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 Holländisches Frachtenkontor v. Federal Republic of Germany (appeal), decision of 15 June 1960 and dissenting opinion

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 Holländisches Frachtenkontor c. la République fédérale d'Allemagne (appel), décision du 15 juin 1960 et opinion dissidente

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Affaire concernant le Holländisches Frachtenkontor c. la République fédérale d'Allemagne (appel), décision du 15 juin 1960 et opinion dissidente**

Rules of Procedure of the Commission—admissibility of claim—claim barred by the time-limit—Commission's power to admit an appeal after the time-limit fixed by a convention—gross negligence of the complainant.

Interpretation of a convention—need to respect the intention of the Signatory States—strict application of a provision limited by the purpose of a convention.

Non liquet—remedy to an error of procedure—admissibility of exception when rules lead to injustice—absence of relevant provision to interpret a convention—obligation to use the general principles of international law and of justice and equity.

Règles de procédure de la Commission—admissibilité de la requête—requête exclue par le délai de prescription—compétence de la Commission d'admettre un appel après la période de prescription fixée par une convention—négligence grave du requérant.

Interprétation d'une convention—nécessité de respecter l'intention des États signataires—application stricte d'une disposition limitée par le but de la Convention.

Non Liquet—réparation d'une erreur de procédure—admissibilité d'une exception quand l'application des règles débouche sur une injustice—absence de disposition pertinente pour interpréter une convention—obligation de se servir des principes généraux du droit international et des principes de justice et d'équité.

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In the present case, the complainant claims the benefit of the provisions of Article 6 of Chapter Ten of the Settlement Convention in relation to the assessment of property levy. The complainant's objection to the assessment of the tax was rejected by the *Finanzamt* [Treasury Office], Duisburg-Nord, by decision dated November 14, 1956. The complainant's appeal from that decision was rejected by the *Finanzgericht* [Treasury Court], Düsseldorf, on

* Reproduced from *International Law Reports* 29 (1966), p. 292.

** Reproduit de *International Law Reports* 29 (1966), p. 292.

June 11, 1958. The judgment of the *Finanzgericht* was served upon the complainant on July 9, 1958.

In a pleading of August 4, 1958, the complainant appealed from that judgment to the Commission. This pleading was sent to the *Finanzgericht* where it was received on August 5, 1958, that is to say, within the statutory time-limit of 30 days. From there it was forwarded to the Registry of the Commission but was not received there until September 19, 1958.

In its answer, the defendant raised the objection of inadmissibility on the ground that the appeal had been lodged too late.

The Third Chamber of the Commission considered separately the question of admissibility and, by Judgment of June 23, 1959, declared the appeal to be inadmissible *(Decisions,* Vol. II, No. 58).

This Judgment having been served upon the complainant on June 26, 1959, the latter filed an application for leave to appeal on July 16, 1959.

By Order of October 30, 1959, the Commission in plenary session granted this application for leave to appeal.

On November 7, 1959, the complainant filed its appeal from the Judgment of the Third Chamber.

The parties having exchanged further pleadings, the oral hearing took place on March 18, 1960, in the course of which the plenary session heard the parties.

The provisions which confer a right of appeal to the Commission from decisions of the German finance courts of first instance under Article 6 of Chapter Ten of the Settlement Convention are to be found in Article 12 of the said Chapter. The relevant provisions of the last-mentioned Article read as follows:

> The following decisions may be appealed to the Arbitral Commission . . . upon application to the Commission by the party concerned within thirty days after the service thereof.
>
> Gegen die nachstehenden Entscheidungen kann auf Antrag der beteiligten Partei innerhalb von dreiBig Tagen nach Zustellung Berufung an die . . . Schiedskommission . . . eingelegt werden.
>
> Les décisions suivantes sont susceptibles d'appel devant la Commission Arbitrale . . . sur demande adressée dans les trente jours de la notification de la décision.

A strict interpretation of these provisions, above all of those of the German text, leads to the conclusion that it is at the Registry of the Commission that the appeal must be received within the specified time. This point of view corresponds also to the provisions of Rule 23 (*a)* of the Rules of Procedure of the Commission, which runs as follows:

> When a pleading or other document is to be filed by a specified date or within a specified time, the date of the receipt of the pleading in the Registry will be regarded as the effective date.

A strict application of these provisions would lead to the conclusion that the complainant's appeal from the judgment of the *Finanzgericht* was filed too late.

The Settlement Convention does not contain any provisions as to the possibility in certain cases of admitting an appeal submitted after the expiry of the time-limit fixed by the Convention. Thus the question arises whether the Commission has the power to do so.

Paragraph *(d)* of Rule 23 of the Rules of Procedure of the Commission which entered into force on April 1, 1957, reads as follows:

> If, after giving the other party an opportunity of stating his views, the Commission is satisfied that a failure to comply with a time-limit is not attributable to the default or negligence of the party himself, it may decide that any step taken after the expiry of the time-limit in question shall be valid.

At its plenary session of November 30, 1957, the Commission agreed to replace this paragraph (*d*) by the following new paragraph (*d*):

> The Commission may declare as valid any step taken after the expiration of a time-limit in respect of which the President could have granted an extension under the preceding paragraph.

It should be stated:

that although the terms of the old paragraph seem to authorize the Commission to declare valid, in certain circumstances, any step taken after the expiry of a time-limit, even of one fixed by the Settlement Convention, this was not the intention of the Commission during the drafting of the Rules of Procedure;

that the replacement of the old paragraph by the new one was made partly to avoid the possibility of such an interpretation; and

that the Commission always intended to reserve the examination of the problem in question to its own decision pursuant to Rule 77 of the Rules of Procedure which provides:

> Any points of procedure not covered by these Rules or by the Charter shall be decided by the Commission when occasion arises.

The problem of the authority of the Commission in respect of the point in question must depend on the intention of the Signatory States as disclosed by the provisions of the Charter of the Commission.

Paragraph 2 of Article 14 of the Charter authorizes the Commission, in general terms, to determine rules of procedure subject only to the qualification that they shall be consistent with the provisions of the Charter. As paragraph 1 of Article 6 of the Charter refers to Article 12 of Chapter Ten of the Settlement Convention, the rules of procedure must also be consistent with the provisions of the last-mentioned article. The question is thus to determine whether the

Signatory States really intended that the time-limit of 30 days provided in the said Article 12 shall apply in all possible circumstances, no matter what injustice might result therefrom. In the opinion of the Commission, it is unlikely that, in a convention essentially designed to remedy injustices, the Signatory States should have intended to exclude the possibility of remedying an error of procedure which might be considered to be excusable and which would lead to injustice. The opinion appears to be confirmed by the provisions of Article 8 of the Charter of the Commission which runs as follows:

> In arriving at its decisions, the Commission shall apply the provisions of the Convention and of legislation made applicable thereby.
>
> Where necessary to supplement or interpret such provisions, or in the absence of any relevant provisions, it shall apply the general principles of international law and of justice and equity.

The terms of the second sentence of this article are wider than would be necessary if it had been intended that they should apply only to cases where it would be necessary to avoid a *non liquet,* and the Commission is of opinion that in reliance upon these provisions it can, in certain cases, admit an appeal submitted to the Registry of the Commission after the expiry of the time-limit fixed by the Settlement Convention.

The Commission must thus examine whether, in the case at issue, the circumstances are such as to induce it to apply this principle.

The judgment of the *Finanzgericht* contains the following instructions as to the various means of appeal against the judgment :

> Against this judgment an appeal *(Rechtsbeschwerde)* is admissible when . . .
>
> The "*Rechtsbeschwerde*" shall be lodged *(ist einzulegen)* with the Registry of the above-mentioned *Finanzgericht* within the month following the service of the judgment . . .
>
> Against this judgment, appeal *(Berufung)* is also possible to the Arbitral Commission on Property, Rights and Interests in Germany at Koblenz, Schloss.
>
> The appeal shall be lodged *(ist einzulegen)* within 30 days after the service of the judgment.
>
> The instruction on this special means of appeal *(das besondere Rechtsmittel)* is based on Article 12 of Chapter Ten of the Settlement Convention.

It is true that the complainant, if it had examined these instructions and the above-mentioned Article 12 with the greatest attention, ought to have understood that it had to lodge its notice of appeal with the Registry of the Commission within the specified time, but the error which it committed by sending it to the *Finanzgericht,* Düsseldorf, is explicable and may be considered excusable.

Pursuant to § 249 of the German *Reich* Tax Code *(Reichsabgabenordnung)* of May 22, 1931, appeals in tax proceedings may always be lodged with the authority which rendered the contested decision. This principle has been adhered

to in the present case, which concerns a tax matter, by the complainant which obviously thought that it applied also to the appeal to the Commission. Its error is due not only to the fact that it followed the routine way without examining the above-mentioned instructions with the necessary care, but also to the fact that these instructions do not make it absolutely clear that the notice of appeal must be lodged with the Registry of the Commission. That other persons more qualified in this matter than the complainant can fall into the same error appears from a letter of November 27, 1958, invoked by the complainant, in which the President of the Second Chamber of the *Finanzgericht* Karlsruhe—in relation to another case submitted to the Commission (No. 305)—came to the conclusion that appeals from decisions of German finance courts to the Commission are regular if lodged with the finance court in due time.

Furthermore, the complainant rightly referred to German text books and judicial decisions on tax procedure indicating the general flexibility of all procedure in tax matters. In this connection, the Commission agrees with the following passages from Hübschmann-Hepp-Spitaler, *Kommentar zur Reichsabgabenordnung und den Nebengesetzen,* 1st-3rd editions, § 86, note 2:

> . . . the character of taxation procedure calls for a more generous and less formal application . . . Authorities should not judge too severely but should enable the appellant to pursue his rights, unless more important principles or legal provisions oppose it. Especially when taxes are high, we consider this to be in accordance with the principle of the rule of law.

Finally, it should be pointed out that the notice of appeal reached the *Finanzgericht,* Düsseldorf—an authority of the defendant—so early that, if the measures required by the circumstances had been taken, it could have been forwarded by the *Finanzgericht* to the Commission early enough to be received before the expiry of the time-limit.

For the foregoing reasons, the Commission holds that the appeal from the judgment of the *Finanzgericht* should be admitted.

For these reasons, the Arbitral Commission decides: (1) the complainant's appeal from the judgment of the Third Chamber of June 23, 1959, is substantiated; (2) the judgment of the Third Chamber is set aside; (3) the appeal from the judgment of the *Finanzgericht,* Düsseldorf, dated June 11, 1958, is admissible; (4) the case is remanded to the Third Chamber for continuation of the proceedings and for decision on the merits and on the costs.

Dissenting opinion of Messrs. Euler, Arndt and Phenix

The facts are simple and not disputed. In our opinion the controlling fact is that the applicant failed to comply with the provisions of Article 12 of Chapter Ten of the Bonn Settlement Convention. His appeal from a decision "of the finance courts of first instance under Article 6" was not made "upon application to the Commission . . . within thirty days after the service thereof".

The thirty-day limit expired on August 8, 1958; the appeal application was received by the Commission on September 19, 1958.

The Commission has no power, either express or implied, under either the Convention or its Charter to consider the reasons for failure to observe time-limits prescribed by the Convention; it can concern itself only with the question whether the relevant time-limit has been observed; if a specific time-limit has not been observed, the Commission has no authority to extend it and thus clothe itself with jurisdiction over appeals excluded by the terms of the Convention. The Signatory Powers conferred no discretion on the Commission in such matters. The time-limit for all appeals to the Commission, whether under Article 12 of Chapter Ten, as in the instant case, or under Article 7 of Chapter Five, is fixed by the Convention at thirty days. Even if the strict application of the thirty-day limit could, in some cases, result in undeserved hardship—a consideration absent in the instant case since any hardship to the complainant results from its seemingly complete ignorance of the provisions of the Convention and of the Commission's Rules of Procedure—the Convention does not recognize hardship as a justification for the Commission to indulge in what is sometimes called judicial legislation.

Admission of the applicant's appeal in the present case is open to the further objection that it violates the provisions of the Commission's Charter. Article 8 of the Charter requires the Commission to "apply the provisions of the Convention" in arriving at its decisions. It reads:

> In arriving at its decisions, the Commission shall apply the provisions of the Convention and of legislation made applicable thereby. Where necessary to supplement or interpret such provisions, or in the absence of any relevant provisions, it shall apply the general principles of international law and of justice and equity.

The Convention permits appeals against decisions such as that involved in the present case only

> upon application to the Commission by the party concerned within thirty days after the service thereof
>
> auf Antrag der beteiligten Partei innerhalb von dreissig Tagen nach der Zustellung . . . an die . . . Schiedskommission
>
> sur demande adressée à la Commission par la partie intéressée dans les trente jours de la notification de la decision.

This provision is clear, complete and unambiguous. There is no "absence of any relevant provisions" regarding the time-limit for appeal, nor is the express thirty-day provision one which it is in any way "necessary to supplement or interpret". Even assuming that applicable "general principles of international law and of justice and equity" existed, the conditions precedent for their application are not present.

Since, however, the majority opinion construes the Convention to mean that it does not exclude the possibility that in certain circumstances an appeal

would be admissible after the expiration of the time-limit prescribed in the Convention and that an express authorization therefor derives from the second sentence of Article 8 of the Chapter, it is not inappropriate to examine this doctrine with considerable care. It can be accepted in the present case only by disregarding completely the first sentence of Article 8 of the Charter of the Commission and the thirty-day time-limit stipulated in Article 12 of Chapter Ten of the Settlement Convention and thereby creating that necessity "to supplement or interpret" the provisions of the Convention and that "absence of any relevant provisions" which alone empower the Commission to "apply the general principles of international law and of justice and equity". At this point it is necessary to consider whether there are any "general principles of international law" or "of justice and equity" which, disregarding the significance of the first sentence of Article 8 of the Charter, would justify the Commission in admitting the complainant's appeal.

1. *International Law*

There are very few precedents to be found in the international field and those that exist do not support the majority doctrine. Witenberg, *L'organisation judiciaire, la procédure et la sentence international* (1937), states on pp. 128 and 129 that an international judge has the power to grant restoration of the *status quo ante* in exceptional cases and adds that this is a standard practice. However, according to his previously expressed opinion (p. 124) such power cannot be exercised in respect of time-limits fixed by the agreement of the parties concerned, for there he says: "*la tendance sera très nette à sanctionner de l'irrecevabilité la méconnaissance des règles procédurales ayant leur source dans l'accord des parties, . . .".* As a matter of fact no decisions of an international tribunal can be found which deviate from this tendency (see Maarten Bos, *Les conditions du procès en droit international public* (1957), pp. 243 *et seq.,* 261 to 263; Hudson, *International Tribunals,* pp. 85, 86).

Simpson and Hazel Fox, *International Arbitration* (1959), p. 123, reads as follows: "Treaties have imposed express time-limits barring claims not made or presented within a certain time . . . "and in Note 62 they cite as an example Chapter Five of the Settlement Convention which "sets up an elaborate system of limitations".

The extensive judicial holdings of the Mixed Arbitral Courts established under the Peace Treaties following World War I cannot be adduced for comparison because the time-limits involved in those cases were not laid down by the Treaties themselves but by the rules of procedure of the Arbitral Courts concerned.

The United States Court of Restitution Appeals of the Allied High Commission for Germany held in three cases that the Court could not admit appeals in respect of cases where claims had not been filed within the prescribed time-limit. In *Erna Fingerhut* v. *Deutsches Reich* (Opinion No. 259, Vol. Ill, p. 541) the Court said:

> The learned trial court rightly found that there had not been compliance with the period of limitation in Article 56 and the Implementing Regulation No. 1 issued thereunder which provide that such a claim must be filed with the Central Filing Agency in Bad Nauheim on or before December 31, 1948. Also without error was the finding that filing with the office of the Property Division in Wiesbaden did not comply with the mandate as contained in Article 56, Law 59, which plainly prescribes the only place for filing and within the stated period. We have discussed this issue in our Advisory Opinion No. 1. The time-limit set forth in Article 56 is one of prescription and the claimant's late filing can only be excused if she fell within the provisions of Regulation No. 5, Paragraph 1 (Paragraph 2 being inapplicable), under Military Government Law 59 (which the court found she did not) . . . Validation cannot be had for a court cannot toll the statute.

The above decision was cited in *Schneider* v. *Franz Eher Verlag Nachfolger GmbH et al.* (Opinion No. 366, Vol. IV, p. 384) and in *Deutsches Reich et al.* v. *Loewenthal et al.* (Opinion No. 464, Vol. V, p. 343). In the former case the Court held:

> Compliance with the period of limitation is mandatory and this Court is powerless to validate a late filing.

In the latter case the Court held:

> However, under Law 59, the Restitution Authorities have jurisdiction to process only those claims which have been filed in accordance with the time-limit fixed by Law 59. The Restitution Authorities have no jurisdiction to entertain claims filed after the time set by Article 56, paragraph 1, and Regulation No. 5 of Law 59.

The Plenary Session of the Arbitral Commission has not heretofore admitted a late appeal. In the case of *Western Machinery* v. *Federal Republic of Germany* the Third Chamber held *(Decisions,* Vol. I, No. 5):

> While we are quite convinced of the *bona fides* of complainant's claimed ignorance and confusion over the change-over from the occupation laws to the Settlement Convention, we do not deem such ignorance to constitute adequate grounds for restoring complainant to its *status quo ante* before the running of the 30 day period.

The Plenary Session held (*Decisions,* Vol. I, No. 21):

> The Third Chamber was right, therefore, in finding that the notice of appeal was lodged too late.
>
> As an alternative motion, the complainant applied for reinstatement, basing itself on its ignorance of the establishment of the Commission, of the time-limit for appeals and of the office with which the appeal should have been lodged.
>
> Even if the Commission had the power to order such a measure, it would not be justified in the present case since the complainant lodged its notice of appeal more than four months after service of the contested decision, although it could have acquired the necessary information with little effort

by studying the *Bundesgesetzblatt* and the *Bundesanzeiger* and in any case by inquiry at the German Patent Office, the German Foreign Office or at any of the Embassies of the three other Signatory States.

In the case of *E. I. du Pont de Nemours & Company* v. *Federal Republic of Germany* (AC/3/J[59]3) the Third Chamber said:

> While it is true, as argued by the complainant, that under Article 12, paragraph I (*f*), of the Settlement Convention the Arbitral Commission is empowered to hear appeals from any decisions of the last instance of the German Patent Office or its Grand Senate under Allied High Commission Law No. 8 . . . the jurisdiction of the Commission in such cases is limited by a further provision in the same Article, namely, that the decisions appealed from must be the subject of application to the Commission by the party concerned within thirty days after the service thereof. In the instant case the record does not show the date when the contested decision of the Appeal Senate was served on the complainant but it is indisputable that such service must . . . have been made prior to . . . a date about ten months prior to June 3, 1955, when complainant's appeal was received at the address of the Arbitral Commission. The appeal is therefore barred by the above-quoted provision of Article 12 of Chapter Ten of the Settlement Convention.

The complainant applied for leave to appeal from the judgment of the Third Chamber and the applicant was referred to the Plenary Session which, on June 20, 1959 (AC/P/O[59]7), rejected the application.

In the case of *Mercedes Büromaschinen-Werke v. Federal Republic of Germany (Decisions,* Vol. I, No. 6) the complainant was served in April 1953 with the contested decision of Appeal Senate Ia. On June 3, 1955, complainant appealed to the Arbitral Commission. The Third Chamber said:

> Article 8, paragraph 2, of Chapter Ten of the Convention, upon which complainant relies for submission of its appeal, plainly provides that an appeal may be taken in accordance with the provisions of Article 12 of this Chapter . . . Article 12 then defines the decisions which may be appealed to the Commission under Chapter Ten, and expressly provides that such decisions may be appealed upon application to the Commission by the party concerned within thirty days after the service thereof . . .
>
> Complainant asks the Commission to give it relief despite the clear time prescription of the Convention . . .
>
> and found
>
> . . . that no other course is properly open to us but to apply the clear language and intention of the governing Treaty.

The appeal was dismissed and on May 10, 1958, the Plenary Session rejected an application for leave to appeal. This case presents one particularly interesting feature. One of the grounds suggested by the complainant in support of its appeal from the decision of Appeal Senate Ia was Rule 23 *(d)* of the Commission's Rules of Procedure. This rule read at that time:

> If, after giving the other party an opportunity of stating his views, the Commission is satisfied that a failure to comply with a time-limit is not attributable to the default or negligence of the party himself, it may decide that any step taken after the expiry of the time-limit in question shall be valid.

The Chamber recognized that the Rule afforded a certain flexibility "in the enforcement of the Commission's procedural rules" but held that

> The discretion that rests in the rule does not extend, however, to time-limits which are fixed in the Settlement Convention or by the Charter of the Arbitral Commission.

The Plenary Session subsequently amended Rule 23 *(d),* effective January 1, 1958, to read as follows:

> The Commission may declare as valid any steps taken after the expiration of a time-limit in respect of which the President could have granted an extension under the preceding paragraph.

The preceding paragraph (Rule 23 (*c*)) authorizes the President to

> extend the time-limits fixed by the Commission or by these Rules other than the time-limits which are fixed by the Charter and repeated in these Rules.

The Plenary Session has, therefore, already formally recognized that the Commission cannot, through its Rules of Procedure, extend time-limits "fixed by the Charter". No other conclusion could be reached. Article 14 of the Charter provides that "The Commission shall determine rules of procedure consistent with the present Charter"; Article 8 of the Charter requires the Commission to "apply the provisions of the Convention" in arriving at its decisions; one of the provisions of the Convention is the requirement of Article 12 of Chapter Ten that appeals be submitted to the Commission "within thirty days after the service" of the contested decision. If appeals which are barred by reason of the thirty-day time-limit fixed by the Convention cannot be made admissible by a more liberal provision in the Commission's Rules of Procedure, they cannot be made admissible by decision of a Chamber or of the Plenary Session in an individual case. Time-limits fixed by the Convention cannot legally be disregarded by the Commission in arriving at its decisions any more than in formulating its Rules of Procedure.

We do not feel that the reason given by the majority for admitting the appeal, namely, that it was filed in due time but at the wrong address takes the case out of the scope of the above-stated rules.

2. Justice and Equity

There is no such uniformity in the various national jurisdictions as to rules regarding the admission of late appeals as would justify the Commission in disregarding the 30-day limitation imposed by the Convention. There are some national jurisdictions which do not recognize the admission of late appeals in the absence of specific statutory authorization.

In France, for example, Article 445 of the French *Code de Procédure Civile* provides: "*Le délai d'appel emportera déchéance.*" If there are decisions of French courts admitting an exception in cases where the appellant was prevented by *force majeure* (Dalloz, Note 1 to Article 445), they concern a special case of impossibility of action and thus, as in cases of hindrance caused by fraudulent conduct on the part of the opponent, justify the exception. Such situations, however, are not presented by the instant case.

Provisions are to be found in Swiss Law which prohibit reinstatement of legally established time-limits for appeals (see Code of Civil Procedure for the Canton of Berne, Article 288; also *Commentary* by Leuch, 3rd edition, 1956, Note 2 to Article 288; also "*Gesetz des Kantons Basellandschaft betr. die Gerichts- und Prozessordnung",* Article 221, and Guldener, *Schweizerisches Zivilprozessrecht* (1958), p. 221, Note 40).

In German law, too, there are time-limits which cannot be restored if they have not been observed, and the non-observance of which thus entails preclusion, *e.g.* periods of limitation and periods for bringing special actions, such as the action for contesting the legitimacy of a child (§§ 203, 206, 1594, 1596 of the German Civil Code). In such cases, exceptions are only allowed in case of *force majeure,* a suspension of the administration of justice or legal incapacity of a party. These exceptions are without any importance in the case at issue.

Rule 34 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, entitled "Computation and enlargement of time". Paragraph 2 of that rule defines as follows the powers of a justice of the court to extend time-limits fixed for appeals to the court:

> Whenever any justice of this court *is empowered by law* or under any provision of these rules *to extend the time* within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, *an application seeking such extension shall be timely if it is presented to the clerk within the period sought to be extended. The clerk will refuse to receive any application for extension sought to be presented after expiration of such period.* (Emphasis supplied.)

In two earlier cases the Supreme Court held: (1) that failure to docket an appeal in time was not excused by the fact that the clerk below agreed to file the record with the clerk of the Supreme Court *(Fayolle* v. *Texas Pac. Ry. Co.,* 124 U.S. 519); and (2) that appeals not docketed in time are inoperative *(Radford* v. *Folsom,* 123 U.S. 725). It would be imprudent, therefore, to describe a general refusal to admit late appeals as unjust or equitable.

There are, however, jurisdictions where the courts follow more lenient rules wherever such leniency is specifically authorized by law. Leniency is permitted, for example, where the delay was not caused by the fault of the appellant. Since the instant case has its origin in German tax legislation it is not inappropriate to cite § 86 of the German tax code which provides:

> Leniency for the non-observance of a time-limit for appeal . . . may be applied for by anyone who had been prevented from observing the time-

limit through no fault of his own. The fault of an authorized representative or agent shall be considered equal to the fault of the applicant.

The non-observance of the time-limit for appeal in the present case was due to the fault, based on ignorance, of the complainant's authorized representative; it was therefore the fault of the complainant under § 86 and leniency would therefore not be in order under that Law.

The complainant had the choice of two different legal remedies against the judgment of the *Finanzgericht,* Düsseldorf, of June 11, 1958, which had rejected its appeal against the decision of the *Finanzamt:* appeal to the *Bundesfinanzhof* [Federal Treasury Court] which in German tax law is called "*Rechtsbeschwerde*" and the "appeal" to the Arbitral Commission. There can be no doubt that it is the provisions of the German Tax Code which alone are decisive for the lodging of a "*Rechtsbeschwerde*" with the *Bundesfinanzhof,* and that the provisions of the Settlement Convention alone are decisive for the lodging of appeals with the Arbitral Commission.

In accordance with the provisions of the German Tax Code valid for lodging a "*Rechtsbeschwerde*" (§ 249, paragraph 3), the "*Rechtsbeschwerde*" is "*anzubringen*" (to be lodged) with the *Finanzgericht* which corresponds to the term "to be filed". It may also be filed with the *Bundesfinanzhof.* Article 12 of Chapter Ten of the Settlement Convention applies to appeals to the Arbitral Commission. The instruction on remedies contained in the judgment of the *Finanzgericht,* Düsseldorf, informed the complainant of both these remedies although the *Finanzgericht* was under no duty to mention the possibility of an appeal to the Commission. It clearly distinguished between the "*Rechtsbeschwerde*" and the "appeal to the Arbitral Commission" and the instruction was divided into two distinct parts by virtue also of the different types of print and the specification in two separate paragraphs. Whereas the first part states that the "*Rechtsbeschwerde*" shall be filed with the office of the *Finanzgericht,* the second part states that "an appeal also lies to the Arbitral Commission on Property, Rights and Interests in Germany, Koblenz, Schloss". The complainant could not assume from these instructions that it had to lodge with the *Finanzgericht* the appeal intended for the Arbitral Commission. We are not of the opinion that these instructions were such as to cause the complainant to fall into error. In any case its error is not excusable because at the end of the judgment, where the "special legal remedy" of appeal to the Arbitral Commission is referred to, its attention was called to the above-mentioned provision of the Settlement Convention. The complainant, a trading company represented by legal experts, was thus able, upon consulting the Settlement Convention, to acquire exact information concerning the provisions valid for proceedings before the Arbitral Commission. It could particularly be expected to do so since the appeal to the Commission constituted a "special" remedy based on an international convention. The complainant could not simply assume, therefore, that it was entitled to file the appeal to the Arbitral Commission, an international judicial body, with the German *Finanzgericht* as laid down in the

German tax provisions for cases of "*Rechtsbeschwerde*" to the *Bundesfinanzhof*. This is particularly true since, by consulting Article 12 of Chapter Ten of the Settlement Convention, to which the judgment of the *Finanzgericht* made express reference, it would have found that an appeal under this provision lies to the Arbitral Commission also from decisions of other German instances, *e.g.,* the regular courts, whose law of procedure provides for appeals to be filed only with the court which is to decide on the appeal.

Examination of Article 12 of Chapter Ten of the Settlement Convention will show that the appeals provided for therein shall be filed with the Arbitral Commission itself and not with the court whose decision is contested:

Firstly, this Article lays down that the decisions of German courts specified therein may be appealed to the Arbitral Commission upon application by the party concerned, (French text ". . . *sur demande adressée à la Commission . . .")* . . . "in accordance with the provisions of its Charter". The wording of this provision alone rebuts the assumption that the appeal should be filed with the lower court.

Secondly, sentence 1 of Article 10 of the Charter of the Commission, to which the said Article 12 makes express reference, reads as follows:

> Proceedings before the Commission shall be instituted by a written complaint which shall contain a statement of the facts giving rise to the dispute and the arguments put forward by the complainant.
>
> Das Verfahren von der Kommission wird eingeleitet durch Einreichung einer Klageschrift, die eine Darlegung der Tatsachen, die dem Streite zugrunde liegen und Rechtsausführungen des Klagers enthalt.
>
> Les litiges sont portés devant la Commission par une requête écrite contenant un exposé des faits qui donnent lieu au litige ainsi que les arguments invoqués par le demandeur.

The Charter here requires a written complaint for all cases in which the Commission may be appealed to. Both the use of the words "written complaint", as well as the remaining text, are inconsistent with the conception that the document with which proceedings before the Commission are instituted, could with legal effect be submitted to any other agency, such as the German court whose decision is contested.

At the same time the decisive provisions quoted above show that the effective date for the lodging of an appeal is the date on which the appeal is received by the Commission, and that consequently the time-limit of 30 days laid down in Article 12 of Chapter Ten of the Settlement Convention has not been observed simply by virtue of the fact that the brief of appeal was dispatched in due time.

Other provisions of the Settlement and of the Charter, which are not applicable in the present case, *e.g.* Article 7, paragraph 3, of Chapter Five of the Convention and Article 13, paragraph 5, of the Charter, also permit no other

interpretation in respect of the cases there defined of resort to the Arbitral Commission.

In conformity with the above, Rule 25 of the Rules of Procedure of the Commission clearly and unequivocally provides:

> A case shall be brought before the Commission by a written complaint transmitted to the Registrar at the seat of the Commission.
>
> Eine Sache wird von der Kommission durch eine Klageschrift anhängig gemacht, die bei dem Sekretär am Sitz der Kommission einzureichen ist.
>
> Une affaire portée devant la Commission sera présentée sous la forme d'une demande écrite transmise au Greffier au siège de la Commission.

and Rule 23 *(a)* states equally clearly:

> When a pleading or other document is to be filed by a specified date or within a specified time, the date of the receipt of the pleading in the Registry will be regarded as the effective date.
>
> Wenn ein Schriftsatz oder ein Schriftstück bis zu einem bestimmten Zeitpunkt oder innerhalb einer bestimmten Frist eingereicht sein muss, so ist der Tag des Einganges im Sekretariat massgebend.
>
> Lorsqu'une pièce de la procédure ou un document doit être déposée avant une date determinée ou dans un délai fixe, c'est la date de la réception de la pièce au Greffe qui est à considérer comme la date dont il sera tenu compte.

In view of these facts, the complainant showed gross negligence in submitting the notice of appeal to the registry of the *Finanzgericht*.

The foregoing considerations lead us inescapably to the conclusion that even if the first sentence of Article 8 of the Charter of the Commission did not exist and that Article merely authorized the Commission in its discretion to "apply the general principles of international law and of justice and equity", there are no such general principles the application of which would justify the admission of the complainant's appeal.

In conclusion, to hold that the *Finanzgericht,* Düsseldorf, was under a legal duty to forward the complainant's appeal papers to the Arbitral Commission in Koblenz is not to hold either that it was a duty to be performed at all costs or that its failure to perform that duty prior to the expiration of the 30-day time-limit excuses the error of the complainant and requires the Commission to admit the appeal. If the *Finanzgericht* was under such legal duty, the failure of the Third Chamber to take that legal duty into consideration could be regarded as an error in law properly the subject of an appeal to the Plenary Session. If that is the judgment of the Plenary Session it should, it seems to us, remand the case to the Chamber with instructions to examine the facts and determine whether it was reasonably possible for the *Finanzgericht* to have acted in time. This would require evidence as to the exact addressee on the envelope, as to the hour on Tuesday, August 5, 1958, when the document reached the *Finanzgericht,* as to the date and hour when the document reached an official competent to deal with the matter, as to the date and hour when,

considering his other duties, he could reasonably have been expected to decide whether the document was one of two copies of the same appeal, the other copy having been sent direct to the Commission, and, in case his decision was that it was not such a copy but an original intended for the Commission, the date and hour when it could reasonably be expected that the necessary letter of transmittal could be prepared, signed and placed in the mail. Only if all these facts, when determined, prove that the *Finanzgericht,* Düsseldorf, could, with the exercise of reasonable efforts, have forwarded the appeal to the Commission so as to arrive prior to the expiration of the 30-day period on Friday August 8, 1958, could it be held that the *Finanzgericht* in fact had not done what was legally required of it. Not until this question of fact has been decided affirmatively would it be proper for the Plenary Session to consider whether such failure by the *Finanzgericht* to comply with the provisions of German law can be recognized by the Arbitral Commission as justifying an admission of the appeal notwithstanding the clear 30-day limitation imposed by the Convention.

The appeal of the complainant should be dismissed.

Case of Heirs of Reuter *v.* Federal Republic of Germany, decision of the Second Chamber of 16 January 1961*

Affaire relative aux héritiers de Reuter c. la République fédérale d'Allemagne, décision de la Deuxième Chambre du 16 janvier 1961**

Competence of the Arbitral Commission—restitution or restoration claim—seizure of property and securities—examination of the possible discriminatory treatment made to complainants' property—Commission not competent to order other measures of restoration than those envisaged in the Settlement Convention—no extraterritorial competence of the Commission.

Discriminatory treatment—assessment of the discriminatory character of a domestic measure—no discriminatory character of a measure applied regardless of nationality, race or religion—discriminatory application of a measure which is not discriminatory.

Diplomatic relations—free discretion of States to engage in diplomatic actions.

Compétence de la Commission d'arbitrage—requête en réparation ou restitution—confiscation de biens et de titres—examen d'éventuels traitements discriminatoires infligés aux biens des requérants—Commission non compétente pour ordonner

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