



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. UNCT/13/1

THE RENCO GROUP, INC. V. REPUBLIC OF PERU (I)

FINAL AWARD

09 November 2016

Tribunal:

[Toby Landau](#) (Appointed by the State)

[L. Yves Fortier](#) (Appointed by the investor)

[Michael J. Moser](#) (President)

Reproduced with the permission of the International Centre for Settlement of Investment Disputes

[Voir le document sur jsumundi.com](http://jsumundi.com)



Table of Contents

Final Award	0
I. THE PARTIES	1
A. The Claimant	1
B. The Respondent	1
II. THE ARBITRAL TRIBUNAL	2
III. THE PROCEDURAL HISTORY	3
IV. THE APPLICABLE RULES	4
V. SUMMARY OF THE PARTIES' SUBMISSIONS	5
A. Renco's Submissions	5
B. Peru's Submissions	6
VI. THE TRIBUNAL'S DECISION	8
A. Application of the "Costs Follow the Event" Presumption in Article 42(1).....	8
B. The Relative Success of the Parties.....	8
C. The Novelty and Complexity of the Issues.....	9
D. The Conduct of the Parties	10
E. The Tribunal's Costs Order	12
VII. FORMAL AWARD	13

Final Award

I. THE PARTIES

A. The Claimant

1. The Claimant in this arbitration is The Renco Group, Inc. (" **Renco** " or " **the Claimant** "). Renco is a legal entity organized under the laws of New York, United States of America. Renco's principal place of business is at One Rockefeller Place, 29th Floor, New York, NY 10020.

2. Renco is represented in this arbitration by its duly authorised attorneys, King & Spalding LLP, whose address and contact details are as follows:

Mr. Edward G. Kehoe

Mr. Guillermo Aguilar Alvarez

Mr. Henry G. Burnett

Ms. Caline Mouawad

KING & SPALDING LLP

1185 Avenue of the Americas

New York 10036-4003

United States of America

Tel: +1 212 556 2100

Fax: +1 212 556 2200

Emails: ekehoe@kslaw.com

gaguilar@kslaw.com

hburnett@kslaw.com

cmouawad@kslaw.com

B. The Respondent

3. The Respondent in this arbitration is the Republic of Peru (" **Peru** " or " **the Respondent** "). Peru is a State Party to the United States-Peru Trade Promotion Agreement dated April 12, 2006 (" **the Treaty** ").
4. Peru is represented in this arbitration by its duly authorised attorneys, White & Case LLP and Estudio Echecopar, whose addresses and contact details are as follows:
Mr. Jonathan C. Hamilton Ms. Andrea J. Menaker WHITE & CASE LLP 701 Thirteenth Street N.W.

Washington, D.C. 20005 United States of America

Tel: +1 202 626 3600

Fax: + 1 202 639 9355

Emails: jhamilton@whitecase.com

amenaker@whitecase.com

Dra. María del CarmenTovar Gil ESTUDIO ECHECOPAR Av. La Floresta 497, Piso 5 San Borja,
Lima, Peru

Tel: +51 1 618 8551

Fax: +51 1 372 7171

Email: Mariadelcarmen.Tovar@bakermckenzie.com
5. The Tribunal will refer to Renco and Peru collectively in this Final Award as "the Parties".

II. THE ARBITRAL TRIBUNAL

6. The Co-Arbitrator appointed by Renco is The Honorable L. Yves Fortier, CC, QC, whose address and contact details are as follows:
The Honourable Mr. L Yves Fortier, CC, QC Cabinet Yves Fortier 1 Place Ville Marie

Bureau 2822

Montréal, Québec H3B 4R4 Canada

Tel: +1 514 286 2011

Email: yves.fortier@YFortier.ca
7. The Co-Arbitrator appointed by Peru is Mr. Toby T. Landau, QC, whose address and contact details are as follows:

Mr. Toby T. Landau, QC Essex Court Chambers 24 Lincoln's Inn Fields London WC2A 3EG
United Kingdom
Tel: +44 207 8138000
Email: tlandau@essexcourt.net

8. The Presiding Arbitrator appointed by the Parties is Dr. Michael J. Moser, whose address and contact details are as follows:
Dr. Michael J. Moser Level 9, Central Building 1-3 Pedder Street
Central, Hong Kong SAR
China
Tel: +852 3958 2923
Email: mmoser@20essexst.com

III. THE PROCEDURAL HISTORY

9. On July 15, 2016 the Tribunal issued its Partial Award on Jurisdiction (" **Partial Award** "). The Tribunal made the following findings:¹
- (a) Renco has failed to comply with the formal requirement of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration because:
 - (i) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b);
 - (ii) The reservation of rights undermines the object and purpose of Article 10.18(2)(b);
 - (iii) The reservation of rights is incompatible with the "no U-turn" structure of Article 10.18(2)(b); and
 - (iv) The reservation of rights is not superfluous.
 - (b) Renco cannot unilaterally cure its defective waiver by withdrawing the reservation of rights.
 - (c) The Tribunal has no power to sever the reservation of rights from Renco's waiver and remedy Renco's non-compliance with Article 10.18(2)(b).
 - (d) Peru's waiver objection is not tainted by any ulterior motive to evade its duty to arbitrate Renco's claims.

¹ Partial Award on Jurisdiction dated July 15, 2016 ¶ 193.

(e) It follows that Renco has failed to establish the requirements for Peru's consent to arbitrate under the Treaty.

(f) Renco's claims must therefore be dismissed for lack of jurisdiction.

10. In the Partial Award, the Tribunal reserved its decision on the question of costs and invited the Parties to present supplementary written submissions on this issue.²
11. On August 15, 2016 the Parties filed their respective submissions on costs (" **Renco's Submission on Costs** " and " **Peru's Submission on Costs** ").
12. On 9 September 2016 the Parties filed brief further comments on the issue of costs (" **Renco's Further Submission on Costs** " and " **Peru's Further Submission on Costs** ").
13. Following a series of further exchanges between the Parties, on September 2, 2016, the Tribunal wrote to the Parties to provide both sides with a final opportunity to make written submissions on the issue of costs on or before September 9, 2016. No further submissions were received from the Parties.

IV. THE APPLICABLE RULES

14. Article 10.26(1) of the Treaty provides as follows:
A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.
15. The UNCITRAL Arbitration Rules (as revised in 2010) (" **UNCITRAL Rules** ") are the applicable procedural rules. The relevant provisions of the UNCITRAL Rules are as follows:

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
2. The term "costs" includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) The reasonable travel and other expenses incurred by the arbitrators;
 - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

² Ibid ¶¶ 191, 194.

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

[...]

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

V. SUMMARY OF THE PARTIES' SUBMISSIONS

A. Renco's Submissions

16. Renco seeks reimbursement of all recoverable fees and expenses in connection with the filing of its Memorial on Liability dated February 20, 2014 (" **Memorial on Liability** "), including the witness statements and expert reports filed simultaneously with Claimant's memorial. Renco submits that Peru's delay in raising its jurisdictional waiver objection caused Renco to incur the substantial and unnecessary expense of a full merits filing and that Peru should bear Renco's costs in this regard.
17. Beyond an order of costs against Peru with respect to Renco's merits filing, Renco submits that each Party should be ordered to bear the costs of its own legal representation and assistance and that each Party should be ordered to bear half of the costs of the Tribunal and the administering authority. Renco submits that the Tribunal has wide discretion to depart from the "costs follow the event" presumption established by [Article 42\(1\) of the UNCITRAL Rules](#). Renco submits that the Tribunal should depart from the presumption for three reasons:
 - (a) First, Peru's conduct in connection with the delay in raising the waiver objection unnecessarily increased Renco's costs;
 - (b) Second, the issues regarding Peru's objection to Renco's reservation of rights were novel and complex; and

- (c) Third, while Peru prevailed on issues relating to the waiver objection, Peru failed on other issues which were decided by the Tribunal and the Tribunal did not rule on many other issues which were briefed by the Parties.
18. Renco states that it has incurred costs of USD 3,836,067.63 in preparing its Memorial on Liability. This sum is comprised of the following amounts:
- (a) Counsel's fees - USD 3,178,789.95;
 - (b) Experts - USD 429,813.95; and
 - (c) Disbursements - USD 227,463.73.
19. Renco states that it has incurred costs of USD 749,354.30 in preparing its Article 10.20(4) Scope submission. This sum is comprised of the following amounts:
- (a) Counsel's fees - USD 720,420.94.
 - (b) Disbursements - USD 28,933.36.
20. Renco asks the Tribunal to render an award on costs:
- (a) Ordering Peru to pay Renco USD 3,836,067.63 for the costs that Renco incurred preparing its Memorial on Liability;
 - (b) Ordering each Party to bear all other costs of their own legal representation and assistance (i.e. all costs other than the USD 3,836,067.63 referenced immediately above); and
 - (c) Ordering each Party to bear half of the costs of the Tribunal and administering authority.
21. Alternatively, if the Tribunal declines to award Renco the costs it incurred in connection with the filing of its Memorial on Liability, then Renco asks the Tribunal to order that each Party bear the costs of their own legal representation and assistance, and that each side shall bear half of the costs of the Tribunal and the administering authority.
22. In the further alternative, if the Tribunal decides to award Peru any of its costs, Renco submits that the Tribunal should offset those costs against:
- (a) The costs that Renco unnecessarily incurred due to Peru's delay in raising its jurisdictional waiver objection, in the amount of USD 3,836,067.36; and
 - (b) The costs that Renco incurred in its successful Article 10.20(4) submissions, in the amount of USD 749,354.30.

B. Peru's Submissions

23. Peru observes that [Article 42\(1\) of the UNCITRAL Rules](#) establishes a presumption that the costs of the arbitration must be borne by the losing party - the so-called "loser pays" or "costs follow the event" principle. This presumption also applies to the costs of legal representation. Peru submits that since Renco's claims were dismissed, Peru was the successful party in the arbitration and, as such, ought to be awarded costs.
24. Peru further contends that the Tribunal should award costs to Peru because Renco opposed every attempt that Peru made to expeditiously determine the merits of Peru's waiver objection, in addition to other conduct that complicated and delayed the resolution of the dispute. Peru contends that it conducted the arbitration efficiently, including by raising issues regarding the waiver requirement, timely filing the related objection, and consistently requesting to be heard despite Renco's efforts to block Peru from protecting its rights under the Treaty.
25. Peru argues that, in addition to delaying the decision of the waiver issue, Renco repeatedly engaged in actions which were inconsistent with the object and purpose of the Treaty and which aggravated and complicated the dispute, which provides further support for the allocation to Renco of the costs of this arbitration.
26. Peru states that it has incurred costs of USD 8,392,778.62. Peru has provided a breakdown of this sum into the following three phases:
- (a) Phase 1: Before Notification of Preliminary Objections:
 - (i) Counsel's fees - USD 2,154,559.80;
 - (ii) Experts - USD 654,613.80;
 - (iii) Disbursements - USD 98,564.39;
 - (iv) Tribunal / administrative expenses - 175,000.
 - (b) Phase 2: After Notification of Preliminary Objections:
 - (i) Counsel's fees - USD 1,306,744.66;
 - (ii) Experts - USD 142,327.97;
 - (iii) Disbursements - USD 9,777.13;
 - (iv) Tribunal / administrative expenses - USD 200,000.
 - (c) Phase 3: After Peru Objected to Ongoing Violations:
 - (i) Counsel's fees - USD 2,374,665.70
 - (ii) Experts - USD 992,993.94;
 - (iii) Costs - USD 83,531.23;
 - (iv) Tribunal / administrative expenses - USD 200,000.

27. Peru contends that its total costs are reasonable in amount, especially when viewed in the context of Renco's claim for damages in excess of USD 800 million and the fact that Renco unnecessarily increased the length and complexity of this arbitration, impacting Peru's costs, for example by raising numerous obstacles to Peru's attempts to have its waiver objections briefed and decided as a preliminary question.
28. Peru therefore asks the Tribunal to render an award of costs in the amount of USD 8,392,778.62.

VI. THE TRIBUNAL'S DECISION

A. Application of the "Costs Follow the Event" Presumption in Article 42(1)

29. The Tribunal observes that [Article 42\(1\) of the UNCITRAL Rules \(2010\)](#) establishes a presumption that "[t]he costs of the arbitration shall in principle be borne by the unsuccessful party or parties". This presumption applies to the costs of the Tribunal as well as the Parties' legal and other costs, provided that such costs are reasonable in amount. Nevertheless, the Tribunal is empowered to "apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case".
30. In the Partial Award, the Tribunal concluded that it had no jurisdiction over Renco's claims because Renco had failed to provide an effective waiver of rights, as required by Article 10.18(2)(b) of the Treaty, and that accordingly Renco had failed to establish the requirements for Peru's consent to arbitrate under the Treaty. Given this conclusion, Renco must be regarded as the "unsuccessful party" for the purposes of [Article 42\(1\) of the UNCITRAL Rules](#). The costs of the arbitration must therefore, in principle, be borne by Renco.
31. Nevertheless, the Tribunal is entitled to have regard to the "circumstances of the case" to determine whether it is reasonable to apportion the costs of the arbitration between the Parties. In the considered opinion of this Tribunal, three circumstances justify a departure from the presumption that Renco must bear the costs of the arbitration, namely:
 - (a) The fact that Peru has only achieved a relative, rather than an absolute, measure of success;
 - (b) The fact that the issues raised in the waiver phase of the arbitration were novel and complex; and
 - (c) The fact that Peru delayed in raising its objection to the Tribunal's jurisdiction on the basis of Renco's non-compliance with Article 10.18(2)(b) of the Treaty.

B. The Relative Success of the Parties

32. As to the first factor listed above, it is commonplace for arbitral tribunals to evaluate the relative success of the parties in reaching a determination on costs. For example, in *ICS Inspection and Control Services v Argentina*, the tribunal upheld one of the respondent's jurisdictional objections but declined to award the entirety of the respondent's legal costs, in part, because the tribunal had not ruled on several other jurisdictional objections which had been briefed by the parties.³
33. In the waiver phase of this arbitration, it is true that Peru succeeded in establishing that Renco's waiver did not comply with Article 10.18(2)(b) and hence that an essential element of Peru's consent to arbitration was absent. However, Peru raised two other objections to the Tribunal's jurisdiction in its Memorial on Waiver filed on July 10, 2015, namely:⁴
- (a) The contention that Renco's wholly-owned local enterprise, Doe Run Peru S.R. LTDA ("DRP"), had failed to provide a waiver under Article 10.18(2) of the Treaty; and
 - (b) The contention that Renco has (through DRP) initiated and/or continued proceedings in the Peruvian courts concerning measures alleged to constitute a breach of the Treaty in this arbitration.
34. It was unnecessary for the Tribunal to reach any decision on these issues because of the Tribunal's decision on Renco's non-compliance with the formal requirement of Article 10.18(2)(b). Nevertheless, these issues were fully briefed in the Parties' memorials and they were the subject of extensive oral submissions at the hearing on waiver and in supplementary post-hearing written submissions. As the arbitral tribunal observed in *ICS Inspection and Control Services v Argentina*, it cannot be assumed that the Claimant's responses to these arguments were without merit.⁵
35. Moreover, the Tribunal observes that Renco was the successful party in the Tribunal's decision on the Scope of Preliminary Objections under Article 10.20(4) of the Treaty.⁶ The Parties exchanged extensive submissions following Peru's notification of preliminary objections, which encompassed issues relating to the Tribunal's jurisdiction *ratione temporis* as well as Renco's compliance with the preconditions contained in investment agreements at issue in the arbitration. In view of the Partial Award, the Tribunal did not reach a decision on these jurisdictional objections and, again, it cannot be assumed that the Claimant's responses to these arguments were without merit.
36. For the reasons set out above, Peru's success in the arbitration has been qualified, and not absolute, and the Tribunal considers that this circumstance justifies a departure from the presumption that "costs follow the event".

C. The Novelty and Complexity of the Issues

37. As to the second factor listed above, arbitral tribunals have observed that if the issues raised in an arbitration are especially novel or complex then this circumstance may justify a departure from the

³ *ICS Inspection and Control Services v Argentina*, Award on Jurisdiction, February 10, 2012, ¶ 342 (CLA-147).

⁴ Partial Award ¶ 61

⁵ *ICS Inspection and Control Services v Argentina*, Award on Jurisdiction, February 10, 2012, ¶ 342 (CLA-147).

⁶ Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20(4), December 18, 2014.

presumption that "costs follow the event". For example, in *Glamis Gold v The United States of America*, the tribunal ordered the unsuccessful claimant to bear two-thirds of the costs of the arbitration, and each party to bear their own legal and other costs, because, in part, the "Claimant raised difficult and complicated claims based in at least one area of unsettled law".⁷

38. Peru contends that the "novelty factor" is no longer apposite when apportioning costs because investment arbitrations "have become so well known and established as to diminish their novelty as dispute resolution mechanisms", citing the observations made by the arbitral tribunal in *International Thunderbird Gaming Corp v The United Mexican States*.⁸ Moreover, Peru contends that the issue of Renco's compliance with Article 10.18(2)(b) was neither novel nor complex because arbitral tribunals have repeatedly held that waivers are invalid if an investor purports to carve out from the scope of the waiver certain domestic court proceedings.
39. The Tribunal observes that Renco does not rely on the "novelty and complexity" of investor-state dispute settlement *per se* as relevant circumstance for the purposes of [Article 42\(1\) of the UNCITRAL Rules](#). Rather, Renco contends that the "novelty and complexity of the issues" raised in the arbitration justify a departure from the "costs follow the event" principle.⁹ In the Tribunal's opinion, the novelty and complexity of the issues are clearly relevant circumstances in determining whether to apportion costs between the Parties.
40. The issues at stake in the waiver phase of the arbitration were undoubtedly novel and complex. In the Partial Award, the Tribunal observed that "[t]he issues raised by the Parties involve complex issues of interpretation of the relevant provisions of the Treaty".¹⁰ The Tribunal also observed that the issue of Renco's non-compliance with Article 10.18(2)(b) was "inherently complex" and the Tribunal found these issues "extremely difficult to resolve, requiring extensive and intensive deliberations by the Tribunal over many months".¹¹
41. So far as the Tribunal is aware, no previous investment tribunal had considered the issue of whether an investor was entitled unilaterally to cure a waiver which suffered from a defect in form, nor whether an arbitral tribunal was empowered to apply the severability principle to remedy a defective waiver, nor whether an objection to jurisdiction of the kind raised by Peru at a late stage of the proceedings amounted to an abuse of rights. Moreover, on the first of these issues, the Tribunal's decision was reached by a majority of the Tribunal.¹² In the Tribunal's opinion, these considerations justify a departure from the presumption that "costs follow the event".

D. The Conduct of the Parties

42. As to the third circumstance referred to above, arbitral tribunals have regularly scrutinized the conduct of the parties during the proceedings to determine whether to apportion costs. For

⁷ *Glamis Gold Ltd v The United States of America*, UNCITRAL, Award, June 8, 2009 ¶ 833 (CLA-134).

⁸ *International Thunderbird Gaming Corp v The United Mexican States*, UNCITRAL, Award dated January 26, 2006 ¶ 218 (CLA-19).

⁹ Renco's Submission on Costs ¶ 15.

¹⁰ Partial Award ¶ 67.

¹¹ Partial Award ¶ 124.

¹² Partial Award ¶ 157.

example, in *Zhinvali v Georgia*, the tribunal awarded the claimant a substantial portion of its costs even though the tribunal dismissed the case on jurisdictional grounds, because the respondent had raised a belated objection to jurisdiction and caused the claimant to incur unnecessary costs.¹³

43. In the Partial Award, the Tribunal observed that it had been troubled by the manner in which Peru's waiver objection had arisen in the context of the arbitration. The Tribunal made the following observations in this regard:¹⁴

The arbitration had already been on foot for quite some time before Peru filed its Memorial on Waiver on July 2015. By this stage over four years had passed since Renco filed its Notice of Arbitration; the Tribunal had already issued Procedural Order No. 1 which recorded the agreed briefing schedule for the arbitration; Renco had filed its Memorial on Liability; the Parties had exchanged voluminous submissions in connection with Renco's challenge to the scope of Peru's Preliminary Objections; and the Tribunal had issued a substantive decision on December 18, 2014 in relation to the Scope of Peru's Preliminary Objections under Article 10.20(4). Clearly it would have been preferable for all concerned if Peru had raised its waiver objection in a clear and coherent manner at the very outset of these proceedings. Instead, they emerged piecemeal over a relatively lengthy period of time. This issue is considered further at paragraphs 180-183 below.

[...]

Indeed, while Peru complained to Renco many years ago that it considered to Peruvian bankruptcy proceedings involving DRP violated Article 10.18(2), Peru did not raise any clear and specific objection in relation to Renco's reservation of rights until Peru filed its Comments on the submission of the United States of America on September 10, 2014... [and] [t]his submission was not developed in any depth until Peru filed its Memorial on Waiver in July 2015, where Renco's compliance with the formal requirements of Article 10.18(2)(6), by reason of the reservation of rights, was placed squarely in issue.

44. Peru maintains that it "raised its objections to Renco's serious violations of an express requirement of the Treaty in a timely and diligent manner".¹⁵ Peru observes that in its preliminary response to the Notice of Arbitration dated September 9, 2011 it raised concerns regarding "the scope of the mandatory waiver" and "the scope of the consent to arbitration," and that it reserved all rights, including as to jurisdiction.¹⁶ Peru also observes that in its preliminary objections dated March 21, 2014 it stated that "Renco has presented an invalid waiver in this proceeding because it does not conform with the language required by the Treaty".¹⁷ Peru also refers to a "one-page figure" summarising the waiver objections and filed together with its Comments on the submission of the United States of America on September 10, 2014.¹⁸
45. In the Tribunal's opinion, none of the documents to which Peru has referred in its costs submission

¹³ *Zhinvali Development Limited v Georgia*, ICSID Case No. ARB/00/1, Award, Jan. 24, 2003, ¶¶ 420-30 (CLA-187).

¹⁴ Partial Award ¶¶ 123, 182-183.

¹⁵ Peru's Submission on Costs ¶ 16.

¹⁶ Peru's Submission on Costs ¶ 14(a).

¹⁷ Peru's Submission on Costs ¶ 14(b).

¹⁸ Peru's Submission on Costs ¶ 14(b).

amount to a clear and specific objection to the validity of the reservation of rights contained in Renco's written waiver. The fact remains that the reservation of rights was not placed squarely in issue until Peru filed its Memorial on Waiver in July 2015. By this stage, Renco had incurred substantial costs preparing its Memorial on Liability and its submissions in connection with the scope of preliminary objections under Article 10.20(4).

46. The Tribunal accepts Peru's submission that, in accordance with the briefing schedule contained in Annex A of Procedural Order No. 1 and [Article 23\(2\) of the UNCITRAL Rules](#), Peru was not required to raise an objection to Renco's violation of the waiver requirement until its Counter-Memorial on Liability.¹⁹ This case is therefore distinguishable from *Zhinvali v Georgia* where the respondent State failed to raise its jurisdictional objection until it filed its rejoinder, and had failed to raise it as a preliminary objection in its counter-memorial in breach of Rule 41(1) of the ICSID Arbitration Rules.
47. Nevertheless, the Tribunal considers that the arbitral proceedings could have been conducted more efficiently if Peru had raised a clear and specific objection to the reservation of rights in Renco's written waiver at the very outset of the arbitration. If an early decision had been made on this issue, then the Parties could have saved substantial legal fees and experts' fees in connection with Renco's claims on the merits. The Tribunal is not persuaded by Peru's submission that Renco impeded Peru's attempts to have the waiver issue addressed in the arbitration. In the Tribunal's opinion, Peru's delay in raising the waiver objection is a relevant circumstance which justifies a departure from the presumption that "costs follow the event".
48. The question which remains is whether Peru's delay warrants the costs order sought by Renco, namely that Peru must pay Renco USD 3,836,067.63 for the costs that Renco incurred preparing its Memorial on Liability. The Tribunal accepts that it has wide discretion in determining whether and, if so, how to apportion costs under [Article 42\(1\) of the UNCITRAL Rules](#). However, the Tribunal is not persuaded that this discretion should be exercised so as to require Peru to pay Renco's costs unless Peru "has acted frivolously, in bad faith or otherwise irresponsibly".²⁰
49. The Tribunal has already found that Peru's waiver objection was not tainted by any ulterior motive to evade its duty to arbitrate Renco's claims. Rather, in raising its waiver objection, Peru sought to vindicate its right to receive a waiver which complied with the formal requirement of Article 10.18(2)(b) and a waiver which did not undermine the object and purpose of that Article.²¹ In view of these findings, the Tribunal is not persuaded that Peru should be required to bear Renco's costs in filing its Memorial on Liability.

E. The Tribunal's Costs Order

50. In the light of the three circumstances set out above, the Tribunal has concluded that it would be reasonable to order each Party to bear their own legal and other costs incurred in relation to the

¹⁹ [Article 23\(2\) of the UNCITRAL Rules](#) provides that "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence".

²⁰ L. Nurick, "Costs in International Arbitrations," (1992) 7 ICSID Rev-Foreign Investment LJ 57, 58 (CLA-180).

²¹ Partial Award ¶ 186.

arbitration (i.e. [Article 40\(2\)\(e\) of the UNCITRAL Rules](#)) and that each Party shall bear half of the costs of the Tribunal and administering authority (i.e. Article 40(2)(a), (b), (c) and (f) of the UNCITRAL Rules).

51. The Tribunal records that the Parties have deposited a total of USD 1,150,000 (USD 575,000 each Party) with ICSID to cover the arbitration direct costs, which include: (i) the fees and expenses of the Tribunal and the Tribunal's Assistant; ii) ICSID's fees as administering authority; and (iii) other direct expenses including court reporting, interpretation, hearing broadcast, translations, courier, audio visual services and estimated charges related to the dispatch of this Award.
52. The fees and expenses of the Tribunal and the Tribunal's Assistant amount to USD 673,308.42. This sum is comprised of the following amounts:

Arbitrator	Fees	Expenses
The Honorable L. Yves Fortier, CC, QC	USD 96,937.50	USD 8,623.09
Mr. Toby T. Landau, QC	USD 118,125.07	USD 16,943.79
Dr. Michael J. Moser	USD 360,525.00	USD 58,758.97
Tribunal's Assistant	USD 13,395	
Total	USD 588,982.57	USD 84,325.85
Total (Fees + Expenses)	USD 673,308.42	

53. Pursuant to paragraph 5.1 of Procedural Order No. 1, the Parties agreed that ICSID would be designated as the administering authority and that the cost of ICSID's services would be included in the costs of the arbitration. ICSID's administrative fees amount to USD 128,000.
54. Payments made by ICSID for other direct expenses of the proceeding (i.e. court reporting, interpretation, hearing broadcast, translations, courier, audio visual services and estimated charges related to the dispatch of this Award) amount to USD 46,649.59.
55. Based on the above figures, the arbitration costs (i.e. items listed in Article 40(2)(a), (b), (c) and (f) of the UNCITRAL Rules), as of today, amount to USD 847,958.01. This sum has been deducted from the advances made to ICSID by the Parties. Once the costs related to the dispatch of this Award have been deducted, the ICSID Secretariat will provide the parties with a detailed financial statement. The remaining balance in the case account shall be reimbursed to the Parties in equal shares in accordance with [Article 43\(5\) of the UNCITRAL Rules](#).

VII. FORMAL AWARD

56. For all of the foregoing reasons, and rejecting all submissions, claims and counterclaims to the contrary, the Tribunal **HEREBY FINDS DECLARES AND AWARDS** as follows:

(a) Each Party shall bear their own legal and other costs incurred in relation to the arbitration;

(b) Each Party shall bear half of the arbitration costs of the proceeding indicated in paragraph 55 of this Award. The ICSID Secretariat will provide the parties with a detailed financial statement reflecting the final costs and balance in the case account; and

(c) ICSID shall reimburse to each Party half of the unexpended balance of the advance on costs.