

CHILE GANA ARBITRAJE DEL CIADI POR EL CASO CLARÍN

Douglas Thomson

Nineteen years after the dispute began, a second ICSID tribunal has refused to grant monetary compensation to Spanish publisher Victor Pey Casado, now aged 101, for the loss of his publishing business under the Pinochet regime – with the arbitrators expressing their hope that the case will now be at a “final end”.

In an award on 13 September the tribunal composed of Franklin Berman QC, VV Veeder QC and Alexis Mourre ruled that Pey Casado, and a foundation named after Pinochet’s ousted predecessor Salvador Allende, had failed to demonstrate any loss for which they should receive monetary compensation.

The tribunal's statement about the case reaching its “final end” highlights the fact that it has apparently done so a number of times before.

Pey Casado first filed for arbitration against Chile in 1997, when he was in his early 80s. The case has since gone through an arbitration, a revision, an annulment, a supplementary decision proceeding, and the resubmitted arbitration which concluded this week.

Pey Casado ran a newspaper in Chile, El Clarin, during Allende’s presidency, but in the wake of the 1973 coup in which Augusto Pinochet seized power, the paper was branded Marxist and his business and assets seized.

In 2008, a tribunal rejected Pey Casado’s claim for expropriation on jurisdictional grounds, on the basis that the seizure took place before the 1991 Chile-Spain bilateral investment treaty entered into force.

But the tribunal ruled that Chile had breached the fair and equitable treatment standard of the BIT and denied Pey Casado justice by taking years to conclude a restitution claim he filed in the Chilean courts in 1995, after the BIT entered force.

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The courts had gone on to award compensation to parties that were not, according to the tribunal, the owners of the newspaper.

For these breaches, the tribunal awarded Pey Casado US\$10 million in damages.

Chile challenged the award and, in 2012, an annulment committee struck down the damages portion, saying the tribunal had contradicted its own reasoning in reaching that figure.

But the committee left intact the tribunal's findings that Chile had breached the BIT and that the claimants had a right to compensation.

Pey Casado and his foundation filed their second claim in 2013, seeking US\$330 million in compensation and US\$10 million in moral damages.

As in the first proceeding, they used counsel from Madrid law firm Garcés y Prada and Gide Loyrette & Nouel, while Chile was represented by Arnold & Porter LLP and Carey in Santiago.

Rejecting the second claim, the tribunal chaired by Berman ruled that the first tribunal's finding of a denial of justice "constitutes in itself a satisfaction under international law".

It said Pey Casado and the foundation had not proved "any further quantifiable injury to themselves" for which they could be awarded compensation. But it had no doubt that, once the ICSID arbitration was concluded, Chile would "remain conscious of that obligation, and [...] weigh its consequences appropriately."

The claimants argued that, had the Chilean courts not taken so long to reach a decision on his rectification claim – which they rejected based on a lack of standing months after the first award came out – he would have been able to characterise the expropriation as a continuing act in the original arbitration.

This, they argued, would have allowed the first tribunal to uphold jurisdiction for the expropriation claim.

They also argued that the denial of justice prevented them from seeking other potential remedies under Chilean law.

However, the second tribunal regarded this as an attempt to resurrect the original expropriation claim "in the guise of a breach of fair and

equitable treatment suffered many years later”.

It said that although the first tribunal had ruled the claimants had a “right to compensation”, they had not drawn a chain of causation between the state’s breach and any losses.

Indeed, the tribunal suggested they had not even “set out to do so”, focusing their submissions on the evaluation of damages “without undertaking the prior step of showing the precise nature of the injury, causation and damage itself.”

The tribunal said that there was “much merit” in Chile’s argument that the claimants had suffered no material damage at all that was admissible under the treaty. However, it turned out to be unnecessary in light of their failure to demonstrate damage.

Given Chile’s “unambiguous and repeated arguments on want of proof” and the “skill and experience of claimants’ counsel and their long familiarity with the case”, it said the omission could not have been inadvertent.

The tribunal also rejected the moral damages claim, saying that it could not be sustained in the absence of a finding of material damage.

In a further finding, the tribunal said Pey Casado had not effectively transferred his standing as claimant in the case to his daughter, Coral Pey Grebe, when he initiated the second arbitration in 2013.

Pey Casado, had sought to assign his rights on the basis of his advanced age. The tribunal accepted that Pey Casado had acted in good faith but said the resubmitted claim was merely a continuation of the previous arbitration, with the same title, case reference and parties.

It accepted that Pey Grebe had in practice acted as the “legal representative of her aged father” and said there had been nothing improper about his counsel taking instructions from her on his behalf.

Chile’s lead counsel, Paolo Di Rosa, took the case with him from White & Case LLP to Winston & Strawn in 2004 and then to Arnold & Porter three years later. He says, “The tribunal had no choice but to dismiss the claims, given the way the claimants pleaded their claims in the resubmission proceeding and the limitations imposed by the original award of 2008 and the annulment decision of 2012.”

“While the new award provides a measure of satisfaction and vindication to Chile’s defence team – including those of us who have been working on the case for 15 years – those sentiments are tempered by our strong belief that, for all its complexity and duration, this case should never have been brought to international arbitration in the first place.”

Victor Pey Casado and Foundation Presidente Allende v Chile (ICSID Case No. ARB98/2)