PHILADELPHIA-GIRARD NATIONAL BANK[1] (UNITED STATES) *v.* GERMANY AND DIREKTION DER DISCONTO GESELLSCHAFT, IMPLEADED

(April 21, 1930, pp. 939-948.)

In this case a final award was entered by the Commission on April 3, 1929. A Petition for the reconsideration of this award, signed by the claimant and presented through its attorneys to the American Agent, has been submitted to the Commission together with certain additional evidence and a printed Memorandum in support thereof, dated August 7, 1929, and prepared by the private counsel for the claimant.

[1] *Bibliography:* Woolsey, A.J.I.L., Vol. 34 (1940), p. 24. See editorial footnote to opinion immediately preceding this.

Although the rules of this Commission, conforming to the practice of international Commissions, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission.

Before taking up the questions raised by this Petition, the Commission desires to announce certain principles having general application to petitions and requests for rehearings as to the claims originally listed, by which the Commission will be guided in dealing with this and other similar applications.

Where it appears that manifestly the Commission committed an error in its findings of fact on the evidence produced by the Agents at the time the claim was submitted for decision, or in applying the principles of law and the rules of the Commission as established and applied in its previous decisions, the Commission will take under consideration the question of reopening or changing the award.

On the other hand, where a rehearing is demanded merely on the ground that by reason of newly submitted evidence the underlying facts were different from those appearing in the record as submitted at the time of the decision, the Commission will not grant a reopening or a reconsideration of the award.

The reconsideration of a claim after a final decision has been rendered would mean that the whole case would have to be dealt with anew. The new evidence submitted would have to be brought to the attention of the opposing party, which would have to be given a reasonable time to investigate and file additional or rebuttal evidence on its side, and also an amended answer or a reply, if that was found to be necessary, and then the whole case would have to be reexamined and decided again. All of these consequences would result from the failure or neglect of the moving party to produce the additional evidence before the claim was originally submitted for the decision of the Commission.

Moreover, if the production of new evidence by a party would give the right to have the whole case reopened, such right would necessarily attach not only to every claimant whose claim had been submitted and decided, but also to the respondent in each case as well.

If such a right were granted and exercised at this advanced stage of the proceedings of the Commission, it would affect awards which have already been paid, and, apart from the confusion resulting from such procedure, it would be clearly contrary to the express wording and manifest purpose of the Agreement of August 10, 1922, between the United States and Germany. According to that Agreement the decisions of the Commission are accepted as final and binding upon both governments, and, inasmuch as the governments are primarily the parties in interest, the private claimant, on whose behalf the Government of the United States has finally submitted a claim for decision, cannot be given the right to alter or nullify this situation by producing new evidence changing the status of the claim as submitted and decided.

It is also pertinent to consider that most of the applications which have been made for rehearing have arisen in cases in which the Commission has pointed out wherein the claimant has failed to furnish evidence sufficient to establish the liability of Germany under the Treaty of Berlin, as interpreted by this Commission, and to grant a rehearing in those cases would mean a great injustice to the great majority of the claimants whose claims were dismissed by the Commission without indicating wherein the evidence submitted was insufficient, and who, therefore, have been unable to discover new points of attack. It may also be noted that in no case, as yet, has the Commission granted an application to reopen a claim in which a final decision has been rendered.

The Commission will not reconsider questions of law, which have been settled in its earlier decisions, as to the jurisdiction of the Commission and the liability of Germany, under the Treaty of Berlin and the Agreements of August 10, 1922, and December 31, 1928, between the United States and Germany, as interpreted by this Commission.

The law of the Commission, as established in its earlier decisions, will control the decisions of the Commission in all later cases.

Turning now to the questions presented by the Petition in this case, it must be noted at the outset that the Petition relates only to the legal effect of the transactions between the claimant and the Disconto Bank concerning ruble credits in Russia.

It will be convenient to recall that the Commission held in its decision on the facts submitted that these transactions did not establish the ordinary banking relationship of creditor and debtor between the claimant and the Disconto Bank so far as these ruble credits were concerned. The Disconto Bank was merely the intermediary through which the orders of the claimant were transmitted in dealing with the ruble credits which had been established in Russia at the claimant's request by the Disconto Bank, in its own name, but for the account, and at the risk of the claimant. Its responsibility for risk generally is questioned by the claimant, but there can be no question as to its responsibility for risk on account of Force Majeure, or restraints imposed by the Russian authorities.

The Petition and brief now presented by the claimant fail to show that the Commission was in error in reaching this conclusion on the facts before it when its decision was made, and the claimant also fails to produce any new evidence which would justify a different conclusion.

The new evidence now offered in support of the claimant's Petition is relied upon to show that the Russian banks in which these ruble credits were established for the claimant's account were not justified by Russian law in refusing to transfer these credits to the claimant, or to its order, when instructed to do so by the Disconto Bank, upon the outbreak of the War between Russia and Germany.

It is established by the uncontested evidence in the record that the refusal of the Russian banks to honor the drawings by the Disconto Bank in favor of the claimant was on account of the state of war existing between Russia and Germany, and it is also established that upon the outbreak of that War the Russian Minister of Finance issued instructions to the Russian banks to discontinue any payments to, or transactions with, enemy banks, and that the Russian banks acted in accordance with these instructions in refusing to carry out the order of the Disconto Bank to transfer to the claimant's credit the rubles carried for its account by the Disconto in the Russian banks.

The claimant now contends, however, that the Russian Minister of Finance was not justified under Russian law in issuing the instructions which prevented the Russian banks from transferring these credits because " it was not until December 2, 1914 (Russian Style November 19, 1914), that Russia promulgated any law, by legislation or Imperial Decree, prohibiting the transfer of money and securities from Russia to German nationals, or preventing the Disconto from carrying out its obligation to make ruble credits available to the claimant in Russia " (Claimant's Memorandum in support of Petition, page 9).

This contention may be accepted without disturbing the conclusion reached by the Commission that Germany was not liable under the Treaty of Berlin for the resulting damages. The fact remains that the Disconto Bank had to its credit in Russian banks sufficient rubles to cover the claimant's ruble account with the Disconto Bank, and that the Russian banks refused to honor the

drawings of the Disconto in favor of the claimant because of the outbreak of war between Russia and Germany. Neither the Disconto Bank nor the German Government was in any way responsible for the refusal of the Russian banks to transfer this credit to the claimant. Moreover, so far as the credit of 500,000 rubles is concerned, the claimant had not asked that this amount be paid to it or its order, or transferred to its credit in the Russian banks, and the Disconto was under no obligation to make such payment or transfer in the absence of a request by the claimant that this be done. The instruction issued by the Disconto Bank to the Russian banks to transfer this credit to the claimant was merely a voluntary effort on the part of the Disconto Bank to protect the interests of the claimant at the outbreak of war between Germany and Russia, and demonstrated the good faith of the Disconto because the claimant had immediately prior thereto neglected the opportunity offered by the Disconto to sell the claimant's rubles credits with only a comparatively small loss. The details of this transaction are set out below.

On the other hand, the claimant's contention that the refusal of the Russian banks to carry out the Disconto Bank's instruction to transfer these credits to the claimant was illegal under Russian law suggests that if the claimant had demanded of the Russian banks, as a matter of right under Russian law, that the transfers ordered by the Disconto be carried out at the time the order was given, the claimant would have received in its own name the entire rubles credit carried for its account in the Russian banks, which would have saved it from whatever loss resulted from the action of the Russian authorities in prohibiting further financial transactions between Russia and Germany upon the outbreak of war.

The claimant also contends in this Petition that even if the relationship of debtor and creditor did not exist between the Disconto Bank and the claimant as to its ruble account in Russia, nevertheless, the Disconto was under obligation to sell rubles, when instructed to do so by the claimant, up to the extent of its ruble credit, and that such instructions were given by the claimant and not carried out by the Disconto. The evidence relied upon in support of this contention consists of a series of cables exchanged between the two banks on July 25, 27, 28 and 29, 1914, the details of which are fully set out in the claimant's supporting Memorandum. This is not new evidence, as it was before the Commission when its decision was made, but it is emphasized here with the view of showing manifest error on the part of the Commission in its findings of fact.

The claimant, by arbitrary assertions, which are inconsistent with the plain meaning of these cables, endeavors to show that they constituted a *firm order* to the Disconto to sell out claimant's rubles account, and, on that ground, challenges the finding of this Commission that " the Disconto acting on its own responsibility did sell at that time for the Philabank 150,000 rubles without any substantial loss, but, although the Philabank accepted this transaction, it failed to respond to the Disconto's specific request for a ' firm order ' as to further sales ".

The circumstances under which the 150,000 rubles above mentioned were sold are plainly shown by the first three of these cables. In its cable of July 25, 1914, the Disconto expressed the wish that the claimant would dispose immediately of its rubles account. The claimant replied in its cable on July 27th, " if advisable sell rubles best ". The Disconto accordingly effected the sale of 150,000 rubles at 210, and cabled to the claimant on the same date reporting this sale, and asking " Shall we continue. Give firm order." On the following day the claimant cabled " We sold at your request only, but if you consider advisable continue selling." This cable justifies the Commission's finding

that Disconto on its own responsibility initiated this sale, and also the Commission's finding that " the claimant failed to respond to the Disconto's specific request for a ' firm order ' as to further sales ". This cable certainly was not a *firm order*, and whatever discretionary power might have been read into the final clause of the cable was nullified by the opening statement that the previous sale was authorized only because requested by the Disconto.

The Disconto accordingly cabled again on July 29th, indicating a desire that the claimant should continue drawing against the ruble account, by again giving quotations, and renewing its request for a *firm order*. The claimant's cable of the same date, in reply, was unresponsive and inadequate, consisting merely of the conditional authority to " sell more rubles if reasonably possible and desirable ".

The claimant's attorneys now allege in their Memorandum that the Commission's finding that the claimant failed to respond to the Disconto's specific request for a *firm order* " obliges us to infer that the Commission was unaware of the three cables authorizing the Disconto to sell rubles in its discretion ". This statement has the appearance of a deliberate distortion of obvious facts, and cannot be excused on the ground of ignorance of the meaning of the expression " firm order ", because the Memorandum says, in the course of the discussion of this point, " When the Disconto asked for a ' firm order ' it was asking for instructions to sell specified quantities at specified prices. It was impossible for the Philabank to give such instructions because of the rapid and progressive decline in the price of rubles as disclosed by the Disconto's cables of July 27 and 28 ".

The claimant being a bank presumably was reasonably well informed about stock market and exchange transactions, and if it was unwilling to give a *firm order* to sell at whatever price could be obtained in the market, it cannot call the Disconto to account for not taking a responsibility on its behalf, which, as shown by its cables, it was unwilling to take for itself. The Disconto explained in a letter written at the time to the claimant, dated July 27, 1914, that its unwillingness to act upon these non-committal orders was because " In the face of such rapid fluctuations we regret we cannot execute discretionary orders and prefer to act only upon firm orders".

The claimant's Memorandum states that " the Disconto for some reason was unwilling to execute the discretionary power given to it by the Philabank to sell ruble exchange for the Philabank's account ", and suggests that " the reason may have been that an effort to sell ruble exchange for the account of the Philabank would have interfered with the sales which the Disconto was making for its own account or for the account of German clients ". This is a mere insinuation, unsupported either by evidence or argument, and the Commission is not favorably impressed by it.

The importance of the point about the legal effect of these cables is unduly magnified by the claimant, and the reasons advanced in the Memorandum in support of it serve to confirm rather than to disturb the conclusions previously arrived at by the Commission.

The claimant has also listed as new evidence supporting its Petition a copy of the decision of the Tripartite Claims Commission between the United States, Austria and Hungary, in the case of Adolfo Stahl, Docket No. 1206.[a] That decision dealt with a claim for the pre-war value of certain Hungarian Treasury notes which were held for the claimant by a German firm in Hamburg, and

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[a] *Note by the Secretariat*, Vol. VI, p. 290.

exchanged by it during the War for a renewal issue without the claimant's sanction, and the Tripartite Claims Commission held that neither the German firm nor the Hungarian Government were liable under the Treaty of Budapest for the loss suffered by the claimant in that transaction.

The submission of this decision of the Tripartite Claims Commission as justification for the reconsideration of this Commission's decision is quite in accord with the general inadequacy of the grounds upon which the claimant's Petition rests. The decision of the Tripartite Claims Commission has a very remote bearing, if any, on the question presented in this case, and, in any event, it is irrelevant and immaterial because this Commission is not bound by the decisions of the Tripartite Claims Commission under the Treaty of Budapest.

The only other arguments presented in support of this Petition, which call for special mention, deal with the meaning of the Treaty of Berlin, and seek to reverse the interpretation of that Treaty on several points which have already been settled by this Commission in its administrative and jurisdictional decisions, and applied in literally thousands of preceding decisions.

For instance, it is contended on behalf of the claimant that even if the relationship of debtor and creditor did not exist between the two banks, the claimant was entitled to recover damages as losses " occasioned as a consequence of the War, or of Exceptional War Measures ".

As to recovering on the ground that the losses were occasioned as a consequence of the War, it is confidently asserted on behalf of the claimant that the Commission was wrong in holding that, under the Treaty of Berlin, Germany is not responsible for damages suffered in consequence of hostilities or operations of war prior to the entry of the United States into the War, unless caused by " the acts of Germany or her agents in the prosecution of the War ". This interpretation of the Treaty was adopted by the Commission in the first decision rendered by it (Administrative Decision No. 1),[b] and has been invariably followed and applied in all of the later decisions of the Commission involving this point. The claimant has not shown that it suffered any loss during the neutrality period of the United States with respect to its rubles credits in Russia which was caused by any action of Germany or her agents in the prosecution of the War, within the meaning of the Treaty of Berlin as interpreted by this Commission.

As to recovering on the ground that the losses were occasioned by the application of Exceptional War Measures, it is asserted with equal confidence on behalf of the claimant that the Commission is wrong in holding that no " question of Exceptional War Measures in Germany within the meaning of the Treaty of Berlin entered into this case because the claimant is an American national and the United States was still a neutral at the time of these transactions."

If the counsel for the Petitioner had taken the trouble to examine the Treaty of Berlin on this point, they would have ascertained that the expression " Exceptional War Measures ", as used in the provisions of the Treaty of Versailles incorporated in the Treaty of Berlin, is distinctly defined therein as meaning measures taken with regard to *enemy property in Germany*, and accordingly, could not apply to measures affecting American property before the United States became an enemy of Germany, or affecting property in Russia or elsewhere outside of Germany. The Petition cites paragraph 13 of the Rules adopted by the Commission on May 7, 1925, as sustaining its contention on this point, but here again an examination of the Treaty would have made it clear that the only Exceptional War Measures mentioned in that Rule were

[b] *Note by the Secretariat*, Vol. VII, p. 21.

those applying during the belligerency period of the United States to American owned property, rights or interests in Germany.

The Commission finds that the Petition for a reconsideration of its final decision in this case is without merit, and it is accordingly dismissed.

Done at Washington April 21, 1930.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner