PERMANENT COURT OF ARBITRATION

MUSCAT DHOWS CASE

FRANCE

V.

GREAT BRITAIN

AWARD OF THE TRIBUNAL

Official Translation

Arbitrators:

H. Lammasch

Melville W. Fuller

A. F. de Savorin Lohman

The Hague, August 8, 1905

[69][1]

AWARD OF THE TRIBUNAL OF ARBITRATION CONSTITUTED IN VIRTUE OF THE COMPROMIS SIGNED AT LONDON ON OCTOBER 13, 1904, BETWEEN GREAT BRITAIN AND FRANCE[2]

The Tribunal of Arbitration constituted in virtue of the Compromis concluded at London on October 13, 1904 between Great Britain and France;

Whereas the Government of His Britannic Majesty and that of the French Republic have thought it right by the Declaration of March 10, 1862 "to engage reciprocally to respect the independence" of His Highness the Sultan of Muscat,

Whereas difficulties as to the scope of that Declaration have arisen in relation to the issue, by the French Republic, to certain subjects of His Highness the Sultan of Muscat of papers authorizing them to [71] fly the French flag, and also as to the nature of the privileges and immunities claimed by subjects of His Highness who are owners or masters of dhows and in possession of such papers or are members of the crew of such dhows and their families, especially as to the manner in which such privileges and immunities affect the jurisdiction of His Highness the Sultan over his said subjects,

Whereas the two Governments have agreed by the Compromis of October 13, 1904 that these questions shall be determined by reference to arbitration, in accordance with the provisions of article I of the Convention concluded between the two Powers on the 14th of October 1903,

Whereas in virtue of that Compromis were named as Arbitrators,

by the Government of His Britannic Majesty:

Mr. MELVILLE W. FULLER, Chief Justice of the United States of America, and

by the Government of the French Republic:

Jonkheer A. F. DE SAVORNIN LOHMAN, Doctor of Law, former Minister of the Interior in the Netherlands, former Professor at the free University at Amsterdam, Member of the Second Chamber of the States-General,

Whereas the two Arbitrators not having agreed within one month from the date of their appointment in the choice of an Umpire, and that choice having then been intrusted in virtue of article I of the Compromis to the King of Italy, His Majesty has named Umpire:

[1] Page numbering in brackets refers to the text as it appears in THE HAGUE ARBITRATION CASES (Boston and London, Ginn and Company Publishers, 1915). Please note, the English language version was only published on uneven numbered pages in this text.

[2] The President of the Tribunal declared on July 25, 1905 that the parties might use French and English in the pleadings. The protocols and award would be drawn up in French which would be of "authentic value" but would be accompanied by an official English translation.

Mr. H. LAMMASCH, Doctor of Law, Professor at the University at Vienna, Member of the Upper House of the Austrian Parliament,

Whereas the Cases, Counter-Cases and Arguments have been duly communicated to the Tribunal and to the Parties,

Whereas the Tribunal has carefully examined these documents, and the supplementary observations which were delivered to it by the two Parties;

AS TO THE FIRST QUESTION:

Whereas generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the [73] rules governing such grants, and whereas therefore the granting of the French flag to subjects of His Highness the Sultan of Muscat in itself constitutes no attack on the independence of the Sultan,

Whereas nevertheless a Sovereign may be limited by treaties in the exercise of this right, and whereas the Tribunal is authorized in virtue of article 48 of the Convention for the pacific settlement of international disputes of July 29, 1899 and of article 5 of the Compromis of October 13, 1904 "to declare its competence in interpreting the compromis as well as the other treaties which may be invoked in the case, and in applying the principles of international law", and whereas therefore the question arises, under what conditions Powers which have acceded to the General Act of the Brussels Conference of July 2, 1890 relative to the African Slave Trade, especially to article 32 of this Act, are entitled to authorize native vessels to fly their flags,

Whereas by article 32 of this Act the faculty of the Signatory Powers to grant their flag to native vessels has been limited for the purpose of suppressing slave trading and in the general interests of humanity, irrespective of whether the applicant for the flag may belong to a state signatory of this Act or not, and whereas at any rate France is in relation to Great Britain bound to grant her flag only under the conditions prescribed by this Act,

Whereas in order to attain the above mentioned purpose, the Signatory Powers of the Brussels Act have agreed in its article 32 that the authority to fly the flag of one of the Signatory Powers shall in future only be granted to such native vessels, which shall satisfy all the three following conditions:

1. Their fitters-out or owners must be either subjects of or persons protected by the Power whose flag they claim to fly,
2. They must furnish proof that they possess real estate situated in the district of the authority to whom their application is addressed, or supply a solvent security as a guarantee for any fines to which they may eventually become liable,
3. Such fitters-out or owners, as well as the captain of the vessel, must furnish proof that they enjoy a good reputation, and especially that they have never been condemned for acts of slave trade,

Whereas in default of a definition of the term "protégé" in the General Act of the Brussels Conference this term must be understood in the sense which corresponds best as well to the elevated aims of the Conference and its Final Act, as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice,

Whereas the aim of the said article 32 is to admit to navigation in the seas infested by slave trade only those native vessels which are under the strictest surveillance of the Signatory Powers, a condition which can only be secured if the owners, fitters-out and crews of such vessels are exclusively subjected to the sovereignty and jurisdiction of the State, under whose flag they are sailing,

Whereas since the restriction which the term "protégé" underwent in virtue of the legislation of the Ottoman Porte of 1863, 1865 and 1869, especially of the Ottoman law of 23 Sefer 1280 (August 1863) implicitly accepted by the Powers who enjoy the rights of capitulations, and since the Treaty concluded between France and Morocco in 1863, to which a great number of other Powers have acceded and which received the sanction of the Convention of Madrid of July 30, 1880, the term "protégé" embraces in relation to States of capitulations only the following classes: 1°. persons being subjects of a country which is under the protectorate of the Power whose protection they claim, 2°. individuals corresponding to the classes enumerated in the treaties with Morocco of 1863 and 1880 and in the Ottoman law of 1863, 3°. persons, who under a special treaty have been recognized as "protégés" like those enumerated by article 4 of the French Muscat Convention of 1844 and 4°. those individuals who can establish that they had been considered and treated as "protégés" by the Power in question before the year in which the creation of new "protégés" was regulated and limited, [77] that is to say before the year 1863, these individuals not having lost the *status* they had once legitimately acquired,

Whereas that, although the Powers have *expressis verbis* resigned the exercise of the pretended right to create "protégés" in unlimited number only in relation to Turkey and Morocco, nevertheless the exercise of this pretended right has been abandoned also in relation to other Oriental States, analogy having always been recognized as a mean to complete the very deficient written regulations of the capitulations as far as circumstances are analogous,

Whereas on the other hand the concession *de facto* made by Turkey, that the status of "protégés" be transmitted to the descendants of persons, who in 1863 had enjoyed the protection of a Christian Power, cannot be extended by analogy to Muscat, where the circumstances are entirely dissimilar, the "protégés" of the Christian Powers in Turkey being of race, nationality and religion different from their Ottoman rulers, whilst the inhabitants of Sur and other Muscat people who might apply for French flags, are in all these respects entirely in the same condition as the other subjects of the Sultan of Muscat,

Whereas the dispositions of article 4 of the French-Muscat Treaty of 1844 apply only to persons who are *bona fide* in the service of French subjects, but not to persons who ask for ships-papers for the purpose of doing any commercial business,

Whereas the fact of having granted before the ratification of the Brussels Act on January 2, 1892 authorizations to fly the French flag to native vessels not satisfying the conditions prescribed by article 32 of this Act was not in contradiction with any international obligation of France,

FOR THESE REASONS,

decides and pronounces as follows:

1°. before the 2nd of January 1892 France was entitled to authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly the French flag, only bound by her own legislation and administrative rules;

2°. owners of dhows, who before 1892 have been authorized [79] **by France to fly the French flag, retain this authorization as long as France renews it to the grantee;**

3°. after January 2, 1892 France was not entitled to authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly the French flag, except on condition that their owners or fitters-out had established or should establish that they had been considered and treated by France as her "protégés" before the year 1863;

AS TO THE SECOND QUESTION:

Whereas the legal situation of vessels flying foreign flags and of the owners of such vessels in the territorial waters of an Oriental State is determined by the general principles of jurisdiction, by the capitulations or other treaties and by the practice resulting therefrom,

Whereas the terms of the Treaty of Friendship and Commerce between France and the Iman of Muscat of November 17, 1844 are, particularly in view of the language of article 3 "*Nul ne pourra, sous aucun prétexte, pénétrer dans les maisons, magasins et autres propriétés, possédés ou occupés par des Français ou par des personnes au service des Français, ni les visiter sans le consentement de l'occupant, à moins que ce ne soit avec l'intervention du Consul de France*", comprehensive enough to embrace vessels as well as other property,

Whereas, although it cannot be denied that by admitting the right of France to grant under certain circumstances her flag to native vessels and to have these vessels exempted from visitation by the authorities of the Sultan or in his name, slave trade is facilitated, because slave traders may easily abuse the French flag, for the purpose of escaping from search, the possibility of this abuse, which can be entirely suppressed by the accession of all Powers to article 42 of the Brussels Convention, cannot affect the decision of this case, which must only rest on juridical grounds,

Whereas according to the articles 31-41 of the Brussels Act the grant of the flag to a native vessel is strictly limited to this vessel [81] and its owner and therefore not transmissible or transferable to any other person or to any other vessel, even if belonging to the same owner,

Whereas article 4 of the French-Muscat Treaty of 1844 grants to those subjects of His Highness the Sultan of Muscat "qui seront au service des Français" the same protection as to the French themselves, but whereas the owners, masters and crews of dhows authorized to fly the French flag do not belong to that class of persons and still less do the members of their families,

Whereas the withdrawal of these persons from the sovereignty, especially from the jurisdiction of His Highness the Sultan of Muscat would be in contradiction with the Declaration of March 10, 1862, by which France and Great Britain engaged themselves reciprocally to respect the independence of this Prince,

FOR THESE REASONS,

decides and pronounces as follows:

1°. dhows of Muscat authorized as aforesaid to fly the French flag are entitled in the territorial waters of Muscat to the inviolability provided by the French-Muscat Treaty of November 17, 1844

2°. the authorization to fly the French flag cannot be transmitted or transferred to any other person or to any other dhow, even if belonging to the same owner;

3°. subjects of the Sultan of Muscat, who are owners or masters of dhows authorized to fly the French flag or who are members of the crews of such vessels or who belong to their families, do not enjoy in consequence of that fact any right of ex-territoriality, which could exempt them from the sovereignty, especially from the jurisdiction of His Highness the Sultan of Muscat.

Done at The Hague, in the Permanent Court of Arbitration, August 8, 1905.

(*signed*) H. LAMMASCH
" M. W. FULLER
" A. F. DE SAVORNIN LOHMAN