

Kluwer Arbitration Blog

Evidence of Odebrecht's Corruption and Third-Party Rights: Arbitration Highlights of the Ruta del Sol Award

Juan Sebastián Arias, Laura Lamo (Philippi Prietocarrizosa Ferrero DU & Uría) · Friday, May 8th, 2020

The *Ruta del Sol* [arbitral award](#) was one of the most important awards in 2019 in Colombia and possibly in the entire region. The arbitral tribunal sitting to resolve the *Ruta del Sol* arbitral proceeding (the “Tribunal”) determined the consequences of securing an infrastructure concession contract in Colombia through corrupt practices and served as pioneers for such determination, setting a precedent for future arbitral tribunals convened to resolve a dispute involving similar facts. The Tribunal declared the Concession Contract executed by the parties in connection with the Ruta del Sol Project null and void for illegal purposes and abuse of power. In light of such declaration, the Tribunal ordered payments be made to the parties involved -including third parties in good faith-, in accordance with Law 1882 of 2018.

The award serves as an important precedent for project finance transactions and for the infrastructure sector generally in the region. As it relates to arbitration, it raises several interesting topics, including (i) the way the Tribunal handled the evidence related to acts of [corruption](#) and (ii) the [intervention](#) of third parties interested in the issue being resolved through the arbitral proceeding, both of which we discuss in further detail below.

Background of the dispute

On January 14, 2010, the Colombian National Agency of Infrastructure (“ANI”) and the concessionaire Concesionaria Ruta del Sol S.A.S. (the “Concessionaire”) entered into the third generation Concession Contract No. 001 of 2010 (the “Concession Contract”) for the construction, operation and maintenance of Sector 2 of Ruta del Sol, a national toll road project (the “Ruta del Sol 2 Project”) for approximately US\$ 935,000,000 (approximately COP\$ 3,2 billions). The Concession Contract required the Concessionaire to extend the Ruta del Sol 2 Project 528 kilometers. The Concessionaire was formed by Odebrecht, holding 62% of its equity interests, Grupo Aval (the largest Colombian financial group) through Corficolombiana and Episol collectively holding 33% of its equity interests and Grupo Solarte holding the remaining 5%.

Obtaining financing for the performance of the obligations under the Concession Contract was the Concessionaire’s responsibility. The Concession Contract required the Concessionaire to provide the resources (including financial resources) to carry out all of its obligations thereunder. The primary source of financing was debt from financial institutions that was secured with the Ruta del

Sol 2 Project and the proceeds generated by such project.

Toward the end of 2016 and in the beginning of 2017, Odebrecht admitted to paying bribes to obtain infrastructure contracts throughout Latin America, including Colombia, which brought the Ruta del Sol 2 Project within the scope of the corruption scandal. Odebrecht specifically confessed to having paid bribes in exchange for being awarded the Ruta del Sol 2 Project, which later followed a confession by the Vice Minister of Transport, Gabriel Ignacio García Morales, to having accepted the bribe payments. The Public Prosecutor's office in Colombia found that the bribes paid to be awarded the Ruta del Sol 2 Project amounted to US\$ 6,5 million. As a result of such information coming to light, the Concessionaire and ANI decided to terminate the Concession Contract.

The Arbitral Proceeding

In 2015, the Concessionaire initiated a domestic arbitral proceeding against ANI, in accordance with the dispute resolution procedures provided for in the Concession Contract, requesting, among other things, the Tribunal to declare that ANI breached the Concession Contract by not recognizing certain events that would exclude liability and would consequently require ANI to compensate the Concessionaire for damages caused to the Concessionaire of approximately US\$ 282,751,000 (COP\$716,491,710,632) resulting from ANI's breach.

ANI filed a counterclaim requesting the Tribunal to declare the Concession Contract null and void given the unlawful acts that gave rise to the Concession Contract, despite the fact that the Concession Contract had already been terminated by the mutual agreement of the parties. As a result, ANI claimed that the Tribunal should order the termination of the Concession Contract and declare that ANI is only obligated to compensate the Concessionaire for the activities performed and fulfilled prior to the termination of the Concession Contract and as long as they had benefited ANI, and further, limit the amount of such compensation to the benefit actually received by ANI.

In May 2018, the financial institutions that provided financing to the Ruta del Sol 2 Project (the "Lenders") were admitted as *co-adjutant* third parties in the arbitral proceedings.

Although the arbitral award ultimately rendered includes several legal issues that would be worth discussing, this post is limited to discussing two aspects relevant to the world of arbitration: firstly, the role the Tribunal assumed in assessing the evidence to determine corruption as a proven fact and the applicable standard of proof and secondly, the participation of third parties in the arbitral process, not bound by the arbitration clause.

The role of the Tribunal in obtaining and assessing the evidence regarding the corruption allegation and the applicable standard of proof

The Tribunal declared the Concession Contract and its addendums and complementary agreements null and void, because they were signed with illegal purpose and motive, considering that the Concession Contract was awarded due to an abuse of power.

In this case, different from most of the cases where a defendant alleges bribery, but cannot

overcome the complex burden of proof associated with that type of allegation, the Tribunal already had apparently sufficient evidence of the illegal actions, including an admission by the relevant parties involved in both the Ruta del Sol 2 Project and the broader corruption scandal.

The Tribunal's decision is based mainly, but not only, on the report of the United States Department of Justice and the plea agreement entered into with Odebrecht, where the company admitted to the criminal activities developed in different countries in Latin America, including Colombia, to win bids for infrastructure projects. As part of the plea agreement, Odebrecht had to file criminal complaints in each country where it carried out illegal actions. Given this requirement, Luis Antonio Bueno Junior, Odebrecht's superintendent in Colombia, filed a criminal complaint against Gabriel Ignacio García Morales, initiating a criminal procedure where Garcia admitted to the penal charges for bribery and recognized he advised Odebrecht on the preparation of a bid that would comply with all of the parameters of the bidding process in exchange for US\$ 6,500,000.

Despite having this evidence of corruption, the Tribunal decided to go beyond and did not limit its determination on the evidence it obtained from the parties and other proceedings. The Tribunal assumed an active role: it undertook its own investigation, it obtained additional evidence and made its own determination regarding the validity of the corruption allegations.¹⁾

The Tribunal, deviating from Department of Justice and the Colombian criminal authorities' determinations, concluded that the participation of García Morales in the adjudication of the Contract went beyond simply guaranteeing that the bid presented by the Concessionaire complied with the parameters of the bidding process, but actually ensured that the Concession Contract was effectively awarded to Odebrecht through the Concessionaire.²⁾

Although there is no reference in the award regarding the standard of proof applicable to the alleged acts of corruption, the truth is that the Tribunal went far beyond the application of a balance of probabilities test. As mentioned above, the arbitrators acting pursuant to its procedural powers, gathered evidence to prove -without any doubt- the alleged corruption facts and specially the key role of Mr. García Morales, which more closely resembles a standard of clear and convincing evidence.

Thus, the Tribunal's role illustrates two of the positions in the debates related to corruption allegations in arbitration: (i) the Tribunal assumed an inquisitor approach -usual in civil law- as opposed to an adversarial approach (which would normally let the parties prove their case), and (ii) the applicable standard of proof was closer to clear and convincing evidence -a stricter standard of proof than the balance of probabilities, which is customary in these types of civil cases. The relevance of this case in Colombia and in the region may explain an arbitrator's decision to act as a prosecutor in a commercial arbitration involving serious corruption allegations.

Can Third Parties be affected by the Arbitral Award?

Why were the Lenders interested in participating in the arbitral proceeding?

One of ANI's claims requested that the Tribunal declare the Concession Contract null and void. [Article 20](#) of Law 1882 of 2018 – interpreted under [judgment C-207](#) of the Constitutional Court – provides the roadmap for liquidating mutual restitution concession agreements when they are

terminated early as a result of being declared null and void, including the payments that third parties acting in good faith (“*tercero de buena fe*”) should receive. Therefore, the determination of the Tribunal of this issue would certainly impact the Lenders and, therefore, the Lenders had an interest in being heard before a decision was rendered in the arbitral proceeding.

Through a procedural order, the Tribunal admitted the inclusion of four Lenders, based on a procedural institution contained in the Colombian Procedural General Code called *coadyuvancia*, which allows third parties that may be affected by a decision of the Tribunal to intervene in the arbitral proceedings. By virtue of this procedural order, such Lenders were able to submit written and oral arguments, participate in evidentiary hearings, submit closing arguments (such Lenders even filed [several motions](#) to set aside the arbitral award with the Council of the State, although such documents are not public yet).

In an international arbitration scenario, would such Lenders have had the possibility to participate in the proceeding?

The provisions of the [Colombian Arbitration Act](#) applicable to international arbitral proceedings contain no reference to the possibility for a third party to join such proceeding. Under the [Arbitration Rules of the Bogotá Chamber of Commerce](#) applicable to the *Ruta del Sol 2* arbitration, there is no reference either. Other international arbitration rules, such as the [ICC Rules](#) provide in Article 8 for the possibility of joinder. However, such rules do not cover the possibility for a third-party to voluntarily join the arbitral proceedings without being invited. The reason is because an arbitration results from a contract agreed by parties and, therefore, no other party can intervene.

If the arbitration of the Ruta del Sol 2 Project had been deemed international under Colombian Arbitration Act, the approach of the Tribunal regarding the participation of the Lenders could have been different.

In disputes, such as this one, in which there are multiple contracts each with dispute resolution clauses that are not necessarily identical, it is very likely that the rights of third parties not involved in the arbitral proceedings may be affected by the resolution of the claims between the two parties. This situation puts on the table the principles of *res judicata*, right to be heard by all parties and the enforceability of the award, each of which are pillars of any legal system -regardless of its civil or common law tradition- and, also, international arbitration.

In this regard, there are two premises that are settled in international arbitration: (i) the arbitration award has *res judicata* effects, and (ii) the award cannot affect a third party who was not part of the arbitration. However, the interaction between these two premises is not perfect because there may be an award between party A and party B that affects party C – the case of the Ruta del Sol, if it had been an international case.

Scholars’ commentary on this issue have pointed to the following courses of action for third parties affected by an arbitral award³⁾ (i) the third party affected by the arbitration award has the right to go to a new competent authority to assert its rights; (ii) the authority should not be absolutely unaware of the previous decision; (iii) the third party – in some national laws – will have the right to file a motion to set aside the award before a judge – this is not the case in Colombia where there is no rule regarding the possibility of a third party filing an action for annulment against an arbitral

award.

There is currently no ideal solution to resolve this problem. One mechanism that could apparently address this problem at an early stage is to design multi-party arbitration agreements. However, it does not seem to be a viable mechanism in response to the multiplicity of interests and economic relations that exist in these projects. In Colombia, no initiative related to this issue is being developed neither for the Colombian Arbitration Act, nor for the Arbitration Rules of the Bogotá Chamber of Commerce.

Conclusion

The arbitration related to the Ruta del Sol 2 Project has raised several legal debates, the intervention of third parties in the arbitral proceeding being one of them. Since foreign companies are currently highly active in Colombian infrastructure projects, the possibility of having international arbitration is high and so is the possibility of third parties having difficulties to be heard in those arbitral proceedings.

For the time being, we would recommend all those actors participating in infrastructure projects, to carry out a detailed analysis when designing and agreeing on the dispute resolution mechanisms in their contracts, to make sure each actor's interests are protected.

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References

“*The Arbitral Tribunal had to perform an important ex-officio evidentiary activity exhaustively described before to incorporate to the file the evidence required to take the correspondent decisions on law-grounds [...]*” (Free translation) Award, page 67.

This finding allowed the Arbitral Tribunal to conclude the Concession Contract was entered with abuse of power and had illicit object, and therefore, fitted within the nullity grounds of a public contract under Colombian law.

See, STAVROS BREKOULAKIS “The effect of an arbitral award and third parties in international arbitration: *res judicata* revisited”, *The American Review of International Arbitration*, Vol.16; BOCHAROVA NATALIYA, “The scope of the Arbitral Award Binding Effect (Interest of “Third Parties” in International Arbitration), *Russian Law Journal*, Volume V (2017) Issue 2.

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