Before the

PERMANENT COURT OF ARBITRATION

CASE PCA-CPA NUM. 2017-30

SPANISH FOUNDATION « PRESIDENT ALLENDE », VICTOR PEY CASADO AND CORAL PEY GREBE

Claimants,

v.

THE STATE OF CHILE

Respondent

WITNESS AND LEGAL STATEMENT

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submitted by Víctor Manuel ARAYA ANCHIA

in his capacity as lawyer qualified to practise that profession, which qualification he received in 1993 from the Chilean Supreme Court after graduating in Legal and Social Science at the University of Chile, and that of having direct knowledge of the facts in hand owing to having taken part in the proceedings held by the 1st Civil Court of Santiago, with case no. 2510 in 1995, as legal representative of the claimant, Víctor Pey Casado.

In Santiago on the 19th of December 2017

In drawing up this Report I referred to the proceedings contained in case no. 3510-95 of the 1st Civil Court of Santiago and, in particular, to the proceedings indicated below, some of which will, I am told, be attached to the Case to be submitted by the claimants on the date set by the Court, with the numbers indicated below:

Document	**Date**	**Annex no.**
Claim filed by Víctor Pey Casado to the 1st Civil Court of Santiago	**1995-10-04**	**C16**
Response from the Treasury	**April 1996**	**C17**
Reply by Víctor Pey Casado	**April 1996**	**C67**
Rejoinder by the Treasury	**May 1996**	**C18**
Notification by Víctor Pey Casado to the Court of the ICSID arbitral procedure in progress	**1999-06-23**	**C116**
Summons by the Court for the parties to hear its Judgment	**2001-01-03**	**C32**
Víctor Pey's request to the court to provisionally suspend the proceedings until the completion of the arbitral procedure	**2002-11-03**	**Araya Exhibit num. 1**
Dismissal by the Civil Court of the request for a provisional suspension of proceedings	**2002-11-12**	**C36**
Appeal for reconsideration and alternative higher appeal against the dismissal of the request for provisional suspension of proceedings; higher appeal dismissed by the Court of Appeals of Santiago	**2002-11-20**	**C36bis**
Judgment	**2008-07-24**	**C1**
Request by the Treasury to the Court to declare that Víctor Pey Casado had abandoned the proceedings	**2009-06-16**	**C53**
Decision by the Court dismissing the Treasury's request for it to declare that Víctor Pey Casado had abandoned the proceedings	**2009-08-06**	**C54**

Treasury's appeal against the Court's decision of 6 August 2009	**2009-08-12**	**C55**
Decision by the Court of Appeals of Santiago allowing the Treasury's appeal of 12 August 2009	**2009-12-18**	**C56**
Request by Víctor Pey Casado to the Court to reinstate the proceedings	**2011-01-17**	**Araya Exhibit num. 2**
Request by Víctor Pey Casado to the Court for it to issue him a copy of the proceedings in the case as from 1 September 2002	**2011-01-24**	**C128**
Decision by the Court to issue a copy of the proceedings to Víctor Pey Casado	**2011-01-27**	**C127**
Request by Mr Pey to the Court to annul the proceedings subsequent to the date of the Judgment	**2011-01-28**	**C129**
Treasury's statement opposing Mr Pey's request for annulment of the proceedings subsequent to the Judgment	**2011-03-25**	**Araya Exhibit num. 3**
Court's decision dismissing Mr Pey's request for annulment of proceedings subsequent to the Judgment	**2011-04-28**	**Araya Exhibit num. 4**
Mr Pey's appeal against the Court's decision of 28 April 2011	**2011-05-03**	**Araya Exhibit num. 5**
Court's decision allowing Mr Pey's appeal without suspending the earlier decision's effects	**2011-05-19**	**Araya Exhibits nums. 6 and 7**
Judgment by the Court of Appeals of Santiago dismissing Mr Pey's appeal	**2012-01-31**	**C59**
Mr Pey's appeal in cassation against the Judgment of the Court of Appeals of 31 January 2012	**2012-03-15**	**C60**
Supreme Court Judgment dismissing Mr Pey's appeal	**2012-07-11**	**C61**
Supreme Court Judgment on the *dies a quo* for the limitation	**2016-03-16**	**C44**

period on civil actions regarding serious unlawful acts by agents of Augusto Pinochet's dictatorship		
The ICSID Arbitral Tribunal Award of 2008	**2008-05-08**	**C14**
***Tratado práctico de derecho procesal civil chileno* [Practical Treatise on Chilean civil procedural law] by Carlos Anabalón, published in Santiago by Ed. Universidad de Chile, Vol. II**	**1946**	**Araya Exhibits num. 8**

CONTENTS

I. BACKGROUND TO THE CLAIM FILED BY VÍCTOR PEY CASADO

1. After 11 September 1973 agents of the military dictatorship entered the offices of Víctor Pey Casado without a warrant and, using violence against property, took his titles of ownership to all the shares of CPP S.A. and the payment receipts – see §§719 and 666 of the arbitral award of 8 May 2008[1], hereinafter the "Arbitral

[1] Arbitral Award, §719: *"expenses incurred in finding the titles of ownership to CPP S.A. and EPC Ltda.*

Award", with *res judicata* status according to the Decision of the ad hoc Committee of 18 December 2012 (§359(4)).

2. Mr Pey recovered the titles of ownership to 100% of CPP S.A. once he was able to return from forced exile in 1990 and, once they had been found, after extensive inquiries, the 8th Criminal Court of Santiago ordered by a decision of 29 May 1995[2] (case no. 12.545.2) that they be returned to him. These court proceedings were submitted at Mr Pey's request to the hearings held at the 1st Civil Court of Santiago in the taking of evidence as to his ownership of the Goss printing press (case no. 3510-95, sheets 180, 220 and 382).

   In Chilean law the *contra non valentem agere non currit praescriptio* rule does not apply. Thus the Supreme Court Judgment of 16 March 2016 holds that the *dies a quo* of civil actions for serious unlawful acts committed for political reasons by state agents during the dictatorship is the date on which democratically elected government was restored, i.e. 11 March 1990, or the subsequent date on which the facts giving rise to the Claim were established by a legally competent body – in the case in hand, 4 March 1991:

   > *As indicated by the full Court in the proceedings in case no. 10.665-2011, the limitation period provided by article 2332 of the Civil Code[3] may be counted only as from the date of the Report of the National Truth and Reconciliation Commission* [9 February 1991], *for prior to that time the claimants were not in a position to bring action given the lack of information on the facts giving rise the damage to be remedied. So as this Supreme Court has stated repeatedly on hearing similar cases, the limitation period must be counted as from the date of the unlawful act or, if applicable, from 9 February 1991, or from the delivery of the so-called Rettig Commission report, i.e. 4 March 1991"* (Recital 10).[4]

   Víctor Pey was entirely bereft of legal protection during the military dictatorship, and was able to recover documentary evidence of his investment in CPP S.A. only by virtue of the aforesaid court ruling of 29 May 1995.

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illegally seized at the offices of Mr Pey on 11 September 1973, and in their recovery by a decision of the 8th Criminal Court of Santiago of 19 May 1995, without which he would have been unable to have recourse to an international court"; §666: "It is worth remembering in this regard that there is a Chilean judgment recognising Mr Pey Casado's ownership of the confiscated shares and that the Chilean authorities, both executive and administrative (and judicial) were aware of the plaintiffs' claims and requests."

[2] Ibid., §§77, 163, 210, 215, 444.

[3] "*Art. 2332. The actions provided for by this title [On offences and torts] in respect of damage or fraud have a four-year time-limitation as from the act's perpetration."*

[4] Judgment of the Supreme Court, case no. 9.975-2015.

3. On 2 October 1995 Víctor Pey Casado filed a Claim to the 1st Civil Court of Santiago in ordinary large-claims proceedings against the Chilean state for the return of a Goss printing press[5] to which title of ownership is conferred on him by his position as owner of 100% of the shares of CPP S.A., bought in 1972:

> *"(...) ordered to return a printing press owned by me which it holds as depositary, on the basis of the following points of fact and law:*
> *(...) corresponding to 40,000 shares of "Consorcio Publicitario y Periodístico SA" which I bought and paid for, constituting the entire share capital of that company."*

4. Mr Pey filed his Claim in conjunction with the Presidente Allende Foundation, of Spanish nationality, pursuant to the terms agreed between them for the defence of their rights, which agreement is mentioned in the Arbitral Award:

> *"On 20 November 1995 and 10 January 1996 Mr Pey Casado asserted his ownership of 100% of the rights to CPP S.A., including the percentage transferred to the Foundation. Accordingly the Ministry of Public Assets in its reply of 20 November 1995 deemed that Mr Pey Casado's claim related to all of the assets of CPP S.A. Mr Pey Casado acted thus pursuant to an agreement of 20 December 1994 concluded between him and the Foundation's Board of Founders, notarised in Madrid. Notice of this agreement was served to the Centre on 19 December 1997. The Arbitral Tribunal notes that this agreement was executed. Consequently (...) the Request submitted by Mr Pey Casado was filed with the Foundation's agreement to the 1st Civil Court of Santiago in 1995 in order to seek the return of all of the large Goss printing press"* [paragraph 566].

5. For these purposes the Claim indicates that a single, purely civil action is being brought, based on the existence of a "compulsory deposit", as provided for in article 2236 of the Chilean Civil Code, which states that:

> *"Deposit in itself is referred to as 'compulsory' where the choice of depositary does not depend on the depositor's free will, as in events of fire, ruinous damage, looting or other similar misfortunes."*

6. According to the aforesaid Code, a compulsory deposit arises where the owner of movable property retains the ownership of the thing, but, owing to some misfortune (such as a fire, looting or the like), loses material possession of it, with the property then being held in custody by a third party.

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[5] Arbitral Award, §634: "On *4 October 1995, the Plaintiffs brought judicial proceedings before the 1st Civil Court of Santiago with the aim of securing the return of the Goss printing press."*

7. In this case, according to articles 2226, 2499 and 2227 of the Civil Code – on which the Claim is based – the owner of the thing may at his discretion demand its return at any time:

   - Article 2226: "*The property in deposit is returnable at the depositor's discretion*"

   In other words, terminating the deposit, by requesting the return of the thing, is a right to be exercised by the depositor at his/her discretion.

   - Article 2227: *"The obligation to keep the thing subsists until the depositor requests it."*

   - Article 2240: *"In other respects, compulsory deposit is subject to the same rules as voluntary deposit."*

   - Article 2499: *"No omission of freely performable acts, or mere tolerance of acts not giving rise to liens, shall confer possession, or result in any lapse of rights. (...) Freely performable acts are those which anyone may perform in their own affairs, with no need for consent from others."*

8. Víctor Pey Casado's Claim asserted (page 1, sheet 433) that at the time of the coup on 11 September 1973, which ousted the democratic government of the Chilean Republic headed by Dr. Salvador Allende by force of arms, shut down the Congress and the media opposed to the dictatorship, banned political parties and suspended fundamental freedoms, all the buildings of the publishers of the Diario Clarín newspaper, of which he was the owner, were occupied by military forces, including the building housing the powerful Goss printing press[6] (the most modern press in Latin America), which were taken into the custody by the *de facto* authorities which took control of the buildings owned by CPP S.A. and EPC Ltda., and which they continue to occupy in the present.

9. As the situation described remained unchanged during the military dictatorship, with a democratic order being partially restored in 1990[7] and the titles of ownership to CPP S.A. being recouped on 29 May 1995, on 4 October 1995, in the said Claim filed to the 1st Civil Court of Santiago, civil proceedings were brought for the return of the deposited property:

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[6] Ibid., §566: "*The Request by Mr Pey Casado was filed, with the Foundation's agreement, to the 1st Civil Court of Santiago in 1995 in order to claim the return of all of the large Goss printing press.*"

[7] Ibid., §668: *"Following the restoration of democratic and civilian institutions in Chile* [in 1990], *the new authorities publicly proclaimed their intention to restore legality and to remedy the damage caused by the military regime."*

"The return of the printing press, as already mentioned, is based on articles 2226 and 2227 of the Civil Code.
The former provides that the property is to be returned at the depositor's discretion and the latter that the obligation to keep the thing subsists until the depositor requests it, which means there is no time limit on demanding its return or on the duty of care.
The wait has clearly now ended and the time has come to claim in the courts the return of the goods that never ceased to be my property, but which are held by the Treasury.
Firstly I request the return of a "Goss" printing press located in the building at Calle Alonso Ovalle no. 1194; the latter is owned by (...)"

10. The Diario Clarín newspaper was published by Consorcio Publicitario y Periodístico S.A. (CPP S.A.), which in turn owned the Goss printing press and 99% of the shares in EPC Ltda., as recounted by Mr Pey in his Claim (pages 1-2).

11. Consequently the Claim did not seek a declaration of invalid public law as regards Decree 165 of 1975, for two reasons:

    a) firstly, because in accordance with article 2237 of the Civil Code,[8] Mr Pey knew, and submitted proof thereof to the proceedings, that the Goss printing press was bought by CPP S.A., whereas the Treasury provided no proof of its appearing in the "inventory" of confiscated property referred to by Decree 165, and consequently of its having been confiscated,[9] and,

    b) secondly, because there is no need to seek such a declaration given that article 7 of the Constitution, applying directly and imperatively to the courts of law, requires the judge to take note of any invalidity of public law. The Claim refers to this as follows:

> *"on 17 March 1975, with the publication in the Official Journal of the Interior Ministry's Supreme Decree no. 165, declaring these two companies to be wound up and confiscating the goods registered in their name with the various Property Registries, in accordance with Decree-Law no. 77, published in the Official Journal of 13 October 1973. This wholly illegal official act, contrary to the Constitution in force when it was enacted and contrary even to Decree-Law no. 77, on which it is based, is vitiated by invalidity of public law that is neither time-barred nor remediable, operating* ex tunc *and resulting in its legal non-existence"*[10] (end of page 2 and page 3, our underlining).

And the point is developed as follows in Section 2, pages 3-17 of the Reply of

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[8] Article 2237: "*Regarding compulsory deposit, any kind of evidence is admissible.*"

[9] Reply by Víctor Pey of April 1996, p. 4.

[10] Arbitral Award, §§203, 589.

April 1996 – "INVALIDITY OF THE MINISTRY OF JUSTICE'S SUPREME DECREE NO. 165 OF 1975" (page 13):

"Complementarily to all this section on the invalidity of Decree no. 165 we must again refute a false assertion by the opposing party, which claims that we said that the invalidation of public law does not require the involvement of the courts of law.
What we said is that invalidity of public law applies ipso jure*, i.e. by the mere action of the law or the Constitution, and thus the task of the courts is not to declare invalidity but simply to* ***take note*** *of such invalidity.*

"This means that in the action in question, as the presumed validity of Supreme Decree no. 165 is cited [by the Treasury] *as a line of defence, your Honour will, in accordance with article 170(6) of the Code of Civil Procedure,*[11] *necessarily have to take a view on this, but once note has been taken of the act's invalidity, this will simply be recognised by a declaratory ruling merely confirming the act's lack of validity and effects* ab initio*, because the Constitution so provides" (our underlining);*

and on page 16 of the same Reply:

"Beyond the multiple reasons in legal doctrine justifying its different nature (which we will consider broadly in subsequent submissions), it is the Constitution of 1925 in its 4th and 23rd articles (and the current one in its articles 6 and 7) that enshrines one of its main features, and from which others derive, consisting of operating automatically.
In a judgment of 1993, in case no. 20733 (published in Legal Gazette no. 159, p. 180), the Supreme Court rightly concluded that the invalidity to which we are referring applies ipso jure, and is neither time-barred nor remediable."

II. DEFENCE AND COUNTER-CASE OF THE CHILEAN STATE

12. The first and main line of defence offered by the Chilean state on countering the Claim was that of a lack of legal standing, asserting that the owner and depositor of the Goss printing press was not Mr Pey Casado but the company "Empresa Periodística Clarín Limitada", without providing any evidence in support of this assertion.

13. In support of this plea, the Chilean state's defence alters the facts of the Claim, asserting that, according to the latter (and contrary to fact), the printing press belonged to the private limited company Empresa Periodística Clarín (EPC Ltda.),

[11] "*Art. 170 (193). Final judgments in first or single-instance cases or second-instance judgments whose operative part amends or revokes those given by other courts shall contain: (...) 6th. The decision on the contentious issue. This decision must contain all the actions and pleas brought in the proceedings; but the resolution of any that are incompatible with those that are accepted may be omitted."*

and not to the public limited company Consorcio Publicitario y Periodístico Clarín (CPP S.A.), for which reason, as the Treasury claims, when [in 1972] Mr Pey Casado bought 100% of the shares in that public limited company, he became shareholder, with 99% of the capital, of Empresa Periodística Clarín Ltda., and the printing press is supposed to have remained the property of the private limited company, which as such has its own legal personality and assets independent of those held by its shareholders.

14. Additionally, in its defence the Chilean state asserted that in the case in hand there was no compulsory deposit, chiefly because "*the Treasury is the owner*" by virtue of the validity *ab initio* of Decree 165 (end of page 3 – page 13 of the Statement of Defence), and accordingly the state is not the custodian of the printing press but rather its owner.

15. Alternatively, the Treasury claimed that the action brought, which as explained concerned only the question of compulsory deposit, had lapsed, because, as it asserted, the *dies a quo* of the limitation period for action seeking the return of the thing deposited ran from "*10 February 1975, the date of the Decree that conferred ownership of the asset on the Treasury*" (page 15).

III. REPLY

16. In our Reply we stated on pages 2 and 3 that the Chilean state evidently sought to misrepresent the content of the Claim, as in 1972 Mr Pey acquired 100% of the shares of CPP S.A., which bought the printing press:

> *"The action for return of property seeks precisely to recover a chattel (a printing press) which belonged to Consorcio Publicitario y Periodístico S.A., and consequently to Víctor Pey Casado.*
> *The confusion which the respondent self-interestedly attributes to us between his position as owner of 99% of the share capital of Empresa Periodística Clarín Limitada, and as holder of title to that company's assets, evaporates when we see that a distinction is made at all times between the assets which as a result of the purchase are Víctor Pey's property, and those in respect of which he has rights only as 99% holder of the proprietary company's capital.*
> *Where we identify the site of the printing press, we explain that the building is the property of Empresa Periodística Clarín Limitada, over which Víctor Pey Casado holds rights as owner of 99% of its capital.*
> *By contrast, when referring to the Goss printing press, we state directly in the first paragraph of our claim that this is the property of Víctor Pey Casado."*

17. Regarding Supreme Decree no. 165 of 1975 cited by the Treasury in asserting that

the printing press belonged to the Chilean state, we note (Section 2, end of page 4 and page 5) that there is no record in the proceedings of the Goss press being subject to the confiscation ordered by this administrative act, for according to its 4th article, the chattels confiscated were those appearing in the inventories forming part of the Decree, but as those inventories were not disclosed, the press could not be assumed to have been confiscated.

18. Alternatively, we submit (page 4) that even if the printing press were among the objects inventoried, this did not make it the Treasury's property, as that Decree is vitiated by invalidity of public law for a series of reasons discussed on pages 2-4 of our Claim and in Section 2, pages 2-18, of our Reply.

19. Our Reply also states (Sections 3 and 4, pages 13-18) that the civil proceedings brought under article 2226 of the Civil Code have not lapsed inasmuch as the obligation to return the thing deposited becomes enforceable not when the compulsory deposit is made but when the owner requests its return:

> *"Art. 2514. The time-limit terminating any third-party actions and rights requires only a certain lapse of time during which no such actions have been brought.*
> *This period is counted as from when the obligation becomes enforceable"* [our underlining].

which in the case at issue did not occur, in any event, until the 8th Criminal Court decided to restore to Mr Pey his titles of ownership on 29 May 1995, and thus when he filed his Claim on the following 4 October the 5-year period for the termination of third-party actions and rights provided in article 2515 of the Civil Code had not elapsed.[12]

20. As to the supposed validity of Supreme Decree no. 165 of 1975, we say in pages 4-13 of our Reply, reiterating the assertions of our Claim, that that Decree was vitiated by a series of defects and was invalid, as the Court could note in any way and at any time given that this invalidity was neither remediable nor time-barred, and we repeated that the action brought did not seek a declaration of invalidity in this regard, as in a ruling on the return of the property in compulsory deposit, no formal declaration of the Decree's invalidity is necessary; it suffices to take note thereof, as stated in articles 4 and 5 of the Constitution of 1925 and 1980, respectively, as these articles are applied by Chile's Supreme Court.

[12] "*Art. 2515. This period is generally three years for enforcement actions and five for ordinary ones.*"

IV. REJOINDER

21. In its rejoinder of May 1996, after on page 2 granting the possibility that the printing press may belong to "Sociedad 'Consorcio Publicitario y Periodístico S.A.", on pages 3-11 the Chilean state again stresses that our party did not request or require a formal declaration of invalidity of Supreme Decree no. 165; it then claims that neither CPP S.A. nor EPC Ltda. has "*legal standing to bring action*" given that, as it claims, "*the Treasury is the owner*" for, in its view, Decree 165 is valid, as "*invalidity of public law does not apply* ipso jure" (end of page 4); it says again that there was no compulsory deposit (pages 11-14) and that the action brought for the return of deposited property has lapsed because, it says, "*the enforceability of the obligation* [to return the thing deposited] *begins at the moment of delivery*" [in this case on 11 September 1973] (page 16), "*arising on the conclusion of this contact, i.e. as from the thing's delivery*" (page 17). Which assertion is incompatible with the nature of this action brought in respect of compulsory deposit, governed by the aforesaid articles of the Civil Code.

V. EVIDENCE STAGE

22. From the evidence stage, two factual circumstances are worth noting:

a) The claimant proved with accounting documents obtained from records procured from the Superintendency for Public Limited Companies and which appear in the aforesaid case no. 12.545.2 of the Criminal Court of Santiago that the Goss printing press was part of the assets of Consorcio Publicitario y Periodístico Clarín S.A.

b) The respondent submitted no evidence to prove that the printing press was included in the inventory of movable property confiscated from the companies affected by the Interior Ministry's Supreme Decree no. 165 of 1975 ordering them to be wound up.

VI. JUDGMENT STAGE

23. On 3 January 2001 the court summoned the parties to hear judgment, pursuant to article 432 of the Civil Procedure Code,[13] which involves putting an end to the discussion and evidence phase and the proceedings entering the judgment stage.

24. On 5 March 2001, at sheet 342, having completed the taking of further evidence in

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[13] Article 432: *"Once the time limit referred to in article 430 has elapsed, whether or not submissions have been filed or any steps remain, the court shall issue summons for judgment to be heard."*

support of its judgment, the court restated the validity of the previous decision summoning the parties to hear judgment. Pursuant to the 3rd paragraph of article 162 of the Civil Procedure Code,[14] the court had a sixty-day period in which to give its judgment.

25. According to the 4th paragraph of the aforesaid article 162, if the judge does not give a judgment within this period, he will be cautioned by the Court of Appeals, and if he fails to give a judgment within the new time limit set by this Court, he will be liable to be suspended from work for a period of 30 days.

26. In a situation without precedent to the undersigned's knowledge, no judgment was given until 24 July 2008, i.e. more than 7 years after the parties had been summoned to hear it, without the judge having been cautioned in all that time, let alone suspended from work, as required by law.

27. Once a judgment was given, according to the last paragraph of article 162 of the Civil Procedure Code, the clerk of the court should have a) noted this circumstance in the statement or list of cases drawn up and posted every day in the court building, and b) also served notice to the parties.

In the words of the legal author Carlos Anabalón:

> *"Notification via the daily statement consists of a normally printed notice drawn up and posted every day in the registry of each court and containing a nominal list of all the proceedings in which on that day any decision has been given, other than those which have to be notified in person or by service of documents.*
>
> *"Service of documents consists of the delivery of documents by the certifying officer at the place of residence (as recorded in the proceedings) of the person to be notified, served to that person or, generally speaking, to any other adult who is present, and containing 'a full copy of the decision and the details necessary for it to be properly understood'; but for the procedure to be complete, two further steps must be taken: a) sending a registered letter to the person notified, informing him of the notification (...)*

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[14] Article 162: *"The final judgment in ordinary proceedings must be given within a period of sixty days as from when the case enters the judgment stage. If the judge does not render a judgment within this period, he shall be cautioned by the respective Court of Appeals, and if despite this caution he fails to render judgment within the new time limit set by the Court, he shall be liable to be suspended from work for a period of 30 days, as shall be decreed by that same Court. Court clerks shall note the fact that a final judgment has been rendered on the statement referred to in article 50 along with its day of issue and the service of notice to the parties. These steps do not involve notification and shall not apply to decisions given in non-contentious judicial acts."*

and b) leaving a record of this in the proceedings in the way common to all procedures and indicating the name, age, occupation and address of the person on whom the documents were served and the circumstance of such notice having been given."[15]

28. In our case the clerk did not serve any notice to Mr Pey's party, so we did not effectively learn that a judgment had been rendered, and we do not know whether a notice was left in the court's "daily statement" (a notice board); but even if it was, legally it would not have been a valid notice, as article 52 of the Civil Procedure Code provides that if six months have elapsed with no decision being given in proceedings, which period had been amply exceeded when this judgment was given, notices in the daily statement shall not be deemed valid notification until a further notice is given in person or by service of documents.

    "If six months elapse without any judgment having been rendered in the proceedings, notices in the daily statement shall not be deemed to be valid notifications until a further notice has been given in person or by service of documents."

29. This being so, in this case the requirement provided in article 52 of the Civil Procedure Code meant that it was the court's duty to serve notice of this judgment given with such extraordinary delay; but the court did not do so.

30. Instead, on 16 June 2009 the Chilean state sought a declaration that the proceedings had been abandoned by Mr Pey, which involves seeking the invalidation of all the steps taken in the proceedings in view of the claimant's inactivity.

31. According to article 152 of the Civil Procedure Code, proceedings are deemed to have been abandoned when all the parties thereto have ceased to pursue them for six months, as from the date of the last decision rendered in any proceedings liable to move the case forward.[16]

32. It is uncontested and accepted in doctrine and case-law that there can be no abandonment of proceedings where it is the task or duty of the court itself to move them forward, as occurs in the judgment stage. Clearly, once the decision summoning the parties to hear judgment has been issued, and until notice of the ruling is served to those involved, no action for abandonment of the proceedings can apply.

    In its Judgment of 18 August 2015 (case no. 3000-2015) the Supreme Court states

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[15] Anabalón (Carlos), *Tratado práctico de derecho procesal civil chileno* (Practical treatise on Chilean civil procedural law), Santiago, Ed. Universidad de Chile, Vol. II, pp. 177 and 211, §§1353 and 211

[16] Article 152: *"The proceedings are deemed to have been abandoned where all the parties thereto have ceased to pursue them for six months, as from the date of the last decision rendered."*

that:

> *"**Fourth:** That in the structure designed for ordinary proceedings in Title II of the Civil Procedure Code, as regards the task of advancing the proceedings, the activity of the parties is combined with that of the judge.*
>
> *In this respect there are stages of the proceedings in which the procedural momentum rests solely with the court, in which the judge should ensure that the proceedings are promptly concluded. Article 433 of the Civil Procedure Code is the clearest example of this, as it provides that once the parties have been summoned to hear judgment, no further pleadings or evidence of any kind are admissible. In other words, the task of advancing the proceedings is altogether taken away from the parties. Accordingly, whatever the period of inactivity, they may not be penalised by it being deemed that the proceedings have been abandoned."*

33. Article 154 of the Civil Procedure Code provides that "*abandonment may be claimed by way of an action or in a plea in objection, and shall be dealt with as a procedural issue*", and article 89 states that "*if a procedural issue is raised, three days shall be given in which to respond, and after this period, whether or not the other party has responded, the court shall decide upon the issue, if, in its view, there is no need for evidence*."

The court did not raise a procedural issue or, consequently, notify Mr Pey that he had three days in which to answer the state's claim.

34. However, owing to the Judgment not having been notified in person or by service of documents, the 1st Civil Court of Santiago, in a decision of 6 August 2009, rightly dismissed the state's request to have the proceedings declared abandoned, reasoning:

> *"3. That the procedural concept in question can refer only to situations of inactivity attributable to the parties insofar as they have any possibility to act in such a way as to move the proceedings forward. 4. That, as according to the record of proceedings the final judgment was rendered on 24 July 2008, i.e. well outside the six-month period provided for in article 52 of the Civil Procedure Code, without the parties having been notified in person or by service of documents, notification via the court's daily statement is not valid."*

35. The Chilean state appealed against this decision on 12 August 2009 and, ultimately, on 18 December 2009 the Court of Appeals overturned it and declared the proceedings abandoned, thereby upholding the irregularity of our party never having been legally notified by service of documents of the ruling, of the procedural issue of abandonment being raised or of the appeal filed by the Treasury, and thus our party was defenceless in both courts and given no chance to lodge the corresponding

appeals in order to set out its arguments so that this claim of abandonment of the proceedings might be dismissed.

36. On learning by chance of what had happened on 24 January 2011, within the legal time limit of the following five days Mr Pey sought the invalidation of all the proceedings carried on since 24 July 2008 without his knowledge and without notification, especially as regards the supposed abandonment of proceedings as sought by the Chilean state. But these pleas were dismissed without due cause, likewise on the instigation of the Chilean state, by the Court of First Instance on 28 April 2011, on appeal by the Court of Appeal of Santiago on 31 January 2012, and in cassation by the Supreme Court on 11 July 2012, with all the steps that had been taken being held to be final once all possible remedies had been exhausted against the ruling (by the Court of Appeals on 18 December 2009) upholding the motion for abandonment brought by the Chilean state on 16 June 2009.

VII. CONTENT OF THE JUDGMENT

1. THE JUDGMENT'S STATEMENT OF FACTS

37. The final Judgment, rendered on 24 July 2008:

1. In the statement of facts corresponding to the claimant, the Judgment says:

a) that Mr Pey is bringing his suit in his capacity of buyer in 1972 of 100% of CPP S.A. (pages 1 and 2, sheets 436 and 437), in keeping with what is stated in the Claim;

b) that the "*Goss printing press (...) is currently registered in the Treasury's name*" (page 1, sheet 436), which is not in keeping with our Claim, of which the corresponding sentence on page 1 links "the registration" not to the press but to the building, in masculine [in the original], where the press is located:

"Firstly I request the return of a "Goss" printing press located in the building at Calle Alonso Ovalle no. 1194; the latter is owned by "Empresa Periodística Clarín Limitada" (of whose capital I hold 99%), but which is currently registered[17] *in the Treasury's name"* (our underlining);

[17] I.e. *inscrito,* with masculine agreement, corresponding to the masculine noun *edificio* (building), whereas *rotativa* (printing press) is feminine (translator's note).

c) that the action brought seeks the return of the printing press deposited on 11 September 1973, on the basis of articles 2236, 2226 and 2227 of the Civil Code mentioned on pages 3 and 4 above (sheets 435, 437);

d) on pages 1-10 (sheets 433-442) the Statement of Facts mentions the concept of "return" eighteen times, i.e. that the subject of the Claim is the return of a printing press, and that "*the action*" (in the singular) being brought in the Claim is for the return of movable property held in deposit:

"Whereas he is bringing a fiscal claim against the Chilean Treasury (...) with a view to the latter being ordered to return a printing press owned by him and which it holds as depositary, according to the points of fact and of law to which he refers" (page 1, sheet 433),

"with a peculiar legal status applying to his property, which may be legally qualified (...) as a compulsory deposit as provided for by article 2236 of the Civil Code" (page 3, sheet 435);

e) and that the Claim asserts that Decree no. 165 is vitiated by invalidity of public law (pages 2, 3, 4, sheets 434, 435, 436).

2. In the statement of facts corresponding to the respondent, the Judgment says:

a) That the Chilean state asserts that the claim involves a single action, viz.:

- the "[single] *action in question* [is] *the return of the thing supposed to have been left in compulsory deposit*" by Mr Pey on 11 September 1973 (page 6, sheet 438);

- "*there is no contract of compulsory deposit between the claimant and the state, and so no action may be brought in this regard, and thus the claim must be rejected*" (page 8, sheet 441). This is the first and main defence plea, which the Judgment tacitly rejects;

b) "*That, alternatively, it pleads by way of defence that the time-limit on the action brought* [in the singular] *has lapsed*" (page 10, sheet 442),

whereas, on the contrary, in Chilean law the property in deposit is returnable at the depositor's will, as we saw in paragraphs 7-11 above. Notwithstanding this, the Judgment accepts the second, alternative defence plea, of time-bar on action brought in respect of compulsory deposit.

c) That, according to the Chilean state,

"the claimant has neither the right he claims nor standing to act, as he does not meet the requirements provided in current legislation to be able to bring the action in question, i.e. for the return of a thing supposed to have been left in compulsory deposit, because according to the general rules applicable, where there is no contract of deposit, it is the depositor that may demand the return of the thing left in deposit, not a third party acting without power of attorney, as in this case."

This assertion by the Chilean state misrepresents the terms of the Claim, in which, as we have seen, Mr Pey is acting in his capacity as owner of the Goss printing press, by virtue of having bought 100% of the shares of CPP S.A.

d) *"The owner of the thing* [deposited] *is supposed to be the company Empresa Periodística Clarín Limitada* (…) *as the claimant himself indicates (...)"* (page 7, sheet 439).

The Judgment accepts this assertion by the state even though it again misrepresents the Claim's factual basis, for, as we have seen, the Claim indicates on pages 1 and 4 that the printing press was bought by CPP Sociedad Anónima and that the owner is Mr Pey, who in his Reply (pages 2-3) restates that his position as owner stems from his having bought 100% of that company's shares;

e) The Judgment's statement of facts further says that, according to the government's representative:

"not even the said company [EPC Ltda.] could make a claim, for it would lack legal standing, since as we will show, the Treasury is the owner of the thing. Alternatively, it asserts by way of defence the validity of the Interior Ministry's Supreme Decree no. 165 of 1975, so that the claim may be rejected inasmuch as there is no compulsory deposit as asserted by the claimant, for in order for that situation to exist it would be necessary to declare the invalidity of the Interior Ministry's Supreme Decree no. 165 of 1975 (...).

"It pleads by way of defence that there is no compulsory deposit in this case, as the Treasury took material possession of the printing press as its owner, not just its holder, so it has possessed it with full ownership, and thus the applicable concept is not deposit but possession. (...)"

This plea by the Treasury – according to which EPC Ltda. lacks legal standing because "the owner of thing" is supposed to be the state – has as its necessary, legal and logical premise the other main plea by the Treasury,

namely that Decree 165 is not vitiated by invalid public law but rather is valid. The Judgment rejects both pleas by deeming, in its 9th Recital, that it is EPC Ltda. that has legal standing.

f) The statement of facts further says with respect to the Treasury:

"That, alternatively, it pleads by way of defence that the time-limit for the action brought has lapsed, in accordance with articles 2492 et seq. of the Civil Code, inasmuch as the 5-year period stipulated by law for such action has elapsed. It states that between 10 February 1975, when Supreme Decree no. 165 was published, and 19 October 1995, when notice was given of the claim, more than 20 years had elapsed, so any action brought was time-barred according to the aforesaid legislation."

This plea is accepted in the Judgment (15th to 17th Recitals), even though bringing action in respect of compulsory deposit is at the discretion and will of the depositor, and Mr Pey was in no position to bring such action until the court ruling of 29 May 1995 restored to him his titles of ownership to 100% of CPP S.A.

2. THE JUDGMENT'S RECITALS

38. The Judgment's 8th and 9th Recitals take note of invalidity of public law as regards Decree no. 165, as sought in our Claim and reasserted in our Reply, as we have seen, for the court does not accept the Treasury's main plea, namely that the owner of the press was the state as from the date of publication of Decree no. 165.

39. Moreover, in the 8th and 9th Recitals, on which the Judgment's operative part is partly grounded,

a) The state's misrepresentation of the cause of action is accepted, consisting of attributing to Mr Pey as claimant the assertion in his Claim that the printing press belonged to the private limited company EPC Ltda., whereas, by contrast, it is enough to read the Claim, and then our Reply, to see that the claimant always asserted, and restated, that the Goss press belonged to the public limited company CPP, S.A., of whose share capital Víctor Pey bought 100% in 1972, and thus as heir by universal succession of that company, he was its sole current owner in 1973. Moreover he not only asserted this in his pleadings but he also provided documentary evidence of it, which was not considered in the ruling.

b) Despite the above, the court rejects the Treasury's plea that EPC Ltda. lacks

"*legal standing to bring action*" and that standing rests with the state, on the grounds that "*the Treasury is the owner*" as a result of Decree no. 165 being regarded as valid as from its publication (Rejoinder, end of page 4).

c) and in its 9th Recital, the Judgment deems that legal standing rests with the person to whom ownership of the printing press is attributed, namely the private limited company EPC, Ltda.

> *"and so it is up to the latter to bring action, not to the claimant appearing in these proceedings, for the holder of the rights is the legal person, not the natural person. In the case at issue, the claimant should have appeared on behalf of the company and not on his own behalf, as he is only the owner, as he states, of 99% of the company."*

VIII. MUTATIO LIBELIS, ALTERATION OF THE CAUSE OF ACTION AND CONTRADICTIONS IN THE 14th TO 18th RECITALS

40. In its 14th and 15th Recitals, the Judgment again misrepresents the arguments made in the proceedings, as it incongruously attributes to the claimant having brought an action which he did not bring – seeking a formal declaration of invalidity of public law – as well as assertions in substantive aspects of the case which he never made, on deeming, in the 15th Recital, that whether the Goss press was confiscated is not in dispute, whereas in his Claim Mr Pey asserted that he was its owner, and in his Reply he expressly disputed and denied that it had been confiscated (Reply, page 4), insofar as the Treasury had not shown that it was part of the inventory of assets referred to in the 4th article of the Confiscatory Degree, and this point was not proven by the Treasury in any of the subsequent proceedings.

41. Following these gross contradictions and manifest material errors, on reflecting in its 15th to 17th Recitals on the plea of time-limitation on action in respect of compulsory deposit, the Judgment makes further confused assertions, referring to the provisions that would determine the time-bar on an action for a formal declaration of invalidity of public law (which action was not brought), and then asserting that civil action in respect of compulsory deposit was time-barred and that the limitation period ran from the date of publication of Decree 156.

IX. IN CONCLUSION

1. After deeming that Decree 165 did not have authority to wind up companies and deprive them of ownership of their assets (9th Recital), the Judgment concludes

that the action for the return of property in compulsory deposit was time-barred, contrary to article 2226 of the Civil Code, according to which the return of property is at the depositor's discretion, and to article 2227 of that same Code, which requires the depositary to keep the thing until the depositor claims it.

2. The declaration of "abandonment" of the proceedings handed down to the 1st Civil Court of Santiago on 18 December 2009 by the Court of Appeals of Santiago, in circumstances leaving Mr Pey defenceless, has a dual effect:

a) Indirectly, it might have prevented Mr Pey from being able to submit to the international arbitration, then in progress, the contestation of the validity of Decree no. 156 by the 9th Recital, on noting the Decree's invalidity as public law;

b) Directly, it certainly prevented Mr Pey from making the appeals allowed by the law against a declaration of abandonment, which has the nature of

> *"an interim judgment, as it establishes permanent rights in the parties' favour; but as well as this it has the peculiarity of 'making the continuation of proceedings impossible', if it is affirmative. Consequently such a ruling is liable both to appeal to a higher court and to appeal in cassation, on the form and the merits, the latter naturally within the legal limits (arts. 158[1], 766[2] and 767[3], yet without*

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[1] Article 158: "*Judicial decisions shall be called final judgments, interim judgments, orders and decrees. A final judgment* [sentencia definitiva] *is one which puts an end to the proceedings, resolving the question or issue that was put to trial. An interim judgment* [sentencia interlocutoria] *is one which rules on a procedural issue, establishing permanent rights for the parties, or decides upon a formality which is to serve as a basis for the delivery of a final or interim judgment. An order* [auto] *is a decision given on an issue not included among those mentioned above. A decree* [decreto, providencia or proveído] *is an order which, without ruling on procedural issues or on formalities serving as a basis for the delivery of a judgment, seeks only to determine or arrange the management of the proceedings.*"

[2] Article 766: "*Generally speaking, appeals in cassation are admissible only against final judgments, or against interim judgments where these put an end to the proceedings or make it impossible for them to continue, or, exceptionally, against interim judgments given in the second instance without the injured party having received service of process, or without indicating a date for the hearing of the case.*"

[3] Article 767: "*An appeal in cassation on the merits is lodged against non-appealable final judgments or against non-appealable interim judgments where they put an end to the proceedings or make it impossible for them to be continued, rendered by Courts of Appeals or by a second-instance arbitral tribunal consisting of arbitrators at law in cases where such arbitrators have heard issues within the jurisdiction of those Courts, where they have given a decision in breach of the law and such breach has substantially affected the operative part of the judgment.*"

prejudice to the provisions of article 769[4] R. de Derecho [Law Journal], *vol. XXXVII, July and August 1940, 1st Sec., page 346).*

It is worth further stressing that on the termination of proceedings arising from an affirmative decision of abandonment (...), the judicial suit or dispute does not disappear. But just as once abandonment is legally declared, the dispute persists for lack of a judicial ruling and the parties' actions are not eliminated or lost, that declaration may also indirectly affect the very existence of those actions where the time covered by the abandonment is enough to complete the limitation periods to which such actions are subject, in accordance with the established precept of article 2503[5] of the Civil Code."[18]

Santiago, 19 December 2017

Víctor Manuel Araya Anchia

RESIDENT at calle Catedral no. 1009, oficina 2101, Santiago, Chile

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[4] Article 769: "*In order for an appeal in cassation to be admissible it is indispensible for the plaintiff to have complained of the error, filing all the appeals provided for by law in a timely manner. Such a complaint is not a prerequisite where the law admits no appeal against the decision in which the error was made, or where it occurred in the very delivery of the judgment which is to be quashed, or where the error came to the party's knowledge after the judgment's delivery. It is likewise not a prerequisite for the filing of appeals in cassation against second-instance judgments on the fourth, sixth and seventh grounds of article 768 for a complaint to have been brought against the judgment at first instance, even where this was also affected by the defects giving rise to the action. The complaint referred to in the first point of this article must be filed by the party or its counsel before the case is heard in the event referred to in the 1st point of article 768."*

[5] Article 2503: *"Interruption of limitation on civil action is any judicial remedy sought by anyone claiming to be the true owner of the thing, vis-à-vis the possessor. Only someone who has sought this remedy may seek interruption; and not even such a person may do so in the following events: 1) if the claim was not notified legally; 2) if the appellant expressly withdrew from the claim or the proceedings were declared abandoned; 3) if a court has dismissed the claim against the respondent. In these three events the limitation period shall be deemed not to have been interrupted by the claim."*

[18] Anabalón (Carlos), ibid., p. 212, §1403.

STATEMENT OF INDEPENDENCE

The undersigned declares as follows:

- In his Witness and Legal Statement he has disclosed all the sources of information of which he availed himself. In preparing his Witness and Legal Statement he was, insofar as possible, accurate and comprehensive.

- He included in his Witness and Legal Statement all the aspects of which he is aware or has been informed.

- In his Witness and Legal Statement he gave his own opinion, with full independence.

- He is aware that the Court, in the presence of the parties and their respective advisors and experts, may question him on all the matters discussed in his Witness and Legal Statement.

STATEMENT OF TRUTH

I declare on my honour that the facts and arguments set out in my Witness and Legal Statement correspond to my own knowledge and are true and accurate, and that the opinion I have expressed truly and fully reflects my professional opinion.

Santiago de Chile, 19 December 2017

Signed: Víctor Araya Anchia
National identity card no.…
Lawyer

DECLARACIÓN DE INDEPENDENCIA

El abajo firmante declara lo que sigue:

- Ha informado en su Declaración testimonial y legal acerca de todas las fuentes de información que ha utilizado. Ha sido, en la medida de lo posible, preciso y completo en la preparación de su Declaración testimonial y legal.

- Ha incluido en su Declaración testimonial y legal todos los elementos de que tiene conocimiento o de los que ha sido informado.

- Ha formulado en su Declaración testimonial y legal su propia opinión, con toda independencia.

- Es conocedor de que el Tribunal, en presencia de las partes, de sus respectivos asesores y expertos, puede escucharle sobre todos los temas tratados en su Declaración testimonial y legal.

DECLARACIÓN DE LA VERDAD

Declaro por mi honor que los hechos y argumentos que indica mi Declaración testimonial y legal corresponden a mi propio conocimiento, son exactos y precisos, y que la opinión que he expresado refleja auténtica y completamente mi opinión profesional.

En Santiago de Chile, 19 de diciembre de 2017

Firmado: Víctor Araya Anchia
Cédula Nacional de Identidad Nº 7.556.971-8
Abogado