

Mealey's Litigation Procedure - Newspaper Investor Seeks To Annul ICSID Award For Republic Of Chile

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Body

The International Centre for Settlement Of Investment Disputes (ICSID) on Oct. 25 registered a request by the former owner of a Chilean newspaper and his foundation to annul an award that dismissed their claims for damages in the amount of \$ 422 million against the Republic of Chile in relation to the military's seizure of the newspaper (Victor Pey Casado and Foundation Presidente Allende v. Republic of Chile, No. ARB/98/2, ICSID).

Newspaper Seizure

In the 1970s, Victor Pey Casado became affiliated with a newspaper in Chile called the El Clarin. The paper was founded by Dario Sainte-Marie and Merino Liana and was controlled by Consorcio Periodistico y Publicitario S.A. (CPP) through a wholly owned subsidiary, Empresa Periodistica Clarin Ltda.

(EPC).

The paper had a left-leaning political orientation and supported a socialist coalition led by President Salvador Allende. Pey Casado acquired 40,000 shares in CPP on Oct. 2, 1972. Allende was subsequently overthrown, and El Clarin was then occupied by troops, during which time papers were seized. On Oct. 8, 1973, Decree-Law No. 77 declared and dissolved all "Marxist entities" and their affiliates, with their property passing to Chile. The paper then came under the complete control of the military and was formally confiscated pursuant to Decree No. 165 in 1975.

Allende Foundation

In January 1990, the Foundation Presidente Allende was established under Spanish law. Pey Casado donated 90 percent of his holdings in CPP and EPC to the foundation. Pey Casado wrote the president of Chile, seeking restitution for the newspaper, which he did not receive. Pey Casado filed a lawsuit in the First Civil Court in Santiago, seeking restitution and the return of a Goss printing press that had been on the property.

On Nov. 7, 1997, Casado and Foundation Presidente Allende (collectively, the claimants) submitted a request for arbitration against the Republic of Chile with ICSID pursuant to the Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments (BIT).

In July 1998, Chile commenced a reparations program that was designed to compensate those who suffered confiscations by the military. Pey Casado was invited to participate in the program, but waived the right. On April 28, 2000, the Chilean

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Ministry of National Assets issued Decision No. 43, authorizing compensation for individuals for the expropriation of CPP and EPC. Those compensated were Dario Sainte-Marie, Ramon Carrasco, Emilio Gonzalez and Jorge Venegas.

Stay

On May 8, 2008, the ICSID tribunal issued an arbitration award for the claimants and against Chile. The claimants filed an application with ICSID for partial revision of the award. Chile requested a stay of enforcement of the award, which was granted. The tribunal found that the claimants' application was inadmissible and lifted the stay of enforcement of the award. Chile filed an application to annul the award and applied for a provisional stay. The claimants opposed the stay of the award.

Annulment

In December 2012, an ad hoc committee issued a decision on Chile's application for annulment. The committee partially annulled the award. Chile submitted a request for supplementation of the annulment in relation to moratory interests for the amounts owed for costs and expenses pursuant to the annulled portion of the award. On April 3, 2012, Chile filed a request for stay of enforcement of the annulled portions of the award, pending an outcome in relation to its supplemental request.

Chile submitted that a stay of enforcement was necessary to avoid confusion and duplication of the case in relation to the unannulled portions of the award. Chile argued that Rule of Procedure of Arbitration Proceedings of ICSID 54(3) provided the committee with the authority to order a temporary stay of enforcement. The claimants argued that Chile was requesting that the committee reconsider the annulment decision regarding the execution of the unannulled part of the award. The claimants argued that the request was unfounded and was an attempt to further delay compliance with the award. The committee denied Chile's request for a stay.

New Case

The claimants then filed a request for a new arbitration on June 18, 2013, under Article 52(6) of the ICSID Convention, which was registered with ICSID. A new tribunal was constituted. The tribunal held its first session on March 11, 2014.

The claimants opposed Chile's jurisdictional arguments in relation to Coral Pey Grebe, the assignee of all the rights of Pey Casado in the present resubmission proceeding. Chile argued that the claimants' decision to substitute Pey Grebe, Pey Casado's daughter, as claimant created jurisdictional problems.

The claimants also sought a determination on the nature and quantum of the compensation due to them in relation to Chile's denial of justice and failure to provide fair and equitable treatment. The claimants expressly disclaimed any request for payment under Article 5 of the BIT for expropriation, which was barred by res judicata by the first award. The claimants sought compensation for damages suffered as a result of Chile's breaches of Article 4 of the BIT and lost profit in a total amount of \$ 422 million. The claimants also sought moral damages of more than \$ 10 million.

Award

On Sept. 13, 2016, the tribunal found that Pey Grebe could not be regarded as a claimant in her own right in the case. The tribunal said the previous tribunal's finding that the claimants were denied justice constituted a form of satisfaction under international law for Chile's breach of Article 4 of the BIT.

The tribunal found that the claimants failed to show that they suffered any quantifiable injury caused by breach of Article 4. The tribunal found that the claimants were not entitled to any financial compensation. The tribunal said the claimants' cause of action for unjust enrichment lacked legal merit and there was no basis for awarding the claimants moral damages.

The tribunal ordered that the claimants pay three quarters of the costs of the arbitration and that Chile pay the remaining amount. The tribunal ordered the claimants to reimburse Chile \$ 159,509.43. The tribunal dismissed all other claims.

Termination

After the award was issued, Pey Casado filed an application for interpretation of the award. He also filed an application for rectification of the award. Pey Casado filed a proposal to disqualify arbitrators Franklin Berman and V.V. Veeder. The case

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was suspended pursuant to ICSID Arbitration Rule 9(6). On Feb. 21, 2017, the chairman of an ICSID administrative council denied Pey Casado's request to disqualify the arbitrators, and the case resumed. Pey Casado filed another request to disqualify Veeder, which was denied April 13. Pey Casado requested that the interpretation and rectification cases be terminated pursuant to ICSID Arbitration Rule 44. On Oct. 6, the tribunal issued its decision on rectification. The judgment was not made public.

Pey Casado and the Allende Foundation filed an application to annul the Sept. 13, 2016, award. ICSID registered the request for annulment proceedings on Oct. 25. An ad hoc committee has not yet been constituted.

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