

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

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**The Deutsche Amerikanische Petroleum Gesellschaft oil tankers (USA,
Reparation Commission)**

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XVII.

**THE DEUTSCHE AMERIKANISCHE PETROLEUM
GESELLSCHAFT OIL TANKERS¹.**

PARTIES: U.S.A., Reparation Commission.

SPECIAL AGREEMENT: June 7, 1920.

**ARBITRATORS: Erik Sjoeborg (Sweden), Jacques Lyon (France),
Hugh A. Bayne (U.S.A.).**

AWARD: Paris, August 5, 1926.

Nature of "beneficial ownership".—General jurisprudence.—Juridical personality of corporation as distinct from its shareholders.—Nationality of shareholders.—Discrepancy between two versions in different languages.—Like treatment of foreigners and of nationals.

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

Special Agreement.

AGREEMENT IN REGARD TO TANKERS OF D. A. P. G. BETWEEN THE REPARATION COMMISSION AND THE UNITED STATES GOVERNMENT.

Paragraph A.—The six D. A. P. G. Tankers now at Leith and the two D. A. P. G. Tankers at Burnt Island to be provisionally allocated to the United States Government and temporarily placed under American Registry, with the understanding that they shall fly the Inter-Allied flag together with the United States flag.

Paragraph B.—If desired by the Governments of France, Belgium and Italy the eight tankers may be used until the question of final disposition has been determined, for transporting such cargoes as are specified by those Governments from the United States as follows:

For transporting 2 cargoes each to France, tankers of approximately 17,000 gross tons;

For transporting 2 cargoes each to Italy, tankers of approximately 9,000 gross tons;

For transporting 2 cargoes each to Belgium, tankers of approximately 12,000 gross tons.

France, Belgium and Italy respectively undertake, at the termination of the use of any of said vessels for conveyance of cargoes as above provided, to pay the reasonable expense, including demurrage if any, of restoring the vessels to such condition of cleanliness as they were at the commencement of the first voyage, and, if such cleaning be necessary for the purpose of any return voyage, agree to pay the same expense. Should the Reparation Commission so decide, tankers may also transport one or two relief cargoes from the United States to Germany. The United States is to be free to employ these tankers unrestrictedly to extent that they are not needed for the transportation of cargoes to France, Italy, Belgium or Germany, as above specified.

Paragraph C.—If any of tankers are used for transportation of relief cargoes to Germany, freight rates to be paid by Germany shall be fixed by the Reparation Commission.

Paragraph D.—The rate of freight shall be fixed by the Reparation Commission, when vessels are used otherwise than for German relief cargoes, provided the rate fixed shall in no instance be less than the time charter rate established by the United States Shipping Board on its own tankers and current at the time of the voyage.

Paragraph E.—Irrespective of the question as to whether there may be any obligation now to pay charter hire to the German Government, it is agreed that all proceeds arising from the use of vessels less the cost of operation and fees for management will be credited, or, if so desired, deposited as they accrue with the Reparation Commission, to be held in trust pending a final disposal with interest accrued in accordance with the decision as to the disposition of the tankers as provided for below. If, however, it is decided that the charter hire is due Germany, charter hire on British bare

boat rates less operating costs shall be refunded to the United States by the Reparation Commission and credited by it to Germany for the purchase of food in compliance with agreements pursuant to Brussels Convention.

Paragraph F.—As soon as the Reparation Commission or Independent Tribunal mentioned in Paragraph "I" has declared its decision upon the claim of the Standard Oil Company, the United States will transfer tankers in accordance with such decision, it being agreed, however, that if Standard Oil Company makes good its claim to beneficial ownership of all or any of the tankers in question then such tankers shall by the terms of the decision be awarded to that company and transferred to the United States flag.

Paragraph G.—If Standard Oil Company fails to make good its claim to beneficial ownership of tankers but is found to be entitled to financial reimbursement, then Standard Oil Company shall be entitled to liquidation of the award by transfer of tankers to a value equal to the award, the tankers to be valued by the Reparation Commission or independent tribunal in its award, and the particular tanker or tankers to be selected by the Standard Oil Company and accepted by the Company at the valuation aforesaid. Any award of tankers, other than to the D. A. P. G. under either Paragraph F or Paragraph G, shall be conditional upon compliance by the Standard Oil Company with any order for repayment to Germany, or payment to the Reparation Commission, of the compensation, if any, paid by Germany to the D. A. P. G. or other owners in respect of the cession of the tankers covered by the award, or with any such order for obtaining and delivering to Germany or the Reparation Commission, a release, or assignment, or agreement of indemnity, covering claims against Germany or the Reparation Commission which may arise out of such cession, provided that the Reparation Commission or independent tribunal shall decide such order to be necessary for the purpose of protecting or indemnifying the Reparation Commission or Germany against claims arising out of the cession of the tankers covered by the award.

Paragraph H.—The Reparation Commission is to settle question of Standard Oil Company's claim if the United States finally ratifies the Peace Treaty and an American representative is duly qualified and acting on the Commission except as otherwise provided in Paragraph I.

Paragraph I.—If the United States has not on July 1, 1920, ratified the Peace Treaty and an American representative is not qualified and acting on the Commission, then the Standard Oil Company's claim shall, at the request of the United States or other interested Governments be adjudicated by an independent tribunal to be agreed upon between the United States and the several Governments concerned so that all parties interested may be properly heard. The Reparation Commission and the United States pledge themselves to use their best efforts to arrange this tribunal without delay.

Paragraph J.—The *Wilhelm A. Riedemann* now building in Germany to be completed and to follow fate of other tankers.

Paragraph K.—It is understood that temporary allocation will in no way prejudice claim of beneficial ownership of Standard Oil Company and on the other hand will in no way recognize validity of any such claim.

For the Reparation Commission:

(Signed) DUBOIS. JOHN BRADBURY.

Paris, France, June 7th, 1920.

For the United States Government:

(Signed) BOYDEN.

Paris, France, June 7th, 1920.

SUPPLEMENT TO THE AGREEMENT IN REGARD TO TANKERS OF THE D.A.P.G.
SIGNED IN PARIS, JUNE 7, 1920, BETWEEN THE REPARATION COMMISSION
AND THE UNITED STATES.

It is agreed that the United States' Government will reimburse the Governments of France, Italy and Belgium their interim expenses incident to the care and safety of tankers to June 8, 1920. These amounts, together with the repairs and other expenses incurred in preparing the vessels for, and putting them into service, shall be a charge against the receipts in reckoning the proceeds from the use of the vessels, as contemplated in Paragraph "E". A separate account of receipts and expenses shall be kept for each vessel. Any deficit attributable to any vessel, after charging all expenses shall be a lien on such vessel.

FOR THE REPARATION COMMISSION:

(Signed) DUBOIS. H. G. LEVIN.

FOR THE UNITED STATES' GOVERNMENT:

(Signed) BOYDEN.

Paris, France, August 23, 1920.

ARBITRAL TRIBUNAL INSTITUTED BY THE REPARATION
COMMISSION AND THE GOVERNMENT OF THE UNITED
STATES TO DECIDE THE CLAIM OF THE STANDARD OIL
COMPANY TO CERTAIN TANKERS.

MAJORITY AWARD

Rendered at Paris, August 5, 1926.

PREAMBLE.

Whereas,

It is fitting, before examining the question in any way, to recall the following facts and documents:

By Paragraph 1 of Annex III to Part VIII of the Treaty of Versailles, the German Government "on behalf of themselves and so as to bind all other persons interested, ceded to the Allied and Associated Governments", represented for the purpose by the Reparation Commission, "the property in all the German merchant ships which are of 1,600 tons gross and upwards".

The third paragraph of the same annex lays down that "the ships and boats mentioned in Paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation".

In execution of the above provisions, the German Government delivered to the Reparation Commission nine tankers (*Helios, Mannheim, Sirius,*

Niobe, Pawnee, Hera, Loki, Wotan and Wilhelm Riedemann) which belonged to a company having its registered office at Hamburg and known as the *Deutsche Amerikanische Petroleum Gesellschaft*, hereinafter referred to as the D. A. P. G.

There was no doubt that, from the point of view of the German Government, the ships in question came under Annex III, seeing that they flew the German merchant flag and also belonged to a company which was indisputably German.

It must be pointed out at once that, subsequently, one of these vessels, the *Wilhelm A. Riedemann*, was recognized as not deliverable as a vessel under construction under Annex III and that three others, the *Helios, Mannheim* and *Sirius*, were sold by agreement between the parties.

The present arbitration is concerned with the tankers *Niobe, Pawnee, Hera, Loki* and *Wotan*, with the proceeds from their working and with the proceeds from the sale of the tankers *Helios, Mannheim* and *Sirius*.

In March, 1919, and subsequently, through the intermediary of the American delegations to the Peace Conference and to the Reparation Commission, the American Standard Oil Company of the State of New Jersey protested against the delivery to the Powers of the vessels in question, of which it claimed the ownership.

In support of this claim, the Standard Oil Company relied upon the fact that the D. A. P. G. had been created by it, with the help of capital supplied by it and employed for the construction of the vessels claimed. It explained that the capital of the D. A. P. G. was 60 million marks, divided into 9 million shares, 21 million share-warrants and 30 million debentures. It alleged that at the time of the coming into force of the Treaty of Versailles, it owned of this capital the whole of the shares and almost all the share-warrants and debentures, except for an infinitesimal part.

It concluded that it had a right of ownership in the disputed vessels of a special kind known as "beneficial ownership", which made it impossible to say that they were the property of German nationals in the meaning of Annex III.

It further invoked considerations of equity which, in its opinion, justified the return of these vessels.

As the Governments of the Principal Allied Powers represented on the Reparation Commission did not see fit to allow the claim of the Standard Oil Company, a convention was concluded, after many discussions which will be mentioned later, on June 7, 1920, between the Reparation Commission represented by M. Dubois and Sir John Bradbury, and the United States Government, represented by Mr. Boyden.

Under this convention the disputed tankers were temporarily handed over to the Government of the United States of America on the understanding that they were to fly both the flag of that country and the interallied flag.

In order to settle the dispute, Article I of this convention provided for the constitution of an independent tribunal in the following form:

Paragraph I: If the United States has not on July 1, 1920, ratified the Peace Treaty and an American representative is not qualified and acting on the Commission, then the Standard Oil Company's claim shall, at the request of the United States or other interested Governments, be adjudicated by an independent tribunal to be agreed upon between the United States and the several Governments concerned so that all parties interested may be properly heard. The Reparation

Commission and the United States pledge themselves to use their best efforts to arrange this tribunal without delay.

The problems to be submitted to this Tribunal were formulated as follows in Paragraphs F en G:

Paragraph F: As soon as the Reparation Commission or Independent Tribunal mentioned in Paragraph I has declared its decision upon the claim of the Standard Oil Company, the United States will transfer tankers in accordance with such decision, it being agreed, however, that if Standard Oil Company makes good its claim to beneficial ownership of all or any of the tankers in question, then such tankers shall by the terms of the decision be awarded to that Company and transferred to the United States flag.

Paragraph G: If Standard Oil Company fails to make good its claim to beneficial ownership of tankers, but is found to be entitled to financial reimbursement, then Standard Oil Company shall be entitled to liquidation of the award by transfer of tankers to a value equal to the award, the tankers to be valued by the Reparation Commission or Independent Tribunal in its award, and the particular tanker or tankers to be selected by the Standard Oil Company and accepted by the Company at the valuation aforesaid.

By a decision of October 14, 1921, the Reparation Commission proceeded, with the approval of the American unofficial delegate, to set up the Tribunal provided for in Paragraph I of the said agreement. It appointed as arbitrators: Colonel Hugh A. Bayne, attorney at the Supreme Court of the United States, and M. Jacques Lyon, *avocat à la Cour d'Appel de Paris*. Moreover, it was provided by this decision that in the event of disagreement between them a third arbitrator previously appointed for the purpose would become a member of the Tribunal and the decision of the majority of the members of the Tribunal thus constituted would be final.

The two arbitrators appointed by the decision of October 14, 1921, received the memorials and heard the observations of the parties concerned, but, as they were unable to come to an agreement and had previously obtained a promise of co-operation from M. Erik Sjoeborg, former Sectional President of the Franco-German Mixed Arbitral Tribunal and Envoy Extraordinary and Minister Plenipotentiary of the King of Sweden, they requested the latter to join them on the Tribunal.

The Tribunal thus constituted proceeded to a further examination of the question. All the documents were submitted to the new arbitrator for examination.

M. Lyon and Colonel Bayne, acting respectively on behalf of the Reparation Commission and the American Government, waived any further hearing and the parties confined themselves to adding a short written note to their previous memorials, the arguments and conclusions of which they maintained.

Thus after various meetings in Paris for deliberation, MM. Sjoeborg and Lyon formulated the majority decision, the text of which is given below, to which Colonel Bayne appended a minority opinion.

THE SALE OF THE SHARES IN FEBRUARY, 1917.

Whereas, in support of its claims, the Standard Oil Company asserts that at the time to which it is necessary to go back to determine the validity of

these claims, that is, January 10, 1920, the date of coming into force of the Treaty of Versailles, it was owner of all the shares and almost all the other securities of the D. A. P. G.;

Whereas the Reparation Commission objects that at a date previous to that time the Standard Oil Company had sold all these shares;

Whereas, in fact, it is indubitable that in February, 1917, when America's declaration of war was imminent, the Standard Oil Company, desiring to save its shares from confiscation by the German Government, sold all its voting shares to a German national, Herr Riedemann: and whereas the price not having to be paid until a later date, the purchaser made over to the Standard Oil Company as partial guarantee, some securities which he held in the United States;

Whereas, however, it is necessary to examine the juridical effects of this sale;

Whereas the above-mentioned securities made over by Riedemann to the Standard Oil Company were seized as enemy property by the Alien Property Custodian, the latter, when opposition was lodged by the Standard Oil Company, asserted his belief in the good faith of the sale, but nonetheless, by a decision of February 6, 1919, declared it to be null and void;

Whereas this decision being prompted only by reasons of public order, could not lead the Tribunal to consider the sale as null;

Whereas, in order to determine the validity of the latter it is necessary to refer to German law;

Whereas this contract was concluded in Germany; whereas it is necessary in this connection to note that in reply to a cable of February 5, 1917, in which, after formulating his offer of purchase, Herr Riedemann added: "Purchase to be perfect on receipt of your confirmation", to which the Standard Oil Company replied the same day: "Terms stated accepted and sale confirmed."

Whereas, moreover, in this case, it was a question of the sale of the shares of a German company, and under the contract the shares sold were, in accordance with the express intention of the parties, to be transferred on the books of the company to their new owner;

Whereas in order to understand the effect of such a sale in German law, two legal opinions were submitted to the Tribunal, the one emanating from Professor Riese of the University of Berlin, communicated by the Managing Board of the Standard Oil Company, and the other from Herr Max Bonnem, Advocate at the Court of Berlin, directly consulted by M. Lyon and Colonel Bayne;

Whereas it appears from these opinions that since the shares in question are registered shares, German law, which is strictly formalistic on this point, considers their sale as perfect only as and when the securities representing the shares have been the subject of a material transfer from the seller to the purchaser;

Whereas it is not denied that the certificates issued by the D. A. P. G. representing shares which formed the subject of the convention of February, 1917, never left the head office of the Standard Oil Company in the United States;

Whereas, therefore, failing their handing over to the purchaser, the sale in question must be considered, in German law, as never having been put into execution;

Whereas it is consequently certain that the time of the coming into force of the Treaty of Versailles, the Standard Oil Company was still owner of the

whole of the shares, as well as of almost all the other securities of the D. A. P. G.;

Whereas, this point being established, it is necessary to consider successively the problems arising for the Tribunal out of Paragraphs F and G of the agreement of June 7, 1920;

PARAGRAPH F.

Whereas, under this paragraph, it is for the Tribunal to decide whether the Standard Oil Company has made good its claim to the "beneficial ownership" of all or any of the tankers;

Whereas, at the outset, a question of interpretation of the terms of reference arises;

Whereas this question is: whether the proof of the ownership by the Standard Oil Company on January 10, 1920, of all or nearly all the various categories of securities issued by the D. A. P. G. is the sole and only condition of its alleged right to the "beneficial ownership" of the tankers, or whether this right does not involve a factor in addition to the right of ownership of the securities, the nature of which factor it is for the Tribunal to determine;

Whereas, in other words, it has to be ascertained whether the previous finding of the right of ownership of the Standard Oil Company in the securities of the D. A. P. G. ends the task of the Tribunal, or whether it is only the point of departure necessary, but in itself insufficient;

Whereas the Tribunal cannot find that the agreement of June 7, 1920, may be interpreted to mean that the ownership of the securities of the D. A. P. G. would suffice to confer upon the Standard Oil Company the "beneficial ownership" of the tankers;

Whereas, in the first place, such an interpretation is belied by the preparatory reports of the said agreement, especially Paragraphs F and G, as communicated to the Tribunal by Colonel Bayne;

Whereas the Reparation Commission had entrusted the drafting of these two articles to Sir John Bradbury and Mr. Boyden, representing respectively Great Britain and the United States on the Reparation Commission;

Whereas in a telegram sent on May 19, 1920, to the State Department, Mr. Boyden summarized as follows the attitude of Sir John Bradbury with regard to the American proposal for the drafting of Paragraph F:

He has no objection to Standard Oil Company making any claim of any kind before Tribunal. His objection is to instructing Tribunal that proposal ownership of securities shall *necessarily* lead to any particular result. He wishes whole matter to be determined by Tribunal. If your language "claim of beneficial ownership" means beneficial ownership in tankers themselves, he would accept your idea. It would then be possible for Tribunal to consider whether ownership of securities as proved did or did not constitute beneficial ownership of the tankers, but if your language means, as he thinks, that ownership of securities *necessarily* determines the question of beneficial ownership, then he is unwilling to accept your suggestion;

Whereas it further appears from this same cable that Sir John Bradbury, not accepting the American suggestion concerning the drafting of Paragraph F, proposed another wording for this paragraph, namely that which was afterwards inserted in the agreement;

Whereas in a note of May 20, 1920, transmitted to Mr. Boyden. Sir John Bradbury, who drafted it, declared:

If the Reparation Commission rightly understands the contention of the United States Government, it is that the vessels in question are substantially the property of United States citizens by reason of the fact that an American Company is the proprietor of practically the whole of the securities of the German Company to which they belong;

Whereas it follows from the facts set forth above that prior to the signing of the agreement of June 7, 1920, the Reparation Commission, through its spokesman Sir John Bradbury, had clearly stated to Mr. Boyden, representing the American Government, that in its opinion Article F, as it stood, could not be interpreted to mean that the problem submitted to the Tribunal was limited to examining the right of ownership of the Standard Oil Company in the securities of the D. A. P. G.;

Whereas, moreover, and independently even of the conclusion to which the preliminary reports necessarily lead, if the parties concerned had meant to submit to the Tribunal only the problem of the ownership of the securities, they would certainly not have failed to say so expressly and would not have concealed this problem, which it would have been easy to state, under cover of the "claim to beneficial ownership";

Whereas, moreover, it would be difficult, if the agreement of June 7, 1920, had been interpreted by the Standard Oil Company as limiting the task of the Tribunal, to explain why the introductory memorial of this company, signed by three eminent counsel was almost entirely devoted to discussing the juridical rights of the shareholders in the corporate assets;

Whereas, finally, such an interpretation of Paragraph F seems to render Paragraph G unnecessary; for either the Standard Oil Company, making good its right of ownership in all or part of the securities, thereby establishes directly, from this very fact, its right of ownership in all or part of the disputed vessels, or else, the Standard Oil Company having failed to get itself recognized owner of the securities, it is difficult to understand on what basis an indemnity could be awarded to it under Paragraph G;

Whereas, since the Tribunal concluded on this point that if the problem of "beneficial ownership" could only arise in so far as the Standard Oil Company had previously established its right of ownership in the securities of the D. A. P. G., the two problems remain distinct, and "beneficial ownership" is only conceivable in the form of a special kind of right, distinct from the right of ownership of the securities and additional to it;

Whereas it is consequently necessary to ascertain what this right may be from the definition given of it by the Standard Oil Company, to whom it falls to make good its claim to "beneficial ownership";

Whereas, indeed, the two memorials submitted to the Tribunal in the name of the Standard Oil Company, that of Mr. John B. Moore of December 31, 1921, and that of Mr. Piesse of August 31, 1923, furnish a twofold definition of this expression;

A.

(a) Whereas the first definition appears in Nos. 16 and 17 of the "*de facto* and *de jure* Summary" at the close of the first memorial (p. 114), as follows:

16. The right of beneficial ownership, derived from the substantial, i.e. the lucrative or economic interest, is universally recognized. This

right, although subject to the agreed conditions of legal control, *reaches the property itself* and comprises the right to the continued present enjoyment and ultimate possession.

17. The right of beneficial ownership is most frequently assured through corporate organization, in which individuals unite their resources for purposes of business, and while the control and use of the property are subject to the terms of the corporate agreement, yet the contributing individuals, as the ultimate owners of the assets, have in the capital and business *a distinct and positive right of property which the law recognizes and protects*. This right, no matter by what form of security it is evidenced, is recognized under all legal systems;

Whereas the argument of the Standard Oil Company is perfectly unambiguous since it lays down very clearly that in its view the shareholder in a company has in the assets of that company "a distinct and positive right of property which the law protects", a right *sui generis* known as beneficial ownership which is essentially a right which "reaches the property";

Whereas the existence of such a right can be affirmed by the Tribunal only in so far as it could be proved that this right has been recognized by doctrine and sanctioned by jurisprudence;

(b) Whereas indeed the memorials of the Standard Oil Company quote passages from authors and appeal to the works of doctrinal authorities;

Whereas, however interesting these opinions may be from the theoretical point of view and for the effect they may possibly have on future jurisprudence, the Tribunal must remark that up to the present they have encountered the opposition of most doctrine and nearly all jurisprudence, which in all countries accord to the legal entity known as a company a personality and a patrimony entirely distinct from those of its shareholders;

Whereas in fact the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets;

Whereas it is sufficient in this connection to quote, in so far as concerns the United States, the case of *Eisner v. Macomber* (1919, 252 U. S. 189), in which, the point being to determine whether stock dividend should be considered to be dividend which as such became the property of the shareholders or to be capital which remained the property of the company, in this case the Standard Oil Company of California, the Supreme Court of the United States declared that: "The stockholder's interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has the full title, legal and equitable, to the whole";

Whereas this decision must be compared with the decision of the New York State Appellate Court in the case of *Riggs v. Insurance Co.* (123 N. Y. 7, 1890), in which, replying in the affirmative to the question as to whether a shareholder as such had the right to insure certain corporate property, the court declared: "It seems to us, both upon authority and reason, that the insurance now in question is a fair and reasonable contract of indemnity founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured";

Whereas numerous similar decisions have been rendered by the British courts, and whereas it will be sufficient to quote in this connection the following decisions which have established a precedent:

Bulmer v. Norris (1860, 9 C. B. N. S. 19), in which it was decided that the shareholder in a joint stock company had no legal or equitable interest in lands belonging to the company, his interest being limited to a proportional share in the profits of the company;

R. v. Arnaud (1846, 9 Q. B. 806), in which Lord Denman, deciding the case of a limited liability company which was the owner of a vessel, declared that "the corporation is, as such, the sole owner of the ship, and individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel";

Gramophone Co. Ltd. v. Stanley (1908, 2 K. B. 89), in which Lord Cozens Hardy declared:

The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in a sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to the policy, but it does not in any way diminish the rights and powers of the directors or make the property and assets his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole but absolutely the whole of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares but no more;

Whereas a decision of the House of Lords of April 3, 1925 (*Macaura v. Northern Assurance Company, Ltd.*) (*Times Law Reports*, May 8, 1925, page 447), summing up and confirming all this jurisprudence, declared null and void a contract insuring a stock of building timber belonging to a company, concluded by a person who was at the same time the owner of all the shares of the company and by far its most important creditor;

Whereas in support of this conclusion it is pertinent to quote the following passages by Lords Buckmaster, Sumner and Wrenbury:

Lord Buckmaster:

Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up;

Lord Sumner:

He stood in no legal or equitable relation to the timber at all. He had no concern in the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire;

Lord Wrenbury:

This appeal may be disposed of by saying that the corporator, even if he holds all the shares, is not the corporation and that neither he nor any

member of the company has any property, legal or equitable, in the assets of the corporation;

Whereas, in so far as concerns French jurisprudence, it will be sufficient to quote Professor Thalier, who is one of the most eminent opponents of the classic theory of the personality of companies, but who adds, on page 189 of the 1916 edition of his *Traité élémentaire de droit commercial*: "Jurisprudence has immutable faith in it and does not seem even to suspect the existence of the other constructions which doctrine advances in opposition";

(c) Whereas the memorials of the Standard Oil Company rely also on various legal or administrative decisions on the seizure of ships or the sequestration of property belonging to companies during the war, according to which courts and administrations of the belligerent countries admitted that the nationality and personality of a company could not constitute an obstacle to a seizure or a sequestration if it could be proved that the company was "controlled" by enemy subjects;

Whereas however the decisions and circulars relied on have avoided placing themselves in direct opposition to the classic theory and the established doctrine; whereas they never denied that the company should in private law be considered to be the legitimate owner of the property seized or sequestrated; whereas reasons of public weal and national safety alone led them to admit that the enemy nationality of the shareholders must affect the character and functions of the company;

Whereas, in order to bring out the real nature of the decision of the House of Lords in the case of *Daimler Company, Ltd. v. Continental Tyre & Rubber Company* (1916 2 App. Cas. 307), and to show the error in the conclusions which the Standard Oil Company seeks to draw from it in favor of its theory, it is sufficient to quote the following passage from Lord Parker's opinion:

No one can question that a corporation is a legal person distinct from its incorporators; that the relation of a shareholder to a company which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it, and the acts of its servants and agents are its acts while its shareholders as such have no property in the assets and no personal responsibility for those acts;

Whereas the decision quoted above, without ignoring either the personality of a company or its right of ownership in the corporate assets, merely draws certain conclusions from the control which is or may be exercised by a shareholder or a group of shareholders over the activity of the company;

Whereas to state that a physical person, a legal person or a group of physical or legal persons exercise a preponderating influence over a given legal person is obviously not equivalent to declaring or admitting that they have a right of ownership in the property of the latter;

Whereas this is so true that when the legal person controlled is an enemy its property can be seized, no account being taken of the fact that the third parties vested with this control are allied or neutral;

Whereas, although it has happened that, for the reasons above set forth, allied companies have been found to be enemy in character and have been treated as enemies, it has not happened—no legal decision is quoted to this effect—that enemy companies have not been treated as such, even when some or all of the shareholders were of allied or neutral nationality;

Whereas the Supreme Court of the United States sustained a similar theory in the case of the *Pedro* (175 U. S. 354), in which a vessel belonging to

a Spanish company and captured by the American Navy during the Spanish-American War was declared lawful prize by the Supreme Court, although all the shares of this company were held by British nationals;

(d) Whereas finally the awards of international arbitration relied on by the Standard Oil Company, in particular those rendered in the cases of the "Delagoa Bay", "El Triunfo", "Alsop" and "Orinoco Steamship" companies cannot be held to support its theory;

Whereas in none of these cases has it been a question of granting or assigning to claimant shareholders or debenture-holders rights in any part of the corporate assets, but merely of granting them indemnity for damage caused by unjustified intervention on the part of the government;

Whereas moreover in all these cases, and notably in the first two, which are the most important, it was clearly specified that the shareholders and debenture-holders were admitted, in view of the circumstances, to be exercising not their own rights but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce; and whereas they were therefore seeking to enforce not direct and personal rights, but indirect and substituted rights;

B.

Whereas, it is true, the conception of "beneficial ownership" has taken, in the oral argument of the Standard Oil Company as reproduced and completed in its supplementary memorial of August 31, 1923, a new form which this memorial presents as follows:

The owner of property may, or may not, be the beneficial owner of that property, and a beneficial owner may not be the owner, when that word is used in the proprietary sense. The owner may be the legal owner of the title to the property, but the beneficial owner is he who has or owns the beneficial interest in that property. The words beneficial owners as used in Paragraphs F and G of the agreement of June 7, 1920, must and can only have been used in the sense of the owner of the beneficial interest without the legal title (page 42);

The words beneficial owner when used together can have but one meaning, and that is, the owner of the benefit, or the owner of the beneficial interest. In the case of a corporation, the corporation itself is entitled to receive the income from the property owned by the corporation, but the shareholders of the corporation are the parties for whose ultimate benefit such income is received. In the present case the D. A. P. G. were entitled to receive the profits derived from the tankers in question, but such profits were received by the corporation for the benefit of its shareholders, and therefore the shareholders were the beneficial owners of the tankers (page 44);

Whereas, according to this new and alternative interpretation, the shareholder would be owner of the corporate assets, not in the legal but in the economic sense, in that he would be owner of the income produced by the operation of the corporate assets;

Whereas however it is not correct to state that the shareholders have a right of ownership in the profits of the operation; whereas indeed the profits belong to them only in so far as and when they are distributed; whereas before this date they are precisely the property of the company, which at the

general meeting will decide as such, by the majority vote of the shareholders, on the use to be made of the profits;

Whereas from that time the shareholders have a right of ownership only in that share of the income which it has been decided to allot to them;

Whereas this right, and the right to share in the division of the assets of the company when dissolved, seem indeed to constitute the two essential characteristics of the right of the shareholder and to be merged with it, so that it is impossible to discern the distinct aspects of any "beneficial ownership" which might be added;

C.

Whereas, *in fine*, according to the commentaries furnished and the documents produced by the Standard Oil Company, "beneficial ownership" constitutes a right of ownership for the shareholders either in the corporate assets or in the profits from the operation of these assets;

Whereas, in the first hypothesis, this alleged right would be in contradiction with universal jurisprudence, in particular with that of the United States, Great Britain and France;

Whereas, in the second hypothesis, it would be merged with the shareholder's right of ownership in his shares, and is therefore only a new expression for the same legal fact;

Whereas, finally, in the course of its written and oral observations the Standard Oil Company has sometimes seemed to maintain that the beneficial ownership on which it relied was not included in the classic legal categories, but must be considered and recognized as a right of an economic nature;

Whereas, however, to proclaim the economic character of an alleged right is not sufficient to vest it with the privileges and sanctions of a right of ownership; whereas the right which the shareholder derives from his share is indisputably of an economic nature, but cannot confer upon him a right of ownership either in the corporate assets or in the corporate earnings, as has just been shown;

PARAGRAPH G.

Whereas the Standard Oil Company, not having made good its claim to the beneficial ownership of any of the tankers under Paragraph F of the agreement of June 7, 1920, it is for the Tribunal to ascertain whether this company is justified in claiming indemnity under Paragraph G of the same agreement;

Whereas—in vain, so far as this paragraph is concerned—the Standard Oil Company seems at times to seek to maintain that the right to financial reimbursement necessarily arises from its possession of the shares of the D. A. P. G.;

Whereas, since compensation under Paragraph G should take the form of a surrender of boats, and since Paragraph F provides for the event of the Standard Oil Company's establishing its beneficial ownership of some of the boats only, which alone would be assigned to it, the difference between the two paragraphs, in such a construction, is not evident;

Whereas moreover the arguments previously adduced in connection with Paragraph F to set aside the identity between beneficial ownership and ownership of shares may be extended to Paragraph G, in respect of the

alleged identity between the possession of shares and the right to financial reimbursement;

Whereas, just as the ownership of shares can imply beneficial ownership in the corporate assets represented by the tankers only in so far as it is reinforced by a legal factor of which the Tribunal finds no trace in doctrine or jurisprudence, so the possession of these shares can confer a right to financial reimbursement only in so far as this right is founded on some express text or on considerations of justice involving a judicial sanction;

Whereas, finally, when Paragraph G lays down that a certain number of tankers, to be determined later, will be handed over to the Standard Oil Company only in so far as it may be found to be entitled to financial reimbursement, it clearly leaves it to the Tribunal to examine and to judge whether it is so entitled;

(a) Whereas the essential if not the only title relied on by the Standard Oil Company is Paragraph 20 of Annex II to Part VIII of the Treaty of Versailles;

Whereas this article reads as follows in French and English:

La Commission, en fixant ou acceptant les paiements qui s'effectueront par remise de biens ou droits déterminés, tiendra compte de tous droits et intérêts légitimes des Puissances alliées et associées ou neutres et de leurs ressortissants dans lesdits;

The Commission, in fixing or accepting payment in specified property or rights, shall have due regard for any legal or equitable interests of the Allied and Associated Powers or of neutral Powers or of their nationals therein;

Whereas it is to be remarked that there is a notable discrepancy in these texts, for while the English stipulates that due regard shall be had to any "legal or equitable interests", which corresponds to very clear and well-known conceptions of English and American law, of which equity is a form, the French employs the infinitely vaguer phrase of "droits et intérêts légitimes", which corresponds to no definite legal idea;

Whereas therefore everything points to the conclusion that the French phrase is merely the translation of the English, in which alone the expression employed has legal sense, and which makes clear the general tenor of the articles;

Whereas if we rely on the meaning in English law of the words "legal or equitable interests" and if we consider that the hypothesis envisaged in paragraph 20 is the "remise" to the Reparation Commission of "specified property or rights", it is obvious that the "legal or equitable rights" to which, according to this same paragraph, due regard shall be had, are only the real rights, the *jura in re*;

Whereas it has just been shown that the rights of shareholders in the corporate assets cannot imply such a limitation;

Whereas it is to be noted that according to the decisions of American and British courts above mentioned the right of the shareholder implies no legal or equitable interest in the corporate assets;

Whereas it will be sufficient in this connection to recall that, in the case of *Eisner v. Macomber*, the Supreme Court of the United States declared that "the corporation has the full title, *legal and equitable*, to the whole (the entire assets, business and affairs of the company)", and that in the case of *Macaura v. Northern Assurance Company, Ltd.*, Lord Wrenbury, interpreting the opinion of the members of the House of Lords, declared that "no member of

the company has any property, *legal or equitable*, in the assets of the corporation”;

Whereas moreover the Reparation Commission, in its interpretation of paragraph 20, agreed with this jurisprudence in so far as it confirmed the report of its Maritime Service of January 13, 1922, on “legal and equitable claims under paragraph 20”;

Whereas this report rejected all claims advanced by Allied or neutral shareholders in German shipping companies whose boats had been handed over in execution of Annex III, because “a shareholder’s interest in a shipping company owning a ship or ships cannot be regarded as a legal or equitable interest in the ship or ships under paragraph 20”;

(b) Whereas, it is true, it was a question only of claimants possessing some shares of these companies, and whereas the Standard Oil Company has several times relied on the fact that it was practically the sole shareholder and the sole creditor of the D. A. P. G.;

Whereas however paragraph 11 of Annex II, which may be relied on in this discussion with as good reason as paragraph 20 of the same Annex, specifies that the decisions of the Reparation Commission must follow “the same principles and rules in all cases where they are applicable”;

Whereas this provision makes it obviously impossible to draw a distinction between the holder of a share in a company and the holder of all the shares;

Whereas only the extent and not the nature or the essence of his right can vary with the number of shares that a shareholder may possess;

Whereas moreover it is inconceivable in practice that during the existence of a company and the transfers of shares that take place the rights of shareholders in the corporate assets could vary with the number of shares held by each of them;

Whereas these rights must be identical, whether the company’s shares are distributed among many holders or are owned by a single holder;

Whereas it will be sufficient to recall in this connection the decisions of the House of Lords above quoted in the cases *Gramophone Company, Ltd, v. Stanley and Macaura* and *Northern Assurance Company, Ltd.*;

(c) Whereas, it is true, this same paragraph 11 of Annex II states that the Commission “shall be guided by justice, *equity* and good faith” and that the Tribunal is equally bound to consider the Standard Oil Company’s claim from the point of view of equity, above all since this company has on several occasions made a final appeal to reasons of equity;

Whereas however the entire theory of the Standard Oil Company rests on the establishment of its right of ownership, on January 10, 1920, in the shares of the D. A. P. G. that is, shares involving, together with the right to vote, the control of this company;

Whereas in fact it is obvious that if the Standard Oil Company had been able to rely on the ownership of share-warrants and debentures on this date, if it had been unable to come forward only as a creditor, even a first creditor, of the D. A. P. G., its claim would have been deprived of all legal basis and devoid of any consideration of equity;

Whereas the sale of shares to which it proceeded in February, 1917, in favour of a German national was, according to the Standard Oil Company, a regular and valid sale *ergo omnes*; whereas the Standard Oil Company has not ceased to contend, before the Alien Property Custodian, that in its view the sale preserved this character;

Whereas, although the Tribunal has nevertheless deemed it necessary to set aside this contract of sale, thereby allowing the right of ownership of the

Standard Oil Company in the shares on January 10, 1920, to stand, it was only by strict application of the German law, which has remained exceptionally formalistic on this point;

Whereas the Standard Oil Company was able to submit its claim to the Tribunal only by the application of strictly legal considerations;

Whereas therefore it does not seem that the Standard Oil Company, which, in order to be able to take advantage of paragraph 20, was obliged to rely on strictly legal arguments, can be allowed, in order to escape from the interpretation which this paragraph implies and from the application of it made by the Reparation Commission to shareholders in other shipping companies, to rely on mere considerations of equity;

(d) Whereas moreover, even if we set aside this argument and rely solely on arguments based on *equity*, they do not justify granting financial reimbursement to the Standard Oil Company;

Whereas, first of all, the Standard Oil Company cannot, in support of its claim for reimbursement, rely on the arbitral awards rendered in the cases mentioned above;

Whereas, in fact, the damage involved in these cases, for which the foreign shareholders or debenture-holders obtained reparation through international channels, was damage caused by government intervention recognized to be wrongful; whereas thus, in the cases of the Delagoa Bay and El Triunfo companies, the Portuguese and Salvador Governments, in appropriating without compensation the property of these companies by arbitrary measures which affected them alone, had committed acts that might be ranked as overstepping of authority or abuse of law;

Whereas in the present case no such grievance could be or has been brought forward; whereas it was in execution of an international undertaking that the German Government proceeded to the confiscation of the tankers; whereas moreover it has not been claimed that the indemnity paid under this head to the D. A. P. G. by the said government was comparable to that which in the same circumstances has been granted to other German shipping companies;

Whereas, in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country;

Whereas therefore an Allied or Associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals;

Whereas this principle of equality of treatment, and not of discrimination in favor of Allied and Associated nationals, has moreover been consecrated by the Treaty of Versailles in Articles 276 C and D and 297 J dealing with the treatment to be accorded in Germany to the property and interests of the said nationals after January 10, 1920;

Whereas this same principle seems also to have been followed by the Reparation Commission in the case of laws for the execution of the Dawes Plan;

Whereas in fact several metallurgic and mining companies, indisputably German but of which most or all the shareholders were Allied nationals, having protested to the Reparation Commission against the subjection of their concerns to the mortgage charge represented by the industrial debentures of the Dawes Plan, the Commission merely transmitted their claims to the Trustee for these debentures, together with the unanimous opinion of

its Legal Service (Opinion No. 527 of November 27, 1924); whereas this opinion rejected the claims because all foreign nationals, including Allied and Associated nationals, residing in Germany or possessing property there, must be considered to be subject, on the same footing as German nationals, to the payment of the charges provided for by the laws carrying out the Dawes Plan;

Whereas, *in fine*, at the time of the confiscation of the tankers of the D. A. P. G., the German Government committed no act of discrimination against this company as compared with other German shipping companies;

Whereas therefore the granting of compensation to the Standard Oil Company cannot be justified, as against these companies, by any consideration of equity;

Whereas such compensation should not in equity be justified as against the other Allied or neutral shareholders in German shipping companies, since the claims for compensation advanced by these shareholders have rightly been rejected by the Reparation Commission;

Whereas it is true that these same shareholders held only a few shares, but whereas it seems that equity would be thwarted *a fortiori* if a shareholder could collect, as the holder of a large number of shares, an indemnity which had been refused to less important shareholders;

FOR THESE REASONS

The Tribunal

Declares that the Standard Oil Company has not made good its claim to beneficial ownership of any of the tankers in question, under Paragraph F of the agreement of June 7, 1920;

Declares that neither is the Standard Oil Company justified in claiming indemnity under Paragraph G of the same agreement;

Finds, therefore, that the tankers *Niobe*, *Pawnee*, *Hera*, *Loki* and *Wotan*, as well as the proceeds of their operation and the proceeds of the sale of the tankers *Helios*, *Mannheim* and *Sirius*, shall remain, under Annex III to Part VIII of the Treaty of Versailles, the property of the Allied and Associated Governments represented by the Reparation Commission.

The present award is drawn up in two copies signed by MM. Erik Sjoeborg and Jacques Lyon.

One of these copies is deposited with the General Secretariat of the Reparation Commission at Paris.

The other copy is delivered to the Government of the United States of America, by the intermediary of Mr. Hill, unofficial delegate of the said government to the Reparation Commission.

Done and signed at Paris this fifth day of August, one thousand nine hundred and twenty-six.

(Signed) ERIK SJOEBORG. JACQUES LYON.