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Annulment Procedure on the Arbitral Awards Involving Long-standing Dispute between Rutas de Lima and Municipalidad de Lima

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On 12 March 2024, Judge Ana C. Reyes, presiding over the District of Columbia (“D.C.”) Circuit, issued a [decision](#) on the petition to set aside filed by the Municipalidad de Lima concerning two arbitral awards. Judge Ana C. Reyes denied the petition from the Municipalidad de Lima.

This post describes the background to this long-standing dispute, the arbitration proceedings between the parties, and the recent decision on the annulment of the awards.

Contractual Background

Before delving into the specifics of the annulment decision, it is crucial to grasp the underlying facts surrounding the two arbitral awards.

The history of these two arbitral awards mirrors that of Groundhog Day. On 13 January 2013, Rutas de Lima S.A.C., a conglomerate integrated by two Brazilian subsidiaries of Odebrecht S.A., [signed](#) a concession contract with Municipalidad de Lima. This contract [stipulated](#) that Rutas de Lima would be responsible for building, improving, and maintaining three sections of highways Panamericana Sur, Panamericana Norte and Ramiro Prialé. According to the contract, the parties agreed that Rutas de Lima would derive revenue from both the exploitation of existing toll booths and new ones to be constructed.

In 2016, the New Chillón Toll Unit (“NCTU”) was inaugurated along a major thoroughfare. This development prompted the Municipalidad de Lima to shutter the NCTU, and subsequently reject contractual rate increases at existing toll booths. Moreover, the Municipalidad de Lima [refused](#) to compensate Rutas de Lima for its resulting losses.

Furthermore, in 2016, Brookfield acquired 57% of Rutas de Lima, while Odebrecht retained the 25%, and the remaining 18% was controlled by Sigma. The new organization of the company became relevant in 2021, amidst the “Lava Jato” scandal, a bribery scheme implemented by Odebrecht to secure contracts across Latin America. In response, Brookfield proposed a modification to the contract, which would have allowed a third company to acquire Odebrecht’s

25% stake in Rutas de Lima. However, the Municipalidad de Lima **did not approve** Brookfield's proposal, thus maintaining the existing structure of Rutas de Lima.

Arbitral Awards

In 2018, Rutas de Lima initiated a first arbitration seeking compensation from the Municipalidad de Lima due to the closure of the NCTU. An *ad hoc* tribunal was constituted, which decided that the arbitration would be conducted under the UNCITRAL Arbitration Rules, the imperative rules of the seat of arbitration, and those rules established by the arbitral tribunal in this proceeding. The seat of arbitration was determined to be Washington D.C. In its defense, the Municipalidad de Lima argued that the contract had become null and void because Rutas de Lima had obtained it through bribing government officials. Specifically, the Municipalidad de Lima asserted that Odebrecht, Rutas de Lima's parent company, secured the contract in 2012 by assisting Mayor Villaran's anti-impeachment process. Additionally, the Municipalidad de Lima claimed that Odebrecht had made two payments in 2014 to secure the Bankability Addendum to the contract.

In 2020, the arbitral tribunal rendered its **decision**. It found that neither the contract nor the addendum was void due to the corruption allegations. The lack of evidence connecting the alleged payments to the contract was decisive in supporting this finding. Consequently, the arbitral tribunal ordered the Municipalidad de Lima to compensate Rutas de Lima for the lost revenue from the Chillón Toll Unit and the NCTU, along with providing a formula for calculating future damages resulting from Rutas de Lima's inability to collect tolls at the NCTU after 13 January 2017. Finally, the arbitral tribunal awarded Rutas de Lima interest on the damages.

In 2019, Rutas de Lima initiated a second arbitration seeking damages resulting from the Municipality de Lima's refusal to permit the agreed toll rate increase in December 2017. An *ad hoc* tribunal was subsequently constituted. The arbitration was also conducted under the UNCITRAL Arbitration Rules, the imperative rules of the seat of arbitration, Rules 3 and 9 of the [IBA Rules on the Taking of Evidence in International Arbitration](#) approved by the IBA on 29 May 2010. The arbitral tribunal decided that all other IBA Rules on the Taking of Evidence in International Arbitration could be relied on by the parties and the tribunal as procedural guidance for this arbitration. The seat of arbitration was Washington D.C.

The Municipalidad de Lima contended that the concession contract, the Bankability Addendum, and the 2015 and 2016 Memoranda of Agreement were null and void due to alleged bribery by Rutas de Lima. However, in 2022, the arbitral tribunal rendered its **second award**, granting Rutas de Lima damages for lost profits, along with non-compounding interests and arbitration costs. The arbitral tribunal also concluded that there was insufficient evidence to establish that payments made by Odebrecht to the anti-recall campaign were related to the contract or the Bankability Addendum.

The timeline of events undermined Municipalidad de Lima's position. Additionally, the selection of unverifiable excerpts from prospective cooperating witnesses by the Prosecutor's Office in Peru and the Municipalidad de Lima did not persuade the arbitral tribunal, as these witnesses had incentives to cooperate with local Peruvian courts and accordingly were deemed unreliable. Arbitrator Martínez Coco issued a partial dissenting opinion, giving weight to one witness statement and noting a change in Rutas de Lima's behavior to support her stance.

Despite the issuance of these two arbitral awards, the Municipalidad de Lima refused to adhere to the contract. In December 2022, Rutas de Lima filed a third arbitration and requested an interim relief to halt the Municipalidad de Lima's termination of the contract during the arbitration process. The arbitral tribunal granted an interim measure preventing the termination of the contract by the Municipalidad de Lima. However, the Municipalidad de Lima proceeded with the contract termination anyway. Subsequently, the Municipalidad de Lima challenged all three arbitrators before the Permanent Court of Arbitration ("PCA"). The PCA dismissed the Municipalidad de Lima's bias allegations.

Annulment Proceedings

In August 2020, the Municipalidad de Lima sought to vacate the first award, and in March 2023, it also petitioned the D.C. Circuit to vacate the second award before the federal courts of D.C. The D.C. Circuit consolidated the two proceedings into one.

Under Section 10 of the Federal Arbitration Act ("FAA"), there are four grounds that allow a US court to vacate an arbitral award, where (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. However, as established by the D.C. Circuit in the case of *Kurke v. Oscar Gruss & Son*, judicial review of arbitral awards is extremely limited, and courts do not evaluate claims of factual or legal errors made by arbitrators. To vacate an arbitral award, as indicated in *Republic of Argentina v. AWG Grp*, the proceeding must have significantly deviated from the FAA standards of fair adjudication.

The D.C. Circuit focused its analysis only on the following two grounds under Section 10 of the FAA:

Section 10(a)(1): Where the Award Was Procured by Corruption, Fraud, or Undue Means

The D.C. Circuit dealt with the three conditions to vacate an award under this ground. First, the party seeking *vacatur* must demonstrate that the opposing party engaged in fraudulent conduct that effectively denied the other party a fundamentally fair hearing. Second, the petitioner must prove that the fraud could not have been discovered until the *vacatur* proceedings under reasonable diligence. Third, the alleged misconduct must materially relate to an issue in the arbitration.

Following the aforementioned test, the D.C. Circuit denied the Municipalidad de Lima's allegations. First, Rutas' alleged fraudulent actions did not deprive the Municipalidad de Lima of a fair hearing, as the procedure was properly conducted. Second, the Municipalidad de Lima did not provide a basis to conclude that Rutas' alleged fraud could not have been discovered during the arbitration. Third, the Municipalidad de Lima could not prove that the alleged misconduct or fraud had any connection to the outcome.

Furthermore, the D.C. Circuit ruled that the “new evidence” purportedly proving that Rutas de Lima bribed officials to obtain the concession contract was not listed as a condition to vacate an award. However, the Municipalidad de Lima argued that, as the FAA does entitle a court to vacate an award procured by fraud, and since Rutas de Lima fraudulently informed the tribunal that it did not bribe officials, the court should have vacated the award. The D.C. Circuit considered that the fraud claim had already been discussed and rejected by the two prior arbitral tribunals. Moreover, the insufficient evidence to establish a link between the alleged fraud committed by Odebrecht and the concession contract between Municipalidad de Lima and Rutas de Lima tipped the scale in favor of Municipalidad de Lima.

Section 10(a)(3): Where the Arbitrators Were Guilty of Misconduct in Refusing to Hear Evidence Pertinent and Material to the Controversy

As established in *White v. Four Seasons Hotel & Resorts*, an arbitral tribunal may decide to exclude evidence and testimony that it finds irrelevant or duplicative. In the case of *Howard Univ. v. Metro. Campus Police Officer’s Union*, the D.C. Circuit ruled that a federal court may vacate an award only if the denial to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceeding.

The Municipalidad de Lima argued that the arbitral tribunal only admitted the indictment but not its annexes, depriving it of a fair hearing, as these documents contained completed transcripts of the sworn testimony of individuals involved in the corruption scheme and documentary evidence of the transmission of illicit payments to Villaran’s campaign. However, the arbitral tribunal pointed out that Municipalidad de Lima did not request the admission of the annexes of the indictment. Indeed, through Procedural Order No. 12, the arbitral tribunal ruled that Municipalidad de Lima could have submitted portions of the indictment relevant to the Odebrecht illicit money trail, but it did not do so. Besides, the Municipalidad de Lima did not seek reconsideration of Procedural Order No. 12.

The D.C. Circuit pointed out that there was no factual basis to vacate the arbitral award, as the Municipalidad de Lima had the opportunity to present all the exhibits and witnesses. Furthermore, the arbitral tribunal conducted the proceeding in accordance with the [UNCITRAL Arbitration Rules](#), and the denial to admit some evidence by the Municipalidad de Lima fell within the discretion of the arbitral tribunal. Additionally, the D.C. Circuit concluded that the exclusion of the annexes of the indictment did not prejudice the Municipalidad de Lima, as these contained excerpts of statements from cooperative witnesses who were not cross-examined and, therefore, were not deemed reliable.

Finally, the D.C. Circuit rejected the petitioner’s arguments which sought to vacate the second arbitral award for relying on the factual section of the first award, as there is no ground under the FAA to vacate an arbitral award for giving *res judicata* effect to a part of an arbitral award. Moreover, the D.C. Circuit found that there was insufficient evidence to demonstrate a case of corruption, as argued by Municipalidad de Lima under the public policy argument.

Based on the aforementioned arguments, the D.C. Circuit rejected the Municipalidad de Lima’s petition to vacate the first and second arbitral awards.

Conclusion

The storyline of the arbitrations between Rutas de Lima and Municipalidad de Lima has been marked by continuous attempts from the Municipalidad de Lima to show a case of corruption. However, the standard for proving corruption as a basis for vacating an arbitral award remains high, as established in the FAA and supported by precedents such as *Petruss Media Grp. v. Advantage Sales & Mktg.* On the other hand, the dismissal of evidence as a ground for annulment of an award requires a showing of prejudice to the parties in the arbitration, something Municipalidad de Lima failed to prove.

Regarding the third arbitration, which concerns Mayor of Lima Rafael Lopez Aliaga's attempt to terminate the Concession Contract and take control of the Toll Units, the arbitral tribunal has not yet rendered its award. However, on 8 March 2024, the [Constitutional Court of Peru](#) ordered a suspension of the NCTU collection, citing a violation of the right to free transit. Following the release of the D.C. Circuit's decision, on 14 March 2024, the [Municipalidad de Lima](#) issued a statement indicating its intent to appeal the decision and clarifying that the D.C. Circuit did not confirm the validity of any contract with Rutas de Lima.

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