# THE AMBATIELOS CASE

By S. E. K. HULME*

The award in this case[1] is of interest for several reasons. It has concluded a history of thirty-two years litigation and diplomatic negotiation. It deals with several questions of public international law on which there is little guidance in the cases or in the text-books. And even in an inflationary era there remains some element of drama in watching an otherwise poor man bringing an arguable claim for £8,000,000.

PART ONE: *The History*

In 1919, it is clear, the Greek shipowner, Nicholas Eustache Ambatielos, contracted to buy from Her Majesty's Shipping Controller, representing the United Kingdom Government, nine steamships then being built in Hong Kong and Shanghai at a total purchase price of £2,275,000. Mr Ambatielos was himself ill in Paris at the time, and the actual negotiations were carried out between his brother, Mr G. E. Ambatielos, and Major Bryan Laing, at that time Assistant Director of Ships Purchases and Sales at the Ministry of Shipping. The brother's authority, so a letter from the purchaser indicated and the Commission found, was to negotiate a contract, the terms of which included *fixed dates of delivery*.

Clause 7 of the contract, finally signed, included the following provision:

> . . . If default be made by the Vendor in the execution of Legal Bills of Sale or in the delivery of the steamers in the manner and within the time agreed, the Vendor shall return to the Purchaser the deposit paid with interest . . .

In fact the contract did not contain any delivery dates, and when Mr Ambatielos discovered this, he threatened to repudiate it. Major Laing flew to Paris (August 1919) and assured Mr Ambatielos that the ships would be delivered by certain dates written on a buff slip of paper handed to Mr Ambatielos by Major Laing. The essence of the original dispute was whether (as alleged by the Greek Government for Mr Ambatielos) this slip of paper was evidence of dates already agreed, or whether (as alleged by the United Kingdom Government) the slip of paper merely indicated dates at which delivery might be expected. The Greek Government alleged that the high purchase price could be explained only on the basis that the contract (un-

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[1] *Ambatielos* case: *Greece v. United Kingdom*. The case was heard in London by Commission of Arbitration under the protocol to the *Anglo-Greek Commercial Treaty of 1886*, in January-February 1956. The Award was delivered in London on 6 March 1956. Members of the Commission were: M. Ricardo; J. Alfaro of Panama, President; M. Maurice Bourquin of Belgium; M. Algot, J. F. Bagge of Sweden; M. John Spiropoulos of Greece; Gerald A. Thesiger Esq. Q.C., of England; Edvard Hambro, Registrar.

usually at that time) included fixed delivery dates. The United Kingdom Government explained the high purchase price by the fact that the ships were allowed 'free charter' and not confined to 'Blue Book rates'. It was undisputed that Far Eastern free charter rates were, in July 1919, at an exceedingly high level.

It was common ground that the ships were not delivered by the dates on the buff slip of paper, but at periods ranging from two to six months after. World freight rates fell heavily in that time. Two of the nine ships were delivered by late 1919, and each made £100,000 profit on its maiden voyage home. The ships delivered a few months later barely covered their costs.

Mr Ambatielos had intended to pay for the ships from their expected profits. When the profit was thus smaller than expected, he was in financial straits. In November 1920 he granted the United Kingdom Government a mortgage over the seven delivered ships, to secure his debt. Business negotiations continued throughout 1921. Mr Ambatielos claimed arbitration under clause 12 of his contract; the Board of Trade instituted proceedings on the mortgage deeds in the Court of Admiralty, and his claims was heard as a defence to those proceedings.

At the trial of the action,[2] the United Kingdom Government successfully claimed Crown privilege for certain inter-departmental minutes. Letters written in 1922 by the Controller of Shipping (Sir Joseph Maclay) to Major Laing were not produced in court. Major Laing, although *(semble)* subphoenaed by the Ministry of Shipping, was not called as a witness. On 15 January 1923, Hill J. gave judgment for the United Kingdom Government for the principal and interest due under the mortgage deed, and the ships were accordingly sold.

Mr Ambatielos then appealed to the Court of Appeal, and sought leave to call Major Laing, who would produce copies of the letters written to him by Sir Joseph Maclay. The Court of Appeal held that there was nothing to justify this course.[3] Mr Ambatielos knew of Major Laing at the trial, and knew of the letters (though he did not know their exact contents). The fact that Major Laing had been subpoenaed by the Ministry of Shipping did not prevent Mr Ambatielos calling him. He could have called him and had not. Scrutton L.J. said:

> In my view it would be contrary to the settled principles to allow a man, who has considered the situation and taken his chance, to have another try when he finds the chance has gone against him; and that is what, in my view, the present defendant is doing in this case.

[2] Reported only in 14 Lloyd L.R. 4. The judgment is set out in *International Court of Justice, Pleadings, Oral Arguments, Documents, Ambatielos Case.*

[3] The case is unreported. *The Ambatielos, The Cephalonia* [1923] P. 68 is not connected with the present case.

Mr Ambatielos did not appeal from this decision, and did not proceed with his appeal on the main point. In 1923 another action was brought against him concerning the last ship under the same contract, and he neither defended it nor appealed from the decision against him.

The matter then entered its diplomatic phase, which lasted twenty-six years. The Greek Government adopted their countryman's case, and sent notes to the United Kingdom Government in 1925, 1933, 1934, 1936, 1939 and 1940. The United Kingdom answers were all variants of the one theme, that the matter had been heard and decided in the courts and no reason had been shown for reopening it.

In 1949 a further note was sent, alleging, what had first been suggested as late as 1939, a breach of the *Treaty of Commerce and Navigation between Great Britain and Greece* of 10 November 1886.[4] On 9 April 1951 the Greek Government filed in the Registry of the International Court of Justice an application instituting proceedings in that Court, and asking that Court to declare that the United Kingdom Government was under obligation to agree to an arbitration under the Treaty of 1886, or alternatively to deal with the claim itself. The court on 1 July 1952 decided by thirteen votes to ten that it had no jurisdiction to deal with the claim itself, but (by ten votes to five) that it did have jurisdiction to decide whether there was an obligation to submit it to arbitration. On 19 May 1953 the court decided, by ten votes to four, that 'the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim.'

In accordance with this decision the two governments concluded the Anglo-Greek compromise of 24 February 1955. By article 2 thereof the Commission was requested to determine:

(a) the validity of the Ambatielos claim[5] under the 1886 Treaty having regard to:
  (i) the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the Treaty;
  (ii) the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;
  (iii) the provisions of the Treaty.

[4] Hereafter called the Treaty of 1886.

[5] The claim was classified under three heads: (a) Claim A, for £8,059,488 11 0, compensation for breach of contract of sale by non-delivery on specified dates; (b) Claim B for £4,140,075 based on unjust enrichment; (c) Claim C for £4,409,242 based on the cancelling of the sale of the last two ships. A great proportion of each claim was for interest during the thirty-five years since the actual events took place. The claims turned on the same issues, so far as the present case is concerned, and are not hereafter distinguished.

The determination of these questions constitutes what would seem to be the last chapter of this long story.

PART TWO: *The Award*

The provisions of the Treaty of 1886 relied upon before the Commission under reference (iii) (*supra*) were article X, a 'most-favoured-nation' clause of common form, and article XV, promising to the subjects of both Governments 'free access to the Courts of Justice for the prosecution and defence of their rights'. Thus the Commission was concerned with four important points of international law:

(a) the question of undue delay;
(b) the interpretation of a 'most-favoured-nation' clause;
(c) the interpretation of a 'free-access' clause;
(d) the question of exhaustion of local remedies.[6]

1. *The Question of Undue Delay:*

It is a settled principle of international law that the right to bring an action can be lost by undue delay in setting about it.[7] The reasons for this were well stated in *Sarropoulos v. Bulgaria*:[8]

> Security and stability of human affairs demand the termination of a delay beyond which rights and obligations can no longer be invoked. The difficulty of producing evidence after a certain lapse of time would often make the recognition of a right uncertain and even impossible.

It is also settled that no arbitrary period is laid down. The determination of the question is

> left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate.[9]

[6] Proceedings of this nature being virtually unknown in Australia, the Australian reader might be interested in the details of the hearing. The Commission sat in Government offices at 10, Carlton House Terrace, London. Counsel appearing were robed, but the Members of the Commission were not. All proceedings were conducted in English. The court-room was not open to members of the public as of right, but tickets could be obtained on proof of some valid interest in the proceedings. The hearing took 14 sitting days, and judgment was then reserved. The judgment and reasons were handed down within three weeks of the last sitting day.

Counsel appearing were: for the Greek Government, the Rt. Hon. Sir Frank Soskice, Q.C.; Professor Henri Rolin; Dr C. John Colombos, Q.C., LL.D.; Mr Frank Gahan, Q.C. and Mr Mervyn Heald; for the United Kingdom Government, Sir Harry Hylton-Foster, Q.C., M.P., Solicitor-General; Mr John Foster, Q.C., M.P.; Sir Gerald Fitzmaurice, K.C.M.G.; Mr Alan Orr, C.B.E. and Mr D. H. N. Johnson. Mr F. A. Vallat, C.M.G., Deputy Legal Adviser to the Foreign Office, was also heard on behalf of the United Kingdom Government.

[7] Oppenheim, *International Law* (8th ed. 1955), i, para. 155 c; Ralston, *The Law and Procedure of International Tribunals*, paras, 683-698, and Supplement, paras. 683 (a) and 687 (a); *Hague Resolutions of L'Institut de Droit International.* (1925).

[8] Mixed Arbitral Tribunal (1928), 47, 51.

[9] *Hague Resolutions of L'Institut de Droit International* (1925). See the authorities quoted in n. 7, *supra;* Schwarzenberger *International Law* (2nd ed. 1949) i, 246-248.

The *Ambatielos* case presented a question which does not seem to have arisen in so neat a form before. Until 1939 the Greek claim was based simply on the general international law. In 1939 the claim ultimately presented (under the 1886 Treaty) was first put forward. The United Kingdom contended that had the claim finally made been put forward earlier, the evaluation and appreciation of the events in dispute would have been simpler and more certain.[10] It further alleged that the change of claim had been made simply to utilize the compulsory arbitration clause under the Treaty.

This explanation the Commission found 'plausible'; but it also found it 'difficult to see what effect it can have on prescription'. The essential question as regards prescription is not motive, but whether the delay in putting the claim on its final basis 'brought about results which would, *in themselves,* justify the operation of prescription'.[11] In this case the United Kingdom Government could point to no specific fact proof or evaluation which would have been simpler had the final claim been made at an earlier stage.

> . . . even though the *legal basis* of the claim has been changed during the diplomatic exchanges – *the facts* which constitute its substance have remained the same from the beginning.[12]

This view would seem to be completely satisfactory, since it links the question raised by change of claim to the basic justification for having a prescription rule. If a change of claim *does* embarrass the defendant in presenting his case, then the claim so changed may be barred although the claim in its original form would not. But where, as here, the original claim raises and so gives notice of all the facts constituting the substance of the claim finally made, there seems no reason why the amended claim should be barred; the *Ambatielos* case now provides authority that it should not.

2. *The Most-Favoured-Nation Clause:*

Article X of the 1886 Treaty is couched in common form:

> The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and naviga-

[10] *U.K. counter-case,* para. 169.

[11] *Award,* 35. (All references to the Award are to the Transcript pagination.) The Greek member of the Commission, M. John Spiropoulos, entered a judgment dissenting from the rest of the Commission on several issues. I have throughout referred to the majority as 'the Commission' and drawn attention to certain issues upon which there was some dissent. The President dissented on the application to the facts of the case of the rule relating to non-exhaustion of local remedies. The italics in this and all other quotations are original.

[12] *Award,* 36.

tion of each country shall be placed, in all respects, by the other on the footing of the most-favoured-nation.

Such a clause has commonly been taken to mean what it seems to say, that 'all favours which either contracting party has granted in the past, or will grant in the future, to any third state must be granted to the other party'.[13] The Greek claim sought to extend this meaning. It called in aid first the *Treaty of Commerce between Great Britain and Bolivia* of 1 August 1911.[14] Article 10 of that Treaty reads:

> . . . They [the High Contracting Parties] reserve the right to exercise such [diplomatic] intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favour by one of their nationals or violation of the principles of international law.

So, the Greek case alleged, the most-favoured-nation clause of the 1886 Treaty, with article 10 of the Bolivian Treaty, incorporated the principles of international law in the 1886 Treaty.[15]

The same argument was then applied to a series of treaties in which Great Britain had guaranteed to the nationals of other countries treatment in accordance with 'justice', 'right' and 'equity'.[16] And, it claimed, article X of the 1886 Treaty, acting with these treaties,[17] incorporated into the 1886 Treaty 'guarantees to Greek nationals [of] treatment in accordance with the principles of international law, "justice", "right" and "equity" '.[18]

To this argument the United Kingdom Government advanced several objections :

(a) A most-favoured-nation clause applies to the category of commerce, and can only attract rights in that category.[19] The rights arising under the Danish and Swedish Treaties are within the category of administration of justice, and so cannot be attracted by a most-favoured-nation clause.[20]

(b) Even if such rights *could* be attracted, no right to abstract 'justice'

[13] Oppenheim, *op. cit.*, para. 580.

[14] Hereafter called the Bolivian Treaty.

[15] *Greek case*, para. 67.

[16] *E.g. Treaty of Peace and Commerce between Great Britain and Denmark* of 13 February 1660-61, (renewed to its 'full extent' 14 January 1818), article 16: '. . . each party shall in all causes and controversies now depending, or hereafter to commence, cause justice and right to be speedily administered to the subjects of the other party, according to the laws and statutes of each country'. This treaty is hereafter referred to as 'the Danish Treaty'.

*Treaty of Peace and Commerce between Great Britain and Sweden* of 11 April 1654 (renewed 18 July 1812), article 8: 'in case and people and subjects of either part . . . shall stand in need of the Magistrate's help, the same shall be readily and according to the equity of their cause, in friendly manner granted them, and justice shall be administered to them without long and unnecessary delays.' This Treaty is hereafter referred to as 'the Swedish Treaty'.

[17] And with other treaties in similar terms with Spain, Peru, Costa Rica, and Japan.

[18] *Greek case*, para. 67.

[19] *U.K. counter-case*, paras. 240-243.

[20] *Ibid.*, paras. 244-245.

'right' or 'equity' was conferred by those Treaties. Those promises were in old Treaties and must be interpreted as such. A right to 'justice' in such a Treaty is a right to 'justice according to law', a right to litigate on equal terms with the country's own nationals. And that right Mr Ambatielos had had.

(c) A most-favoured-nation applies to *privileges* and *favours granted* to citizens of other states.[21] These words do not include 'an inherent right by virtue of international law itself'[22] which cannot be withheld at all, in accordance with international law.

(d) In any case, no such right was in fact conferred by the Bolivian Treaty. Article 10 of that Treaty *recognized* and *regulated* a right of customary international law. It reserved a *pre-existing* right which would otherwise have been renounced by the earlier words of that article, where the parties agreed to abstain from diplomatic intervention.[23]

The Commission made several statements of importance on these issues. It agreed with the United Kingdom contention that a most-favoured-nation could only attract matters within its own category, commerce. It disagreed as to what those matters were.

> It would seem that this expression [matters relating to commerce and navigation] has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible . . . It is true that 'the administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders.[24]

So a most-favoured-nation clause *can* attract rights given to other nationals concerning their rights in litigation. But the Commission agreed with the United Kingdom contention concerning the effect of the Danish and Swedish Treaties. Their wording was 'influenced by the customs of the period', and what was guaranteed thereunder was 'the application of their national laws concerning the administration of justice'. The Danish Treaty made this explicit, with the words 'according to the laws and statutes of each country'. But it was nonetheless true of, *e.g.* the Swedish Treaty, where no such words appeared.[25]

Whether a most-favoured-nation clause *can* have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, the Commission expressly left undecided.[26] It was clear that *this* most-favoured-nation clause in its express terms covered only 'any privilege, favour or immunity'. A guarantee of

[21] See *e.g.*, the words of article 10 of the 1886 Treaty itself.
[22] *U.K. counter-case*, para. 237.
[23] *Ibid.*, paras. 246-248.
[24] *Award*, 43.
[25] *Ibid.*, 48. M. Spiropoulos dissented on this issue; *ibid.*, 104.
[26] *Ibid.*, 42.

treatment in accordance with international law is neither a privilege, a favour or an immunity. It is a pre-existing right.

Two results followed from these findings, and they were fatal to Mr Ambatielos's case. Firstly, he had no claim under the 1886 Treaty on any general principle of unjust enrichment, but only inasmuch as a remedy is provided in the particular case by the rules of English law. Secondly, he had no claim unless he could prove that he had been treated in the English courts otherwise than in accordance with English law.

3. *The 'Free-Access' Clause:*

Article XV of the 1886 Treaty reads:

> . . . The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of the rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.

Before discussing the Greek submissions under this clause, the Commission ventured a general statement on such a clause. It is aimed at a former custom of hindering foreigners in litigation. Hence the essence of 'free access' is non-discrimination.

> Thus, when 'free access to the Courts' is covenanted . . . the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set-off or counterclaim; to engage counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[27]

The Greek case claimed three infringements of this rule. It alleged firstly that 'The British Government put forward a case before Mr Justice Hill contrary to documents in their possession'. The Commission found as a fact that this was not so. It admitted that the words in clause 7 of the contract, 'within the time agreed', would seem to indicate that dates had been agreed. But it could find no evidence that this was so, nor any explanation why, if they were agreed, they were not stated in the contract. But it also said that even if this allegation were true, the 'free-access' clause had not been infringed. 'Free-access', it said, 'is something entirely different from

[27] *Award*, 55.

whether cases put forward in courts by govermnents are right or wrong'.

The second and third alleged infringements of the clause related to the facts that documents were withheld from Mr Ambatielos. These allegations the Commission dismissed without trouble.

> The non-disclosure here alleged would constitute a denial of 'free-access' if it could be shown that the act of non-disclosure does not conform with English law, or that that law gives to British subjects, and not to foreigners, a right to discovery, thereby establishing a discrimination between nationals and foreigners. No evidence to that effect has been produced in the present case.[28]

4. *Exhaustion of Local Remedies:*

The Commission then discussed the last question, that of the exhaustion of local remedies, and again it found itself breaking new ground. This well-established rule is not one of jurisdiction, but is a defence on the merits. The failure to exhaust local remedies 'excludes any question of an international liability on the part of the territorial state for denial of justice.'[29] The Greek Government conceded the existence of this rule, but emphasized the qualification on the rule that failure to exhaust local remedies does not provide a defence if the remedies will patently be ineffective. This the Commission accepted :

> Remedies which could not rectify the situation cannot be relied upon by the defendant state as precluding an international action.[30]

The United Kingdom relied on two alleged failures to use local remedies. The first of these was the failure of Mr Ambatielos to call Major Laing in the proceedings before Hill J. in 1922. In 1956 the Greek contention was that Major Laing's evidence would have been vital to their case; but in 1922 he had not been called. The rule of non-exhaustion, the United Kingdom contended, is not confined to *instituting* and if necessary *appealing* from proceedings, though it has previously been discussed and applied on those fields alone.

> It also requires that during the *progress*, and for the purposes of any particular proceedings in one of the local courts, the complainant should have availed itself of all such *procedural* facilities in the way of calling witnesses, procuring documentation, *etc.*, as the local system provides.[31]

This submission was unsupported by authority from cases or from recognized text-books, and its recognition by the Commission is of considerable importance. The Commission ventured a general statement on the issue:

[28] *Award*, 73.
[29] Waldock, *British Yearbook of International Law* (1954), 100.
[30] *Award*, 76.
[31] *U.K. counter-case*, para. 109.

> The rule requires that 'local remedies' shall have been exhausted before an international action can be brought. These 'local remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a state, as the protector of its nationals, can prosecute the claim on the international plane.[32]

Although the President and M. Spiropoulos dissented on its application, they both accepted the existence of this widened rule:

> Writers on international law deal with the question of non-exhaustion of local remedies from the point of view of the legal means of recourse from a lower to a higher court. As far as I know, the question relevant in the present case, *i.e.*, exhaustion of existing remedies *within one and the same court*, has never been considered by writers or international tribunals . . . I agree with the Commission that the *same* rule must apply.[33]

At the same time, the Commission pointed out, there must be some limit on this rule.

> It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure – even one which is not important to the defence of the action – would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.[34]

The general limit was then stated:

> In the view of the Commission the non-utilisation of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.[35]

Was the failure to call Major Laing such a gap? The Commission was faced with the fact that it did not have materials to answer this question. It had not, for example, seen the other witnesses in 1922. Nor did anyone know what might have been the result of cross-examination of Major Laing. It therefore adopted as the test of deciding the necessity or otherwise of calling him the contention of the claimant Greek Government. It argued that because the Greek case now alleged that Major Laing was an essential witness, the question whether Mr Ambatielos fully utilized his procedural rights in 1922 must be tested on that basis. And clearly, on that basis, he had not fully utilized those rights. He had failed to call an essential witness.[36]

[32] *Award*, 79.
[33] *Ibid.*, 100, *per* M. Spiropolous. The President 'concurred' in the Commission's statement, *ibid.*, 91.
[34] *Award*, 79-80. [35] *Award*, 80. [36] *Award*, 80-83.

This passage is probably the least convincing part of what is otherwise, with respect, a convincing and magisterial judgment. It provoked a weighty dissent from the President.

> The rule cannot be carried so far as to interfere with the actual or concrete use of a given procedural remedy. Thus, a claimant who avails himself of the procedural remedy of adducing evidence, should not be held by an international tribunal to have failed to exhaust local remedies because he did not produce a certain exhibit or because he did not call a certain witness.
> Mr Ambatielos . . . made use of the procedural remedy of adducing evidence in court. He adduced such evidence as he thought might prove his case. Whether he was clever or made a mistake, whether or not he lost because of an error in handling the instrumentality of evidence, are questions with which an international tribunal cannot concern itself in dealing with the issue of exhaustion or non-exhaustion of local remedies. Such tribunal should not be called upon to pass judgment in the manner in which procedural remedies were used but on the fact that they were used.[37]

Of the Commission's assumption, for this purpose, that the facts as stated in the Greek case were to be accepted, the President said:

> Such an assumption . . . is however contrary to the realities of the case. The evidence before the Commission does abundantly prove that if Major Laing had been called . . . it was extremely doubtful that his testimony, especially after cross-examination, would have resulted favourably to Mr Ambatielos.[38]

To decide the question of exhaustion in 1922 in the light of later attitudes was, the President said, wrong.

> In view of the above stated facts, it seems difficult to maintain that not calling a witness in 1922 because at that time his testimony was not deemed essential, and on the contrary was considered dangerous or at least doubtful, constituted failure to exhaust local remedies because in 1923 the same testimony was considered essential. Non-exhaustion of local remedies must necessarily take place at the time when the local remedy can be resorted to, but not afterwards.[39]

[37] *Award*, 92-93.
[38]. *Award*, 94.
[39] *Award*, 96. The whole of this passage would demand attention when the question is again before the courts. It may be suggested that both views can give rise to grave difficulties. The weakness of the majority view is illustrated in the present case, where the Commission did not have the material before it to be able to decide whether the failure to call Major Laing in 1922 did constitute a vital gap in the plaintiff's case, and so decided that question on the basis that the Greek contentions in 1956 were all true—a basis patently not in accord with the facts. The President's view equally causes difficulty. If there is an *obvious* gap, as for example, a failure to call evidence which the tribunal from facts *proved to it* can see was vital to the claimant's case, why should the fact that the claimant called other evidence prevent the tribunal finding that the claimant did not exhaust his procedural remedies? The middle course thus suggested is thought to be more satisfactory—that failure to call a witness (or to utilize any other procedural remedy) does not constitute non-exhaustion unless the tribunal on facts proved to it can say that the failure did constitute a vital gap in the claimant's case. Any doubt should be resolved in favour of the claimant; nor should the question be decided on a basis patently untrue.

The second allegation of non-exhaustion stemmed from the failure of Mr Ambatielos to appeal generally from the decision of Hill J. The explanation given was that once the Court of Appeal had refused leave to adduce further evidence, an appeal would have been futile. But this, said the Commission, was the fault of Mr Ambatielos.

> It would be wrong to hold that a party who, by failing to exhaust his opportunities in the court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.[40]

The President again dissented:

> My view regarding this situation is that once it has been established that recourse to appeal is obviously futile, the claimant is exonerated from the responsibility of non-exhaustion of that remedy, without entering into considerations as to the cause of the futility. The two things are separate and distinct.[41]

*Conclusion:*

It can be seen that this judgment contains material of permanent importance. The Commission directed[42] that a copy of the *Award* be placed in the Archives of the Permanent Court of Arbitration at The Hague. It is to be hoped that it will be published and made available more widely.

[40] *Award*, 85.
[41] *Award*, 96.
[42] *Award*, 89.