

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Arbitral Commission on Property, Rights and Interests in Germany established by the
Convention on the Settlement of Matters Arising out of the War and the Occupation,
signed at Bonn on 26 May 1952

**Case of the Government of the Kingdom of Greece (on Behalf of Karavias) v.
Federal Republic of Germany, decision of the Second Chamber of 28 June 1960**

Commission d'arbitrage sur les biens, les droits et les intérêts en Allemagne établie en vertu de la
Convention sur le règlement de questions issues de la guerre et de l'occupation,
signée à Bonn le 26 mai 1952

**Affaire concernant le Gouvernement du Royaume de Grèce (au nom de Karavias) c. la
République fédérale d'Allemagne, décision de la Deuxième Chambre du 28 juin 1960**

28 June 1960

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Pursuant to Article 7, paragraph 4, Chapter Five, the present case should be remanded to the *Bundesamt* which has to fix the amount of the compensation due in accordance with the present instructions.

For these reasons, the Arbitral Commission decides:

(1) The objections of inadmissibility raised by the defendant against the claim of the claimant, the firm of Apostolidis, are purpose-less, and the objections of defect in form and inadmissibility raised by the defendant against the claim of the Greek Government are rejected as not well-founded.

(2) The Federal Republic of Germany is ordered to pay to the complainant Government, in the interest of the firm of Apostolidis, Volos, claimant, compensation for part of the chrome ore the restitution of which became impossible after its identification in Germany, *i.e.*, for 1,259 tons. All other submissions for compensation of the complainant are declared unfounded and are dismissed.

(3) The present case is remanded to the *Bundesamt* for the determination of the sum of compensation corresponding to the replacement value of 1,259 tons of chrome ore, pursuant to the instructions contained in the present decision and subject to the right of each party to appeal to the Arbitral Commission.

(4) The parties shall bear half of the court costs each.

**Case of the Government of the Kingdom of Greece (on behalf of
Karavias) v. Federal Republic of Germany, decision of the
Second Chamber of 28 June 1960***

**Affaire concernant le Gouvernement du Royaume de Grèce (au nom
de Karavias) c. la République fédérale d'Allemagne, décision
de la Deuxième Chambre du 28 juin 1960****

Compensation claim—Convention on Settlement of Matters Arising out of the War and the Occupation—request for revision of judgment of the German Higher Prize Court—request for compensation for absence of restitution of a seized steamship—only claimants entitled to restitution can be compensated.

State sovereignty—sovereignty of State over its merchant fleet on the open sea—open sea cannot be assimilated to occupied territory.

International law of naval warfare—right of visit of neutral States vessels by belligerent States—seizure of the steamship on the open sea considered to be lawful.

* Reproduced from *International Law Reports* 34 (1967), p. 267.

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Requête en dédommagement—Convention sur le règlement des questions résultant de la guerre et de l'occupation—demande en révision d'un jugement du plus haut Tribunal des prises allemand—demande de dédommagement pour l'absence de restitution d'un vapeur saisi—seuls les plaignants ayant droit à restitution peuvent être dédommagés.

Souveraineté étatique—souveraineté de l'État sur sa flotte marchande en haute mer—la haute mer ne peut être assimilée à un territoire occupé.

Droit international de la guerre navale—droit des États belligérants d'inspecter les navires d'États neutres—la saisie d'un vapeur en haute mer est considérée comme légale.

(1) On August 22, 1957, the complainant Government (respectively the Greek ship-owner Emmanuel Karavias) instituted before the Arbitral Commission an action against the defendant for revision of the decision of the *Bundesamt für äussere Restitutionen* [Federal Office for External Restitution] (called *Bundesamt*) of July 27, 1957, served upon it on July 29, 1957, concerning payment of compensation for restitution, which failed, of the steamship *S/S Marietta Nomikos*, and for revision of the judgment of the German Higher Prize Court, Berlin, of April 7, 1941 (file OPH/E/5/40).

A. *The facts*

(2) The facts underlying this claim are the following:

The Greek steamship *S/S Marietta Nomikos*, which was going from Stockholm to Alexandria in Egypt with a load of timber, was held up in the night of October 25/26, 1939, on the open sea, in the Baltic, by the German navy in the exercise of the right of visit recognised by the international law of war, and was conducted to the German port of Pillau on the Baltic Sea, where it was sequestered and placed under German command on October 29, 1939.

(3) By judgment of February 16, 1940, the Hamburg Prize Court decreed the liberation of the steamship on the ground that its cargo did not constitute war contraband and that its place of destination was not in enemy country, Greece being at that time still a neutral country and Egypt, although it had broken off its diplomatic relations with Germany, not being at war with this country.

An appeal having been lodged against this decision, the steamship was not immediately liberated and the Higher Prize Court at Berlin, by judgment of April 7, 1941, rendered after the commencement of the war between Greece and Germany, finally decreed the capture of the steamship and its cargo for the benefit of the German *Reich* (file OPH/E/5/40), so that the *S/S Marietta Nomikos* remained in the possession of Germany; it sailed under the German flag, henceforth bore the name of *Drau*, and was sold by the *Reich* to Ludwig

Müller, probably of the shipping-firm of Leth & Co. at Hamburg, on January 31, 1945.

After the capitulation of the German army and navy in 1945, the British Occupation Power sequestered the steamship which, by order of the Naval Control Service, Flensburg, put out to sea on October 11, 1948, and was sunk, with a load of ammunition, in the North Sea; it is no longer possible today to determine the place and date of this action.

(4) In its request of November 4, 1955, to the *Bundesamt*, the complainant Government declared to make the request addressed to this Office on November 1, 1955, by . . . [counsel] Dr. Constant, Hamburg, on behalf of the ship-owner Emmanuel Karavias, its own; relying on Articles 3 and 4 of Chapter Five of the Settlement Convention, it claimed restitution and, possibly, compensation for frustrated restitution of the steamship in question.

By decision of July 27, 1957, the *Bundesamt* rejected the application which had thus been submitted to it by the Hellenic Government and on the following July 29 only served it upon the Royal Greek Embassy, but not on the ship-owner Karavias, who was not considered a party to the proceedings by this Office.

(5) On May 5, 1956, the agent of the ship-owner Karavias, *Rechtsanwalt* Dr. Constant, on his part instituted an action against the Federal Republic before the *Landgericht* [District Court], Bonn, First Civil Chamber (file No. 10 [66/56]), applying for restitution of the steamship *S/S Marietta Nomikos*, possibly for payment of compensation for its value, which was fixed at 3,000,000 DM.

Reproaching the *Landgericht* at Bonn for not having decided on this claim within one year after filing of the application, . . . Dr. Constant, on behalf of the ship-owner Karavias, also brought his claim before the Commission by letter of June 3, 1957. This application for revision was taken up by the Hellenic Government and incorporated in its complaint of August 22, 1957, before the Commission.

B. *The procedure*

(6) On the basis of these facts, the Commission has before it two actions which, although relating to the same object, namely the steamship *S/S Marietta Nomikos*, and the same damage suffered by the ship-owner Karavias, must nevertheless be clearly distinguished, because they are based on different reasons of law and governed by procedures peculiar to each of them.

(a) The action instituted by the complainant Government aims, first of all, at obtaining the revision of the decision of the *Bundesamt* of July 27, 1957, and at payment of a compensation equal to the replacement value of the steamship which was seized by the German forces and not restituted, plus legal interest, on the basis of Articles 3 and 4 of Chapter Five of the Settlement Convention (Application of August 22, 1957, page 2).

(b) In its brief of complaint, the complainant Government furthermore requested the revision of the judgment of the German Higher Prize Court of

April 7, 1941, in application of Articles 5 and 12, paragraph 3, of Chapter Ten of the Settlement Convention.

In the application which he addressed to the Commission on June 3, 1957, the ship-owner Karavias, too, made submissions to this effect, the wording of which is as follows:

(a) that the judgment of the Higher Prize Court (OPH/E/5/40) of April 7, 1941, ordering confiscation of the steamship in question which belongs to the complainant, be annulled;

(b) that the defendant be ordered to pay to the complainant by virtue of Article 3 in conjunction with Article 4, paragraph 1 and paragraph 2, second sentence, of Chapter Five of the Settlement Convention, a compensation corresponding to the replacement value.

(7) In respect of this second action, the Commission states that the Hellenic Government, in its brief of complaint of August 22, 1957, first demanded that the two actions be joined; however, in the latter's Note of November 20, 1958, it specified that it referred to the pleading of Mr. Emmanuel Karavias only inasmuch as it concerned and tended to support, on the law and on the facts, the application of this Government to the *Bundesamt für äussere Restitutionen* and that part of the appeal of August 22, 1957, to the Arbitral Commission which deals with the application in question.

As regards the application, filed by virtue of Article 5 of Chapter Ten of the Settlement Convention, for revision of the judgment of April 7, 1941, of the German Higher Prize Court, this application was filed by Mr. Emmanuel Karavias personally with the Court of first instance at Bonn and afterwards transferred to the Commission by virtue of Article 12, paragraph 3, of Chapter Ten of the Convention. In this action, the Hellenic Government is not a party to the proceedings, nor does it intend to intervene. The complainant submits that it leaves it to the discretion of the Court to decide whether it will join the two actions.

In its Answer of September 26, 1958, the defendant opposed the joining of the two actions, without raising a preliminary objection at the beginning of the proceedings on the basis of Rule 58 of the Rules of Procedure, and in its Rejoinder of January 14, 1959, interprets the above-quoted declaration of the complainant Government of November 20, 1958, to mean that the application for joining the actions has been abandoned.

The Commission is also of opinion that, in view of the clearness of this latter declaration, the Hellenic Government can no longer be considered a party to the action concerning the revision or annulment of the judgment of April 7, 1941, of the German Higher Prize Court and consequently decides that this action should be decided separately.

(8) It is appropriate to specify also the legal position, from the point of view of procedure, of the Greek ship-owner Karavias in the present action,

which thus only concerns compensation for restitution which has failed on the basis of Articles 3 and 4 of Chapter Five of the Settlement Convention.

The Commission states, as did the defendant (Answer of September 26, 1959), that the question of the qualification of the shipowner Karavias to act by virtue of Articles 3 and 4 of Chapter Five of the Settlement Convention has no practical significance in the pending case since his interests are wholly safeguarded by the intervention of the Hellenic Government, the *locus standi* of which before the Commission has not been contested.

Since the complainant Government has filed its application for revision within thirty days after service of the decision of the *Bundesamt* pursuant to Article 7, paragraph 3, of Chapter Five of the Settlement Convention, the competence of the Arbitral Commission to deal with it is unquestionable. The whole part of the appeal of the ship-owner Karavias which relates to the application for compensation for restitution which failed is absorbed by the application of the Hellenic Government of August 22, 1957, and, under these circumstances, the Commission must hold that the defendant's objections with regard to the capacity to act of the ship-owner Karavias are devoid of any practical significance.

(9) On the merits, the defendant requests that the Commission be pleased to reject the application as inadmissible, alternatively as unfounded.

(10) By declaration of January 6 and 8, 1960, the parties to the proceedings have agreed to abstain from oral proceedings, and the Commission decides that they be dispensed with and that the case is now ready to be judged.

C. *The law*

(11) The action of the complainant Government for compensation for the frustrated restitution of the steamship *S/S Marietta Nomikos* is based on Articles 3 and 4 of Chapter Five of the Settlement Convention; it does not fulfil the conditions for the application of these articles as defined at length by the Commission in its two judgments of November 14, 1959 (Case No. 34 between the Italian Republic and the Federal Republic of Germany) and of May 11, 1960 (Case No. 215 between the Hellenic Government and the Federal Republic of Germany): *cf. Decisions [of the Arbitral Commission]*, vol. III, Nos. 70 and 78.

Article 4, paragraph 1, of Chapter Five of the Settlement Convention obliges the Federal Republic to compensate claimants who would otherwise be entitled to restitution under Articles 1 and 3 of this Chapter only in the case of certain property which should have been restituted but the restitution of which was prevented after its identification in Germany but before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, because it had been utilised by the German economy with the authorisation of the Occupation Powers or because it has been consumed or has disappeared owing to destruction, larceny or any other act of disposal.

The compensation provided by this provision does not fall within the concept of reparation for loss or damage resulting directly or indirectly from the war, the right of any of the United Nations to advance during negotiation for a peace settlement between the former belligerents any claim for compensation for its own or its nationals' property, rights or interests having been formally reserved by Article 1, paragraph 6, of Chapter Ten and by Article 1 of Chapter Six of the Settlement Convention and having already been dealt with in several special agreements the conclusion of which is expressly reserved by this Convention.

(12) In the present case, none of the conditions which would oblige the Federal Republic to compensate the claimant has been fulfilled.

Under the terms of Article 3 of Chapter Five of the Settlement Convention, it must be a case of property of which a person, or his predecessor in title, has been dispossessed by larceny or by duress (with or without violence) by the forces or authorities of Germany or their individual members (whether or not pursuant to orders) during the occupation of a territory.

The seizure of the steamship *S/S Marietta Nomikos* does not meet these requirements. The Commission cannot assimilate this seizure to a dispossession in a territory occupied by the German forces during the war. Although the authors of international law often describe the trading vessel on the open sea as "floating territory" of the State under whose flag it sails, this is merely a metaphorical expression to signify that, under these circumstances, the vessel remains under the sovereignty of that State. But that it cannot really be a part of its territory has been luminously demonstrated by Verdross when stating that this "floating territory" cannot be surrounded by any territorial waters and that it cannot have the effect, either in respect of height or of depth, of extending the sovereignty of such State over the air-space above the vessel or over the portion of the sea underneath it (*cf. Verdross, Volkerrecht*, 4th ed., 1959, p. 217 *et seq.*). Besides, international law provides several exceptions to the sovereignty of a State over its merchant fleet on the open sea; one of them concerns the exercise of the right of visit in time of war which permits belligerent States to hold up neutral vessels on the open sea, to dictate to them a route to be followed, to conduct them to their ports to be searched there for the purpose of ascertaining whether they have any war contraband on board and, if necessary, to subject them to a prize procedure.

In holding up the *S/S Marietta Nomikos* on the open sea on October 25/26, 1939, at a time when Greece was still a neutral State, in conducting this steamship to a German port and in declaring it to be a lawful prize after that State entered the war, the German authorities followed the rules of international law concerning naval warfare; these measures were, moreover, taken on the open sea with regard to the orders of stopping and of prescription of a route for the purpose of visit and search, and then in German territorial waters with regard to the capture effected at Pillau and then the confiscation of the steamship by decision of the German Higher Prize Court. The fundamental condition

for the damage resulting from these measures to be repaired in application of Article 4 of Chapter Five is lacking, for there is no question of property removed in occupied territories during the war and brought to Germany; a confiscation ordered by a prize court having its seat in Germany cannot be assimilated to a removal of property by German forces occupying territories considered hostile during the war.

Contrary to what is stated in the decision of July 27, 1957, of the *Bundesamt*, the complainant, by the production of the correspondence exchanged between the Royal Greek Embassy and the British High Commission, on September 3, 1954, September 8, 1954 and March 4, 1955, has succeeded in proving that he had already addressed an application for restitution and payment of compensation to the appropriate authorities of one of the Three Powers, *in specie* Great Britain, but this application could not lead to a favourable result for the ship-owner because, at that time, the steamship had already been destroyed for nine years without having been the subject of a decision of delivery to the Hellenic Government. This destruction occurred almost ten years before the entry into force of the Settlement Convention, at a time when the execution of restitutions had not even begun. The complainant's affirmation that the steamship had been delivered to the British authorities for the purpose of restitution to Greece or one of its nationals is not only wholly unsupported by the records but also very unlikely.

Thus the Commission cannot admit that the conditions of Article 4, paragraph 1, of Chapter Five of the Settlement Convention have been fulfilled, considering that there has been no removal of property in Greek territories occupied by the German forces and that the destruction of the *S/S Marietta Nomikos*, without restitution proceedings ever having even started, took place under circumstances which do not permit to grant the complainant the compensation provided in Chapter Five of the Settlement Convention in cases of restitution which has failed.

For these reasons, the Arbitral Commission decides:

- (1) The dispensation with oral proceedings requested by the parties is allowed;
- (2) The application is declared unfounded and its submissions are rejected;
- (3) The court fee shall be borne by the complainant Government.