AWARD IN REGARD TO THE INTERPRETATION OF THE RUNCIMAN-CLÉMENTEL AGREEMENT OF 3 DECEMBER 1916, RENDERED ON 9 AUGUST 1918 [1]

1. This is an arbitration of an issue that has arisen between the British Government and the French Government in regard to the interpretation of Clause 5 of an agreement entered into on December 3, 1916, between His Excellency M. Clémentel, Minister of Commerce, on behalf of the French Government, and the Right Honorable Walter Runciman, M.P., President of the Board of Trade, on behalf of the British Government. The clause of the said agreement, of which the interpretation is in dispute, reads as follows:

5. The British Government will grant—

(A) The transfer to the French flag of the steamers ordered by and constructed for French firms as specified on the attached list, which list may be subject to alteration after consultation between the competent authorities of the respective countries.

(B) Certificates of Priority A, for the construction of such cargo steamers which French firms can prove to have been ordered by them before the date of this agreement, on condition that they are employed by the French Government. The steamers referred to in this paragraph are specified on the attached list (B).

2. The contention of the British Government is that their obligation under Clause 5 of the agreement was limited to the transfer to the French flag of steamers scheduled as already completed, and to the granting of certificates of priority for the completion of those steamers scheduled to the agreement which were still in process of construction, and also in the case of the latter steamers to the making of arrangements whereby these steamers, when completed, should be employed by the French Government but subject to their registry under the British flag.

3. The contention of the French Government is that the list of steamers referred to in Paragraph " B " is not a separate list from the list referred to in Clause " A " of steamers to be transferred to the French flag, but merely a sub-category of the list referred to in Clause " A " consisting of those steamers ordered by and under construction for French firms which were not yet completed and for the acceleration of which, to the point of completion, certificates of priority were desired.

4. The representatives of the two Governments having agreed that a certain list of steamers, built and building, submitted to the Board of Trade by M. de

[1] *American Journal of International Law*, vol. 35, 1941, p. 379.

Fleuriau with his letter dated February 5, 1917, is to be regarded as the list scheduled to the agreement, and all the vessels appearing in that list having been transferred to the French flag or granted certificates of priority according as they were completed, or in process of construction, the question to be decided is whether certain steamers listed as in process of construction, and for which certificates of priority were granted, should or should not on their completion be transferred to the French flag.

5. The agreed procedure for the submission of statements of fact and arguments for each side in this arbitration is indicated by the following documents, filed with the Arbitrator and exchanged between the parties, to which reference is made in this award.

I

Statement of Case of the French Government, 19th June 1918. Statement by the Board of Trade, 19th June 1918.

II

Answer of the French Government, 5th July 1918. Answer by the Board of Trade, 5th July 1918.

III

Interrogatory letter addressed by the Arbitrator in identical terms to the representative of the French Government, and to the representative of the Board of Trade, 8th July 1918.

IV

Replies by the Board of Trade to the questions of the Arbitrator, 10th July 1918.
Replies of the French Government to the questions of the Arbitrator, 29th July 1918.

V

Submissions of the French Government, 29th July 1918. Note by the Board of Trade on the Submissions of the French Government, 31st July 1918.

6. It appears from the correspondence between the two Governments that the interpretation of Clause 5 of the agreement, for which the French Government contend, was expressly embodied in three letters from M. de Fleuriau dated 16th December 1916, 12th January and 5th February 1917 respectively. In all three letters M. de Fleuriau prefaces the list " B " with the following words: " Cargo steamers ordered by French firms before date of agreement on condition that they are employed by the French Government, for which Certificates of Priority A are to be granted *and transfer to the French flag when completed.* " No issue is joined upon the use of these words in any acknowledgment of M. de Fleuriau's letters by Mr. Hipwood, and the first disagreement as to the construction of Clause 5 arises out of the letter of Sir N. Highmore, K.C.B., dated 26th September 1917, refusing an export license for S.S. *Ville de Verdun.*

7. The question was, however, raised by a note written by Sir E. Wyldbore Smith on the official papers of the Board of Trade, dated 20th January 1917, as follows:

I should also draw your attention to paragraph " B ", on the second page of M. de Fleuriau's letter of January 12th, in which he asks not only that certificates of priority should be granted in respect of certain vessels which he proceeds to enumerate, but also that they should be transferred to the French flag when completed. No such transfer is mentioned in Section (b) of Clause 5 of the agreement.

8. It is evident that in the framing of the agreement and in the preparation of the list of steamers to be scheduled to the agreement, as well as in the protracted correspondence relating to this matter, there was a lack of that precision and punctuality usually observed in matters of similar importance — a lack which is fully explained by war-time conditions and the consequent preoccupation of the officials concerned with other weighty matters; and by the necessity, exhibited in many important negotiations of this kind, of arriving as quickly as possible at an agreement on general principles, subject to the later perfection of details. The risk of inaccuracies and misunderstandings, due to these conditions, is one that cannot always be avoided and indeed, must often be taken if substantial results are to be obtained. For this reason I have not given great weight, in arriving at a decision in this matter, to the prejudice to which the position of either party may seem to have been subjected at one time or another by an apparent delinquency in asserting its position, but have rather given my attention to the meaning of the agreement, in the light of all the attendant circumstances.

9. Practically the whole agreement, of which Clause 5 is in dispute, is a statement by the British Government of certain things it was prepared to do as a matter of co-operation with its ally. This co-operation was actuated by a broad and indeed a generous view of the common interest. Under these circumstances, if the case were one of acknowledged obscurity as to the meaning of any part of the agreement, the greatest deference would naturally be shown to the British Government's interpretation of its desires and intentions. On the other hand, such a statement of what the British Government was prepared to do in co-operation with its ally, though perhaps not a bargain in the ordinary sense of that word, was, nevertheless, an engagement expressed by the words " The British Government will grant ". It is in order that this engagement, as to which a difference of opinion has arisen, should be defined, that the services of an arbitrator have been requested by the friendly action of the two parties.

10. Having examined the statements of the case submitted on behalf of the two Governments and the arguments submitted in addition thereto, I find that those steamers the names of which were scheduled to the agreement under Paragraph " B " as in process of construction, should be regarded as a subcategory of the list of steamers referred to in Paragraph " A ", all of which were to be transferred to the French flag. This finding is based upon the following considerations:

(*a*) Only with this interpretation of the agreement does it seem possible to reconcile the use of the words in Paragraph " B " of Clause 5 " on condition that they are employed by the French Government." These words indicate that upon the completion of the steamers the French Government would be in a position, but for the limiting condition, in which they would be able to permit the steamers to be employed otherwise than in government service. It was naturally not to the interest of the British Government to grant priority certificates without the assurance that the steamers profiting by these certificates should be used for public purposes conneced with the prosecution of the war, rather than in private interests, and the words used in the limiting condition seem to have been appropriately chosen to limit the action *of the French Government.*

(*b*) Whilst it was entirely within the right of the British Government to prevent the export of any steamers built or building for the account of French owners, it was a natural desire on the part of the French Government to persuade the British Government to waive this right in the interest of an allied nation, and it seems reasonable to infer that it was in order to secure possession and control of the steamers already ordered, without regard to the precise date of their completion, that the agreement was entered into. The effect of Paragraph " B " was to prevent this object from being defeated by undue delay in the completion of the unfinished steamers. Had the British Government at the time of making the agreement attached importance as regards export, to the distinction between the steamers completed before December 3rd and steamers completed shortly after that date, it would be reasonable to expect that this distinction would be clearly expressed. The fact seems to have been, however, that information was lacking at the time the agreement was signed as to what steamers were completed and what steamers were still under construction.

(*c*) The alternative procedures by which the British Government proposed to carry into effect the provisions of Paragraph " B ", while adequate for the purpose of placing the tonnage in question in the service of the French Government (as would have been equally true of the completed steamers) cannot be fairly regarded as implied or understood by the language of the agreement. Moreover the opening clauses of the agreement deal specifically with the question of British tonnage chartered for French use, and it would seem that some cross reference would have had to be used to bring the ships of List " B " within the provisions of Clause 1, or at least to provide that the limitation to the amount in use as of October 31, 1916, would not operate against the employment of the List " B " ships, should this addition lead to an excess over the total stipulated in Clause 1.

(*d*) The evidence brought forward by the British Government to show that its policy had been becoming less and less favourable to the export of ships built in the United Kingdom for foreign owners, tends to explain the occasion for the negotiations leading up to the agreement, rather than to support the British Government's interpretation of the agreement. The very fact that difficulties were experienced in securing the export of steamers built for foreign account was an adequate reason from the point of view of the French Government for securing a general agreement covering all cases of steamers constructed in the United Kingdom for French owners.

11. The above considerations oblige me to express my judgment in favor of the contentions of the French Government, and to find that the steamers in question should have been transferred to the French flag.

[Signed] Jerome D. GREENE
Arbitrator

Lancaster House
London, *9th August 1918*