

# The NeverEnding Story: latest developments in the Pey Casado v. Chile case include arbitrator challenge ruling; another challenge; and a slowed rectification process

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The International Centre for Settlement of Investment Disputes (ICSID) has rejected a challenge against two arbitrators in the long-running Pey Casado v. Chile case.

The challenge, filed against arbitrators Franklin Berman and VV Veeder, came in proceedings commenced in November 2016 to seek rectification of an [award issued](#) in September 2016 by Messrs Berman and Veeder, together with their co-arbitrator Alexis Mourre. (That September 2016 award had ruled on certain claims resubmitted to ICSID following the [partial annulment](#) in December 2012 of the original award in Mr Pey Casado's case.)

As we review below, while the double challenge has been rejected, the claimants have now moved to file a new challenge against Mr Veeder in the same proceedings.

## Challenge focused on London barristers' chambers

As we've discussed ([see here](#)), the claimants' double arbitrator challenge centred on the discovery that Alan Boyle, a barrister at Essex Court Chambers in London, had been appointed to represent Chile in a case against Bolivia at the International Court of Justice (ICJ). The claimants observed that Mr Berman and Mr Veeder were also barristers at Essex Court Chambers, and took issue with the alleged failure of the two arbitrators and of Chile to disclose this connection between a fellow member of their chambers and the respondent state.

The claimants argued that they had discovered Mr Boyle's appointment via public news reports only days after the September 2016 resubmission award was issued, and that this discovery constituted new information that justified a challenge to Messrs Berman and Veeder in the proceedings for rectification of the resubmission award.

Chile, meanwhile, protested that the claimants displayed no concerns over Mr Berman at the time of his appointment to the resubmission tribunal in 2014, and that the claimants themselves had nominated Mr Veeder to the tribunal in full knowledge of his position at Essex Court Chambers. Chile observed that it was then well-known that other members of Essex Court Chambers were acting either for or against Chile in other pending international cases.

Furthermore, Chile argued that an arbitrator challenge during a rectification proceeding would undermine the nature of this remedy, since the Convention and Rules envisaged that the *same* arbitrators would decide rectification requests. Citing the work of Christoph Schreuer, Chile contended that a rectification remedy would in fact not be available if the same tribunal members were unable to reconvene.

## Challenges dismissed, as filed too late

In his February 21, 2017 ruling on the request, ICSID Administrative Council Chairman (and World Bank President) Jim Yong Kim focussed on the question of the claimants' knowledge at the time of appointments to the resubmission tribunal in 2014.

While the investor claimed that Mr Boyle's engagement as counsel for Chile at the ICJ was a new discovery, Mr Kim observed that the claimants had known, or should have known, of the appointment of other Essex Court Chambers members in the ICJ case at least since 2014, when the resubmission tribunal was constituted. If there were concerns about the propriety of the two arbitrators' position, Mr Kim said, the claimants should

have brought their challenges at an early stage of the resubmission proceedings in 2014, and certainly before closure of those proceedings in March 2016.

Thus, Mr Kim dismissed the challenges, finding that they had not been filed ‘promptly’ as required by the ICSID Arbitration Rules.

### **New effort to disqualify Veeder based on statements during first challenge request**

However, in a new filing on February 23, 2017, the claimants have again sought to disqualify Mr Veeder from the rectification proceedings.

The claimants accuse Mr Veeder of a deliberate omission, amounting to a ‘lie’, in his responses to the parties in December 2016 in relation to the first arbitrator challenge.

These responses related to Mr Veeder’s resignation in 2007 from the *Vannessa Ventures v. Venezuela* tribunal, which (the claimants say) had been motivated by the appearance of another Essex Court Chambers member, Christopher Greenwood, as counsel for *Vannessa Ventures* in that case. (As [we discussed](#), the claimants had relied on the *Vannessa Ventures* situation as precedent for their concerns over conflicts between members of the same barristers’ chambers, justifying their earlier and now-rejected challenge against Mr Veeder.)

According to the claimants, Mr Veeder had said that he was unaware before the jurisdictional hearings in the *Vannessa Ventures* case that Mr Greenwood was representing *Vannessa Ventures*. However, the claimants allege that Mr Veeder knew this information twelve days before those hearings.

Mr Veeder’s December 2016 responses had also maintained that he had resigned in the *Vannessa Ventures* case not merely because a fellow member of Essex Court Chambers was appearing as counsel in the case, but because he and Mr Greenwood were both representing a party as co-counsel in an unrelated case. (The reference here is likely to the *Bayindir v. Pakistan* case, in which Mr Veeder represented Pakistan as co-counsel with Mr Greenwood until November 2007.) However, the claimants reject this view, arguing that Mr Veeder has provided no evidence for it.

The claimants observe that Chile’s counsel in this case, from Arnold & Porter LLP, had represented *Venezuela* in the *Vannessa Ventures* case, and had themselves requested Mr Veeder’s resignation there. The claimants now allege a ‘connivance’ between Chile’s lawyers and Mr Veeder, in that Chile’s lawyers are supporting Mr Veeder’s insistence that he resigned from that earlier case not because of his chambers link to Mr Greenwood but because the two men were acting together as co-counsel in a separate case.

The claimants’ new challenge to Mr Veeder also requests access to documents from the *Vannessa Ventures* case, in order to confirm its views on the reasons for Mr Veeder’s resignation there. According to the claimants, disclosure by ICSID of these documents could be made subject to a confidentiality order, and would thereby not breach any confidentiality rules. (The claimants had also sought access to these documents in the first challenge. However, the ICSID Secretariat had declined to provide them, inviting the claimants to contact the *Vannessa Ventures* parties directly. The claimants did so, but it is not known whether those parties agreed to provide the documents. The issue was side-stepped in the decision on the first challenge, which relied instead on the untimeliness of the challenge, as discussed above.)

### **Investors support challenge powers even during rectification proceedings**

In the arbitrator challenge ruling of February 21, described above, ICSID Chairman Mr Kim did not address Chile’s arguments over whether challenges are even permitted during rectification proceedings. In the second challenge to Mr Veeder, the claimants take up this argument, finding no reason to deny challenges during rectification.

The claimants find no distinction in the ICSID Convention or Arbitration Rules between arbitrator challenges during different kinds of ICSID proceedings. The claimants argue that the Arbitration Rules treat the death of an arbitrator in the same manner as disqualification or resignation, suggesting that the effect of a challenge during a rectification proceeding would simply be the same as the death or incapacity of an arbitrator during

such proceedings. Moreover, the claimants add, it would threaten due process to permit rectification proceedings to continue before an arbitrator who was clearly biased or partial.

The claimants are represented in the case by Garces y Prada Abogados and Gide Loyrette Nouel, while Chile is represented by Arnold & Porter LLP and Carey & Cia.

**Short URL:** <http://tinyurl.com/h2whx2h>