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## Fit for Print: the “El Clarín” Saga Leads to US\$ 550 Million Enforcement Order by Spanish Courts

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The case involving Mr. Víctor Pey Casado, the President Allende Foundation, the 1960s Chilean newspaper “El Clarín” and the Republic of Chile – once the longest-running dispute in ICSID history – is certainly a complex one. The dispute has spanned more than twenty years, encompassing [three different arbitration proceedings](#) with three separate arbitral awards issued in 2008, 2016 and 2019, court proceedings in Chile and Spain, multiple requests for annulment and also an ongoing effort by a persistent group of claimants to obtain compensation.

This post will provide an overview of the background to the dispute and the multiple arbitration proceedings, the history of the dispute before the Spanish courts including the most recent enforcement order made against Chile and finally, possible outcomes and considerations in light of Spanish procedural law.

### Background to the Pey Casado Proceedings

The dispute concerns the newspaper “El Clarín”, a publication established in Chile in 1960. After the newspaper became an outspoken supporter of President Salvador Allende during his mandate, it was seized on 11 September 1973 as part of Augusto Pinochet’s coup d’état in the country. “El Clarín” was shut down, its assets were transferred to the State by a 1975 decree; and its owner, Mr. Victor Pey Casado, was exiled from the country and returned to his native Spain, where he founded the President Allende Foundation.

Upon his return to Chile in the 1980s, Mr. Pey Casado sought compensation from the Chilean courts for his loss suffered as a result of the expropriation of the newspaper. When this was unsuccessful, he turned to the [1991 Spain-Chile bilateral investment treaty](#) (“BIT”), commencing what would become a more than twenty-year long and complex battle to obtain compensation for his investment that has recently culminated in a Spanish judge’s [order](#) against Chile for US\$ 430 million plus interest of US\$ 122 million.

### *First arbitration*

Mr. Pey Casado and the President Allende Foundation initiated the first arbitration in 1997 under

the BIT seeking compensation for the expropriation of the newspaper in 1973.

In its 2008 award, the tribunal found it lacked jurisdiction over most of the claims, including the expropriation claim as the alleged measures took place before the BIT entered into force. However, it awarded US\$ 10 million in damages as it found that Chile had breached its fair and equitable treatment (“FET”) obligation by refusing to compensate the Claimants after shutting down “El Clarín.”

After the decision, both parties sought to annul the award and, in December 2012, an ICSID *ad hoc* committee annulled parts of the award relating to damages, including the US\$ 10 million estimation, holding that Chile had been denied the opportunity to present arguments on the issue of damages.

### ***Second arbitration***

The Claimants resubmitted the dispute to a new ICSID tribunal seeking US\$ 150 million in damages for Chile’s alleged breaches of the BIT. However, the tribunal rejected the claims and issued an award in September 2016, finding that the Claimants had failed to prove that Chile’s FET breach caused damages. In 2017 the Claimant applied for annulment of the 2016 award. Nevertheless, in January 2020, the *ad hoc* committee rejected the Claimants’ application noting that the circumstances alleged were insufficient to succeed in the annulment of the award.

### ***Third arbitration***

The Claimants did not give up. In 2017—while the annulment proceedings of the 2016 award were taking place—they initiated a third arbitration, this time administered by the Permanent Court of Arbitration under the [UNCITRAL Arbitration Rules](#). The Claimants argued that this proceeding was distinct from the previous proceedings, as they brought claims related to Chile’s lack of compliance with the 2008 award, as well as a series of claims related to domestic law, and sought restitution, damages, and moral damages, as well as the costs relating to the first arbitration and the enforcement proceedings in Spain in 2013.

This arbitration also was unsuccessful. In its 2019 award, the tribunal declined jurisdiction over all claims, noting, among other reasons, (i) that the BIT did not allow the Claimants to bring claims under domestic law; (ii) that the Claimants did not have an investment when Chile refused to comply with the 2008 award, and (iii) that the Claimant’s right to arbitrate, as well as their 2008 award, did not qualify as investments under the BIT.

## **Enforcement Proceedings in the Spanish Courts and Next Steps**

In the most recent twist to the case and one that has grabbed headlines, on 7 December 2021, a Spanish judge ordered Chile to pay approximately US\$ 430 million to Ms. Coral Pey (daughter and successor of Mr. Pey Casado) and the President Allende Foundation.<sup>1)</sup>

The December 2021 decision relates to the continued enforcement of the 2008 award. While the 2008 award was annulled in regard to the damages awarded by the Tribunal, subsequent awards and decisions had reiterated the Tribunal's finding that Chile breached the BIT and had an obligation to repair the damage caused. Pursuant to Spanish procedural law (*Ley de Enjuiciamiento Civil*) the lower courts have jurisdiction to hear enforcement of foreign arbitral awards. Reportedly, the Claimants turned to the Spanish courts to determine the amount owed by Chile for its breach of Article 4 of the BIT.

Judge Pedro José Puerta ordered Chile to pay almost US\$ 430 million to the Claimants, along with US\$ 122 million provisionally fixed as “*the interest that could arise from the enforcement and procedural costs.*”<sup>(2)</sup>

While Spanish law does not *prima facie* allow court judgments or awards to order the payment of unspecified amounts, it does allow for quantum to be determined at the stage of enforcement when the judgment or award clearly identifies the amounts that should be compensated and quantified. To this purpose, the Claimants reportedly provided the court with a quantum expert report directed at quantifying the compensation sought in enforcement for the breach of Article 4 of the BIT, which is likely to be the source for the quantum granted by the judge.<sup>(3)</sup>

Under Spanish procedural law, decisions ordering enforcement are notified to the parties and while they are not open for appeal, the aggrieved party may file its opposition to the enforcement within ten days from notification. In this case, Chile had the possibility to oppose enforcement based on a number of limited grounds, namely, and if applicable: (i) that the amount for which enforcement is sought has already been paid; (ii) that Chile has already complied with the award, with adequate justification of how this compliance has taken place; (iii) that the period in which the Claimants had to request enforcement had expired; or (iv) that there is an agreement to the contrary by the parties contained in a public document.

To ensure enforcement, if the party seeking enforcement has not designated assets with sufficient value to cover the quantum, the court would issue an order requiring the party against whom enforcement is sought to show sufficient assets to cover the amount claimed. This order can include sanctions and fines in the event the party does not comply. Typically, if the party against whom enforcement is sought does not comply with the court's requirements, the court may order the seizure of any assets of which it is aware. In this case, the fact that the respondent, Chile, is a sovereign State implies the rules of immunity and their assets also come into play.

No publicly available information has been found to confirm whether Chile opposed enforcement and/or provided proof of its assets to cover enforcement. However, according to news reports the Spanish Courts ordered the seizure of the debts of Nexans Iberia, the Spanish subsidiary of French cable manufacturer Nexans, to Codelco, the National Corporation of Copper of Chile. News reports also advise that Nexans Iberia has reportedly confirmed receipt of the order and informed the Court that it does not have any outstanding debts with Codelco.

## Conclusion

Given the long track record and battle between the parties, it is not unlikely that we have seen the end of this case and that the Claimants will continue with its efforts for compensation and that

Chile will continue to oppose such efforts. One other interesting issue to watch is to see how the recently elected President of Chile, Gabriel Boric manages this issue and any enforcement order issued against Chile, and specifically, if news reports are correct, Codelco. While his predecessor, Sebastián Piñera, [declared](#) in 2012 his intention to comply with any final decision reached in the case (which at the time, was still in the stage of arbitration), President Boric has not made any public statements to that effect. Again, this opens the door to more twists and turns in the long running saga of the “El Clarín” dispute.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

References

- This latest decision is not the first time that the Spanish Courts had become involved in the “El Clarín” saga. At the request of the Claimants, in July 2013 the First Instance Court of Madrid no. 101 issued an order to enforce the costs portion of the 2008 award issued in the first arbitration proceedings, which became the first case of direct enforcement of an ICSID award in Spain. See, José Ángel Rueda García, “*Primera ejecución forzosa conocida de un laudo arbitral CIADI en España (Víctor Pey Casado y Fundación Presidente Allende v República de Chile): sin exequatur.*”
- ?1 Spanish procedural law does not allow interest from enforcement proceedings to exceed 30% of the principal amount; in this instance, interest is almost at that limit, constituting approximately 28% of the amount awarded to the Claimants.
- ?2 Except for the 7 December 2021 decision, all orders related to the “El Clarín” case currently before first instance court no. 101 are confidential and not available to the public.
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