

OPINIONS IN THE SWEDISH-VENEZUELAN COMMISSION

GAYTÁN DE AYALA, *Umpire*:²

The writer, umpire of the Swedish-Norwegian-Venezuelan Mixed Commission, constituted by virtue of the protocol signed at Washington on March 10, 1903, and named by His Majesty, the King of Spain, at the request of the Government of Sweden and Norway, states:

That the record filed to prove the validity and amount of the claim in question having been examined;

That the arguments presented in defense of the rights of their respective constituents by the commissioners of Sweden and Norway and Venezuela, and their opinions relating to the demand for the payment of interest on the amount allowed on the claim which the commissioner of Sweden and Norway presents;

Whereas it appears from the opinion of the Venezuelan commissioner:

That neither the diplomatic nor consular representatives of Sweden and Norway in presenting the *Christina* claim to the commission demanded interest on the sum claimed;

That the creditor has no right to interest for default, except when there has been a delay in payment chargeable to the debtor, and in the present case the delay which has transpired can not be charged to Venezuela, since the Government of the Republic has given notice that it was willing to satisfy the claim, provided it was reduced to a just amount;

That the Government of Venezuela was right in refusing to acknowledge as just the estimate of the damages and injuries made by the owner of the bark *Christina*, as is seen from the award of the commission, by virtue whereof only the fifth part of such claim has been allowed;

That the persistence on the part of the claimants in demanding excessive damages — more than has been agreed were their due — should be considered as the sole cause of delay; and therefore it is neither just nor equitable that Venezuela should be liable for the losses caused by the rash pretensions of said claimants;

That the Venezuelan commissioner calls the attention of the umpire to the rate of interest that is demanded in favor of the claimants, and to the date

¹ No rules of procedure were formulated in this Commission.

² For a French translation see Descamps-Renault *Recueil international des traités du XX^{ème} siècle 1903*, p. 889.

from which said interest should run, alleging with respect to the first point that the rate of 6 per cent per annum is very much too high, and with respect to the second that the claim was not officially presented to Venezuela until the month of September, 1895.

And whereas it appears from the opinion of the commissioner of Sweden and Norway:

That the fundamental spirit of all the protocols signed in Washington is to decide all the claims upon a basis of absolute equity, and that equity has no criterion of making satisfaction for damages and injuries except to reinstate the injured person in the same condition in which he would have been had the damages and injuries not occurred.

That in support of the foregoing doctrine he cites the general rules as to the payment of the claims approved by mutual agreement of all the representatives of the interested powers after and on account of the Boxer uprising at Peking, which rules provided, in Article I, section 5:¹

Persons who may have suffered damages and injuries as a consequence of the Boxer movement shall be restored to the situation in which they would have been had not the aforesaid uprising taken place.

That said principle is especially applicable to the case of the *Christina*, and that because there is question of damages committed in the year 1892, which was not decided until 1903, when they were estimated at one thousand pounds sterling, this circumstance implies, as against the perpetrator thereof, the obligation to pay interest for the time elapsed;

That he determines 6 per cent per annum as the rate of interest, relying therefore upon the facts that in Venezuela 18 per cent per annum is frequently paid, and that the commercial rate is 12 per cent per annum, and that it is certain that the owners of the *Christina* earned in their business a rate much higher than the said 6 per cent;

The writer, bearing in mind the foregoing opinions of the interested parties, and

Considering that even though the fact alleged by the Venezuelan commissioner be true — that neither the minister nor the consul-general of Sweden and Norway demanded interest upon presenting the claim under consideration — the fact that they did not do so does not involve the express or implied waiver of interest upon claiming specifically, since those officials in demanding a cash indemnity for the damages and injuries caused to their constituents did not abandon the rights that might arise by lapse of time during negotiations of the claim;

Considering that the right to demand the payment of interest arises in the present case out of the length of time it has taken the representatives of the two parties to agree upon the proper amount of the claim, but that said delay can not be attributed exclusively to the negligence or ill will on the part of Sweden and Norway, since on several occasions propositions of settlement were proposed which the Government of Venezuela rejected, for reasons which do not enter into the subject-matter of the discussion before this commission;

Considering that it is a principle of justice universally recognized that the measure of damages should be made coextensive not only with the material direct damages suffered by the injured person, but also with the profits of which he has been deprived;

Considering that when there is question of ascertained sums of money the

¹ Examine Foreign Relations for 1901 (Appendix), p. 107 of the original Report referred to on the title page of the Swedish-Venezuelan Commission.

profits of which the injured party has been deprived are compensated for by the payment of interest which may be general or special, as the case and circumstances connected with the nature of the business in which the interested party devoted himself;

Considering that in cases like that of the *Christina* it is proper to allow interest at the rate generally adopted in the negotiations of owners of ships;

Considering that the legal interest of 3 per cent per annum urged by the commissioner of Venezuela is only applicable by virtue of specific stipulations, or in case of loans of money under absolute security, and not when there is question of industrial or commercial undertakings in which this requisite is necessarily lacking;

Considering that Venezuela pays its creditors interests varying in rate between 9, 6, 5, and 3 per cent per annum, according to the circumstances and sort of the debt;

Considering that the Venezuelan commissioner in calling the attention of the umpire to the rate of interest which the honorable commissioner of Sweden and Norway demands, shows secondarily how it is possible to allow interest in accordance with the principles of justice and equity which are to inspire this decision;

Considering that these very principles of equity and justice hold that interest should be allowed the injured party by reason of the damage suffered from the day when the party causing the injury incurred the inherent liability to pay the same, and that this liability should be considered as fixed in the case of the *Christina* from the day on which the owners and claimants herein proved their blamelessness for the act which gave rise to the detention of said bark;

Whereas Article II, paragraph 1, of the protocol signed at Washington by the representatives of Sweden and Norway and Venezuela on March 10, 1903, the commissioners of the two interested parties agreed upon the amount of the indemnity which ought to be allowed the claimants and fixed it at one thousand pounds, sterling;

Whereas by the disagreement of the commissioners with respect to the payment of interest on the one thousand pounds sterling agreed upon as the amount of the claim, and as a consequence thereof by the disagreement concerning the rate of said interest and concerning the time from which it should run, the writer is required to decide the foregoing disagreements, and bearing scrupulously in mind the provisions of Article I, paragraph 3, of the protocol above mentioned, which says:

The commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation.

He decides —

1. That interest should be paid.
2. That the rate of interest shall be 5 per cent per annum, which is the rate that Venezuela pays commercial companies on her external debt.
3. That interest should begin to run from the day when the blamelessness of the claimants in the act which caused the detention of the *Christina* was proved; that is, from the 7th day of July, 1892, until the date of the present award.