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Past haunts Chile in latest Pey Casado challenge?

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07 April 2017



Galo Leoro Franco, who left the tribunal in 2006

In the latest challenge in the Pey Casado case at ICSID, the 102 year-old newspaper publisher argues that because one of Chile's past appointees as arbitrator breached the confidentiality of the tribunal in a fundamental way, the state should have lost the right to appoint in the latest phase of the two decade-long dispute.

Pey Casado seeks to block Canadian arbitrator **Stephen Drymer** from hearing a pending proceeding to interpret the 2008 award in the case, on the basis that Chile's prior loss of the right to appoint should carry over to the new proceeding thanks to the principle of *res judicata*.

Instead, the Spanish publisher wants the appointment to be made by the president of ICSID's Administrative Council on Chile's behalf.

If the challenge succeeds, Drymer will join an array of over 15 international arbitrators who have played "bit parts" in the dispute centred on the seizure of Pey Casado's newspaper publishing business during the military coup that brought Augusto Pinochet to power in Chile in 1973.

Pey Casado's challenge to Drymer has its roots in the resignation from the tribunal of the late Ecuadorean arbitrator and diplomat **Galo Leoro Franco** on the eve of an award on jurisdiction in the case in 2005. Evidence had emerged that Franco, who was appointed to the tribunal by Chile, had leaked details of the decision to government officials. His resignation was rejected by his co-arbitrators without precise reasons being given but he left the tribunal in any event.

After that, the president of ICSID's Administrative Council appointed a replacement arbitrator to fill the vacancy, in line with the requirements of the ICSID Convention where such a breach has occurred. The chosen replacement was **Emmanuel Gaillard** of France, who with **Pierre Lalive** of Switzerland as chair and **Mohamed Chemloul** of Algeria as Pey Casado's appointee issued an award in 2008 upholding the publisher's claims for denial of justice and awarding damages.

None of the arbitrators were the original appointees to the tribunal, which in its first form was presided over by **Francisco Rezek** of Brazil, with **Mohamed Bejaoui** of Algeria appointed by Pey Casado and **Jorge Witker Valasquez** of Mexico appointed by Chile. Rezek and Velasquez both resigned early in the case. In an ICSID first, Bedjouai – a former president of the International Court of Justice – was disqualified as arbitrator after Leoro's departure. The Algerian had accepted a role as foreign minister of his home state, which Chile said made him biased.

After the award, Chile initiated annulment proceedings in which an ad hoc committee composed of **Yves Fortier QC** of Canada, **Piero Bernadini** of Italy and **Ahmed El Kosheri** of Egypt upheld findings of the tribunal in the 2008 award but held there was a lack of clarity in its rulings on damages and quantum and that the parties had not been properly heard. The rest of the award was declared to have *res judicata* effect.

Pey Casado went on to resubmit the annulled point to a fresh tribunal composed of UK arbitrators **Franklin Berman QC** and **Philippe Sands** (later replaced by **VV Veeder QC**) and French arbitrator **Alexis Mourre**.

The resubmitted arbitration came to an end last September, with the second tribunal declaring the 2008 award as having *res judicata* effect but awarding no damages. The tribunal urged the centenarian to accept that the case was finally at an end.

Since then, Pey Casado – who is represented by **Juan Garcés** of Garcés y Prada in Madrid and Gide Loyrette Nouel in Paris – has kept fighting, initiating a rectification proceeding to be heard by the Berman tribunal and an interpretation proceeding to be heard by a fresh tribunal. **Robert Howse**, a professor at New York University, has also recently joined Pey Casado's team.

Alongside Drymer, **Hélène Ruiz Fabri** of the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg, has accepted a place on the fresh tribunal, appointed by Pey Casado. The tribunal is tasked with interpreting parts of the 2008 award that the publisher says the second tribunal failed to understand.

In past months, Pey Casado has also brought challenges to Berman and Veeder separately and together, alleging that their independence and impartiality in the second arbitration was compromised by Chile's prior instruction of other members of their London barrister' set, Essex Court Chambers, in a dispute with Bolivia.

Veeder has further been accused of deliberately withholding key information in his disclosures to the parties, while Berman's attempt to recuse himself from ruling on this allegation against his colleague has been held up as further evidence of his bias.

Asked about the latest development, **Paolo Di Rosa** of Arnold & Porter, counsel to Chile, declined to comment. GAR understands Pey Casado's argument regarding the effect of the Leoro's unaccepted resignation in 2005 was already raised unsuccessfully in the resubmission proceeding. Since his replacement by Gaillard, no arbitrators in the case have been appointed by the ICSID Administrative Council.

Pey Casado's claim is brought in conjunction with a foundation established in honour of Pinochet's predecessor as president of Chile, Salvador Allende, who was killed in the 1973 coup.

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

In the resubmitted arbitration

Tribunal

- **Franklin Berman QC** (UK) (Chair)
- **VV Veeder QC** (UK) (replaced **Philippe Sands** in 2014)
- **Alexis Mourre** (France)

Counsel to Victor Pey Casado and Foundation Presidente Allende

- Garcés y Prada

Partner **Juan Garcés** in Madrid

- Gide Loyrette Nouel

Partner **Carole Malinvaud** and counsel **Alexandra Munoz** in Paris

- Buckley Sandler

Partner **Samuel Buffone** in Washington, DC

Counsel to Chile

- Arnold & Porter

Partners **Paolo Di Rosa** and **Gaela Gehring Flores** and associate **Mallory Silberman** in Washington, DC

- Carey & Cia

Partners **Jorge Carey** and **Gonzalo Fernández** and associate **Juan Carlos Riesco** in Santiago de Chile

In the annulment proceeding

Ad hoc annulment committee

- **Yves Fortier QC** (Canada)
- **Piero Bernardini** (Italy)
- **Ahmed El Kosheri** (Egypt)

Counsel to Victor Pey Casado and Foundation Presidente Allende

- Garcés y Prada Abogados in Madrid

Partner **Juan Garcés** in Madrid

- Gide Loyrette Nouel

Partner **Carole Malinvaud** and associate **Alexandra Muñoz** in Paris

- Buckley Sander

Partner **Samuel Buffone** in Washington, DC

Counsel to Chile

- Foreign Investments Committee

Matías Mori Arellano and **Carlos Dettleff** in Santiago

- Arnold & Porter

Partners **Paolo Di Rosa**, **Jean Kalicki*** and associates **Samuel Witten** and **Mallory Silberman** in Washington, DC

*no longer with the firm

- Carey & Cia

Partners **Jorge Carey** and **Gonzalo Fernández Ruiz** in Santiago

In the original arbitration

Arbitral tribunal

- **Pierre Lalive** (President) (Switzerland) - appointed following the resignation of **Francisco Rezek** (Brazil)
- **Mohammed Chemloul** (Algeria) - appointed following the disqualification of **Mohammed Bedjaoui** (Algeria)
- **Emmanuel Gaillard** (France) - appointed by ICSID following the resignation of **Jorge Witker** (Mexico) and **Galo Leoro Franco** (Ecuador)

Counsel to Victor Pey Casado and Allende Foundation

- Cabinet Garcés y Prada Abogados

Partner **Juan Garcés** in Madrid

- Gide Loyrette Nouel

Partner **Carole Malinvaud** and associate **Alexandra Muñoz** in Paris

- Ropes & Gray

Partner **Samuel Buffone** in Washington, DC

- Boston University School of Law

William W Park

Counsel to Chile

- Chief of justice, ministry of the economy, development and reconstruction, **Eduardo Escalona Vázquez**
- Department for defence of arbitrations relating to foreign investments, Ministry of Economy, Development and Reconstruction **Eduardo Bobadilla Brinkmann**, **Nicolás Muñoz Montes** and **Diego Rioseco Antezana**
- Carey & Cía

Partners **Jorge Carey** and **Gonzalo Fernández Ruiz** in Santiago

- Arnold & Porter (from 2007)

Partner **Paolo Di Rosa** in Washington, DC

- Winston & Strawn (from 2004 to 2007)

Partner **Paolo Di Rosa** in Washington, DC

- White & Case (from 1997 to 2004)