VII, I, 2 *(a),* reads "*qu'il ait été expressément convenu dans les accords initiaux écrits relatifs à la dette que le paiement serait fait à l'étranger . . . ".*

Since Article 1247 of the French Civil Code lays down that, in the absence of a contrary agreement, a debt is payable at the residence of the debtor, although the *Cour de Cassation* has imposed upon the debtor the risk of sending the money to a creditor abroad (Cass., March 30, 1925, DP 1927 I 168), it might be argued that the term employed in the French text has a technical meaning. Nevertheless, the words of the French text of Annex VII, "*le paiement serait fait à l'étranger",* are equally susceptible of the natural interpretation that the payment should actually be made and received abroad.

The parties have discussed the rules of law in various other countries also concerning the place at which the debtor is obliged to pay his money debt in the absence of any agreement. Since, however, the application of the Swiss Government is necessarily based upon an allegation of the existence of an agreement on this point, these rules are irrelevant except in so far as they may be thought to throw light upon the meaning of the word "payment". It is therefore sufficient to mention that, whereas in Germany, France and Belgium, in the absence of agreement the so-called place of performance of a money debt is fixed as the debtor's residence, in England, Switzerland, the United States of America, the Netherlands, Italy, Greece, Hungary and the Scandinavian countries the place of payment is the place where the creditor resides.

It is noteworthy that the International Law Association at its 47th Conference held at Dubrovnik in 1956 considered a Revised Draft Convention concerning the payment of foreign money liabilities in which the term "place of payment" is used in several Articles. In order to eliminate the ambiguity attaching to this term the draftsmen inserted Article 10, which reads as fol-

lows: "The place of payment referred to in the preceding Articles shall be the place where payment is due."—The French text of this Article reads: "*Le lieu de paiement au sens des articles qui précèdent est le lieu où le paiement est dû.*"—This definition does not, however, cure the ambiguity since there is no definition of "the place where payment is due". This was recognized by the Committee on Monetary Law, since in paragraph 18 of their Report they write:

> The words "place of payment" are ambiguous in that they may contemplate the place where payment ought to be made or the place where payment is in fact made. Art. 10 suggests that the expression should be given the former meaning.
>
> *(Report of the Forty-Seventh Conference of the International Law Association,* Annexes I and II, pp. 287 to 289.)

The Tribunal is of the opinion that the natural meaning of "place of payment", *"Zahlungsort", "que le paiement serait fait à l'étranger",* contained in Annex VII is to be preferred to the technical and artificial meaning advanced by the Respondent. This is even more evident when it is borne in mind that Annex VII does not use the technical term *"Leistungsort"* found in Sections 269 and 270 of the German Civil Code.

The Tribunal is confirmed in this opinion when it examines both the origin of Annex VII to the Debt Agreement as it emerges from the preparatory documents to the Debt Agreement and its Annexes which were published in connection with the Agreement, and the legal position of the creditors as it was at the time of the London Conference. But although the parties to this case have referred to what they claim occurred during the negotiations between representatives of debtors and creditors at the London Conference and during the subsequent special negotiations resulting in Annex VII, the Tribunal does not feel that in interpreting Annex VII it can give any evidential value to such assertions, based as they are on no published record, even should the parties agree as to their accuracy.—At any event, in so far as the so-called material referred to bears on the substance of such negotiations it permits of no compelling conclusion to the effect that the terms *"Zahlungsort",* "place of payment", *"que le paiement serait fait à l'étranger"* were to have the narrow and technical meaning asserted by the Respondent and were thus to lead to an extraordinary and inequitable denial of "specific foreign character" to claims [such] as the one discussed. The whole history of the origin of the London Debt Agreement also contradicts any such narrow interpretation.

By Article XVI (16) of Military Government Law No. 63 (Conversion Law) of June 27, 1948, it was provided that, in principle, Reichsmark claims (which for the purpose of that Law were defined to include claims expressed in Goldmarks) were to be so converted into Deutsche Mark claims that the debtor should be obliged to pay to the creditor one Deutsche Mark for every ten Reichsmarks due. But by Article XV (15) of that Law, as amended by Articles 1 and 2 of Law No. 46 of the Allied High Commission *(Bundesanzeiger* No. 31 of February 14, 1951), it was provided, in effect, that the provision for con-

version should not apply to debts owing to United Nations nationals whenever a creditor refused to agree to payment in accordance with Article XVI (16). Accordingly, at the date of the Conference on German External Debts held in London from February to August 1952, the United Nations creditors arrived at the conference table with their claims to be paid in accordance with the gold clause unimpaired by the provisions of the Conversion Law. The fact that the present case concerns a Swiss claim and not one of a United Nations national is irrelevant since the plan of the London Conference for the settlement of external debts comprised the totality of these debts (except those owed to Eastern Europe), and the principle underlying this plan was that of non-discrimination (see Article 8 of the Debt Agreement).

The Conference set up among other committees four negotiating Committees to deal with the following categories of debts (see paragraph 8 of the Report of the Conference which is reproduced as Appendix B to the Debt Agreement):

Committee A.—*Reich* debts and other debts of public authorities;

Committee B.—Other medium and long-term debts;

Committee C.—Standstill debts;

Committee D.—Commercial and miscellaneous debts.

The recommendations of these Committees, which were appended to the Report of the Conference adopted on August 8, 1952, appear as Annexes I to IV to the Debt Agreement. That part of the Report of the Conference which deals with the gold clause appears in paragraph 30 and reads as follows:

> 30. On the question of the gold clause in general the Tripartite Commission informed the Conference that, as part of the arrangements agreed on in order to make a comprehensive settlement of the German debt problem possible, the Governments of France, the United Kingdom and the Unites States of America had decided that, in so far as the German debt settlement was concerned, gold clauses should not be maintained but might be replaced by some form of exchange guarantee.
>
> With respect to the Young Loan, they of course regarded it as essential that the equality of treatment for the different issues of that Loan provided for under the loan contract should be maintained. The representatives of the European bondholders have expressed their regret at the decision to depart from the contractual right of the bondholders of this international Loan to payment in their own currencies on a gold basis. They have inserted in the "Agreed Recommendations for the Settlement of *Reich* debts and debts of other public authorities" (Appendix 3) the provision there included solely in view of this Governmental decision.
>
> Corresponding provisions had been included in other reports where appropriate.'

These "corresponding provisions" are those contained in paragraphs (1), (2) and (3) of Sub-Annex D to Annex I (dated November 19, 1952), paragraphs

2 and 3 of Article V of Annex II and Articles 6 to 8 of Annex IV, which cover both Foreign Currency Debts with gold clauses and German Currency Debts with gold clauses. With regard to the latter, the principle was accepted that such debts (claims) and mortgages, expressed in Goldmarks or in Reichsmarks with a gold clause, as had a specific foreign character should be converted into Deutsche Mark at the rate of 1 Goldmark, or 1 Reichsmark with a gold clause, = 1 Deutsche Mark. The Annexes continue:

> The definition of the criteria constituting the specific foreign character of the above indebtedness shall be the subject of further negotiation. Both sides reserve their position as to the question in which cases and in which way the above principle can be implemented . . .

The present dispute involves a loan which falls within the provisions of Annex II. Article V of that Annex prescribes the terms of settlement, and paragraph 1 thereof states: "There shall be no reduction in the outstanding principal amount." This statement would have been more accurate if it referred to the outstanding "nominal" amount, since by agreeing to the non-application of provisions in original contracts calling for repayment in terms of gold or currency of equivalent gold value the London Debt Conference in effect resulted in a substantial loss to some foreign creditors.

Article V of Annex II deals with two principal categories of debts. In respect of "*Foreign* Currency Debts with Gold Clauses" it provides that

> . . . debts expressed in gold dollars or gold Swiss francs . . . shall be computed on the basis of 1 currency dollar equalling 1 gold dollar and 1 currency Swiss franc equalling 1 gold Swiss franc . . .

and that in the case of other non-German currencies with gold clauses

> the amounts due shall be payable only in the currency of the country in which the loan was raised . . . the amount due being computed as the equivalent at the rate of exchange when the amount is due for payment of a sum in U.S. dollars "reached" by converting the amount of the obligation expressed in the currency of issue into U.S. dollars at the rate of exchange ruling when the loan was raised . . .

provided, however, that the amount of currency issue so reduced shall not be less than

> if it were computed at the rate of exchange current on 1st August 1952.

In all non-German currency debts with gold clauses, therefore, the principle of repayment in depreciated foreign currencies (including U.S. dollars and Swiss francs) is established regardless of the original gold clauses, and equality of treatment is maintained.

The other category of debts covered by Article V is "*German* Currency Debts with Gold Clauses". Here a similar principle is followed, namely, that such of these debts as have "specific foreign character" shall be settled on the basis of 1 Deutsche Mark (which is the same as 1 currency Deutsche Mark) for each Goldmark or Reichsmark with a gold clause, just as one depreciat-

ed currency dollar and one depreciated currency Swiss franc were made the equivalent, for settlement purposes, of one gold dollar and one gold Swiss franc respectively. But since debts expressed in Goldmarks or Reichsmarks with a gold clause do not *prima facie* possess foreign character, special safeguards had to be introduced to ensure that such German currency debts be genuine external debts. These safeguards were established in paragraph 3 of Article V of Annex II, which provides that German currency debts with gold clauses must have a "specific foreign character" to entitle the creditor to repayment at the rate of 1 Deutsche Mark for each Goldmark or Reichsmark with a gold clause. (The Deutsche Mark, though, is of lesser value than were the Goldmark or Reichsmark.)

The criteria for determining the "specific foreign character" of debts covered by Annexes I, II and IV are set forth in Annex VII, which incorporates the agreement reached on November 21, 1952, after a month of negotiations between the German Delegation for External Debts and a delegation of British, American, Swiss and Netherlands creditor representatives.

The task of the negotiators was not an easy one; its purpose was, as far as possible, not to place foreign creditors of foreign loans expressed in German currency with a gold clause in a more unfavourable position than creditors of foreign loans expressed in non-German currencies with a gold clause, provided, of course, that there was no *mala fide* acquisition of rights. It cannot be assumed that the Signatories of the London Debt Agreement could have intended to single out for discriminatory further loss foreign creditors having claims expressed in German currencies with a gold clause.

In this respect the Tribunal believes the Respondent has been led astray by a wrong interpretation of the German word "*Zahlungsort*" in the German text of Annex VII. Considering only German law, the word "*Zahlungsort*" in the German text may well conjure up in the mind of a German jurist the special technical significance with which German law and custom have endowed the word "*Leistungsort*". As shown above, however, the Tribunal regards that interpretation as too limited and not consistent with the clear purpose of the relevant Annexes to the London Debt Agreement.

In this connection it should also be mentioned that the Governments Signatory to the Debt Agreement made amongst others the following declarations in its Preamble:

> . . .
>
> Considering that, for about twenty years, payments on German external debts have not, in general, conformed to the contractual terms . . . and that the Federal Republic of Germany desires to put an end to this situation;
>
> Considering that . . . the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America were prepared to make important concessions with respect to . . . their claims for post-war economic assistance . . . on condition that a satis-

factory and equitable settlement of Germany's pre-war external debts was achieved;

Considering that such a settlement of German external debts could be achieved only by a single overall plan which would take into account the relative positions of the various creditor interests, the nature of various categories of claims and the general situation of the Federal Republic of Germany;

. . .

The application of the principle of interpreting treaties according to the natural sense of the words is therefore particularly appropriate to this case, where the natural meaning seems to coincide with the intention of the parties as deduced from the circumstances of the case. For all these reasons the Tribunal is of the opinion that the terms "place of payment", "*Zahlungsort*", "*que le paiement serait fait à l'étranger*", should be interpreted as denoting the place where the creditor was entitled actually to receive his money, whether directly from the debtor or by transmission through the post or by any other agency.

There remains to be decided the question whether, in the contract of sale of July 31, 1931, it was "expressly agreed" that the place of payment, as defined above, was situated abroad.

Much has been said on behalf of both Parties as to the effect to be given to the terms "expressly agreed", "*ausdrücklich festgelegt*", "*expressément convenu*", as used in Annex VII. On the one hand it is contended that these words are equivalent to "*expressis verbis*" and that the agreement must therefore state in express words that the place of payment is abroad. On the other hand it is contended that it is sufficient that there should be a written agreement which clearly and unambiguously establishes that the place of payment is situated abroad.

To apply the term "*expressis verbis*" to the English text would do violence to the meaning. The English words are "expressly agreed", not "agreed in express terms" (the equivalent of "*expressis verbis*").

Moreover, there are decisions of the highest German Courts to the effect that the term "*ausdrücklich*" as used in Section 244 of the German Civil Code requires only unambiguous evidence of the intention of both parties.

Thus in the case of *D. Bank & Disk. Ges., Filiale D.* v. S. *Rh. Giro-Zentrale und Prov.-Bank* reported at p. [384] of volume 153 (1937) of the "*Reichsgerichtsentscheidungen in Zivilsachen*", the German Supreme Court held, following earlier decisions of the same Court, that where the plaintiff had opened a credit in foreign currency in favour of the defendant "by way of loan" ("*leihweise*"), that expression implied "effective" repayment in foreign currency. Consequently, the effective repayment in foreign currency had in the opinion of the Court been "expressly stipulated for" ("*ausdrücklich bedungen*") within the meaning of Section 244, para. 1, of the German Civil Code, and it was not necessary for the word "effective" to be used.

In a case decided by the Federal Supreme Court (*Bundesgerichtshof)* on January 25, 1954 (Lindenmaier-Möhring No. 5 to Section 275 of the German Civil Code), the plaintiff bank had obtained from its client, the defendant, a promissory note (*eigener Wechsel)* for the like principal amount in the same effective currency as the amount of the credit granted to the plaintiff bank by a London bank. This procedure was laid down in paragraph 7 (1) *(a)* (i) of the German Credit Agreement of 1939 made between a committee representative of banking, commercial and industrial concerns in Germany, and the Reichsbank and the Deutsche Golddiskontbank on the one hand, and several committees representative of banking institutions in the United States of America, Belgium, England, France, Holland and Switzerland on the other hand. The Court of Appeal had held that, although the German Credit Agreement only affected the relations of banks to each other, yet it should be applied *mutatis mutandis* to the obligation of the defendant towards the plaintiff as there was a specific reference to the Credit Agreement. This reference was a sufficient contractual stipulation that the loan was to be repaid in foreign currency. This being so, the payment in foreign currency had been expressly made a part of the contract.

In its judgment the Federal Supreme Court said:

> According to the jurisprudence of the *Reichsgericht,* which is adopted, repayment of a credit in foreign currency will only be "expressly stipulated for" if the intention of both parties as to an effective payment in foreign currency is unambiguously evident to a special degree. In this connection the word "effective" need not be used (RGZ 158, 383 (385) and note). The Court of Appeal regards the reference to the Credit Agreement in particular as constituting such evidence. That can legally not be contested. The Court of Appeal has stated that the arrangement which is contained in the Credit Agreement, and was binding only on the banks which were parties to it, was also applicable *mutatis mutandis* to the obligation of the defendant, whose attention has specifically been called to the Credit Agreement. Thus, it bases itself decisively upon the fact that the credit was granted, according to the written confirmation, "within the scope of the Credit Agreement" and therefore considers that the payment in £-currency was expressly stipulated for. This conclusion is logically possible.

The English case of *Charlton* v. *Lings* (1868) L.R.C.P. 374 deals with the word "expressly", the Court stating:

> The difficulty, if any, is created by the use of the word *"expressly".* But that word does not necessarily mean "expressly excluded by words" . . . The word "expressly" often means no more than plainly, clearly, or the like, as will appear on reference to any English dictionary.

The words "expressly agreed", "*ausdrücklich festgelegt",* and "*expressément convenu"* are words found in an international multilateral agreement. As pointed out earlier, the usual practice in interpreting words and phrases in a treaty is to give them a reasonable, as distinguished from a restricted or technical, meaning.

In this connection, one may refer to Hackworth's *Digest of International Law* (Washington 1927) on page 223 of Volume V, where it is said:

> . . . courts have usually held that where treaties are open to two constructions, one restricting the rights which may be claimed under it and the other enlarging those rights, the more liberal interpretation is to be preferred, bearing in mind the purpose of the treaty and the fact that diplomatic relations between nations require the utmost good faith.

"Reasonable" as distinguished from "restricted or technical" meanings of the English words "expressly agreed" and their French equivalent can be found in dictionary definitions. Among other definitions, the *Oxford English Dictionary* (Oxford 1933) defines "express" as "definite, unmistakable in import" and the word "expressly" as "in direct or plain terms; clearly, explicitly, definitely, distinctly, positively". Bouvier's *Law Dictionary* (West Publishing Co., 1914) defines "express" as "stated or declared, as opposed to implied. That which is made known and not left to implication". *Larousse Universel* (Paris, 1948) defines "*expressément*" both as "*en termes exprès*" and "*d'une façon nette, précise, claire*".

The Tribunal is of the opinion that the language of Annex VII becomes unclear or obscure only when there is imported into the meaning of the word "*Zahlungsort*" in the German text the unique and restricted definition given under German law to the word "*Leistungsort*". There was no "express" or even implied agreement in the contract of July 31, 1931, as to "*Zahlungsort*" in the strictly German sense of the word "*Leistungsort*", but there was "express" agreement defined as "clear", "definite", "unmistakable in import" as to the place where the creditor was entitled actually to receive the money due to him.

The Tribunal finds that the terms "expressly agreed", "*ausdrücklich festgelegt*" and "*expressément convenu*" as used in Annex VII mean agreed "clearly" or "definitely" or "distinctly" or "unmistakable in import", and that to fulfil the requirement of Annex VII in this respect it was not necessary for a place of payment to have been in specific terms geographically located in the contract of July 31, 1931. It is sufficient that the place where the creditor was entitled to receive the money due to him was clearly and unmistakably set forth in the text of the contract as being situated abroad.

The Aargauische Hypothekenbank is incorporated under Swiss law, having its head office in Brugg, Switzerland, and with branch offices elsewhere in Switzerland. Neither at the date of the contract nor thereafter has the bank had a branch office in Germany. Whenever the Aargauische Hypothekenbank is mentioned in the contract by name (twice), the name is coupled with the phrase "with its head office at Brugg" ("*mit Hauptsitz in Brugg*"); elsewhere the bank is called the vendor. Article 5 of the contract provides for payment of principal and interest to be made to the vendor *(an die Verkäuferin)* The Respondent has asserted that this calls for payment *to* a person but not *at* an agreed place, and that the words "with its head office at Brugg" ("*mit Hauptsitz in Brugg*") are significant only in so far as they state "the address to which the

debtor had to transmit the amounts due 'free of charge' ", that is, that Article 5 establishes "to whom, but not where the debtor has to discharge his obligation 'free of charge' ".

In the light of its interpretation of Annex VII the Tribunal does not accept this contention. If the debtors are obliged to make payments *to* the *"Aargauische Hypothekenbank mit Hauptsitz in Brugg"* they are no less obliged to make those payments *in* Switzerland, since that is the only country where the Aargauische Hypothekenbank is located. In this case the "to whom" and "where" are clearly connected. If it was "expressly agreed" under the 1931 contract "to whom" the payments due were to be made—and that cannot be disputed—it was no less "expressly agreed" that the "place of payment", namely, the place at which the creditor was entitled actually to receive payment, was in Switzerland. Moreover, the German debtor could not, without the consent of the Swiss creditor, have discharged his liability by making a payment into an account of the creditor in a German bank even assuming the creditor had such an account, since this would leave the creditor with nothing but a foreign claim (Enneccerus, *Recht der Schuldverhältnisse* 1954, § 61, II; v. Tuhr-Siegwart, *Allgemeiner Teil des Schweizerischen OR,* Vol. II, p. 439).

Finally, it should be noted that according to a formal statement by the creditor the Reichsmark interest payments made by the debtors from 1931 to 1944 were transferred with the authorization of the German foreign exchange authorities and paid to the creditor in Brugg in Swiss francs.

For these reasons the Arbitral Tribunal, by five votes to four, declares: that, within the meaning of Annex VII, I, 2 *(a),* to the Agreement on German External Debts of February 27, 1953, it was expressly agreed in the contract of July 31, 1931, between the Aargauische Hypothekenbank AG. and Herren Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the said contract was situated abroad.