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

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, signee à Bonn le 26 mai 1952

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

16 January 1961

VOLUME XXIX, pp.505-512

NATIONS UNIES - UNITED NATIONS

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

* Reproduced from *International Law Reports* 42 (1971), p. 401

** Reproduit de *International Law Reports* 42 (1971), p. 401

des mesures de restitution autres que celles envisagées par la Convention de règlement—Commission dépourvue de compétence extraterritoriale.

Traitement discriminatoire—évaluation du caractère discriminatoire d'une mesure interne—les mesures imposées sans égard à la nationalité, à la race ou à la religion n'ont pas un caractère discriminatoire—mise en œuvre discriminatoire d'une mesure non discriminatoire.

Relations diplomatiques—faculté discrétionnaire des États d'entreprendre des démarches diplomatiques.

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(1) By pleading of 12 September 1958, M. Antoine Saint-Germier, the representative of the Reuter heirs, submitted to the Arbitral Commission an application for review of the decision of the *Bundesamt fur die Prüfung ausländischer Rückgabe- und Wiederherstellungsansprüche* (called *Bundesamt)* [Federal Office for Examination of Foreign Restitution Claims] dated 13 August 1958 (No. BA/Pr. 62/55) in the case of the heirs of the late Rudolf Florian Reuter at Baden-Baden, dismissing the latter's claim for restitution of their property and restoration of their rights and interests in the territory of the Federal Republic.

A. Facts

(2) On 28 July 1891 the Austrian national Rudolf Florian Reuter concluded before [a] notary public with the municipality of Baden-Baden a contract of deposit and donation which is incorrectly called "foundation "in the complainants' pleading and which was governed at the time of conclusion by Articles 913, 920, 915, 1930, 1984 and 1991 of the Baden Civil Code *(Badisches Landrecht).*

By virtue of this contract, he handed over to the said municipality 6,500 3% Austrian South Railway debentures which were subsequently exchanged for 6,500 3.6 to 4.5% debentures (at variable interest) of the Danube-Save-Adriatic Railway Corporation; these securities were inalienable, and if they fell mature by lot they had to be replaced; the inalienability was made manifest by double stamping of the securities. Under this contract, the municipality had over these securities rights and obligations of custody and administration; it had undertaken vis-à-vis the depositor and donor to use the yield of these assets in compliance with the stipulations of the said contract which it accepted without reservations, after having obtained the necessary administrative authorisations such as were required at that time by the law of the Grand Duchy of Baden.

Pursuant to § 3 of the contract, the municipality of Baden-Baden had to distribute among ten poor families of Baden-Baden the yield of 308 securi-

ties after deduction of its administration fees; pursuant to § 4, the yield of the remaining 6,192 securities had to be paid, during his life-time, to the donor and depositor and after his death to his four children as well as to their possibly surviving spouses; after the death of these first beneficiaries the capital should be distributed, if there were any grandchildren of Rudolf Florian Reuter, in the proportion of 1/10 to the municipality of Baden-Baden and 9/10 to the grandchildren; if there were no grandchildren the capital should be shared out to the municipality of Baden-Baden and a foundation, "Emil Reuter, Neuendorf "(in Prussia), at the rate of 1/3 for the former and 2/3 for the latter.

(3) Rudolf Florian Reuter died in 1930, leaving four children of French nationality and residing in France; they are all dead by now. The widow [of] Josef Saint-Germier, born Mathilde-Ludovica Reuter, the last surviving of the children of Rudolf Florian Reuter, died on 2 March 1956, after the institution of proceedings before the *Bundesamt;* she it was who since 1930 distributed the yields among the persons entitled, and it is her son, M. Antoine Saint-Germier, who presently represents the grandchildren of the donor, all of them heirs and beneficiaries of the contract of deposit and donation of 28 July 1891, and most of them of French, one of German and one of Russian nationality.

(4) Until 1939, the municipality of Baden-Baden strictly fulfilled the obligations which it had assumed under the contract. Since 1942, the said municipality found it impossible to transfer the coupons of the securities which it had to administer, on account of the following circumstances:

By public announcement *(Bekanntmachung)* of 22 October 1942 *(Reichsanzeiger* 1942, No. 257), the Reich Minister of Economy and the Board of Directors of the *Reichsbank* requested the holders of bearer debentures of the Danube-Save-Adriatic Railway Corporation to offer these securities to the *Reichsbank* in compliance with the Law of 12 December 1938 concerning the *Devisenbewirtschaftung* (§§ 51 and 60) and of the second implementing ordinance of this Law of 16 March 1939, to the extent to which

(a) these securities were owned by persons who, under foreign currency law, were German nationals, "*Inländer", (Deviseninländer)*;

(b) these securities were entrusted directly or indirectly to the custody of "*Inländer"* and were owned by persons who, under foreign currency law, were emigrants, "*Auswandere" (Devisenauswanderer).*

Considering it its duty to follow this request, the municipality of Baden-Baden delivered to the *Reichsbank* agency at Baden-Baden on 24 November 1942 all the debentures, *i.e.*, 6,494, which it held at that time on behalf of the Reuter heirs, and received the counter-value of these securities, namely 259,740 RM, which were paid into an account with the Baden-Baden Savings Bank and which were reduced to 16,733.25 DM during the currency reform.

The 6,494 debentures of the Danube-Save-Adriatic Railway Corporation thus transferred to the *Reichsbank* disappeared. The numbers of these securities had been noted, however, and could be made known to the Baden-Baden

agency of the *Reichsbank,* which acknowledged on 25 November 1942 having taken delivery of these securities; the French Committee of the holders of debentures of the said Corporation declared on 10 June 1958 that these 6,494 debentures were part of a lot of 866,674 debentures which were returned to this Railway Corporation by the German Reich in 1943, and confirmed this information by a letter served on the Arbitral Commission on 18 July 1960.

The debentures of the Danube-Save-Adriatic Railway Corporation had formed the subject of the Rome Agreement concluded on 29 March 1923 between Austria, Hungary, Italy, Serbia and the Corporation. This Agreement was replaced by the Brioni Agreement concluded during World War II on 10 August 1942 between the German Reich, Italy, Croatia and Hungary; the face value of these debentures was decreased from 112.50 gold francs to 22.50 gold francs; under this Agreement, the Signatory States had undertaken to pay to the Corporation annuities, and Article 11 stipulated that

> any State holding debentures issued under the old Rome Agreement or overdue coupons shall have the right to use them for reducing his own undertakings in respect of payment of the debts, by handing them over to the Corporation within the three months following the entry into force of the present Agreement . . . The Corporation will immediately annul the debentures and coupons transferred in compliance with this paragraph.

The Brioni Agreement was subsequently declared null and void by the Peace Treaties of 10 February 1947 with Italy (Annex XIV, paragraph 15) and with Hungary (Article 26, paragraph 10) as well as by the Treaty with Austria of 15 May 1955 (Article 25, paragraph 10). The representative of the heirs, M. Antoine Saint-Germier, admits in his letter of 17 July 1947 that the securities of the Reuter heirs transferred to the *Reichsbank* and then to the Corporation by the German Reich have been destroyed, which statement is supported by the obligation imposed on the Corporation by the Brioni Agreement to annul immediately the debentures and overdue coupons which it received (Article 11, mentioned above) and also by the notice of 22 July 1956 published by the Committee of debenture holders with its headquarters in Paris, where it is declared that the 866,674 Danube-Save-Adriatic debentures were physically destroyed in 1943.

B. Procedure

(5) On 27 December 1955 the widow Saint-Germier submitted to the *Bundesamt* on behalf of the Reuter heirs an application based on Article 1, paragraph 1, of Chapter Ten of the Settlement Convention, requesting the restoration of the legal and financial situation of the interested parties comprised under the collective expression "Reuter Foundation", such as it existed on 24 November 1942, the date on which the securities had been delivered by the custodian, the municipality of Baden-Baden.

After several inquiries during which both the municipality of Baden-Baden and the Federal Ministry of Finance were given the opportunity of setting forth their arguments, the *Bundesamt,* by decision of 13 August 1958,

dismissed the application of the Reuter heirs; on 30 August 1958, this decision was served upon the representative of the interested parties in Paris who submitted a complaint to the Arbitral Commission on 15 September 1958, i.e., within the thirty day time-limit fixed by Article 12 of Chapter Ten of the Settlement Convention, thus regularly bringing the matter before the Arbitral Commission.

After an exchange of pleadings on both sides, the oral hearings took place on 19 February 1960, at the close of which the complainants made the following submissions:

> That the Commission set aside the decision rendered and, deciding again, declare the complaint of the joint heirs Reuter to be admissible and well-founded since the rights and interests of the latter in the Reuter Foundation have suffered discriminatory treatment through an injustified requisition; declare that the German Federal Republic is obliged to restore the Florian Reuter Foundation (comprising 6,494 Danube-Save-Adriatic debentures), the choice of diplomatic negotiations or other means for reaching this aim being left to the Federal Republic.

In its Answer of 17 December 1958, the defendant requested that the complaint be dismissed as unfounded; it upheld this request in its Rejoinder of 27 January 1959 and at the close of the oral hearings.

(6) Before the opening of the oral hearings, the municipality of Baden-Baden submitted to the Commission on 4 May 1959 a pleading in which it supports the claim of the Reuter heirs, without presenting an application for intervention in compliance with Rules 51 and 52 of the Rules of Procedure or submissions to this effect, restricting itself to asking the Commission to allow the application of 27 December 1955 by setting aside the decision rendered, following the application for review of 12 September 1958. This document, which does not contain any new element of fact or of law, was communicated for information purposes to the complainants and the defendant; the latter did not deem it appropriate to answer this pleading.

The Law

(7) The claim of the Reuter heirs is based on Article 1, paragraph 1, of Chapter Ten of the Settlement Convention, the first sentence of which reads as follows:

> Insofar as this has not already been done, the Federal Republic will take all steps necessary to ensure that the nations, persons and companies referred to in paragraph 3 of this Article shall be able to secure the return of their property in its present condition, and the restoration of their rights and interests, in the Federal territory to the extent to which such property, rights or interests suffered discriminatory treatment.

The concept of discriminatory treatment is given in paragraph 4 of this Article, which provides:

> The term "discriminatory treatment" as used in this Article shall mean action of all kinds applied between 1 September 1939 and 8 May 1945 to any property, rights or interests, as a result of any exceptional measures which were not applicable generally to all non-German property, rights or interests, and giving rise to prejudice, deprivation or impairment without the free consent of the interested parties and without adequate compensation.

The Arbitral Commission, set up by the High Parties Signatory to the Settlement Convention for ensuring its application, is therefore competent in the present proceedings to examine whether the property of the complainants suffered discriminatory treatment and whether restitution or restoration of this property is possible in the Federal territory.

(8) All parties to the present action agree that the public announcement of 22 October 1942 of the Reich Minister of Economy and the Board of Directors of the *Reichsbank (Reichsbankanzeiger* 1942, No. 257) has no discriminatory character since it applied, regardless of nationality, race, religion or ideology, to all Germans and to all foreigners in Germany who under foreign currency law were "*Inländer*" [local nationals], and also to all Germans and all foreigners in Germany who were, directly or indirectly, custodians of securities of the Danube-Save-Adriatic Railway Corporation owned by emigrants, "*Auswanderer*", under German foreign currency law. The Reuter heirs, all but one of non-German nationality, and all of them living outside Germany, did not fall within the group of persons considered "*Inländer*" or "*Auswanderer*" under the German law on foreign currency (§ 5 *Devisenbewirtschaftungsgesetz),* for it was not the nationality of the owner which was determining, but, from the point of view of the German law on foreign currency, their domicile or their residence. Unquestionably they were thus not subject to the obligation to declare their securities and to offer them to the *Reichsbank,* and possibly to deliver them if the latter accepted the offer, nor were they obliged to conclude to this effect a sales contract with the latter *(Kontrahierungszwang).*

The complainants assert, however, that they suffered a discriminatory application of these provisions, which in themselves were not discriminatory, in that their securities were offered by the municipality of Baden-Baden to the *Reichsbank* which actually took delivery of them. They believe that in reality their securities were requisitioned and that this requisition answers all the requirements of Article 1, paragraph 4, of Chapter Ten of the Settlement Convention for discriminatory treatment. They state:

(1) that the seizure of their securities by the *Reichsbank* took place during the crucial period laid down in the said Article, *i.e.*, between 1 September 1939 and 8 May 1945;

(2) that their securities were not subject to the requisition envisaged in the public announcement of 22 October 1942, that they were delivered to and accepted by the *Reichsbank* in compliance with the order contained in the announcement, and that this measure of requisition indeed constituted an exceptional treatment, since it was not applicable generally to non-German

rights and interests, and was by no means applicable to the rights and interests of the Reuter heirs;

(3) that the Reuter heirs, the owners of the securities and the only interested parties, never freely consented to their securities being delivered to the *Reichsbank;*

(4) that they were never paid adequate compensation, since the sum of 259,740 RM assigned to them, which does not take into account that the debentures were made out in gold francs and that the coupons were paid in dollars and which has in reality to be reduced to 16,773.25 DM, did not correspond to the real value of the securities so that the Reuter heirs had suffered a loss in the order of 240,000 new French francs.

For these various reasons, the complainants consider themselves entitled to complete restoration, in a way which to the defendant appears realisable, if necessary by diplomatic negotiations with the States which signed the now lapsed Brioni Agreements, or with the Danube-Save-Adriatic Railway Corporation, and emphasise that they request neither the actual restitution of their securities nor compensation which they themselves consider impossible.

(9) The question whether the transfer of the securities by the municipality of Baden-Baden, which was merely a custodian, to the *Reichsbank* and the latter's seizure of these securities in application of a Law which did not relate to them since they were owned by foreigners domiciled outside Germany, constitute discriminatory measures within the meaning of Article 1, paragraph 4, of Chapter Ten of the Settlement Convention, may be left open, since admittedly the Law itself does not have a discriminatory character and since it is only its application which is criticised and criticisable.

As has been stated in the contested decision of the *Bundesamt* of 13 August 1958, the public announcement *(Bekanntmachung)* of 22 October 1942 of the Reich Minister of Economy and of the Board of Directors of the *Reichsbank* ordering the requisition of the securities of the Danube-Save-Adriatic Railway Corporation was in fact wrongfully applied to the complainants since they were domiciled abroad.

The transfer of the securities by the municipality of Baden-Baden and their seizure by the *Reichsbank* being thus equally unjustified, the dispossession of the Reuter heirs is altogether irregular.

Even supposing that the seizure of the securities by the *Reichsbank* and their being used by the Reich for paying its debts to the Danube-Save-Adriatic Railway Corporation by virtue of Article 11 of the Brioni Agreement, which was, moreover, declared null and void by the Peace Treaties of 1947 between the Allied Powers and Italy, Hungary and Austria, falls within the discriminatory measures defined by the Settlement Convention, the submissions of the complaint of the Reuter heirs could not be supported by the Commission.

(10) Under Article 1 of Chapter Ten of the Settlement Convention the Commission is only authorised to remedy the damage resulting from discriminatory action in either of the two following ways:

(a) by ordering the return of the property in its present condition ;

(*b*) by ordering the restoration of the injured rights and interests in the Federal territory.

Both the complainants' application itself concerning the facts alleged by them and the facts ascertained by the Commission show that the seizure of the securities took place in the Federal territory, but that they were destroyed by the company by which they had been issued, the Danube-Save-Adriatic Railway Corporation, which has its headquarters outside the territory of the Federal Republic.

On the one hand, the return of the securities is therefore physically impossible, and, on the other hand, the restoration requested could only take place at the headquarters of the company, *i.e.,* in territory outside the Federal Republic.

The Commission is not competent to order other measures of restoration than those envisaged in the Settlement Convention. It is not entitled to charge the Federal Republic of Germany with an obligation to initiate diplomatic negotiations or to try to come to an agreement with the Danube-Save-Adriatic Railway Corporation, since decisions of this kind cannot bind States not designated by the complainants, which have not taken part in the present proceedings, or a company which was no party to the proceedings either, quite apart from the fact that an obligation imposed on the defendant to act through diplomatic channels would be very unusual, since it is universally admitted in international law that it is natural to any diplomatic action that it is left to the free discretion of the States.

As to the restoration of the rights and interests of the Reuter heirs in the Federal territory, which could be justified only if the destroyed securities were replaced by new securities by way of substitution of things following negotiations contemplated by the Peace Treaties of 10 February 1947, which to this day have not been realised, it is impracticable in this form; on the other hand, any form of compensation by the purchase of new equivalent securities or by payment of a sum corresponding to the value of the property on 24 November 1942 is excluded by paragraph 6 of Article 1 of Chapter Ten of the Settlement Convention, as recognised also by the complainants.

For these reasons

The Arbitral Commission decides:

(1) to reject as unfounded the application of the Reuter heirs for review of the decision of the *Bundesamt* of 13 August 1958;

(2) to confirm this decision and to dismiss all contrary submissions of the complainants ;

(3) to impose the court costs on the complainants.