



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: The Renco Group Inc. v. Republic of Peru, ICSID Case no. UNCT/13/1- Partial Award on Jurisdiction – 15 July 2016

Case Report by: Moritz Abramovitz**, Editor Lorena Perez McGill***

Summary: The Partial Award derives from an arbitration dispute between The Renco Group, Inc. and the Republic of Peru related to the operations and environmental remediation measures at the metallurgical plant in La Oroya - Peru, which Renco acquired through Doe Run Peru S.R.LTDA, its wholly-owned local enterprise, in a privatization sale in 1997. The dispute was submitted to arbitration under the United States-Peru Trade Promotion Agreement (“the Treaty”) and the UNCITRAL Rules. Renco submitted a claim to arbitration on its behalf (10.16(1)(a) of the Treaty), and on behalf of Doe Run Peru S.R.LTDA (Article 10.16(1)(b) of the Treaty). Doe Run’s claim was later withdrawn in Renco’s Amended Notice of Arbitration.

Main issues: Non-compliance with the formal and material requirements of a Treaty’s waiver provision; comprehensiveness of investor’s waiver; incompatibility of reservation of rights with waiver provision.

Tribunal: Michael J. Moser, L. Yves Fortier, Toby T. Landau.

Claimant’s counsel: Mr. Edward G. Kehoe, Mr. Guillermo Aguilar Alvarez, Mr. Henry G. Burnett, Ms. Caline Mouawad of King & Spalding LLP.

Defendant’s counsel: Mr. Jonathan C. Hamilton, Ms. Andrea J. Menaker of White & Case LLP; Dra. María del Carmen Tovar Gil of Estudio Ehecopar.

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1. Parties' Allegations

On 15 July 2016, the Arbitral Tribunal issued a Partial Award on Peru's objection to jurisdiction based on Renco's alleged non-compliance with the formal and material requirements of the Treaty's waiver provision. Article 10.18(2)(b) of the Treaty requires that an investor waive its right to initiate or continue before any dispute settlement body, including before any administrative tribunal or court under the law of any party, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

In its Amended Notice of Arbitration, Renco had included the following waiver:

Renco waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. *To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.*

Peru contended that the Tribunal lacked jurisdiction because in qualifying its written waiver, Renco was reserving its right to bring claims in another forum for resolution on the merits in the event the Tribunal dismissed any claims on jurisdictional or admissibility grounds (formal non-compliance with the waiver provision).

Additionally, Peru alleged that Doe Run did not submit a waiver, even though Renco had submitted claims on its behalf.

As to material non-compliance with the waiver provision, Peru alleged that Renco (through Doe Run) initiated and/or continued proceedings in the Peruvian courts concerning the very same measures that according to them constituted a breach of the Treaty in this arbitration.

Renco responded that its qualified waiver was compliant with the Treaty and that the claims it was asserting in its memorial had to do with the losses and damages that Renco suffered as a result of the measures taken by Peru – the same measures that also affected Doe Run. Additionally, Renco alleged that the Peruvian proceedings could not be seen as a breach of the waiver requirement because those proceedings had to do with claims arising from different measures taken by the Peruvian government, and that Doe Run simply responded to allegations asserted against it.

2. Tribunal's Legal Analysis

The Tribunal said that an arbitration agreement is formed under the Treaty only if the investor satisfies the formal and material waiver requirements of Article 10.18(2)(b), which constitutes a condition and limitation upon Peru's consent to arbitrate.

Regarding the formal requirement, the Tribunal noted that a waiver must be given in writing and it must be "clear, explicit and categorical," as emphasized by the tribunal in *Waste*

*Management (No I)*¹. In this sense, arbitral tribunals have repeatedly held that a waiver is invalid if an investor purports to carve from its scope certain courts proceedings that cover the same grounds as the measures being challenged in arbitration.

The Tribunal found that an investor's waiver must be comprehensive (as repeated references to the word "any" in Article 10.18 of the US-Peru Trade Promotion Agreement clearly show), and that it must cover arbitral proceedings initiated at the time of filing of the notice of arbitration, during the pendency of the arbitral proceedings or after the arbitration concludes. The Tribunal thus concluded that Renco's reservation of rights was impermissible.²

Consequently, the Tribunal said it could not accept Renco's argument that its reservation of rights was not contrary to Article 10.18(2)(b)'s object and purpose because if the Tribunal were to dismiss all claims on jurisdictional or admissibility grounds, there would be no risk of concurrent proceedings. The Tribunal indicated that its position was consistent with the object of the waiver provision, which is to protect a respondent State from having to litigate multiple proceedings in different forums, commenced either in parallel or subsequently.³ The Tribunal also found that Renco's position overlooks the possibility that only some of its claims may be dismissed and then litigated in parallel in a domestic court.

The Tribunal also determined that Article 10.18(2)(b) is a "no U-turn" provision, meaning that once an investor has chosen arbitration pursuant to the Treaty, the waiver requirement prevents it from subsequently resorting to domestic courts if an arbitral claim is dismissed on any grounds. Accordingly, the Tribunal found that Renco's reservation of rights is incompatible with the referred provision.

On this point, Renco argued that any dismissal of its claims for lack of jurisdiction or admissibility does not affect its underlying rights and does not preclude a later claim before a Tribunal with jurisdiction. The Tribunal opined that Renco was missing the point in that what was under analysis was the waiver requirement issue, not the preclusion of a subsequent claim by *res judicata*.

Finally, the Tribunal also rejected Renco's argument that its reservation of rights should have no validity on its waiver because the language is "superfluous." The Tribunal embraced Peru's argument that there are a number of situations where a waiver (without the reservation of rights) might prevent a subsequent claim in a domestic court or tribunal after dismissal of the claim on jurisdictional or admissibility grounds: either when the Tribunal dismisses a claim for reasons of illegality; when the Tribunal dismisses the case but, having heard the complete case, indicates the claim would have failed on the merits; when an expropriation claim is held inadmissible because it is unarguable; and when a tribunal decided that it lacks jurisdiction over a claim regarding a breach of an Investment Agreement.

¹ *Waste Management Inc. v United Mexican States (No I)*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000 ¶ 18.

² The Tribunal indicated that the only express exception to the Article 10.18(2)(b) waiver requirement is for proceedings seeking interim injunctive relief that do not involve payment of monetary damages.

³ Thus, minimizing the risk of double recovery and inconsistent determinations of fact and law.

3. Decision

The Tribunal concluded that Renco failed to comply with the formal requirements of Article 10.18(2)(b) by including the reservation of rights in the waiver because:

- (a) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b);
- (b) The reservation of rights undermines the object and purpose of Article 10.18(2)(b);
- (c) The reservation of rights is incompatible with the “no U-turn” structure of Article 10.18(2)(b); and
- (d) The reservation of rights is not superfluous.

As a consequence, Renco’s non-compliance with the formal requirement of Article 10.18(2)(b) to Peru’s consent to arbitration means that no arbitration agreement existed and therefore the Tribunal lacks jurisdiction.

The jurisdictional defect could only be cured if Renco withdrew its reservation of rights and Peru consented to this (but Peru does not consent), or if Renco commenced a new arbitration (being there a limitations issue under Article 10.18(1) of the Treaty), but not unilaterally by Renco by means of a subsequent action (the *Mavrommatis doctrine*⁴).⁵ The Tribunal has no power to sever Renco’s reservation of rights and to remedy Renco’s non-compliance with the Treaty. States are entitled to shape their consent as they see fit by providing conditions to their offers to arbitrate.

Renco argued that Peru’s arguments and conduct with respect to the waiver objection constituted an abuse of right because Peru did not show it would suffer any prejudice due to Renco’s waiver with reservation, stating that Peru’s only purpose was to evade arbitration. In this respect, the Tribunal found that Peru sought to enforce its right to receive a waiver compliant with the Treaty. However, the Tribunal was troubled by the fact that the reservation of rights objection arose nearly three years after Renco submitted its claims to arbitration⁶ and considered that an abuse of right might be found if Peru were to argue in any future proceeding that Renco’s claims are time barred.

Finally, the Tribunal, having decided that Renco failed to comply with Article 10.18(2)(b) of the Treaty, found it unnecessary to express its view on Peru’s contention that Doe Run did not submit a waiver and on the proceedings in the Peruvian courts.

⁴ As explained by the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment, November 18, 2008 [2008] ICJ Reports 412, “[w]hat matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.”

⁵ This is the majority opinion, as one member considers that Renco could unilaterally cure its defective waiver.

⁶ Previously, Peru’s waiver objections had been the absence of a written waiver by Doe Run and the conduct of the Peruvian bankruptcy proceedings.