

Toxic Tort Lawsuit Against U.S Investor May Proceed Despite Parallel Arbitration Proceeding Brought Under Free Trade Agreement

Section 3 of the Federal Arbitration Act (“FAA”) entitles litigants in federal court to stay an action that is “referable to arbitration under an agreement in writing.” 9 U.S.C. §3. The Eight Circuit Court of Appeals was recently asked to decide whether a District Court erred by denying a motion for a mandatory stay pending the outcome of an arbitration between a U.S. investor and Peru. The specific issue raised by the case was whether claims filed in the United States by Peruvian children against the U.S. owner of a manufacturing facility in Peru were “referable” to an ongoing arbitration between the manufacturer and Peru. In Reid v. Doe Run Res. Corp., 12-1065, 2012 WL 5476836 (8th Cir. Nov. 13, 2012), the Eighth Circuit held that the District Court properly denied a mandatory stay under the FAA because the claims in the lawsuit were not referable to arbitration.

In 1997, the U.S. Renco Group and Doe Run (“Renco”) purchased from a Peruvian state-owned company a lead smelter facility in La Oraya, Peru (the “Facility”). Shortly thereafter, however, several studies revealed that the children of La Oraya under 6 years of age had elevated blood lead levels. In response to this evidence, the Peruvian government began citing Renco for environmental violations. In 2008, the children of La Oraya filed a toxic tort action against Renco in the United States, alleging that they had been contaminated by the Facility owned and operated by Renco.

In 2009, Renco decided to close down the Facility due to the high, unaffordable cost of the environmental fines. Renco commenced an arbitration against Peru claiming that Peru’s actions (environmental citations) violated the terms of their U.S-Peru Free Trade Agreement (FTA). Renco further alleged that under its agreement with the Peruvian state-owned company when it bought the Facility, Peru had the duty to indemnify, defend, and hold harmless Renco from all toxic tort claims brought by the La Oraya children. Because of the pending arbitration, Renco moved the court for a mandatory stay of the children’s toxic tort action in the United States until the issues in the arbitration were decided. The United States District Court denied the motion to stay and Renco appealed.

The Eight Circuit affirmed the District Court’s ruling denying the stay. The Eighth Circuit rejected Renco’s argument that the “claims in this case were similar because they are based upon the same operative facts and inherently inseparable from the claims in the arbitration.” The Eighth Circuit found that the claims were not referable to arbitration because Renco’s arbitration with Peru involved separate and distinct issues concerning breach of contract and indemnification. In contrast, the lawsuit filed by the La Oraya children concerned whether Renco negligently operated the Facility, based on its handling and disposing of metals at the Facility. The Court further noted that the children will not be bound by the arbitration decision, thus there was very little risk of inconsistent rulings.

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