OPINIONS OF A GENERAL NATURE

CERVETTI CASE

AGNOLI, *Commissioner* (claim referred to umpire):

The above-mentioned claim having been submitted to the umpire in consequence of a divergence of views and appraisement between the Commissioners in regard to the proofs of the acts which gave rise to the claim proper and the amount of the damages as well as to the question of the interest which may be awarded the claimant, the undersigned reserves the right to indicate the amount to be paid in principal to Cervetti as an equitable compensation for

[1] A like rule was adopted by the German-Venezuelan Commission (*supra*, p. 423), but in the British-Venezuelan Commission interest was only allowed to the date of the awards, nothing more being asked by the English agent.

[2] See to like effect Vol. IX of these Reports, p. 470.

actual damage done him, after the demonstration of the proof by the interrogatories deemed opportune on this occasion put to the claimant by the Commission.

Regarding the question of interest the undersigned contends:

1. That the adjudication of interest is in conformity with justice and equity, and impliedly comprised in the protocol.

2. That the interest in the case should run from the day on which Cervetti suffered damages to the day on which his case will be settled by the Commission, without in any wise forfeiting the interest which may eventually be conceded to claimants of any nationality, either by decision of the Mixed Commissions or by the grant of the Venezuelan Government, from the day of its award by arbitration to the day of payment.

3. That the rate of interest shall be at 5 per cent per annum.

Regarding the first point, it is held that the indemnity would not be complete and therefore not in accord with the requirements of strict equity, which alone should guide the decisions of the Commission, if interest were not allowed, excepting in cases of indirect damages and personal injuries.

The refunding to a merchant after a long time of the price only of the goods taken from him or the reimbursement to him of forced loans, also after a long time, does not constitute an equitable or integral compensation. Like to the tool in the hands of the workman, merchandise and money in the hands of the merchant constitute capital in a productive form, and may perhaps be his only resource, his only means of earning his livelihood.

The merchant must have paid interest to the hands furnishing the goods, and he from whom money has been forcibly taken or he to whom money has not been paid when due must have been compelled to procure capital on credit, and in either case the injured party must have been compelled to submit to the payment of interest, which, according to the local commercial conditions, must have exceeded 5 per cent.

What motive is there for denying in principle compensation for precise and certain damages? It is indisputable that the measure of redress should be fixed in a spirit of moderation.

In any event the protocols signed at Washington in no wise exclude the adjudication of interest, but rather determine that indemnity shall be accorded on the basis of absolute equity, and leave to the commissions a full and absolute liberty to deliberate on the sum to be by them accorded as an indemnity in each case.

The fact that the adjudication of interest must aggravate the financial situation of Venezuela is worthy to be taken into consideration, and it is with this in view that the undersigned has fixed the rate at 5 per cent, which, given the usages of the country, is very light indeed. It is further worthy of note that interest has been accorded in the majority of cases by arbiters and arbitral commissions, above all, in cases where decisions have been given in claims of long standing and those in which the payment could not be immediately made.

It should be sufficient to cite the very recent precedent of the " Commissions des Indemnités " in China. Various members of the diplomatic corps accredited to Peking, among which was the plenipotentiary of the United States, appointed to adopt rules for the government of claims in trust for their colleagues, established the principle adopted by all the interested powers, that the injured parties would be given interest at 5 per cent in civil and 7 per cent in commercial matters.[1]

The President of the Swiss Republic, sitting as arbiter in the large claim of

[1] Foreign Relations, Appendix, 1901, p. 107.

Fabiani against the Venezuelan Government, awarded 5 per cent. (Moore, p. 4915.)

The United States asked and obtained from Mexico (Com., 1838-1841, Moore, History and Digest, etc., p. 1254) interest at the rate of 5 per cent and from Peru at 6 per cent. (Moore, p. 1629.)

Interest at 5 and 6 per cent were likewise conceded by the Spanish Spoliation Commission and in the Panama riot and others. (Moore, p. 1004, 1381.)

The equity of the principle which the undersigned desires to see adopted seems from the foregoing precedents to be sufficiently established, though admitting that in some cases the request for interest had not been advanced at the time when the agreement as to the government of claims had not been formulated, or for other reasons.

The mere fact that the royal Italian legation in presenting claims did not request interest does not imply a renunciation of them. The legation believed it its duty to limit itself to the presentation of claims, leaving to the Commission the full liberty of deciding as to the amount and as to the form of the compensation.

If its silence in this regard is to be interpreted as a renunciation of interest, the legation will demand interest on all claims to be hereafter presented, as well as on those now in the hands of the Commission.

Even the silence of a claimant in this respect can not be considered as a renunciation, which latter should be explicitly stated, as otherwise it would be strongly contrary to the principles of equity and justice that interest should be accorded to a claimant asking it, while refusing it to another claimant who, through neglect or ignorance of the law, had failed to apply for it.

The question should be decided, after due examination, according to general and uniform criteria, as well in the case of Cervetti as in all the others.

If the silence of claimants with regard to interest is to be taken as a renunciation, similarly should it be considered a renunciation of indemnity when, by reason of illiteracy, or because not deemed by them necessary, a formal claim for indemnity does not accompany the testimony of witnesses as to the loss of receipts attesting forced loans or similar documents.

The Commission would most certainly depart from the principles of justice and equity, which should alone inspire it, if it were to reject all claims so presented, and the same principles and the same rules apply with equal force to the question of interest.

Regarding the second point, by the same reasons of equity, interest should run from the date on which the damage occurred to the date of the decision of the Commission or of the umpire, excepting the reserve in regard to the interest from the date of future decisions referred to above. This is the rule adopted recently in China by the " Commission des Indemnités."

The date of the presentation of the claim to the Venezuelan Government or to the Commission does not appear to the undersigned worthy of consideration, and not only because the forwarding of said claims to the legation was much delayed by the interruption in or temporary suspension of mail facilities of the Republic, but also because the legation did not deem it wise to call attention to these claims in times of political and financial crises, knowing well that there could not result practical utility or immediate solution.

It is known that for the claims of the period 1898-1900, none had as yet been obtained from the Venezuelan Government at the beginning of the current year and previous to the action of the allied powers.

What would it have profited the claimants and the legation to have hastened the presentation of the claims? It belongs to the Commission to provide therefor, and if the assembling of this latter could not be effected before the

1st of June, 1903, this fact should not influence the selection of a date from which interest should run in favor of the claimants.

This is not a case in which to invoke the rules governing ordinary courts and permanent tribunals, whose decisions, more or less solicited, depend solely on the diligence of the interested parties. We are in a question of claims and not in a jurisdiction absolutely exceptional, in which not only we may but we should depart from the usual forms of procedure.

Regarding the third point, assuming that local law may not according to the terms of the protocol of May 7 in all that concerns the settlement of Italian claims, it is clear that the Commission in order to determine the rate of interest to be awarded to Cervetti and other Italian claimants must base itself on equity and on precedents in similar cases, as well as on the usage of the country and of local commerce.

Though the Civil Code of Venezuela fixes the legal rate of interest at 3 per cent, it is notorious that is not the usual rate throughout the Republic. Instead the conventional rate is 12 per cent, and the same is true of the rate of interest on deferred payment in commercial affairs, and in this regard it is noteworthy that the Government exacts 12 per cent from importers that are backward in the payment of import duties.

The new law of the banks of Venezuela provides that on the falling due of hypothecated credits the banks may in case of delay exact 12 per cent per annum. According to articles 5 and 27 of the above-mentioned law, 7 per cent per annum is lawfully borne by hypothecated credits and 9 per cent for credits on 'change and mutuals.

The same local Government pays, as I am informed, to the Bank of Venezuela as per contract, 9 per cent on its operations in current accounts.

The legal rate in Italy is 5 per cent in civil matters and 6 per cent in commercial affairs.

It has been seen above how in cases of arbitration interest has run from 5 per cent to 7 per cent per annum.

In asking, therefore, that in the case of Cervetti and the other claimants interest be fixed at 5 per cent, the Italian Commissioner does not doubt having adopted an equitable and moderate average and one fairly convenient to the Venezuelan Government.

ZULOAGA, *Commissioner:*

Respecting the principle, I have admitted that it appears proven that a damage caused by Venezuelan forces exists, but I do not find elements of conviction by which it may be estimated, the proof submitted being altogether deficient. The case has been submitted to the umpire, who is to render his decision freely thereon, based on proofs and such other evidence as he may deem proper to obtain and consider.

Respecting the second point raised by the Italian Commissioner, whether or not interest shall be allowed Cervetti, it is my opinion that interest should not be allowed, either for the past or for the future. Respecting the latter, it would appear that the Commissioner for Italy and myself are in accord that none should be granted, though it seems that he wishes to make certain reservations as to the decisions, in case, as he says, the nations interested should desire to fix the rate of interest.

This reservation is foreign to our attributes as judges and to the faculties invested in us by the treaties in virtue of which we were appointed. Judges decide, grant or adjudicate that which they believe to be just, but they have not the power to make bargains.

Article V of the protocol of February 13, 1903, determines the manner in

which Venezuela is to make the payment of claims within a reasonable time, and, as Italy accepted this mode of payment, Venezuela is within her rights, since payment is to be made to the Italian Government within the delay and in the manner agreed upon without concerning herself as to whether any particular claim is to be paid immediately or not.

It is to be observed that many delicate and laborious negotiations were had before the establishment of the 30 per cent agreed upon, in which, without doubt, the economic and political conditions of Venezuela were duly considered and appreciated by the powers agreeing upon a fixed mode of payment.

In regard to the payment of interest for time past, I am also of the opinion that it should not be granted. These claims, as appears in the case of Cervetti, do not come to the notice of the Government before the moment in which they are presented to the Commission, and now is the time to fix the amount of the damages. It does not, therefore, appear just or equitable that interest should be awarded on amounts which Venezuela did not in reality know she owed.

Many nations, among them Italy and Venezuela, have decreed that legal interest (in Venezuela, 3 per cent) does not accrue on debts for liquidated sums without a request on the debtor for same. This request is necessary, and is based on equity, as without it the debtor can not be supposed to know that interest is demanded. When it is a question of unliquidated sums it is impossible to establish the fact that interest has accrued, since the amount actually owed was not known.

This case of Cervetti appears singularly appropriate for the bringing out of this class of argumentation — for the development of its applicability. He has come before this tribunal, and the Commission has been unable to agree on an award for damages, for the want of satisfactory and convincing evidence. The case has passed to the umpire, who is equally unable to determine it, and is seeking further proof. Can it be said to be equitable, under such circumstances, to award the payment of interest by Venezuela for time past? Is it not puerile to award interest on sums which can only be approximated?

As these claims were not before brought to the knowledge of the Government of Venezuela, it seems strange to assume that interest is due on them. It is objected, however, that the royal Italian legation was prevented from presenting these claims to the Venezuelan Government by reasons of its being inconvenient, and therefore these very reasons would undoubtedly seem to prohibit the allowance of interest upon these claims.

I do not agree with the Italian Commissioner that the matter should be decided in general terms, though in fact this may be the result.

We are judges, and our proceedings should declare a judgment in each case. Naturally the decisions of the umpire will be accepted as determining the course of settlement by the Commission of future cases, but I believe, nevertheless, that we, as well as the umpire, should give special and full consideration in each case. That each case may or not be consequent on previous criteria is a question of a different nature.

Without any doubt, only well-founded reasons would determine a different procedure in any one case from that followed in others.

RALSTON, *Umpire:*

A difference of opinion arising between the Commissioners for Italy and Venezuela, this case was duly referred to the umpire.

Upon examining the record, it was the opinion of the umpire that, although the claim was probably well founded, the proof would not justify any recovery, the claimant's witnesses merely stating that the facts alleged by them were

public and notorious, but stating nothing of their own knowledge. The foregoing view being submitted by the umpire to his associates, it was determined that the claimant himself should be summoned before the Commission and examined by its members under oath. This course was taken and the claimant appeared and was examined at length on June 25.

The claim is for the enforced loan of three horses (one being returned injured, and all, as appeared on examination, dying shortly after their return because of bad treatment), and for the taking on July 29, 1902, of some fowls, household effects, gold and silver articles, and 250 pesos in coin, the acts complained of being committed by Venezuelan troops at Macuto under the command of a colonel, and by virtue of his express direction, the damage claimed being said to amount to 3,200 bolivars.

The fact of the taking, under the circumstances as stated by the claimant, has been demonstrated, and the only questions are as to the amount of damages and the interest thereon.

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(After discussing the facts, the umpire continues:)

The taking having been without right, should interest be included in the award? If so, when should it begin and terminate, and what rate should be allowed? In the opinion of the umpire, some interest is justly due, the claimant having been deprived of the possession and use of his property and interest constituting some measure of return for such deprivation.

According to the general rule of the civil law, interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been "*mis en demeure.*" Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know, until a proper demand be made upon them, of the existence of claims which may have been created without the authorization of the central power, and even against its express instruction. So far is this principle carried that in the United States no interest whatever is allowed upon any claim against the Government except pursuant to express contract.

In view, however, of the conduct of past mixed commissions, the umpire believes such an extreme view should not be adopted. It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the royal Italian legation to the Venezuelan Government [1] or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government. This method of procedure will, in the opinion of the umpire, offer in international affairs the degree of justice presented by the "*mis en demeure*" as to disputes between individuals.

In opposition to the foregoing it is suggested in the opinion of the honorable Commissioner for Italy that the above rule would be unjust for the reason that the forwarding of claims was much delayed by the interruption in or temporary suspension of mail facilities, and because the legation did not deem it wise to call attention to these claims in times of political and financial crises, knowing well that no practical benefit or immediate arrangement would result therefrom.

[1] This principle was adopted in the case of the *Macedonian* against Chile by the King of the Belgians. (See 2 Moore's Arbitrations, p. 1466.)

As to the first of these suggestions, it is to be said that the present claimant has been able at all times to reach Caracas personally or by letter without and delay, and the situation of so many other claimants has been the same that no general rule should be adopted based upon the condition of postal communications.

As to the further suggestion relating to the hesitancy of the royal Italian legation to submit claims, it can not be assumed that a nation which joins in creating a mixed commission to settle claims against it would have failed to recognize its just obligations when presented.

The umpire recognizes fully the fact that it may be a hardship to individual claimants not to receive interest from the date of taking; but, believing that this hardship could have been avoided in the manner before indicated, he does not now consider that it would be just to charge Venezuela with the payment of interest for perhaps long periods of time during which that Republic was not notified that a claim was made against it.

Next considering the question of the time when interest should terminate, the umpire is clearly of the opinion that no interest should be allowed upon the award finally to be made. In this conclusion he is influenced largely by the action of the Geneva tribunal, which granted no interest upon the award, and he is controlled by the fact that the protocols by virtue of which he acts do not provide for interest upon the awards. He believes, however, that under the powers contained in the protocols interest may in every case be calculated to a fixed period within the life of the Commission, this course placing all claimants upon a like footing. In the present claim, therefore, and in others like in general character where judgments are given for the claimants, interest may be calculated as a part of the award up to and including December 31, 1903, that being the date upon which the labors of the Commission might be presumed to terminate.

We now come to the final question as to the rate of interest to be allowed.

The umpire has been referred to the fact that commissions have allowed rates varying from 3 to 7 per cent and even more in some cases, while the commercial rate at Caracas often equals 12 per cent per annum, the latter rate being exacted by the Government on certain overdue taxes or imposts. Attention has further been called to the fact that the American Commissioners allowed against the recent Chinese indemnity 5 and 7 per cent.

The practice among prior mixed commissions has been so far from uniform and so often dependent upon the language of particular treaties as not to afford any very useful guide. Commercial rates are so uncertain that, while their consideration may be useful, the umpire would not be justified in being controlled by them. Of course, high percentages demanded by a Government from a defaulting taxpayer do not afford a safe precedent. Again, as to the Chinese indemnity, the rates were intended to operate simply between the United States and the claimant, and did not operate between nations.

The umpire believes it fair to take into special consideration the rate of interest paid in Venezuela by law in the absence of contract and also the rate accepted by foreign governments upon bonds given by Venezuela to pay obligations created by former arbitral tribunals.

It appears by article 1720 of the Civil Code of Venezuela that the legal rate is 3 per cent in the absence of contract, and the umpire is further informed, that although 5 per cent has been given in some cases, the rate upon bonds given by Venezuela in payment of awards in favor of French citizens and English and Spanish subjects is the same. He thinks, therefore, that this rate should be followed in the absence of contract of the parties fixing another.

Pursuant to the foregoing opinion, judgment will be entered for 1,724

bolivars, plus interest at the rate of 3 per cent per annum from the date of the presentation of the claim to the Commission up to and including Decem-ber 31, 1903.