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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:** Victor Pey Casado and Foundation “Presidente Allende” v The Republic of Chile (ICSID Case No. ARB/98/2) – Decision on Rectification of the Award – 6 October 2017

**Case Report by:** Dr Marija Đorđeska\*\*, **Editor:** Ignacio Torterola\*\*\*

**Summary:** Following the award rendered between the Parties on 13 September 2016, the Claimants requested the Tribunal to correct clerical errors and to disqualify two arbitrators – Sir Frank Berman and Mr Veeder. In the Decision on the Rectification of the Award dated 6 October 2017, the Tribunal agreed to correct the 13 September award but rejected the request for disqualification, and ordered the Claimants to cover the cost of the issuance of the Decision.

**Main Issues:** Duty of the Tribunal to correct clerical errors regardless of the submission of the Parties, allocation of costs in proceedings of rectifying the award

**Tribunal:** Sir Frank Berman KCMG QC (President), V.V. Veeder QC, Alexis Mourre

**Claimants’ Counsel:** Juan E. Garcés (Garcés y Prada, Abogados, Madrid, Spain), Carole Malinvaud and Alexandra Muñoz (Gide Loyrette Nouel, Paris, France)

**Respondent’s Counsel:** Paulina Nazal Aranda, Federico Gajardo Vergara, Liliana Macchiavello (Dirección General de Relaciones Económicas Internacionales, Ministerio de Relaciones Exteriores, Santiago de Chile, Chile), Paolo Di Rosa, Gaela Gehring Flores and Mallory Silberman (Arnold & Porter Kaye Scholer LLP, Washington, D.C., U.S.A.), Jorge Carey, Gonzalo Fernández, Juan Carlos Riesco (Carey, Las Condes, Santiago de Chile, Chile)

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## **Digest:**

### **1. Relevant Facts**

The Claimants requested the rectification of the 13 September 2016 award (Resubmission Award), issued in place of the part of 8 May 2008 award (First Award) (¶ 1). The First Award had been partially annulled on 18 December 2012 (¶ 2). The Claimants' Request for Rectification included (i) a request to rectify four points of the Resubmission Award; (ii) request that the rectification proceedings be suspended until the tribunal issued a decision on the interpretation of the 8 May 2008 Award (discontinuance of the interpretation proceedings was noted on 12 May 2017), and (iii) a request for inquiry and disclosure (later a request for disqualification) of the President of the Tribunal, Sir Frank Berman, and an arbitrator, V. V. Veeder (¶ 4).

### **2. Procedural History**

The Claimants submitted the Request for Rectification on 27 October 2016 pursuant to Article 49 of the ICSID Convention. The request was registered by the Acting Secretary-General of the ICSID on 8 November 2016 (¶ 7).

On 22 November 2016, the Claimants submitted its first disqualification proposal questioning the independence and impartiality of Sir Franklin Berman and V. V. Veeder. The proposal was rejected by the Chairman on the ICSID Administrative Council on 21 February 2017. The Claimants submitted further proposals for disqualification of Sir Franklin Berman and V.V. Veeder under Article 57 of the ICSID Convention and the ICSID Arbitration Rule 9 on 23 February and 4 April 2017 (Second Disqualification Proposal). ICSID treated the proposals as a proposal to disqualify majority of the tribunal. On 13 April 2017, the Chairman of the Administrative Council dismissed the Second Disqualification Proposal under Article 58 of the ICSID Convention (¶ 19).

The rectification proceedings were suspended for the duration of the decision of the Chairman of the Administrative Council on the disqualification of the two arbitrators. On 21 April, the Claimants requested the Tribunal to discontinue the rectification proceedings under ICSID Arbitration Rule 44. The Tribunal decided on 3 May 2017 to continue the rectification proceedings (¶ 24).

On 9 June 2017, the Claimants requested that the Tribunal order the Respondent to disclose payment of the Chilean Ministry of Foreign Affairs to Essex Court Chambers. On 15 June 2017, the Tribunal noted that the Claimants' request lacked any connection with the rectification and was outside its powers and functions of the rectification proceedings (¶ 31).

### **3. Position of the Parties**

#### *3.1. Claimants' Position*

The Claimants requested a (1) correction of an erroneous reference to "Decision No. 43" in paragraph 198 of the Resubmission Award, (2) replacement of the term "before" with the term "by" in paragraph 61 of the Resubmission Award, (3) replacement of the term "by" with the term "since" in paragraph 66 of the Resubmission Award, and (4) the removal from point 2 of

the *dispositif* of the Resubmission Award of any reference to portions of the First Award, including footnote 387 (¶ 37).

As to the first request, the Claimants said that the Tribunal erred in referring to Decision No. 43 instead of Chilean Decree No. 165 (¶ 38). Furthermore, the Claimants requested for the rectification of the term “before in paragraph 61 of the Resubmission Award with the word “by”, arguing that such error may lead to an unjustified rapprochement that Claimants did not question the nullity of the Decree No. 165. Similarly, the Claimants requested the Tribunal to correct the proposition “by” with the word “since” in paragraph 66 of the Resubmission Award as the former preposition could have led to the perception that the First Award consummated the denial of justice, whereas the original Claimants position was that the denial of justice has been brought about through the actions of the Respondent (¶ 42).

Lastly, the Claimants urged the Tribunal to correct paragraph 2 of the *dispositif* of the Resubmission Award and delete the reference to paragraph 704 of the First Award, as this paragraph was part of the annulled portion of the First Award (¶ 44).

### 3.2. Respondent’s Position

Respondent agreed with all proposed rectifications by the Claimants, without agreeing to the reasons for rectification. In relation to the first request for correction, Respondent agreed that the reference to Decision No. 43 was in error. However, the Respondent noted that the Tribunal should rectify a clerical or similar error without engaging in reinterpretation of the First Award and that a complete deletion of the reference to the specific laws would exceed the scope of the Tribunal’s competence in a rectification proceeding (¶ 39).

Similarly, the Respondent agreed with the Claimants’ proposed rectification of the term “before” in paragraph 61 and a replacement of the term “by” with the term “since” in paragraph 66 of the Resubmission Award. The Respondent dismissed the reasons put forward by the Claimants as unjustified (¶¶ 41, 43). Respondent offered an alternative wording of paragraph 2 of the *dispositif*, arguing that the Claimants’ proposed rectification would create confusion. (¶ 45).

## 4. Tribunal’s Analysis

Under Article 49(2) of the ICSID Convention and Arbitration Rule 49, the Tribunal has a duty to rectify any duly established clerical, arithmetical or similar error (¶ 49). Although the Parties established the existence of errors, it is the duty of the Tribunal to ascertain the existence of one or more errors falling into the scope of Article 49 and to decide how to correct them (¶ 51). To fall within the rectification procedure, an error must be “in the award”, it must be clerical, arithmetical or an error of a similar nature (¶ 48). Outside of the scope of the rectification procedure are alleged mistakes of law by the Tribunal or any factual determination or its discretionary assessment (¶ 49).

The Tribunal pointed out that there are only two conditions that satisfy rectification, firstly, that an error must be found to exist, and secondly, that the rectification request concerns an aspect of the award that is accessory to the dispute resolved in the award (¶ 50).

The Tribunal found that the first three errors were purely clerical errors and adopted the proposals made by the Claimants (¶¶ 52-54). The Tribunal did not see an imperative need to

rectify the *dispositif*, as the finding to the effect that the Claimants had been victims of denial of justice was a form of satisfaction under international law and the Respondent's breach of Article 4 of the Bilateral Investment Treaty (¶ 55). The Tribunal reformulated paragraph 2 of the *dispositif* and excluded the reference to paragraph 704 and footnote 387 (¶ 55).

## **5. Costs**

The tribunal decided that it has the power to allocate the costs in these rectification proceedings, although no specific provision is made under Article 49 of the ICSID Convention in relation to the rectification proceedings (¶ 56).

The Tribunal decided that the Claimant was to bear the burden of the procedure in the amount of USD 45,926.72, and additionally reimburse the Respondent for USD 22,963, for bringing challenges for the disqualification of the majority of the tribunal as part of the rectification proceedings (¶ 62, *dispositif*).

## **6. Decision**

The Tribunal rectified the three paragraphs brought to the attention of the Tribunal by the Claimant, and rephrased paragraph 2 of the *dispositif* of the Resubmission Award (¶ 62). In the *dipositive* of the present decision, the Tribunal also decided that the Claimant should pay USD 22,963,36 to Respondent (¶ 62).