



PCA (PERMANENT COURT OF ARBITRATION)

PCA Case No. 1910-01

CANEVARO CLAIM (ITALY / PERU)

ARBITRAL AWARD

03 May 1912

Tribunal:

[Manuel Alvarez Calderon](#) (Co-Arbitrator)

[Guido Fusinato](#) (Co-Arbitrator)

[Louis Renault](#) (Co-Arbitrator)

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Arbitral Award

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Whereas, by an agreement to arbitrate dated April 25, 1910, the Italian and Peruvian Governments agreed to submit the following questions to arbitration:

Ought the Government of Peru to pay in cash, or in accordance with the provisions of the Peruvian law on domestic debt of June 12, 1889, the drafts (*lettres à ordre, cambiali, libramientos*) now in the possession of the brothers NAPOLEON, CARLOS, and RAPHAEL CANEVARO, and which were drawn by the Peruvian Government to the order of the firm of JOSÉ CANEVARO & SONS for the sum of 43,140 pounds sterling, plus the legal interest on the said amount?

Have the CANEVARO brothers the right to demand the total of the amount claimed?

Has Count RAPHAEL CANEVARO the right to be considered as an Italian claimant?

Whereas, in the pursuance of this agreement to arbitrate, the following persons were designated as arbitrators:

Mr. LOUIS RENAULT, Minister Plenipotentiary, Member of the Institute, Professor in the Faculty of Law at the University of Paris and at the School of Political Sciences, Jurisconsult of the Ministry of Foreign Affairs, President;

Mr. GUIDO FUSINATO, Doctor of Law, former Minister of Public Instruction, Honorary Professor of International Law at the University of Turin, Deputy, Counselor of State;

His Excellency Mr. MANUEL ALVAREZ CALDERON, Doctor of Law, Professor at the University of Lima, Envoy Extraordinary and Minister Plenipotentiary of Peru at Brussels and Berne.

Whereas, the two governments have respectively appointed as counsel:

The Royal Italian Government:

Professor VITTORIO SCIALOJA, Senator of the Kingdom of Italy and, as assistant counsel, Count GIUSEPPE FRANCESCO CANEVARO, Doctor of Law;

The Peruvian Government:

Mr. MANUEL MARIA MESONES, Doctor of Law, Attorney.

Whereas, in accordance with the terms of the agreement, the memorials and counter-memorials have been duly exchanged between the parties and communicated to the arbitrators;

Whereas, the Tribunal met at The Hague on April 20, 1912.

Whereas, in order to simplify the statement which follows it is best to decide first on the third question propounded in the agreement, that is to say, upon the status of RAPHAEL CANEVARO;

Whereas, according to Peruvian legislation (Art. 34 of the Constitution), RAPHAEL CANEVARO is a Peruvian by birth because he was born on Peruvian territory.

As, on the other hand, the Italian legislation (Art. 4 of the Civil Code) attributes to him Italian nationality because he was born of an Italian father;

Whereas, in fact, RAPHAEL CANEVARO has on several occasions conducted himself as a Peruvian citizen, both by standing as a candidate for the Senate, where none are admitted except Peruvian citizens and where he went on to defend his election, and also especially in accepting the office of Consul General of the Netherlands, after having solicited the authorization of the Peruvian Government and then of the Peruvian Congress;

Whereas, under these circumstances, whatever RAPHAEL CANEVARO's status may be in Italy with respect to his nationality, the Government of Peru has the right to consider him as a Peruvian citizen and to deny his status as an Italian claimant.

Whereas, as the debt (*créance*) which gave rise to the claim submitted to the Tribunal arises from a decree of the dictator PIÉROLA of December 12, 1880, by virtue of which there were issued, under date of the 23rd of the same month, pay checks (*bons de paiement, libramientos*) to the order of the firm of JOSÉ CANEVARO & SONS for the sum of 77,000 pounds sterling, payable at different dates;

As these "checks" were not paid at the dates fixed, which coincided with the hostile occupation;

As one installment of 35,000 pounds sterling was paid at London in 1885, there remains a debt of 43,140 pounds sterling in regard to the fate of which it is necessary to pass judgment;

Whereas, it follows from the facts of the case that the business firm of JOSÉ CANEVARO & SONS, established at Lima, was reorganized in 1885 after the death of its founder, which occurred in 1883;

As indeed it preserved the firm name of JOSÉ CANEVARO & SONS, but in reality, as the act of liquidation of February 6, 1905 shows, it was composed of JOSÉ FRANCISCO and CÉSAR CANEVARO, whose Peruvian nationality was never contested, and of RAPHAEL CANEVARO, whose said nationality, in accordance with the law of Peru, has just been recognized by the Tribunal;

As this company, Peruvian on two grounds both by its firm name and by the nationality of its members, continued to exist until the death of JOSÉ FRANCISCO CANEVARO, which occurred in 1900;

Whereas it was during the existence of this firm that the Peruvian laws of October 26, 1886, June 12, 1889, and December 17, 1898, were enacted, which laws prescribed the gravest measures in regard to the debts of the Peruvian Government, measures appearing to be necessitated by the disastrous condition to which Peru had been reduced by the evils of foreign and civil war;

Whereas, though it is not the place of the Tribunal to judge the provisions of the laws of 1889 and 1898 themselves, which provisions were indeed very severe on the creditors of Peru, the provisions were imposed without any doubt on Peruvian individuals and Peruvian firms alike, which is merely a fact the Tribunal can but recognize.

Whereas, on September 30, 1890, the CANEVARO firm, through its representative GIACOMETTI, applied to the Senate to secure the payment of the 43,140 pounds sterling which had according to it been furnished to supply the needs of the war;

As on April 9, 1891, in a letter addressed to the President of the Tribunal of Accounts, GIACOMETTI assigned a triple origin to the debt: a balance due to the CANEVARO firm from the government in payment of armaments bought in Europe during the war; drafts drawn by the government against the consignment of guano to the United States, protested and paid by JOSÉ FRANCISCO CANEVARO; money furnished for the army by General CANEVARO;

As finally, on April 1, 1891, the same GIACOMETTI, again addressing the President of the Tribunal of Accounts, cited Article 14 of the law of June 12, 1889, which he said the Congress had passed "for the most patriotic purposes", in order to obtain a settlement of the debt;

Whereas, the representative of the CANEVARO firm had at first assigned a manifestly erroneous origin to the debt, which was by no means a matter of supplies or advances made in view of the war against Chile, but, as was recognized later, solely for the repayment of previous drafts which, drawn by the Peruvian Government, had been protested and then paid by the CANEVARO firm;

As it is with view to this situation that the case should be considered;

Whereas, the CANEVARO firm acknowledged in 1890 and 1891 that it was subject to the law of 1889 on the domestic debt, and it merely sought to place itself in a position to profit by a favorable provision of this law instead of submitting to the common fate of the creditors;

As its claim (*créance*) does not come within the provisions of Article 14 of the said law which it invoked, as said above; as it is not a question, in this case, of a deposit received by the government, nor of bills of exchange drawn upon the government, accepted by it, and recognized to be lawful by the "present" government, but of an adjustment of accounts not being for the purpose of procuring resources for the government, but of settling a previous debt;

As the CANEVARO claim does, on the contrary, come within the very comprehensive terms of Article 1, No. 4, of the law which mention the pay orders (*libramientos*), bonds (*bons*), checks, bills and other orders to pay issued by the national bureaux *up to January, 1880*; as it is possible, as a matter of fact, to argue that it would seem that this phrase ought to exclude the CANEVARO claim, which is of December 23, 1880; but it is important to remark that this limitation as to the date was for the purpose of excluding claims arising from acts of the dictator PIÉROLA, in accordance with the law of 1886 which declared void all the acts of the latter; as thus, construing literally the provision in question, the CANEVARO claim could not be invoked on any ground, even to obtain the slight portion allowed by the law of 1889;

But whereas, on the one hand it appears from the circumstances and from the terms of the agreement to arbitrate that the Peruvian Government itself acknowledges that the annulment prescribed by the law of 1886 does not apply to the CANEVARO claim; and, on the other hand, the annulment prescribed by the PIÉROLA decree would leave intact the previous claim arising from the payment of the bills of exchange;

As thus the obligation arising from the bonds of 1880, delivered to the CANEVARO firm, must be considered as coming within the category of the claims enumerated in Article 1, No. 4 of the law.

Whereas it has been held in a general way that the CANEVARO debt ought not to be under the application of the law of 1889, as it could not be considered as coming within *the domestic debt* because all its characteristics are against this, the obligation being to order, made payable in pounds sterling, and belonging to Italians;

Whereas, apart from the nationality of the persons, it is known that financial measures taken within a country do not affect the acts concluded outside and by which the government has appealed directly to foreign credit; but such is not the case in this instance, as it is a question, in the case of the certificates issued in December, 1880, of a settlement of a domestic nature, of obligations created at Lima, and payable at Lima, in compensation for a payment made voluntarily on behalf of the Peruvian Government;

And this fact is not impaired by the circumstances that the obligations were to order and payable in pounds sterling, circumstances which did not prevent the Peruvian law from being applicable to obligations created and payable in the territory in which the law prevailed;

As the enumeration in Article 1, No. 4, referred to above, comprises obligations payable to order, and as Article 5 foresees that there may be conversions of money to be made;

Finally as has been stated before, when the financial measures which rest on the claim were taken, the claim belonged to a company which was incontestably Peruvian.

Whereas, the claim of 1880 belongs at present to the three CANEVARO brothers, two of whom are certainly Italians;

As one is justified in asking whether this circumstance renders the law of 1889 inapplicable;

Whereas, the Tribunal need not inquire what would be decided if the claim had belonged to Italians at the time when the law was enacted which reduced in such comprehensive fashion the rights of the creditors of Peru, and whether the same sacrifices could be imposed on foreigners and on natives;

But at present it is a matter solely of ascertaining whether the situation imposed on natives, and to which they must submit, will be radically modified because foreigners are substituted for natives under one form or another;

And such modification could not easily be admitted, because it would be contrary to the plain proposition that the one to whom a right has been transferred has no greater right than its author.

Whereas the CANEVARO brothers present themselves as holding the disputed evidences of indebtedness by virtue of an indorsement;

As there is invoked in their behalf the ordinary effect of indorsement, which makes the bearer of a note to order to be considered as the direct creditor of the debtor, so that he may repel any exceptions that might have been brought against his indorser;

Whereas, even rejecting the theory according to which outside of bills to order, indorsement is a purely civil conveyance, there is ground in this instance for disregarding the effect attributed to the indorsement;

As a matter of fact, while the date of the indorsement of the certificates of 1880 is not known, it is indisputable that this indorsement was long after maturity; and there is therefore ground for applying the provision of the Peruvian Code of Commerce of 1902 (Art. 436), according to which indorsement subsequent to maturity is valid only for an ordinary conveyance;

As, moreover, the principle invoked above in regard to the effect of indorsement that it does not prevent making against the bearer the exceptions drawn from the very nature of the obligation, which he knew or ought to have known; and it is useless to remark that the CANEVARO brothers knew perfectly the character of the obligations indorsed in their behalf.

Whereas, while the CANEVARO brothers can not, as possessors of the claim by virtue of an indorsement, sustain a more favorable status than that of the company from which they derive their rights, it may be asked whether their status ought not to be different considering them as heirs of JOSÉ FRANCISCO CANEVARO, as shown in a notarial declaration of February 6, 1905;

As, in fact, there is this difference between the case of a conveyance and the case of an inheritance, that in the latter case it is not by a pure act of the will that the claim has passed from one person to another;

As nevertheless no decisive reason is found for admitting that the situation has changed by the fact that Italians succeeded a Peruvian and that the heirs have a new title which enables them to take advantage of the claim under more favorable conditions than the *de cujus*.

As it is a general rule that heirs take property in the condition it was in when in the possession of the decedent.

Whereas, finally, it has been maintained that the Peruvian law of 1889 on domestic debt, without affecting the existing claims against Peru, simply gave the government the privilege of discharging its debts in a certain manner when the creditors should demand the payment thereof, and it is at the time the payment is demanded that the matter should be considered in order to ascertain whether the exception arising from the law may be invoked against all persons, especially against foreigners;

As the present owners of the claim are Italians, there would be reason for the Tribunal to pronounce on the point whether the Peruvian law of 1889 may in spite of its exceptional character be imposed on foreigners;

But whereas this point of view seems in disagreement with the general terms and spirit of the law of 1889;

As Congress, whose acts themselves are not here under examination, intended to liquidate completely the financial situation of Peru and substitute the bonds which it created for the old bonds;

As this situation can not be modified because some creditors present themselves earlier or later for the settlement of their claims;

As this was the situation of the CANEVARO firm, which was Peruvian at the time when the law of 1889 went into force, and as, for the reasons already set forth, this situation has not been changed in law by the fact that the claim has passed to Italians by indorsement or by inheritance.

Whereas, finally, it has been alleged that the Peruvian Government ought to indemnify the claimants for the injury that the delay in discharging the debt of 1880 has caused them, and that the injury consists of the difference between the payment of the consolidated debt in gold and its payment in bonds; that thus the Peruvian Government would be obliged to pay in gold the amount claimed, even admitting that the law of 1889 was properly applied to the claim;

Whereas the Tribunal considers that if it were to follow this line of thought it would be departing from the terms of the agreement to arbitrate, which instructs it solely to decide whether the Peruvian Government ought to pay in cash *or* in accordance with the provisions of the Peruvian law of June 12, 1889; as the Tribunal has admitted the latter alternative, the former solution ought to be excluded; as it is not charged with judging the responsibility which the Peruvian Government may have incurred on any other ground, especially with inquiring whether the delay in paying may or may not be excused by the difficult circumstances in which it found itself, it being granted especially that it would in reality be a question of responsibility incurred toward a Peruvian firm which was the creditor when the delay took place.

Whereas there is reason for inquiring what the amount of the CANEVARO claim was at the time when the law of 1889 came into force;

As it was composed primarily of the principal, amounting to 43,140 pounds sterling, but to this must be added the interest which had accrued up to that time;

As the interest, which according to the decree of December 23, 1880, was 4% per annum up to the respective maturities of the bonds delivered, and which was included in the amount of these bonds, ought from the said maturity dates to be calculated at the legal rate of 6% (Art. 1274 of the Peruvian Civil Code) up to January 1, 1889;

As there is thus obtained the sum of 16,577 pounds 2 shillings 2 pence sterling, which must be added to the principal in order to make up the total amount due to be paid back in bonds of the consolidated debt and to yield interest at 1% payable in gold from January 1, 1889, until final payment;

Whereas, according to what was decided above in regard to the situation of RAPHAEL CANEVARO, it is only in regard to his two brothers that the Tribunal is to pass judgment.

Whereas it is for the Tribunal to determine the mode of executing the award.

FOR THESE REASONS,

The Arbitral Tribunal decides that the Peruvian Government shall, on July 31, 1912, deliver to the Italian Legation at Lima, on account of the brothers NAPOLEON and CARLOS CANEVARO:

1. In bonds of the domestic (1%) debt of 1889, the nominal amount of 39,811 pounds 8 shillings and 1 penny sterling (£39811.8.1) upon the surrender of two-thirds of the bonds delivered on December 23, 1880, to the firm of JOSÉ CANEVARO & SONS;

2. In gold, the sum of 9,388 pounds 17 shillings, 1 penny sterling (£9388.17.1), constituting the interest at 1% from January 1, 1889, to July 31, 1912.

The Peruvian Government may delay the payment of this latter sum until January 1, 1913, on payment of interest thereon at the rate of 6% from August 1, 1912.