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THE ARBITRATION BETWEEN THE LENA GOLDFIELDS, LTD. AND THE SOVIET GOVERNMENT

Arthur Nussbaum*

The arbitration proceedings conducted in 1930 by Lena Goldfields, Ltd., London, against the Soviet Government constitute one of the most remarkable occurrences in the field of arbitration. It is the only arbitration, in fact the only international law case, in which the Soviet Government was a party.¹ Of still greater significance are the actions taken in the case by the Soviet Government and the problems to which they gave rise. The implications extend beyond the legal area and in part to the case a lasting interest. It has been repeatedly referred to in recent publications,² but it has not yet been discussed in detail, probably because the material is not readily available. In the following an attempt has been made to fill the gap.

The text of the comprehensive award was published in *The Times* (London) of September 3, 1930. It is divided into thirty-three sections which will be referred to in the following. The main facts of the case are these:³

* See Contributors' Section, Masthead, page 95, for biographical data.

¹ The aversion of the U.S.S.R. toward arbitration outside the commercial area is well known. See, e.g., TARACOUSIO, *THE SOVIET UNION AND INTERNATIONAL LAW* 295 (1935), and HUDSON, *INTERNATIONAL TRIBUNALS* 240 (1944). Arbitration of a political kind was envisaged by Art. XIV. of the treaty concluded in 1920 between the U.S.S.R. and Estonia, 11 *LEAGUE OF NATIONS TREATY SERIES* 30ff (translation pp. 50ff.). According to that provision, arbitration was to take place in disputes "between citizens of the contracting parties," but also in "special questions between the two Governments." No actual arbitration between the two Governments occurred, however. The "special" questions mentioned in the treaty were not even defined, it seems, nor were the "composition, rights and duties" of the arbitral Commissions "fixed" by supervening conventions as intended by Art. XIV. There are some international agreements of the U.S.S.R. providing for commercial arbitration, but they remained a dead letter, cf. Nussbaum, *Treaties on Commercial Arbitration*, 56 *HARV. L. REV.* 219, 220, n. 4 (1942). Arbitration clauses have appeared in commercial contracts between Soviet corporations and non-Soviet firms, but very little has been publicized on these arrangements, and except for the Lena Goldfields case, which however was not a purely commercial affair, there is no instance of a direct party role of the U.S.S.R. Government. We are not concerned with Soviet courts styled arbitral tribunals. It may be mentioned, however, that American and English trade associations have declined, even before the war, to place their members under the jurisdiction of those tribunals as required by the commercial agencies of the U.S.S.R. for business transactions, *FTC REPORT ON INTERNATIONAL ELECTRICAL EQUIPMENT*, No. 80, 1948.

² See, e.g., SCHWARZENBERGER, *I INTERNATIONAL LAW* 215 (1945); JESSUP, *A MODERN LAW OF NATIONS* 33 (1948); Rashba, *Settlement of Disputes in Commercial Dealings With the Soviet Union*, 45 *COL. L. REV.* 539 (1945). A brief summary was included in LAUTERPACHT, *ANNUAL DIGEST OF INTERNATIONAL LAW CASES* 426 (1929-30). See *infra* n. 30.

³ Our account follows, on the whole, the statements in the published award. The objec-

The Lena Goldfields, Ltd., which had operated in Siberia as early as Tzarist times,⁴ received from the Soviet Government in 1925—that is, during the conciliatory N.E.P. (new economic policy) period—a vast exploring, mining and transportation concession (Award, Nos. 16-18). After N.E.P. was replaced in 1929 by the Five Year Plan, the Soviet Government withheld from Lena performances, in part of a vital nature, owed under the concession contract (Award, No. 21[a] to [f]). This was followed by a class war against the Lena employees; as serving a capitalist enterprise. Thereupon the company's staff resigned in large numbers. As a result the Company was disorganized (Award, No. 21[g]). Finally, on the night of December 15, 1929, the Government, through the O.G.P.U. carried out a formidable raid at practically all of Lena's many establishments which were separated from each other by thousands of miles (Award, No. 21[h]). The employees, among them the leading officials—managers, metallurgists, electrical engineers, mine managers, etc.—were seized and searched and their plans and reports of a technical character taken away together with confidential documents; twelve officials were arrested and prosecuted on charges of “counter-revolutionary activity and espionage” (Award, No. 21[h]).⁵ Under these circumstances the Company discontinued the operation of the plants which, together with the secret technical processes described in the seized documents, were taken over by the Soviet Government. The Company at that time had £3,500,000 invested in the concessions (Award, Nos. 20[a] and 23).⁶

Under the arbitration clause contained in the Concession Agreement, Lena, in February, 1930, brought suit against the Soviet Government for

tions of the Soviet Government and of writers favorable to its cause have not been directed against the accuracy of these statements, but against their interpretation on the part of the arbitrators. On the persons of the arbitrators, see *infra* p. 33.

⁴ *The Times* (London), Sept. 3, 1930, p. 13, col. 2.

⁵ According to the award (No. 21g), there was in the ensuing trial no evidence that Lena's employees had been guilty of any espionage or other disloyalty to the Government.

⁶ The general background of the measures against Lena Goldfields has been discussed by Cleona Lewis in her careful study, LEWIS, *THE UNITED STATES AND FOREIGN INVESTMENT PROBLEMS* 150 (1948). According to this study, under the N.E.P. as inaugurated by Lenin foreign capitalists were urgently invited to develop various branches of the Russian economy. As late as Sept. 1928 the Government was continuing its efforts to attract foreign capital, but a shift in policy was already in prospect. Before the end of the year some foreign concessionaires were facing government charges of non-fulfillment of contract and a new period of confiscation was soon under way. Of 59 foreign enterprises operating in U.S.S.R. late in 1928, none was left at the outbreak of World War II. Miss Lewis adds that “among the companies taken over were the famous Lena Goldfields and 5 other British enterprises, a German agricultural concession (Drusag) in which the German Government had a large investment, and a flourishing Austrian textile mill (B. Altman).”

the payment of £13,000,000 on the ground that there had been created for Lena "total impossibility of either performing its obligations under the Concession Agreement, or enjoying its benefits" (Award, No. 25). The Soviet Government thereupon appointed as its arbitrator Dr. S. B. Chlenow, a Soviet citizen; Lena appointed Sir Leslie Scott, a former Attorney General; and both elected as "super-arbitrator" (chairman) Dr. Otto Stutzer, a professor of mining at the Bergakademie (mining college) of Freiberg, Saxony. By telegram of April 27, 1930, signed jointly, both parties requested the Chairman to fix the first session of the tribunal for May 9, 1930. The Chairman fixed the session accordingly (Award, No. 9), with the London Royal Courts of Justice as the place of the hearing.

Shortly afterwards the Government changed its attitude. By telegrams of May 5, 1930, to the Chairman and to Lena, it declared that Lena had dissolved the Concession Agreement by stating that it took no further responsibilities, by recalling its engineers and by withdrawing the powers of attorney from its representatives. Under these circumstances, the Government said, the arbitration tribunal "had ceased to function" (Award, No. 10). Lena replied that the arbitral tribunal was properly and completely constituted and that the company would attend on May 9. When the non-Soviet arbitrators and Lena's attorney met on this day, Dr. Chlenow and counsel for the Government did not appear. The situation arrived at had been provided for by the carefully drawn arbitration clause of the Concession Agreement in the following terms: (Award, No. 5)

If on receipt of the summons from the super-arbitrator appointing the time and place of the first session, one of the parties, in the absence of insurmountable obstacles to such action, does not send its arbitrator or if the latter refuses to take part in the Court of Arbitration, then, at the request of the other party, the matter in dispute is settled by the super-arbitrator and the other member of the Court, on condition that such decision is unanimous.

Consequently, the tribunal consisting of the Chairman and Sir Leslie Scott decided to go ahead with the proceedings. Copies of this decision were sent to both parties but the Government persisted in its refusal to attend on the ground that the tribunal lacked jurisdiction (Award, Nos. 11 and 12). On May 29, Lena submitted its specified statement of claims (Award, No. 13). On September 2, 1930, after five weeks of hearings,⁷ the tribunal rendered its award which held the Government liable to pay £8,500,000 sterling, plus 12% interest.

⁷ *The Times* reported throughout August currently on these hearings, *Cf.* Official Index of *The Times* for July to September 1930, sub "Lena Goldfields, Ltd."

Consistent with its telegrams of May 5, 1913, the Soviet Government did not take official cognizance of the award. It gave, however, an indirect answer through the official press. On September 4 (3?) *Izvestia* said that the "two gentlemen playing at arbitration" did not even deem it necessary to inform the Soviet Government of the exact time and place where the tribunal assembled; that this comedy was now ended and that the decision cannot bind the Soviet Government.⁸ (This objection was not reiterated by the Government or its legal advisers; as a matter of fact, it was manifestly unfounded as the Government had been notified of the first hearing and of the tribunal's decision to go ahead over the Government's protest. As the Government persisted in its view that the tribunal had ceased to exist, there was no use in further notification.)

A few days later, *Pravda* brought forward heavier cannon.⁹ It blamed the English press for having lost its traditional sense of humor by taking the award seriously.

One might applaud such a game [as played by the arbitrators, A.N.] if it were played well at a Soviet circus or music hall, but the Moscow circus has already a famous learned pig able to play with figures no more clumsily than Scott and Stutzer, but it is a good honest pig and certainly costs the circus less than the circus buffoonery costs the Lena Company.

The legal point made here, namely, that the amount awarded to Lena was extravagant, will be discussed later.

As the Soviet Government refrained from formal statements, numerous interpellations on the Lena affair were addressed to the English Government in the House of Commons; for a considerable period the interpellations followed each other weekly or bi-weekly.¹⁰ Finally, the English Government took the matter up with the Soviet Government. On March 13, 1933, Prime Minister Baldwin circulated the following statement in the House of Commons:¹¹

The arbitration court awarded the company compensation to the amount of some 13,000,000 pounds; but this award was ignored by the Soviet Government, and after a delay of two months his Majesty's Government were obliged to ask the latter how they proposed to implement it. The Soviet Government replied that, as they had already stated, they did not regard the arbitration court as competent; but the Chief Concessions Committee in Moscow, with whom the company's contract had been signed, finally suggested that they should meet representatives of the company in Berlin with a view to arriving at a settlement of the case by

⁸ *The Times*, Sept. 5, 1930, p. 12, col. 2.

⁹ *The Times*, Sept. 12, 1930, p. 11, col. 4.

¹⁰ Cf. Official Indices of *The Times* for the period from November 1930 to March 1933, under "Lena Goldfields, Ltd."

¹¹ *The Times*, March 14, 1933, p. 8, col. 3.

direct negotiation, on condition that the arbitral award was not mentioned.

These negotiations, however, which began in July, 1931, broke down in September of the same year, since the company's representatives, though willing, for the sake of an early and satisfactory settlement, to accept a great reduction in the amount of compensation awarded by the Arbitration Court, were unable to obtain from the Soviet representatives anything beyond a purely derisory offer of 800,000 pounds.

The company then again applied for assistance from his Majesty's Government, and representations were accordingly made to the Soviet Government both through the Soviet Ambassador in London and through his Majesty's Ambassador in Moscow. The Soviet Government, however, still maintained that the matter was one for direct settlement between the company and the Chief Concessions Committee; and though they were warned that his Majesty's Government could not accept this point of view, and would be obliged, if no settlement were reached by other means, to claim from them the full amount of the arbitral award, it was nevertheless felt desirable, in order to explore every possibility of effecting an amicable settlement, to authorize his Majesty's Ambassador at Moscow to discuss unofficially with the then President of the Chief Concessions Committee, M. Kameneff, the prospects of a settlement at a sum of 3,500,000 pounds, representing approximately the proved capital losses of the company after taking into account all counter-claims put forward on behalf of the Committee.

Mr. Kameneff, however, refused even to submit to the Soviet Government any figure beyond 1,000,000 pounds, which was almost as derisory as the figure of 800,000 pounds offered in Berlin; and M. Litvinoff, the Commissar for Foreign Affairs, though urged both by his Majesty's Ambassador at Moscow and by the Secretary of State for Foreign Affairs at Geneva on July 21 last to make further efforts for a settlement, has refused to take any action.

One last opportunity of settling the case seemed to have arrived when the Soviet Ambassador in London represented last month that it would be unfortunate if public agitation on this question were to revive during the continuance of the present Anglo-Soviet commercial negotiations. My right hon. friend¹² then informed his Excellency that it lay with the Soviet Government to prevent that danger by offering an early and satisfactory settlement, which would effectively contribute to that spirit of confidence in the relations between the two countries which it is the object of the negotiations to promote, and requested him to warn them that in default of an offer of such a settlement he would be obliged to make a public statement on the lines of that which I am now making.

Since, however, no such offer has been received from the Soviet Government, the situation necessarily reverts to that reached prior to the direct conversations between the company and the Chief Concessions Committee and the subsequent negotiations for a settlement without reference to the award; and the payment to be claimed is the full amount specified in the award—namely, 12,965,000 pounds.

Negotiations on a Trade Agreement with England—which was actually concluded on February 14, 1934¹³—caused the Soviet Government to

¹² Sir John Simon, the Foreign Secretary.

¹³ TREATY SERIES, No. 11 (England 1934).

reopen discussions with Lena. On an intimation from the Soviets to the English Government,¹⁴ Lena sent representatives to Moscow, but the discussions, which lasted six weeks, failed again.¹⁵ The English Government, describing the attitude of the Soviets as "not helpful", continued its efforts and on November 4, 1934, an agreement was reached under which the Soviet Government delivered to the Company in settlement of the latter's claims, transferable and non-interest-bearing notes in the amount of £3,000,000 payable over twenty years in semi-annual installments due on each May 1 and November 1.¹⁶ The notes were honored until May, 1940, but not afterwards.¹⁷ Even prior to the discontinuance of payments, the outcome of the dispute had proved fatal to the Company. In April, 1937, the paid-up capital of £4,238,310, scattered other several thousands of shareholders, was reduced to £21,825.7s.6d. after repayment of 8½d. on each pound share, 19s.3½d. being written off.

Proceeding now to an analysis of the case we find the first question to be that of the applicable law. There can be little doubt that the legal consequences of a contract establishing a concession in Soviet territory and under control of the Soviet Government are determined by Soviet law. Counsel for Lena and, following him, the arbitral tribunal took the same view in so far as performance of the contract inside the U.S.S.R. was concerned, whereas in other respects the "general principles of law" as referred to by the famous Art. 38 of the Statute of the Permanent Court of International Justice should decide (Award, No. 22). In this writer's opinion such a splitting of applicable legal systems was not warranted; the "proper law" of the entire contract was Soviet. Still, there is no need to elaborate this point, as the Soviet Government did not invoke its own law. Nor was Soviet law referred to by the legal experts of the Government.¹⁸ In fact, such a reference would have been harmful to the Soviet cause. Soviet law, while greatly narrowing the access to arbitration, strictly bars escape from arbitral engagements.¹⁹ It considers an arbitra-

¹⁴ Statement by Mr. Colville, Secretary to the Overseas Trade Department, in the House of Commons on Jan. 28, 1934. 285 H. C. DEB. 39 (5th Ser. 1934).

¹⁵ Interpellation by Sir W. Davison and others of June 4, 1934. 290 H. C. DEB. 547 (5th Ser. 1934).

¹⁶ *The Times*, Nov. 6, 1934, p. 13, col. 1.

¹⁷ For the preceding statements, see STOCK EXCHANGE OFFICIAL YEARBOOK 2905 (England 1948). In the same Yearbook for 1949 the Company is no longer mentioned.

¹⁸ *Infra*, p. 39.

¹⁹ In 1 INTERNATIONAL YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION 145 (Eng. tr., Nussbaum ed. 1928; German orig. 1926), Professor E. Kelmann, Kiev, has given a fully documented account of "Arbitration under Soviet Law." While legislative regulation of the subject is left to the several Soviet republics, the representative enactment (and apparently

tion tribunal once agreed upon as "not established"²⁰ in the following four cases:²¹

- (a) if the time limit is allowed to lapse unused;
- (b) in the event of the refusal of one of the arbitrators to fulfil his duties or the rejection of an arbitrator by a party (Article 7);
- (c) if, during the proceedings, a fact becomes known which justifies the criminal prosecution of one of the disputing parties, and if such fact is of influence upon the settlement of the dispute;
- (d) in the event of the death of one of the disputing parties.

According to Article 7 as referred to under (b), a party may withdraw from the arbitration agreement, if he can prove that an arbitrator is interested in the result of the proceedings and that this fact was unknown to him at the time when the agreement was made. Apart from this exception, "the parties to an arbitration agreement may not withdraw from such agreement before expiration of the time limit fixed therein, except in such cases as are indicated in article 7 of this regulation."²² Manifestly the course followed by the Government in the Lena case is incompatible with the prescriptions of Soviet law.

However, the Government, by not invoking any definite legal system, probably envisaged the general principles of (arbitration) law which, as mentioned, were also contemplated by the arbitral tribunal. Ascertainment of those principles is made easier by the fact that few legal subjects have received a comparative treatment as comprehensive as has arbitration.²³ On this basis it can be stated that neither in cases nor in legal

the only elaborate one) was the Arbitration Statute of the R.S.F.S.R. of Oct. 14, 1924, 1 INT. Y. B. CIV. & COMM. ARB. 224 (English tr., Nussbaum ed. 1928). Prof. Kelmann, a Ukrainian, therefore bases his account on the Russian rather than on the Ukrainian regulation, which incidentally does not materially differ from the Russian.

The strict attitude of Soviet law in matters of arbitration is in accord with Russian tradition. cf. 2 LEHR, *ELÉMENTS DU DROIT CIVIL RUSSE* 303 (1890).

²⁰ This is the term employed in both the Russian and the Ukrainian statute. 1 INT. Y.B. CIV. & COMM. ARB. 225, 229 (Eng. tr., Nussbaum ed. 1928). Apparently the Government, by declaring that the arbitral tribunal had "ceased to function", leans on that statutory language. Generally, the same idea is expressed by such phrases as invalidity (or nullity) of the arbitration agreement or of the award.

²¹ R.S.F.S.R. arbitration statute Art. 12, 1 INT. Y.B. CIV. & COMM. ARB. 225 (Eng. tr., Nussbaum ed. 1928)

²² R.S.F.S.R. arbitration statute, Arts. 10 and 7. 1 INT. Y.B. CIV. & COMM. ARB. 225 (Eng. tr., Nussbaum ed. 1928)

²³ By the numerous articles, contributed by experts from the countries concerned, published in INT. Y. B. CIV. & COMM. ARB. (Monographs and articles in point are listed or reviewed therein) and by a publication of the Institut International de Rome pour l'Unification du Droit Privé, DAVID, *RAPPORT SUR L'ARBITRAGE CONVENTIONNEL EN DROIT PRIVÉ, Étude en Droit Comparé* (1932). See also Cohn, *Commercial Arbitration and the Rules of Law, a Comparative Study*, 4 U. OF TORONTO L. J. 1 (1941).

writing has it ever been asserted—much less proved—that an arbitration agreement loses its force if one of the parties (as alleged was done by Lena) rescinds²⁴ the underlying contract. What has been asserted is only that if the underlying contract is void *ab initio*, then the attached arbitration agreement likewise breaks down so as to leave no legal basis for an arbitral procedure. The latter proposition, which is questionable,²⁵ we need not discuss. Breach of contract, whether it amount to rescission or not, is manifestly the proper and main object of arbitration. Had Lena committed a breach, it was for the Government to sue Lena before the arbitral tribunal for damages or other reparations. Far from destroying the competence of the tribunal, Lena's alleged one-sided act of rescission would have created another ground of competence.

The action of the Soviet Government has been defended by S. A. Bernstein, a Soviet economist, in a short pamphlet, "The Financial and Economic Results of the Working of the Lena Goldfields Co., Ltd." (London, 1931). He contends that Lena lacked "real financial foundation" for its undertaking. With the legal aspects of the case he is not concerned—the arbitral proceeding is not even mentioned by him—; in fact, his statements lack legal relevancy throughout.

Fresh information of a legal character in support of the Government's action has more recently been furnished in an article published in 1945 by the *Columbia Law Review*.²⁶ There it is asserted that the withdrawal of the Soviet Government from the proceedings (telegram of May 5, 1930) was the answer to a communication just received from Lena, according to which the Company under the circumstances declined responsibility for the concession property, was recalling its engineers, and was cancelling the powers of attorney of its representatives. While this is virtually in accord with the Award (No. 10), a new legal point is raised by a reference to section 86 ¶ 1 of the concession contract which prescribed: "The concession shall only be terminated before its time by a decision of the arbitration court" (the time agreed upon was 30 or 50 years for the various rights granted; *cf.* Award, No. 8). The Government, we are told by the commen-

²⁴ The Soviet Government used the term "dissolution." That word is ordinarily employed for termination by way of agreement.

²⁵ It has been examined, by way of comparative analysis, in Nussbaum, *The Separability Doctrine in American and Foreign Arbitration*, 17 N. Y. U. L. Q. 609 (1940).

²⁶ Rashba, *Settlement of Disputes in Commercial Dealings With the Soviet Union*, 45 COL. L. REV. 530, 539 (1945). On p. 539, n. 42 it is stated that the author relies on a selection of documents concerning the *Lena* case "edited in Moscow in 1930 and then circulated by the Central Concessions Committee of the U.S.S.R." Data on publication are not given.

tator, took the view that Lena had violated Section 86 ¶ 1 and thereby destroyed the arbitration agreement. The reference to section 86 ¶ 1 implies that the Government's defense was based not only on general principles of law, but also on the letter of the contract. However, section 86 ¶ 1 has nothing to do with the question before us. It imposes an obligation *exclusively on the Government*, namely, the obligation not to use its sovereign power of revoking the concession during the contract period, earlier termination of the concession being reserved to the tribunal. The assertion that the *Company* had prematurely "terminated" the concession is preposterous, and, as far as the record goes, was actually not used by the Government. And it has been shown above that a violation, if any, would have merely created a cause of action before the arbitral tribunal. Still the new version as given in the Columbia article seems to envisage another point. According to the award, Lena had raised its claim for arbitral decision before February 26, 1930. These claims, we know, were for compensation on the ground that the Government had made it impossible for Lena to perform its obligations and to enjoy its right under the concession. The Government, in its answer of February 25, 1930, agreed without qualification to the submission of these claims to arbitration, itself setting forth further issues by way of defense and counterclaim (Award, No. 8). Moreover, it appointed Dr. Chlenow as its arbitrator, agreed upon Professor Stutzer as the chairman, and requested him to fix the hearing for May 9, 1930. These measures of the Government amounted to a binding, that is, irrevocable, admission of the tribunal's competence with regard to Lena's claims made known to the Government. The new version set forth by the commentator suggests that before the Government's change of attitude (on May 5, 1930) something "new" had happened which justified that change, and that the new event was Lena's "communication." However, the recalling of the Lena engineers and the cancellation of the powers of attorney were nothing but the necessary consequence and the confirmation of the stand previously taken by Lena, viz., that the Government had made it impossible for the Company to perform its obligations and enjoy its rights under the concession agreement. The situation remained after the communication to all intents and purposes the same as before. The new version proves but one thing: its author felt that the change in the Government's attitude needed justification. He has tried to furnish that justification, but has signally failed.

The commentator further reports that the legal experts of the Soviet Government, Professors A. J. Pergament and V. N. Shreter, Legal Adviser to the Supreme Economic Council, had pointed out:

(1) that the contract provided for the arbitration only of disputes concerning its "interpretation or execution" and not of disputes relating to its "suspension or annulment";

(2) that if it had been contemplated that the arbitrators were to pass on questions which did not pertain to performance of the contract, but which involved solely the assessment of the amount due as compensation for loss resulting from suspension of the contract, the parties would scarcely have chosen, as they did, an eminent geologist as an umpire, but would probably have selected a more appropriate specialist;

(3) that, in any event, the arbitrators as a matter of law did not have capacity to determine the extent of their own competence.

None of these three defenses has actually been advanced by the Soviet Government as far as the record goes. They are all manifestly unfounded:

(1) Section 90 ¶ 1 of the concession contract referred to arbitration "every kind of dispute and misunderstanding in regard to either the construing or the fulfilment of the contract." "Suspension" or "annulment" are temporary or final refusal of fulfilment; they therefore undoubtedly fall under the broad arbitration clause. The theory of the experts is all the more puzzling as it was agreed (section 89) that "the parties base their relations with regard to this agreement on the principle of good will and good faith, as well as reasonable interpretation of the terms of the agreement."

(2) Under the agreement the Government had to nominate six members of the Freiberg Mining Academy (Bergakademie), or of the Royal High Technical School in Stockholm for the selection of a chairman. Hence from the beginning both parties wanted to have a mining expert preside over a tribunal which they entrusted with the decision of questions definitely legal in character (Award, No. 6). Each party, or at least Lena, then appointed a lawyer as associate arbitrator.²⁷ Such a combination is proper and frequent. Besides, a mining expert was particularly suited for the determination of the damages in question. The whole argument is obscure and gives somewhat the impression of a desperate scrambling for pretexts of any kind.

(3) The third objection is more interesting. Arbitrators cannot help forming an opinion on their own competence and acting upon it; otherwise they could not proceed at all. The real significance of the objection consists in the fact that the arbitrators' opinion regarding their competence is not necessarily binding upon the parties. Generally, in civil or commercial arbitration a dissenting party may turn to the ordinary law courts for a re-examination of the question of competence; the

²⁷ Dr. Chlenow's profession is not mentioned in the material available, but most probably he too was a lawyer.

court, if it approves of the dissent, will then annul the arbitral proceedings and the award *for excess of power*. That remedy was not available in the *Lena* case.²⁸ To this extent the situation was similar to a typical public-international-law arbitration between governments. There a government party, though it had submitted to the arbitration, might nevertheless decline recognition of the award rendered on the ground that the arbitrators had exceeded their power.²⁹ However, what *legally* matters is the *reason* for which the government objects to the assumption of competence by the arbitrators. One needs no legal experts to know that a powerful government though lacking good reasons may defy an award with impunity. When the Soviet experts advanced, as an independent reason for rejecting the award, the incapacity of the arbitrators to determine their competence, they proclaimed in reality the maxim of "might makes right." To sum up: none of the many reasons which have been presented in vindication of the Soviets' withdrawal from the *Lena* arbitral proceedings is well founded or colorably acceptable.

The substantive-law aspects of the *Lena* case present much less legal interest.³⁰ Breach of contract and unjust enrichment, bases of the *Lena* claims, have long been recognized as legitimate causes of action under the various systems of law, including international law. The Soviet Government itself has at no time formally refused to compensate *Lena*. As to the amount of compensation, the English Government figured the actual loss suffered by *Lena* as £3,500,000.³¹ Though the tribunal had power to award additional damages for the cessation of gain (*lucrum cessans*), the amount awarded (£12,965,000) gives the impression of being disproportionately high.³² It is true that in the published text of the award the statements on the amount of damages are not complete, but it is unlikely that familiarity with the missing sentences would lead to a different conclusion.

²⁸ The question of whether in the *Lena* case the English courts would have had jurisdiction under the Arbitration Act, 1889, 52 and 53 Vict. c. 49, *Int. Y. B.* I 196, is too academic to warrant discussion.

²⁹ See, e.g., OPPENHEIM, *INTERNATIONAL LAW* 16 (6th ed., Lauterpacht, 1940).

³⁰ The brief summary in Lauterpacht's Digest, *supra* n. 2, is only concerned with the substantive-law aspects. The arbitration problems involved are not even hinted at.

³¹ Cf. the statement of the Balfour Cabinet, *supra* p. and Award, No. 29.

³² The amount awarded was criticized by Lord Marley (Labour Party) in the House of Lords, Nov. 1, 1932. 85 H. L. DEB. 950 (5th Ser. 1932).

APPENDIX

*Text of the Award in the Lena Goldfields, Ltd., Arbitration,
September 3, 1930**

[Nos. 1 to 4 are introductory.]

5. The chief clauses of Article 90 of the Agreement read as follows:

I. All disputes and misunderstandings in regard to the construing or fulfilment of this Agreement and of all schedules thereto, on the declaration of either of the parties, are examined and settled by the Court of Arbitration.

II. The Court of Arbitration shall consist of 3 (three) members, of which one shall be elected by the Government and the other by Lena, and the third—the super-arbitrator—shall be elected by both parties by mutual agreement.

III. If such agreement cannot be reached within 30 (thirty) days from the day of receipt by the defendant party of a summons in writing to attend the Court of Arbitration, setting out the matters in dispute and stating the member of the Court of Arbitration appointed by the plaintiff, the Government within the period of 2 (two) weeks appoints 6 (six) candidates from among the professors of the Freiberg Mining Academy or the Royal High Technical School of Stockholm, from among whom within a period of 2 (two) weeks Lena shall elect one, who will be the super-arbitrator.

IV. and V. . . .

VI. If on receipt of the summons from the super-arbitrator appointing the time and place of the first session, one of the parties, in the absence of insurmountable obstacles to such action, does not send its arbitrator or if the latter refuses to take part in the Court of Arbitration, then, at the request of the other party, the matter in dispute is settled by the super-arbitrator and the other member of the Court, on condition that such decision is unanimous.

6. It will be observed that by paragraph I. of Article 90, the parties agreed to refer to arbitration every kind of dispute and misunderstanding in regard to either the construing or the fulfilment of the contract, and that each party was entitled to that right of access to an Arbitration Court without any further consent from the other. It was proved to the satisfaction of the Court in the course of the trial that Lena would not have entered into the Concession Agreement at all but for the presence in the contract of this arbitration clause and of the preceding clause (Article 89), whereby it was mutually agreed that "the parties base their relations with regard to this agreement on the principle of good will and good faith, as well as on reasonable interpretation of the terms of the agreement."

7. The Court was duly constituted by correspondence between the parties during February and March last.

8. The terms of reference defining the scope of the Court's jurisdiction, and the issues which, by accepting their arbitral office, the members of the Court became bound to try, are defined by three telegrams, subject to such further elucidation in detail as the parties might think fit or be ordered by the Court to give in their written declarations under paragraph VIII. of Article 90, or in their explanations and evidence (paragraph XII.).

By far the most important issues so referred were (a) the contention by Lena that the Government had "created for Lena undue difficulties and interference, and, in fact, the impossibility as regards performing its part of the Concession Agreement, and had prevented Lena from carrying out the Concession Agree-

* It is believed that the award has never been published in the United States, the only other publication appearing in *The Times* (London), September 3, 1930, from which the following text has been reprinted.

ment, or enjoying the rights, privileges, and benefits thereby created;" and (b) Lena's consequent claim for the ascertainment by the Court of what compensation is due to Lena from the Government. Certain other claims were made by Lena which are subsequently particularized in Lena's declaration to the Court mentioned in paragraph XIII. hereof.

To the submission to arbitration of these two main issues so raised by Lena, the Government, in its answer of February 25, 1930, agreed without qualifications, although in the same telegram, and also in its telegram of March 1, it raised further issues by way of defence and counterclaim. These included contentions that Lena, by failure to perform its obligations in regard to payment of royalties, and in regard to the programmes of production and expenditure on development laid down in the Concession Agreement, had committed breaches on which the Government presumably intended to rely as a defence to Lena's main claim.

But in neither telegram did the Government mention the provisions of Article 86, which authorizes dissolution of the Concession Agreement by the Court on proof that Lena, "by its own fault," has failed to perform her undertakings in regard to royalties, production, and expenditure. By reason of the Government's abstention from any further active part in the arbitration, the Government's said contentions were not further developed.

9. By telegram, dated April 27, 1930, to the Chairman of the Court, signed jointly, both parties requested that the first session of the Court should be fixed for May 9, 1930, and the Chairman fixed the first session accordingly.

10. By two telegrams of May 5, 1930, from the Chairman of the Concessions Committee to the Chairman of the Arbitration Court and to Lena respectively the Government contended that Lena, by stating that it took no further responsibilities, by refusing further financing, and by withdrawing the powers of attorney from its representatives, had dissolved the Concession Agreement; and the Government further said that in these circumstances the Arbitration Court had ceased to function. On inquiry by the Chairman of the Court Lena replied submitting that the Arbitration Court was properly and completely constituted, and saying that it would attend on May 9.

11. On May 9 the first session was duly held, although neither the Government nor its arbitrator attended. In answer to the Government's contention above-mentioned counsel for Lena contended that the Concession Agreement necessarily continued to exist until formally dissolved by the Court under Article 86; he pointed out that the claim of Lena in the telegram of February 12, 1930, demanding arbitration, was that the Government had by its conduct in breach of the contract made performance of the Concession Agreement impossible, and he submitted that if Lena succeeded in establishing that allegation to the satisfaction of the Court it would then, and not till then, be the time for the Court to declare the Concession Agreement dissolved.

The Court decided that the Concession Agreement was still operative and that according to the plain language of Article 90, paragraph 6, the jurisdiction of the Court remained unaffected, and accordingly dealt with the preliminary questions of procedure. A copy of the order of the Court was duly sent to each party—to the Government as well as to Lena.

12. The Government, however, adhered to its decision not to attend the arbitration, still contending that Lena had caused the jurisdiction basis of the Court agreed on by both parties to be invalid. This contention Lena denied.

13. On May 29 Lena delivered its statement of claims.

14. As the Government persisted in wholly repudiating the Court and all the arbitration proceedings, the Court, on an application by Lena pursuant to the

leave reserved in the Court's order of May 9, fixed the next preliminary hearing for June 19, and on that date gave directions for the trial on August 6 in London at the Royal Courts of Justice. A copy of the order was duly sent to the Government.

15. The Government did not, however, avail itself of the said liberty and did not attend the trial. The Court was thus deprived of the assistance of the opposing party in testing and checking the contentions and evidence of Lena. Although the Government has thus refused its assistance to the Court, it still remains bound by its obligations under the Concession Agreement and in particular by the terms of Article 90, the arbitration clause of the contract. By paragraph 12 of that Article each party undertook "to present to the Court, in manner and period in accordance with its instructions, all the information necessary respecting the matter in dispute, which it is able and which it is in a position to produce, bearing in mind considerations of State importance."

This information, by reason of the premises, the Court was not able to obtain direct from the Government, and in order to ascertain the truth upon the issues before it, the Court was thus compelled to admit the best evidence available of various facts and documents, upon which Lena was unable to produce primary evidence by reason of the documents or witnesses being in Russia and not available at the trial. The Court finds as a fact upon the evidence that this was rendered necessary by the difficulty in which the company found itself of getting either documents or persons out of Russia for the purposes of the trial.

16. The Concession Agreement by Article 1 granted to Lena exclusive rights of exploration and mining over certain vast areas of territory. In addition Article 2 granted the right of searching and prospecting in accordance with the Statute of Mining, 1923, over the whole of the rest of the territory of the U.S.S.R., and in the first and third districts mentioned below granted a further and exceptional right to Lena of prospecting and adding new areas to the concession without being bound in certain respects by the said Mining Statute. The territories over which Article 1 granted the said rights were:—

(1) The Lenskoi-Vitimsk Mining District, containing some 15,000 to 20,000 square kilometres or over 7,000 square miles, and situate about 1,000 kilometres north-east of the Lake Baikal in Eastern Siberia.

(2) The Sissertski and Revdinski districts in the Urals, containing some 4,000 square kilometres, equal to 1,500 square miles.

(3) The Zmeinogorski and Zirianovski regions in the Altai, containing some 30,000 square kilometres, or about 12,000 square miles.

Of these concessions No. 1 contains chiefly gold, of which there are large deposits in and under the alluvial gravel. No. 2 contains chiefly iron ore and copper ore, with small percentages of the precious metals. No. 3 contains chiefly complex ores of copper, lead, and zinc, with small percentages of the precious metals.

For the purpose of the company's metallurgical works in the Altai and the Urals Article 1 granted the company the right to exploit coalmines in the Kuznetski Coal Basin, near the Altai district, and anthracite deposits in the Egorshinsk region east of the Urals; the list of plans of the mines to be transferred was to be settled by a joint committee before February 19, 1926 (Article 1, paragraphs 4 and 5, and Notes 1 to 4 thereto).

In addition valuable rights (some outside the concession territory) to timber exploitation, water power, agricultural land, building sites, etc., were conferred on Lena (Articles 3 to 9).

17. The duration of these concessions was for Lenskoi-Vitimsk 30 years,

and for all other enterprises provided by the concession agreement 50 years from August 18, 1925 (Article 13), with certain qualifications in Article 1 not now material. All enterprises then working were to be transferred as going concerns with all plant, supplies, &c., and delivery of possession was to be made not later than within three months (coal and anthracite within six months, Article 1) from August 18, 1925—*i.e.*, it was due on November 19, 1925, five days after the execution of the concession agreement (Article 10).

18. Other terms of primary importance in the concession agreement are the following:—

(a) Lena was to develop the whole of the concessions with the highest skill and knowledge known to modern science in the whole world (Article 37).

(b) Lena undertook to comply with certain minimum programmes of development and production (Articles 39 to 49)—*inter alia* to invest during the first seven years of the concession 22,000,000 roubles in development (Article 38); to pay certain royalties by way of percentages on production (Articles 50 to 58, 60 to 62), and make certain payments for surface plots (Article 63) and timber (Article 64); and pay taxes on equality with Government enterprises subject to certain exceptions (Article 69).

(c) (Subject to certain limitations and qualifications which are not material to the general epitome contained in the present paragraph) Lena was given very complete rights of user of the concession (Article 14), freedom to buy and sell in the markets of the U.S.S.R. (Articles 18 and 20), to import without import duty for seven years (Article 17), to export without licence duty but subject to large rights of pre-emption by the Government (Article 21), of transport (Articles 22 to 25); and generally Lena was given complete freedom of contract for all business purposes (Articles 15, 16, 28, and 29—which is with Schedule 13 particularly important in regard to freedom of finance, banking, and exchange—and Articles 30 and 31).

(d) All payments by each party to the other were to be calculated and effected in British sterling or U.S.A. dollars (Article 81).

(e) The Government undertook responsibility for all losses caused as a result of breach of the Concession Agreement by organizations of central or local power, or illegal actions thereby (Article 80). The Court finds as a fact that under the Soviet law the trade unions and the various labour authorities were such "organizations."

(f) Lena was permitted to employ staff and labour, Russian and foreign, on certain conditions laid down in Articles 70 to 74, one of which was that the employees and workmen should enjoy equal rights with those granted to employees and workmen of Government enterprises (Article 71), another that Lena should observe all labour laws (Articles 70 and 73), and a third that no committees of the trade unions should possess the right to interfere in the "administrative economical activities of Lena" (Article 71).

(g) The Government undertook to supply the necessary police and military protection sufficient to guarantee the safety of the whole of Lena's property, particularly the safe production of precious metals (Article 35).

(h) Lena undertook to give the Government complete information as to, and the right to take part in all exploration work—no doubt in order that the Government might have full knowledge of the mineral wealth of the U.S.S.R. discovered by the company (Article 67); but no Government institution, either central or local, was to have any right to investigate the company's financial or commercial operations and Lena was not to be "bound to admit anyone to the examination of or to present information anywhere regarding the means employed by it or its enterprises for acquiring, working, and treating the various

metals and minerals or other subsidiary products, as well as its plans, drawings, and other data of a secret character the publication of which would have a harmful effect on the activities of Lena (Article 68).

(i) Lena was to submit to all existing and future legislation, but subject to the extremely important qualification—"in so far as special conditions are not provided in this agreement" (Article 75); and the Government undertook not to make any alteration in the Agreement by Order, Decree, or other unilateral act or at all except with Lena's consent (Article 76). The result of Articles 75 and 76 was completely to protect Lena's legal position—*i.e.*, to prevent the mutual rights and obligations of the parties under the contract being altered by any act of the Government, legislative, executive, or fiscal, or by any action of local authorities or trade unions.

(j) A general implication of the agreement is that Lena, although a capitalist enterprise, was to enjoy "most-favoured-nation" treatment as compared with Government enterprises of a commercial character, and not to be penalized for being capitalists in a Socialist State.

19. In the year 1925, when Lena entered into the Concession Agreement, the policy of the Russian Government was to encourage the entrance into Russia of commercial and industrial enterprises conducted on ordinary individualistic lines as so-called "capitalist" concerns, in order to encourage development and promote employment in the U.S.S.R. This was what was then known as "the New Economic Policy."

Lena was a concern of the kind; and the Court finds as a fact that if this policy had been continued and if the Concession Agreement had been carried out by the Government in accordance with its true meaning—which *inter alia* implied and demanded a continuance of that policy, at least towards Lena—the company would have encountered no insuperable difficulties up to the present time, would have had credit to obtain all necessary financial assistance in the great money centres of the world and would in fact have been by now far advanced on the road to very great prosperity.

Even as it is, and in spite of many breaches of the Concession Agreement by the Government from the very outset which created great difficulties in the company's performance and enjoyment of the Concession Agreement, Lena succeeded in the first three years of the concession in making a net profit to the amounts of £251,000, £117,000, and £391,000 respectively.

But by the autumn of 1929 a radically different policy had been adopted by the Government—the so-called "Five-Year Plan"—which meant the development of the U.S.S.R. and of all its industries, commerce, banking, agriculture, transport, and indeed its whole economic life on purely Communistic principles, and brought with it a bitter class war against capitalistic enterprise and everyone connected with such enterprise. With the "Five-Year Plan" a capitalistic concern like Lena, conducting its manifold enterprises on ordinary commercial and individualist lines, was radically incongruous, however obedient it might be to the laws of the U.S.S.R., or however purely commercial and non-political it might be in its behaviour, as the Court finds that Lena in fact was.

The Five-Year Plan thus put Lena into a position in the Communist State where it became peculiarly exposed to hostile criticism. The official Soviet Press has been filled with such attacks in an increasing degree during the last 12 months. As an equally inevitable consequence Lena has been regarded as a capitalist outcast by the Communist public of the U.S.S.R.

This complete reversal in 1929 of the official policy of 1925 towards Lena necessarily meant, when measured in terms of contractual obligation, the breach by the Government of many of the fundamental provisions, express and implied,

of the Concession Agreement. Open markets ceased to exist. The Government became the only buyer of the company's production. The Government became the only seller of the company's supplies—and Lena had under the contract *inter alia* to feed and clothe all its employees and workmen. Difficulties with labour organizations and authorities became incessant and overpowering, and Lena's workmen became in the words of its counsel "untouchables." Banking and exchange facilities were denied it. Difficulties with Government departments and local authorities multiplied in intensity. The end was inevitable; how it was brought about is explained in the latter part of this Award.

20. In regard to the claims of the Government against Lena, as outlined in the Government's telegrams agreeing to and defining the terms of reference (see paragraph 8 of this Award), and generally as regards the question of Lena's performance of its contractual obligations, the Court finds as a fact that,

(a) During the 4½ years from August, 1925, Lena invested nearly £3,500,000 sterling in the development of mines and works as against her undertaking in Articles 38, 47, 48, and 49, to invest for that purpose in the first seven years from that date 22,000,000 roubles, or on the Government's official valuation of the rouble, say £2,250,000 sterling, i.e., £1,250,000 sterling more, in 2½ years less than the contract required.

(b) Lena performed the obligations of Article 37, which required the highest modern skill and knowledge, in both development and operating, with extraordinary success, engaging the very best advice on each aspect of the many difficult technical problems to be solved, acting with deliberation, but translating the final expert decisions into instant action, and ordering and installing the best modern plant and machinery without any delay on the part of Lena.

(c) Lena not only gave to the Government full information about exploration work as required by Article 67, but, in addition, of its own initiative volunteered full information about its processes for treating its ores, although in its opinion Article 68 permitted it to keep secret the processes if it chose. It thus enabled the Government to utilize in the Government's own metallurgical works vast resources of similar ore in the districts of the U.S.S.R. not included in the company's concession.

(d) Lena in general duly carried out its obligations under the Concession Agreement, save in so far as it was directly or indirectly prevented (i.) by the Government or by subordinate authorities for whose acts and defaults the Government had under the Concession Agreement accepted responsibility (Article 80), or (ii.) by *force majeure* (Article 83).

Apart altogether from the fact that the Government did not appear before the Court to prosecute its claims (if any) and prove them by evidence, and that, therefore, they must be rejected, the Court is satisfied that even if the Government case had been put and proved before it, whatever claims for damages could have been substantiated are amply covered by the very generous allowances in favour of the Government which the Court has made in the assessment of the amount due to Lena. The Court therefore rejects the claims by the Government against Lena.

21. There is, however, an allegation by the Government against Lena, not made in the telegrams mentioned in the last paragraph, with which the Court conceives it its duty to deal. In the telegrams of May 5, 1930, to the Chairman of the Court, and of the same date to Lena in London, contending that the Concession Agreement had been dissolved by Lena, and that this Court had ceased to function, as pointed out above in paragraph 10 of this Award, the Government referred to what is described as "the refusal by Lena further to finance its enterprises," and in various recent articles published by the Govern-

ment in its Press, which were put in evidence before the Court, the Government alleged that the company was alone responsible.

Although this issue of finance was not raised by the Government in the telegrams defining the terms of reference, the matter is necessarily one which the Court has had to consider, since it affects the readiness and willingness of Lena to perform its contract; and in view of the fact that the Government did not attend the arbitration, the Court has given special attention to the whole of the evidence bearing on the financial history of the company and its relations with the Government, and has reached the conclusion that the Government was the cause of Lena's financial difficulties.

The following are some of the chief contributing factors:—

(a) The total gold production by Lena in the 4½ years was 1,844 Russian poods (a pood = say 16 kilogrammes or 36lb. avoirdupois), for which at London prices in accordance with Article 21 of the contract, the Government, which bought the whole, ought to have paid about £3,250,000 sterling. The Government, in fact, in breach of the Concession Agreement, insisted both on paying in roubles and on calculating the equivalent of the London price in roubles at an exchange rate officially fixed by itself, without regard to the world value of the Russian rouble, at 9.45 roubles to the £1 sterling.

This official rate assumed for the rouble is very much greater value than it really possessed on the average of the 4½ years since 1925. The true ratio cannot be ascertained with certainty, as the rouble has not been quoted on foreign exchanges, and no test of the market value of gold in Russia was possible as Lena's freedom of sale granted by Article 20 was made a nullity so far as gold is concerned by the Government forbidding any person in Russia to buy gold, subject, according to the evidence, to the penalty of death.

It was said in evidence that latterly the rouble was not worth more than 40 to the £1, or one-quarter of the official value; and as a result the company appears during the 4½ years to have received for its gold less than it ought to have under the contract by at least, say, £1,000,000 sterling. It is, however, unnecessary for the Court to arrive at any precise conclusion on this point, as the company did not make any actual claim for further payment.

(b) There was a large loss of gold by theft, which Lena in its evidence put at 30 per cent. to 40 per cent., or, say, £1,000,000 sterling. This loss, which we do not doubt was serious, would have been reduced to very much smaller proportions if the Government had carried out its obligations under Articles 35 and 80, in regard to police protection and the control of local authorities, whose duty it was to help the company's administration.

(c) The Government wrongfully, in breach of Article 2, refused to Lena valuable extensions of the gold area of the Concessions in the Lenskoi-Vitimsk district, called Kollara and Kitejamacha, which, according to the evidence, were discovered by Lena in 1927 and ought to have been available to Lena for working in 1928. These gold-bearing areas are to-day being worked by the Government, who state officially that they expect to employ there next year 5,000 workmen. The Court cannot estimate what amount of profits the company would have made there in 1928, 1929, and 1930, but they would probably have been substantial.

(d) The Government wrongfully refused similar extensions in the Urals (Elizavetinsky iron mines) and in the Altai (Hair-Kumin fire-clay deposits).

The Elizavetinsky iron-ore deposits were just outside the Sissertski area of Article 1 of the Concession Agreement, but contiguous to the deposits within the Concession which fed the modern Sverdlovsk furnaces erected by the company. It was entitled as of right to the grant under Article 2.

The Hair-Kumin area was in 1928 treated by the Government as included in the Altai district conceded by Article 1; but anyhow the company was entitled to it under Article 2. According to the evidence, it contained the only fire-clay deposits of the Altai district and was therefore of great importance for making, *e.g.*, the linings of furnaces. In consequence of the deprivation Lena was forced to import from Germany at great cost.

It is noteworthy that the date of the Government's definitive repudiation of these two very important rights of Lena was October, 1929. Both Elizavetinsky and Hair-Kumin would have afforded valuable additions to the company's assets, and would have increased its future profits.

(*e*) According to the evidence the Government wrongfully prevented Lena from working a large deposit of marble, which was of a kind both suitable and necessary as limestone flux for metallurgical smelting. This deposit was within the Concession area of Article 1, and Lena had a right to work it. In consequence of the deprivation Lena was forced to buy or work inferior limestone at a greater cost.

(*f*) The Government for not less than 15 months, namely, till June, 1927, delayed transferring to the company the coal and anthracite mines, which were essential for its metallurgical production, and should under the Concession Agreement have been available for the company's exploitation early in March, 1926. Early delivery was important in order to avoid delay in designing the furnaces suitable for the kinds of fuel available.

(*g*) The Government in breach of their obligations under the combined effect of Article 71, paragraph 1, and Article 80, paragraph 2, caused many of the workmen and employees of Lena to lose trade union rights and political rights (*e.g.*, of voting); and in addition in 1929 it launched and fomented a class war against all persons employed by Lena, on the ground that the company was a capitalist enterprise. By reason of the premises the Government gradually caused the whole staff of Lena, higher and lower, technical and non-technical, to resign in large numbers.

This led to disorganization, and it became more and more difficult, and finally impossible, to get the necessary qualified men in those remote places to carry on. This attitude of the Government and of "all organizations of central and local power" (Article 81), including the trade unions, and the various Labour authorities from the lowest to the highest, acting under the Government's encouragement, culminated in a raid directed by the Central Government and carried out by the O.G.P.U. ("the Federal Political Police"), on the night of December 15, 1929.

(*h*) The raid was executed simultaneously on that night at practically every one of the numerous establishments of Lena throughout its vast concessions. These remote places were situated at great distances apart, and many of them far from railways. Bodaibo, the centre of the gold concession in Eastern Siberia, was 4,500 miles from Moscow; the chief centre of the Altai concession was 2,400 miles from Moscow, and Sverdlovsk, the chief town of the Ural concession, was over 1,300 miles from Moscow.

About 131 men, including the highest officials of the company, managers, metallurgists, electrical engineers, mine managers, and chiefs of the operating departments, were all seized and their persons and premises searched and their papers, including a mass of confidential documents, such as plans, reports, and investigations into processes necessary for the scientific operation of the various works, were taken away. About 12 of these officials were arrested, and some were subsequently prosecuted in the Soviet Court at Moscow on charges of "counter-revolutionary activity and espionage" against the Government.

Immediately after the raid and concurrently with the subsequent criminal proceedings against the persons arrested the campaign in the official Press against the company was made more aggressive and violent. But throughout this campaign no charge of "espionage" or any other political activity was ever made against the company by the Government in the correspondence, or in the many interviews between the chief representatives of Lena and the leading members and officials of the Government.

The natural result of this campaign, culminating in the raid and prosecution, was that the staff of Lena, including the whole of its labour, was terrorized.

A local raid of the same kind was carried out at Sverdlovsk on February 4, 1930, when 14 persons were similarly searched.

The criminal trial took place after the arbitration proceedings had begun, and it is not necessary for the Court to discuss it or the constitutional relationship in Soviet law between the Executive and the Judiciary, and between executive policy and justice, save to observe that it rests on principles fundamentally different to those of the rest of the Western world. The effects of this relationship were particularly apparent in the evidence before the Court in regard to "Labour Courts" in the Lenskoie area in connexion with gold thefts and with trade union questions. So far as Lena's employees are concerned there was nothing in the evidence before the Court to suggest that they had been guilty of any "espionage" or other disloyalty to the Government.

(i) During the autumn of 1929 and the winter of 1929-30 old difficulties of Lena were aggravated and many new ones arose, partly in connexion with trade union claims, partly in connexion with the furnishing of supplies—*e.g.* cereals for men and horses—causing grave troubles in regard to labour and transport. For these the conduct of the Government was responsible.

The result of the actions of the Government described in sub-paragraphs (a) to (i) above was to deprive the company of available cash resources, to destroy its credit, and generally to paralyse its activities.

22. Before drawing final conclusions upon the above-mentioned facts it is desirable to state the legal form in which Lena's claim was presented to the Court. It was admitted by Dr. Idelson, counsel for Lena, that on all domestic matters in the U.S.S.R. the laws of Soviet Russia applied except in so far as they were excluded by the contract, and accordingly that in regard to performances of the contract by both parties inside the U.S.S.R. Russian law was "the proper law of the contract," *i.e.*, the law by reference to which the contract should be interpreted.

But it was submitted by him that for other purposes the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice at The Hague should be regarded as "the proper law of the contract" and in support of this submission counsel for Lena pointed out that both the Concession Agreement itself and also the agreement of June, 1927, whereby the coal mines were handed over, were signed not only on behalf of the Executive Government of Russia generally but by the Acting Commissary for Foreign Affairs, and that many of the terms of the contract contemplated the application of international rather than merely national principles of law. In so far as any difference of interpretation might result the Court holds that this contention is correct.

23. The company's claim was put thus. Lena made no claim for damages for any breaches of contract down to the time of the final claim, although it relied on them as part of the history of the case and as an answer to various claims of the Government. Its main claim it put in two alternative ways, preferably the second.

The first was for damages for breach of contract—viz., the present value of the future profits lost by reason of the Government's acts and defaults. The second was for restitution to the company of the full present value of the company's properties, by which in the result the Government had become "unjustly enriched." This second formulation of the case rested upon the principle of Continental law, including that of Soviet Russia, which gives a right of action for what in French law is called "*Enrichissement sans cause*"; it arises where the defendant has in his possession money or money's worth of the plaintiff's to which he has no just right.

This right is recognized and enforced in Germany under Article 812 of the Civil Code. It is also recognized in Scottish law, but not fully in English law; although the English right of action "for money had and received" on "total failure of consideration" often leads to the same result. The principle was discussed and approved in the British House of Lords in the Scotch case of *Cantiare San Rocco S.A. v. Clyde Shipbuilding Company, Limited*, 1924 Appeal Cases, p. 226.

Counsel for Lena contended that the Government was, in fact, in possession, present and future, throughout the remainder of the Concession (25 years for Lenskoi and 45 years for the rest) of Lena's valuable properties, into which Lena had put £3,500,000 sterling, and from which Lena was entitled, if the Government had performed its contract, to great profits; and that, as the Government had wrongfully turned the company out of Russia, it obviously could show no "just cause for its enrichment."

24. It follows that, as the question of "just cause" is in issue, it is material to consider the character of the Government's conduct in doing what the Court decides that it did. On that question the following facts are relevant:—

(a) In the raid on December 15, 1929, a large number of documents throwing light on the best methods of working the difficult metallurgical processes and ore dressing, upon a knowledge of which the successful exploitation of the company's enterprises by anyone else would depend, were taken away by the Government. It is immaterial whether the documents were permanently retained or returned after a certain delay.

(b) At this time the company's greatest schemes of development of mines, flotation plants, metal extraction, furnaces, &c. covering vast areas of ground—at Sverdlovsk alone 21 acres—were nearly completed, and everything practically in working order—except for the final ascertainment of the best method of dealing with the zinc concentrates in the Altai.

(c) As Lena's counsel pointed out, these steps so taken by the Government were such as to promote the Five-Year Plan.

25. The Court finds as a fact that this state of affairs in which Lena found itself in February, 1930, brought about (in the words of Lena's telegram demanding arbitration) a "total impossibility for Lena of either performing the Concession Agreement or enjoying its benefits."

The Court further decides that the conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations thereunder and to be compensated in money for the value of the benefits of which it had been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the Court prefers to base its award on the principle of "unjust enrichment," although in its opinion the money result is the same.

26. It remains to consider the amount which on either basis ought to be paid. The problem before the Court is to arrive at the present value, if paid in cash now, of future profits which the company would have made and which the

Government now can make—on the assumption of good commercial management and the best technical skill and up-to-date development. In the case of Lena that assumption has been fully proved by past facts. In the case of the Government it is legally just.

The problem is, therefore, similar to that of ascertaining a fair purchase price for a going concern. The principles of such valuations are to-day, well known, as the result of accumulated experience in the estimating of mineral properties all over the world. In Article 84 of the Concession Agreement, which deals with optional redemption by the Government on the expiration of 35 years, it is expressly provided that the purchase price is to be "determined by multiplying the average annual income by the number of years remaining to the end of the concession, with discount of incomes intended to be paid in advance" (*i.e.*, under the redemption) "of 5 per cent. per annum," and that "on calculating the income Lena is bound to be guided by the methods generally adopted in large mining and metallurgical enterprises of England and the U. S. A." These methods the Court has followed in its calculations.

The award then explains at length the "primary factors" of the method of calculation and then, in paragraph 27, gives the figures arrived at. This part of the award is omitted in The Times, which reproduces only the following totals:

Lenskoie	
Gold	£985,000
Urals	
Copper	£1,900,000
Iron	£7,000,000
Altai	
Copper, lead, zinc, silver, gold	£3,080,000
	£12,965,000

The Court directs the Government to pay to Lena the above sum of twelve millions nine hundred sixty-five thousand pound sterling.

28. In the course of the hearing it was admitted by Lena that the Government had lent the company some 4,500,000 roubles, and that the company was, down to September 30, 1929, behindhand to the extent of 644,000 roubles in its payment of royalties, and that the Government was claiming a further 147,000 roubles as royalty on the portion of the price paid for gold represented by certain "premium" additions which had been made in response to Lena's complaint that it was not getting English sterling or its equivalent as due under Article 81.

Evidence was given on behalf of Lena of an understanding that repayment of the loan was not to be demanded because of the non-payment by the Government of the price of the gold in sterling, and that the shorts on the royalties were only to be paid on receipt by Lena on October 1, 1929, of 25 per cent. advance payment for the ensuing year's gold output.

Without deciding whether these understandings ever became binding agreements, we are of opinion that the Government's claim to these moneys must be subject to a defense by way of set-off of the short payment of the gold price (see paragraph 21 (*a*) above). As this was not less than £1,000,000 judgment must be given for Lena on these two claims by the Government.

29. Lena, as above stated, put forward an alternative claim. This was for restitution of the money spent by the company:—(*a*) On prospecting, development, and equipment; (*b*) on costs incidental to obtaining the concession; and (*c*) on the acquisition of shares of the old companies, (*d*) interest. The total amount so spent was about £8,500,000 sterling. Of this amount (*a*) rep-

resented about £3,500,000, and (c) about £4,500,000. It was contended that restitution was due on the principle of "unjust enrichment," and in regard to (c) reliance was placed on the terms of the special agreement contained in Schedule 3 of the Concession, whereby Lena guaranteed the Government against claims by the old companies mentioned in that schedule, which were expropriated in 1918-19, when the Government nationalized private mineral properties, or by their shareholders.

Head (c) would have been open to considerable doubt, but the Court would have allowed (a) if it had not been covered by the main claim, in respect of which the Court decides in favour of Lena.

30. If the Government should think that the Court's conclusions on the facts would have been different if the Government's witnesses had been before the Court, the Court regrets their non-attendance at its sittings; but it is bound to observe that nobody but the Government itself is to blame for any such incompleteness in the evidence. In truth, however, so much of the essential evidence, upon which the Court's conclusions depend, was contained in written documents of a contemporaneous character, and the oral evidence of the company's witnesses was corroborated to so large an extent by documents or admitted facts, that the Court feels sure that its conclusions would not have been in any material degree modified in favour of the Government by any evidence the Government could have called.

31. The Court directs that all moneys due shall be paid in British sterling, and shall carry interest at 12 per cent., pursuant to the terms of Article 82 of the Concession Agreement, from the date of this award.

32. The Government is directed to repay to Lena one-half of the expenses for the chairman and the secretariat on production of the chairman's receipt for the payment of the total amount due therefor.

33. The Court resolves that the Concession Agreement is dissolved.

(Signed) O. STUTZER.
LESLIE SCOTT.