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GERMAN INDUSTRIAL CHARGES LAW [1].

PARTIES: Germany, Reparation Commission.

SPECIAL AGREEMENT: § 69 of German Statute of August 30, 1924.

ARBITRATOR: Marcus Wallenberg (Sweden).

AWARD: Stockholm, December 28, 1925.

Should the German Public Law Mortgage of 1924 apply to industrial property acquired after September 1924?—Interpretation of German Statute.—Importance of international and national "Preparatory Work". —Importance of object aimed at in a treaty, in determining its interpretation.

[1] For bibliography, index and tables, see Volume III.

Agreement.

GERMAN "INDUSTRIAL CHARGES LAW" OF AUGUST 30th, 1924.

Arbitration.

§ 69. — (1) Any dispute which may arise between the Government of the Reich or the Bank, on the one hand, and the Reparation Commission or the Trustee, on the other hand, concerning the interpretation of this law, or the legality, appropriateness or fairness of any measure taken or to be taken in virtue of these provisions, shall be decided by an arbitrator without right of appeal. The arbitrator shall be appointed jointly by the Government of the Reich and the Reparation Commission as soon as this law comes into force and for a period of not less than five years. Failing agreement as to the choice of the arbitrator, he shall be appointed by the President of the Permanent Court of International Justice. If the arbitrator is prevented from giving a decision in a particular case, an arbitrator shall be appointed for that case in accordance with the same procedure.

(2) A decision may be given by a single arbitrator; he can also require the appointment of two further arbitrators to be nominated by the parties concerned.

(3) The arbitration clause contained in paragraph 1 extends, in particular, to disputes referred to in §§ 8, 42, 48 and 55, paragraph 3.

ARBITRAL AWARD IN THE DISPUTE BETWEEN THE GERMAN GOVERNMENT, ON THE ONE SIDE, AND THE TRUSTEE FOR THE GERMAN INDUSTRIAL DEBENTURES, ON THE OTHER SIDE,

REGARDING THE EXTENT OF THE PUBLIC LAW MORTGAGE, CREATED BY THE INDUSTRIAL CHARGES LAW OF AUGUST 30, 1924 [1].

Rendered December 28, 1925, *at Stockholm.*

BY MARCUS WALLENBERG.

Chosen arbitrator by virtue of § 69 of the mentioned law.

Through identical letters of June 22, 1925, the German Government, through the Minister of National Economics, and the Trustee for the German Industrial Debentures have chosen the undersigned, Marcus Wallenberg, as the arbitrator, according to § 69 of the Industrial Charges Law of August 30, 1924, and have submitted for decision a divergence of opinion that has arisen between them regarding the correct interpretation of certain dispositions of the law in question.

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[1] Translation of *American Journal of International Law*, 1926, p. 370.

The questions of dispute are as follows:

Ob die Hypothek des öffentlichen Rechtes auf den Grundstücken und gleichgestellten Rechten eines der Industriebelastung gemäss dem genannten Gesetze unterliegenden Unternehmens bloss auf den Grundstücken und gleichgestellten Rechten, welche am 1. September 1924 zum Betriebsvermögen gehören, lastet, oder ob die Hypothek sich überdies erstreckt:

(a) auf die Grundstücke und gleichgestellten Rechte, welche seit dem 1. September 1924 dem Betriebsvermögen eines der Industriebelastung unterliegenden Unternehmens zugewachsen sind oder ihm künftig zuwachsen werden,

(b) auf die Grundstücke und gleichgestellten Rechte, welche zum Betriebsvermögen eines anlässlich der ersten Umlegung freigebliebenen Unternehmens oder eines neuerrichteten Unternehmens gehören, sobald diese Unternehmungen in der Folge der Industriebelastung unterworfen werden.

Whether the mortgage of public law on immovable property and equivalent rights of a concern, subjected to the industrial charges according to the mentioned law, encumbers only the immovable property and equivalent rights belonging to the business capital (*Betriebsvermögen*) on September 1, 1924, or whether the mortgage extends also:

(a) to the immovable property and equivalent rights which, since September 1, 1924, have been added to the business capital (*Betriebsvermögen*) of a concern subjected to the industrial charges, or might be added in future,

(b) to the immovable property and equivalent rights belonging to the business capital (*Betriebsvermögen*) of a concern exempted at the time of the first repartition, or to a newly created concern as soon as these enterprises become in time subjected to the industrial charges.

The Trustee for the Industrial Debentures has, in a memorandum of July 15, 1925, expressed his opinion and proposed that the submitted questions be answered in the affirmative and it be declared that the public law mortgage extends to the immovable property and equivalent rights as defined in (a) and (b).

The German Government stated its viewpoint in a written reply of August 26, 1925, and proposed that the questions under (a) and (b) be answered in the negative.

On September 30, 1925, the Trustee gave a written answer to the reply of the German Government.

Finally the two parties have made it known, the German Government in a letter of November 7, 1925, and the Trustee in a communication of November 19, 1925, that they had no intention of giving any further opinions in this matter.

The Arbitrator renders the following

AWARD.

The public law mortgage extends also to the immovable property and equivalent rights which have been mentioned in sections (a) and (b) of the question submitted for decision.

EXPOSÉ.

From an examination of the text of the law it is seen that § 1, paragraph 1, sentence 2, contains a clear and explicit regulation to the effect that the

charge imposed upon industry must first of all be guaranteed by a mortgage of the public law. No exception is given to this rule, at least not in this sentence. Neither does the wording of the regulation give any cause for assuming that exceptions might be expected later in the law. The assertion made in this respect by the German side is not correct. The reference quoted "in conformity to this law" (*nach Massgabe dieses Gesetzes*) does not occur in the second sentence of § 1, paragraph 1, but in its first sentence, in which is stated what persons engaged in industrial and commercial concerns are affected by the "personal" charges.

On the German side it is, however, maintained that an exception to the regulation mentioned in § 1, paragraph 1, sentence 2, is established in § 41, in the sentence which reads:

Gehören zum Betriebsvermögen eines belasteten Unternehmers inländische Grundstücke etc., so entsteht an ihnen im Zeitpunkt des Inkrafttretens dieses Gesetzes zur Sicherung für die Ansprüche auf die Jahresleistungen an Zinsen und Tilgungsbeträgen die öffentliche Last.	If any domestic (*inländisch*) immovable property, etc., belongs to the business capital (*Betriebsvermögen*) of the encumbered entrepreneur there accrues to it, with the date of the enforcement of this law, the public charge (*öffentliche Last*) as guaranty on the claims for the annual payment of interests and amounts of amortization.

On the German side they wish to interpret this provision in the sense that, from the regulation that immovable property, etc., is encumbered by the public charge on the day of the enforcement of the law, it follows that immovable property, etc., which did not belong to the business capital (*Betriebsvermögen*) of an encumbered entrepreneur on the day in question, can not be affected later by the public charge.

Objections can be raised against this interpretation.

One might say, first of all, that the wording of the provision gives cause to assume that its primary purpose was certainly not to establish *the* principle that the public charge should be limited to immovable property which, on the day of the enforcement of the law, belonged to the encumbered industry. As the wording reads, it allows one to assume that the primary purpose of the provision is *partly* to define more precisely what kinds of property belonging to the business capital should become the object of public charge, *also partly* to prevent that immovable property or equivalent property, which at the time of the enforcement of the law belonged to an encumbered entrepreneur, from being withdrawn from the public charge through later transactions. For a provision for the later purpose there could, without doubt, be a reason, in so far as it could be foreseen that some time would elapse between the enforcement of the law and the time when the amount to be charged to every entrepreneur would be determined.

There arises, however, the question whether the quoted provision in § 41, paragraph 1, does not, after all, bring about the same effect as maintained by the German side, although its primary purpose is a different one. In support of this opinion the German side has set forth that there is no provision regarding the time at which the public charge should affect immovable property which has been acquired after the enforcement of the law, or which belongs to the business capital of an entrepreneur who has not taken part in the first repartition (*Umlage*), but has been made to take part in a later one.

It is correct that there is no express provision regarding the time at which the public charge shall affect immovable property of the category just mentioned. But, on the other hand, it cannot be maintained that the absence of a definite provision makes it impossible to draw conclusions from the law for that condition to which the existing definite provision is not applicable. If the provision in § 41, paragraph 1, had been lacking there would certainly not have been created a gap which would have made the functioning of the law impossible. Since the mortgage has been made a public charge, and since the entry in the register of landed property (*Grundbuch*) is not necessary for its occurrence, doubtless, in the absence of a provision in § 41, paragraph 1, *all* immovable property belonging to entrepreneurs who are subject to the "personal charge", would also have been affected by the public charge at the moment when the "personal charge" would have affected the encumbered entrepreneur. The fact that for special reasons a certain period of time has been fixed, as has been the case, does not prevent the application of the mentioned principle within the sphere for which the special provision in § 41, paragraph 1, does not apply. That it is possible for divergencies of opinion to arise regarding the moment at which the personal charge affects an entrepreneur, does not justify the conclusion that no rule on this subject *can* be derived from the law. There might be other reasons which would make necessary the deduction of such a rule from the law.

Since it is not impossible to draw from the remaining contents of the law conclusions regarding the moment for the beginning of the public charge on immovable property belonging to entrepreneurs who have not been affected before the new repartition, or regarding immovable property which has been acquired after the enforcement of the law by entrepreneurs who have taken part in the first repartition, one cannot with certainty, contrary to the provision in § 1, paragraph 1, sentence 2, conclude from the wording of § 41, paragraph 1, that immovable property, to which the provision given there is not applicable, is to be exempted from the public charge.

In the Opinion of the Experts it is said that the Committee is convinced that it is just and desirable to demand from German industry, as a contribution to the reparation payments, the sum of at least 5 milliards goldmark to be represented by obligations secured by first class mortgages which are to bring five per cent annual interest and one per cent amortization.

In a plan which the Committee has worked out regarding such industrial obligations it is stated that the obligations represent the liabilities of the individual enterprises which, as far as payment of capital, interest, and amortization-quota is concerned, should be secured by a first mortgage on investments and property of those enterprises issuing them (*ausstellende Unternehmungen*).

The Committee of Organization, which was charged to work out in detail the plan of the Committee of Experts, and which was also empowered to propose certain changes, emphasized in the exposé of its Law-Project that the entire wealth of the industrial enterprises must be considered as a guaranty and must give effective security, both in the form of a mortgage on property which, according to German legislation, could become the object of a mortgage, and, in case of bankruptcy, in the form of preference claims (*Vorzugsrecht*) on property objects which could not be encumbered with a mortgage.

The instructions of the Committee of Organization authorized it in case the Committee should find a concern too small to make the security (*Bestellung*) of a mortgage appear practical and desirable, to entirely exempt such

an enterprise from participation in the payment of the five milliards. Pursuant to this provision, the Committee believed that it should exclude in its project commercial, financial, and insurance enterprises. The Committee based this viewpoint on the fact that hypothecary securities were the safest, and that many of the enterprises of the named categories offered only relatively unimportant securities of a hypothecary kind.

When the project of the Committee of Organization, after having been accepted by the governments, was submitted to the German Reichstag, mention was made in the official exposé attached thereto of the difficulties caused by the regulation of hypothecary security for the obligations with reference to the clear and precise request contained in the Opinion of the Experts that the obligations be secured by a first mortgage on the investments and property of the enterprises which issue them. It was further emphasized that, in consideration of the clear provisions of the mentioned Opinion, it has been impossible to choose the otherwise desirable solution, i.e., to limit the real obligation to a certain part of the property, if the immovable property of an enterprise be of insignificant value in proportion to the total property of the entrepreneur.

Since these different opinions were given during the international proceedings which led to the execution of the Industrial Charges Law and were incorporated later in the exposé which the German side furnished in favor of the acceptance of the law, they must be of great importance in any question of the interpretation of the law where it cannot be considered as sufficiently clear.

The opinions mentioned show that in the different stages of the discussion of the question of German industrial charges special importance was attached to the hypothecary security for the charge of five milliards goldmark which it was intended to impose on German industry.

If one examines what effect an acceptance of the German viewpoint would have, one cannot help but realize that, in the course of years, it would mean that an ever larger part of non-negotiable obligations would lack hypothecary security. With every new repartition, in the proportion as it transfers a part of the charge from the entrepreneurs having taken part in the first repartition to entrepreneurs who have not taken part, it would follow that the transferred part would remain without mortgage. In the exposé on the law given by the German Government it has been emphasized that new repartitions would often become necessary for many various reasons. As such reasons are given, *partly* the incompleteness adherent to the system of assessment for the property-tax for 1924, *partly* the uncertainty in the present period of reverse of German finances from the state of inflation to new currency, which period will presumably continue for some time; *partly*, at last, the fact that existing concerns will decline to a marked degree, indeed even disappear or, on the contrary, will expand considerably and new enterprises will spring up. According to the plan of amortization, the period of time required for the complete amortization of the charge is about 37 years from the date of the enforcement of the law. If we compare the situation of German industry at the time when the law was enforced with the situation of 37 years before, it will certainly be found that a large number of those concerns the entrepreneurs of which had taken part in the first repartition of the charge were not in existence 37 years ago. There is certainly no reason for assuming that during a period of 37 years to come German industry will not show a corresponding development and change. It can therefore be foreseen with certainty that, if the German viewpoint be accepted, a great

part of the charge would, towards the end of the period, be wanting in hypothecary security. And if entrepreneurs who have taken part in the first repartition have later on increased their business capital (*Betriebsvermögen*) and consequently have been taxed higher, this increase [in taxes], it is true, would also increase the public charge on the properties which the entrepreneur possessed at the time when the law was enforced; but since after-acquired property would not be affected by the public charge, the result would be, also regarding these concerns, a decrease in hypothecary security.

It has been remarked by the German side that in the majority of cases the refounding of companies does not also mean a refounding of concerns, and that even less often does it signify at the same time discontinuance of existing concerns, but that, on the contrary, the refounded companies generally (*in aller Regel*) take over existing concerns and do it in a way which will not result in the extinction of the public obligation. From this train of thought the German side seeks to draw the conclusion that there is no real cause for the fear of the Trustee that, if the German viewpoint be accepted, the non-negotiable obligations would be wanting more and more in hypothecary security. Against this one only needs to be reminded of the provision in § 49, paragraph 1, according to which, in case of transfer of the whole or part of the business capital (*Betriebsvermögen*) from one entrepreneur to another, the acquiring party is liable only for the annual payments (*Jahresleistungen*) which will be due up to the end of the calendar year in which presumably the new repartition will take place. If the acquiring party is an industrial entrepreneur who, according to the law, is to take part in the charge at a new repartition, this entrepreneur will take part, to be sure, in the next new repartition of the personal charge with an amount corresponding to his business capital (*Betriebsvermögen*). But if the acquiring party is a newly founded concern, or generally speaking, a concern which has not taken part in the first repartition, its immovable property would, in case the German viewpoint be accepted, not be affected by the public charge; and this might be the case even if this new concern had acquired immovable property which formerly had been affected by the personal charge. This is at least the view which has been advanced by a German commentator (Geiler, *Industriebelastungsgesetz*, p. 250), and it might not be easy to refute this opinion, if the German viewpoint is accepted at all. Hence the fact cannot be disputed that, according to the German viewpoint, an ever increasing part of the charge would lose its hypothecary security during the course of years, and if the opinion of the German commentator just mentioned is correct, there would even be means by which to hasten, through some intentional measures, the exemption of the older enterprises from the public charge.

Since then an acceptance of the German viewpoint would lead to results which are in obvious contradiction to the purpose which has been the fundamental starting point of the Committee of Experts and of the Committee of Organization, and since no provision in the law necessarily demands the interpretation advanced by the German side, I must reject it.

(Signed) MARC. WALLENBERG.