(10) *Special Fee.—Claims in Nature of Liquidated Damages in respect of Different Transactions.*

Although, as mentioned in my previous reports, the Tribunal has on more than one occasion refused to allow a claim for unliquidated damages to be put forward as a debt under Article 296, it has nevertheless permitted a debtor to raise as a set-off in respect of a 296 claim the defence that he is entitled to a claim for unliquidated damages arising out of the same transaction in respect of which the original claim was made.

There have been numerous cases in which debtors have sought to set off against the same creditor claims in the nature of unliquidated damages arising out of different transactions. In all these cases the Tribunal has strictly adhered to their former view and refused to allow a set-off. In the *Nitrogen Fertilizers, Ltd.* v. *Verkaufs Vereinigung fuer Stickstoffdunger, G.m.b.H.* (No. 495), (*Recueil*, v, p. 648), a number of companies amongst which were the creditors (a British company) owed a debt to the debtors (a German company). Under agreements between the parties the creditors had to deliver to the debtors, subject to strikes, lock-outs, &c., quantities of lime nitrogen to be specified. The creditors claimed under Article 296 of the Treaty the amount due to them in respect of the deliveries which they had made before the outbreak of war.

The Tribunal held that the debtors were not entitled to set off against this claim costs incurred by them in defending actions brought against them by German purchasers for non-delivery of the lime nitrogen which they had contracted to sell, and which they could have delivered had the creditors effected the deliveries due from them; nor were they entitled to set off the amount which they had paid to a subsidiary Norwegian company belonging to the creditors, in respect of purchases of lime nitrogen made during the war in order to enable them to carry out their contracts with German purchasers.

They further held that the debtors were not entitled to set up by way of defence to the creditors' claim a counter-claim for damages for breach of contract to deliver to the debtors during the war the specific quantity of lime nitrogen, and to them alone, because such damages did not arise out of the deliveries in respect of which the creditors' claim was made. Moreover, the creditors' obligation to make deliveries to the debtors, and to them alone, was extinguished as from the outbreak of war by reason of Article 299 of the Treaty.

They further held, however, that the debtors were entitled to set off the amount of a penalty incurred by the creditors in respect of a breach of agreement before the outbreak of war; and, further, that, as the lime nitrogen had been sent to the debtors before the war as agents for sale and collection of the purchase price, acts had been done under the contract before its dissolution giving rise to a pecuniary obligation when the purchase price came into the debtors' hand: See *Schuster & Co.* v. *Deutsche Bank* (No. 409). The debtors therefore remained liable to the creditors for any surplus after payment by the debtors to a German bank of the amount of a loan to the creditors upon the security of the lime nitrogen.

The principle that a claim for unliquidated damages arising out of one transaction cannot be set off against an ordinary debt claim arising out of a separate transaction was also affirmed by the Third Division in four cases: *Morgan & Co.* v. *W. N. Chaplin & Co., Ltd.* (No. 3543), (*Recueil*, vi, p. 43); *Vandyck Printers, Ltd.* v. *Moderner Verlag* (No. 3058), (*Recueil*, vi, p. 33); *Delling* v. *Berliner & Co.* (No. 4057); *Weber & Co.* v. *I. Altschuler & Co.* (No. 3023).

(11) *Principal and Agent.—Sale of Perishable Goods without Special Authority.*

There have been a number of cases in which forwarding-agents, coming into the possession of perishable goods for their principals, took it upon themselves to realise such goods without any special authority. In such cases the Tribunal has always held that the agent must himself account to the principal for a debt under Article 296. Such a case was that of *Armour & Co., Ltd.* v. *Rudert* (No. 1676), (*Recueil*, vi, p. 29), in which the British creditors prior to the war had employed the debtor as their forwarding-agent in respect of goods purchased by the creditors on the Continent. In July, 1914, the creditors purchased certain eggs in Bessarabia, which were despatched thence on the overland route to the United Kingdom. On the 4th August, 1914, the eggs had reached the hands of the debtor.

The Tribunal found, as a fact, contrary to the contention of the German Government Agent, that the debtor held the eggs as the forwarding-agent of the creditors. It was common ground that, as it was then impossible to forward them to England, the debtor, in view of their perishable nature, on or about the 10th August, caused them to be sold by auction, and took charge of the proceeds of realization. In those circumstances the Tribunal held that the debtor was under an obligation to account for those proceeds to the creditors, and that this obligation was a debt which became payable during the war, and arose out of a transaction or contract with them of which the execution was suspended on account of the declaration of war.

(12) *Government Guarantee of Clearing Office Claims.—"Formal Indication of Insolvency."*

With regard to the question of formal indication of insolvency in the case of *Baron & Salaman* v. *Max Arendt* (No. 2101), (*Recueil*, v, p. 303), referred to in my last report, whilst expressing their opinion that there had been a "formal indication of insolvency" by the German debtor, and that the creditors' claim was not one for the guarantee by the German Government, nevertheless, having regard to a statement by the creditors that certain dividends had been offered or paid during the war, the Tribunal allowed the point to remain open for six weeks with a view to the creditors, if so advised, presenting an amended case within that period. In their amended case the creditors established that the debtor had made a settlement with his Berlin creditors, the money having been placed at his disposal by relations, and that under the settlement so made—(1) The debtor was to pay to his creditors 8 per cent. on the balance owing; (2) no further claims were to be made against the debtor personally; (3) a deposit was made of the sum to which the creditors in this case would be entitled under the settlement.

In those circumstances, the Tribunal, having ascertained from the creditors that they were prepared to accept the dividend in question subject to the above conditions, declared that they regarded the creditors' share of the amount to be distributed as a dividend within the meaning of paragraph 4 of the Annex to Section III, Part X. In consequence it was to be credited through the clearing procedure, and would carry interest at the rate of 5 per cent. per annum. An award was accordingly made upon that basis.

In *Leader, Plunkett, & Leader* v. *Heye* (No. 1954), (*Recueil*, vi, p. 77), the creditors claimed a debt for which they had recovered judgment in Germany prior to the outbreak of war. The only question which arose at the hearing was whether the circumstances of the case brought it within the exceptions to the general provision rendering each of the High Contracting Parties responsible for the payment of debts due by their nationals contained in Article 296 (*b*) and paragraph 4 of the Annex to Section III, Part X.

On the 9th August, 1913, an attempt was unsuccessfully made to levy execution against the debtor upon a judgment, and a protocol attesting this fact was duly recorded in the Court in Berlin from which the proceedings in execution had issued. In July, 1914, an attempt to levy execution in another action was similarly unsuccessful, and the appropriate protocol thereof was duly made. Acting in pursuance of paragraph 807 of the German Civil Code, whereby under such circumstances a debtor may be required to swear the oath called "Offenbarungseid," and in default that the Court may make an order for his personal arrest to enforce the making of such an oath, the District Court, upon the application of the creditor, made an order for the debtor's arrest with a view to compelling him to take the oath. The arrest did not appear to have been effected, but the order for his arrest remained open for inspection. Upon the facts established in the case, the Tribunal, after examination of both the English and French texts of the Treaty, were of opinion that at the outbreak of war the debtor was in a juridical condition comprised within the scope of the words "*en faillite ou déconfiture ou en état d'insolvabilité déclarée*," and that he was within the scope of the intended meaning of the corresponding English words used in the Treaty: "in a state of bankruptcy or failure or had given formal indication of insolvency." No question arose as to the recovery of any dividends in accordance with paragraph 4 of the annex. They accordingly decided that there was no debt within the meaning of Article 296 of the Treaty from the debtor to the creditor.