

Arbitrators condemn intimidation tactics in Guatemalan telecoms feud

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The US parties sought to invest in Central and South American telecoms projects (Credit: Shutterstock/Elena Frago)

An ICDR tribunal has awarded US\$354 million to US private equity investors in a “deeply troubling” dispute with the majority shareholders of a Guatemala-based telecoms company, who were found to be responsible for a campaign of intimidation against the claimants and arbitrators.

In a [fifth partial award](#) on 21 March, the tribunal chaired by New York-based **Marc Goldstein** ordered the majority shareholders of Continental Towers Latam Holdings to pay damages, including punitive damages, and interest to the claimants – affiliates of Ohio-based Peppertree Capital Management and Goldman Sachs.

The tribunal is seated in New York and includes retired Jenner & Block partner **Richard Ziegler** and Arnold & Porter partner **Mélida Hodgson** as co-arbitrators.

The majority shareholders – including Terra Towers and other companies owned by California-based Guatemalan businessman Jorge Hernandez – were found liable for interfering in the attempted sale of Continental Towers to a third party.

The tribunal described the case as “deeply troubling” to anyone who cares about international arbitration as “a viable dispute resolution process”. It noted the respondents had failed to comply in any respect with the four prior partial awards and that their efforts to undermine enforcement of the awards had become “increasingly disturbing”.

Those efforts have included the use of “proxies” to pursue multiple arbitrations in Central and South American jurisdictions where Continental Towers operates, and the incarceration of Continental Towers’ CEO and his father in a Guatemalan prison on criminal charges the ICDR tribunal had determined to be “false”.

The tribunal also found the respondents were responsible for the publication on several “obscure, anonymous and untraceable websites” of articles vilifying the claimants and defaming the tribunal members – including an article that accused the tribunal chair of taking a bribe from one of the claimants.

It observed that the American Arbitration Association had dismissed the respondents’ attempts to disqualify the tribunal members on five different occasions, and that a separate US lawsuit seeking the disqualification of the panel had also been dismissed.

As well as taking the “exceptional step” of awarding punitive damages, the tribunal said it was granting the claimants’ application to allow [**public disclosure of all its orders and awards**](#) in the case, saying it was “necessary and appropriate” to counter the “public campaign of disinformation” by the respondents.

The tribunal also suggested that some of the conduct of the respondents and their proxies “may be prosecutable as violations of federal and state criminal laws in the United States.” It said it would respect the claimants’ wishes and not impose an obligation on them to make a criminal referral at this time, but said this did not diminish the tribunal’s concern that “crimes have been committed”.

Peppertree is represented in the arbitration by UB Greensfelder in Cleveland, while the Goldman Sachs entity is using Ropes & Gray.

Miami firm Gelberg Schachter & Greenberg and UK-Argentine boutique Dechamps International Law act for Continental Towers, which is a “nominal” and neutral party in the arbitration.

GST in Miami acts for the Hernandez parties after they changed counsel on several occasions.

US investors enter telecoms tower business

Peppertree and Goldman Sachs acquired a 45% stake in BVI-registered Continental Towers in 2015. The business of the company was building a network of telecoms towers in Central and South America and renting “space” on the towers to mobile operators.

Hernandez’s companies held the majority stake in Continental Towers, which continued to make monthly payments to another Hernandez company, DTH, for construction of the towers and administrative functions.

A dispute broke out after the private equity investors invoked a provision in their shareholder agreement obliging the majority shareholders to join in the sale of Continental Towers to a third party at the end of a five-year “lock-up” period in 2020.

US company Torrecor had offered US\$408 million to purchase the business – but the deal stalled after the Hernandez parties accused them of conspiring with the private equity funds to eject them from the company at an unfair price.

The private equity funds filed for arbitration under the shareholder agreement in February 2021. A month later, representatives for Continental Towers and for both the claimant and respondent shareholders determined that the company would remain neutral in the shareholder dispute.

Later that year, when the majority shareholders subsequently removed Continental Towers’ CEO Jorge Gaitán and COO Carol Echeverria, the private equity funds obtained from the tribunal ordering that the pair be reinstated.

Five awards and no compliance

In a first partial award in 2022, the tribunal granted the claimants’ request for specific performance of the majority shareholders’ obligation not to block any sale of Continental Towers.

The tribunal found in a second partial award the same year that Gaitán had been wrongfully terminated as CEO. It ordered that he be reinstated and found that criminal complaints lodged against him in Guatemala by Hernandez-affiliated companies, including for embezzlement, were false.

A third partial award in 2023 restrained the Hernandez parties from using proxies to pursue parallel arbitrations in Peru, Guatemala, El Salvador and Honduras. The tribunal says those arbitrations were an attempt to reassert counterclaims by the respondents in the ICDR case which had been stayed.

The private equity investors won a fourth partial award in 2023 granting them an anti-suit injunction to restrain court proceedings launched by the majority shareholders in the British Virgin Islands to obtain an order for the removal of Gaitán.

In the latest award, the tribunal held that Hernandez and DTH had maliciously sought to interfere with a sale that risked ending DTH's revenue from Continental Towers. It found them liable for tortious interference but dismissed claims for breach of fiduciary duty as redundant.

The tribunal held that it did have jurisdiction over Hernandez, a non-signatory, under the doctrine of direct benefits estoppel – but declined jurisdiction over three other executives named as respondents.

The latest award includes a mandatory injunction against Hernandez and DTH requiring them to cause the majority shareholder companies to comply with the first award for specific performance of the sale obligation.

The Hernandez parties were also ordered to compensate the private equity funds for advances they had paid to Continental Towers to cover its management salaries and legal fees related to the various parallel arbitrations and other proceedings.

The private equity funds also asserted derivative claims on behalf of Continental Towers for harmful actions taken against the business, including over unauthorised expenditures for unapproved tower sites.

The tribunal declined to grant money damages for the derivative claims but granted equitable relief by ordering the Hernandez parties to deposit more than US\$44 million into an escrow account as security for a potential future award. It also ordered that the proceeds of the future sale of Continental Towers should be paid into escrow.

The Peppertree entities were awarded a total of US\$193.2 million in damages and interest, while the Goldman Sachs affiliate won US\$82 million.

Mike Ungar of UB Greensfelder in Cleveland, counsel to Peppertree, says the “beautifully written, well-reasoned award speaks for itself” and his client is “obviously very happy with the outcome”.

He says that the tribunal has been and remains “crystal clear” that the four Central American arbitrations are “inappropriate” and “totally violate proper legal decorum”.

“Efforts to intimidate”

The Hernandez parties were also ordered to pay an additional US\$25.2 million in punitive damages in view of conduct including the “ouster and legal harassment” of Continental

Towers management, “fabricated” criminal complaints in Guatemala and the publication of various articles vilifying the claimants and defaming the arbitrators.

These included an article alleging that a “whistleblower” had exposed a scheme by Goldman Sachs to pay a bribe to Goldstein – which Goldman Sachs and Goldstein emphatically denied. The tribunal said the publication of “this baseless accusation... as a tactic to disrupt the arbitration was a wilful and wanton act.”

The award also notes an anonymous article on a website called ArbitrationMonitor.com criticising Goldstein for making “sua sponte” orders without a request from the parties. This coincided with allegations by respondents’ counsel that Goldstein was using his Arbitration Commentaries blog as a “back-channel” to signal the claimants on how to respond to issues in the case.

The respondents also applied to the New York Southern District Court to have the arbitrators disqualified. They alleged that Hodgson was conflicted because at the time of her appointment she was a partner at Jenner & Block, which has acted in matters involving Goldman Sachs. They also alleged that Goldstein had failed to disclose contact with a family member who works at Goldman Sachs. The district court threw out the petition in February.

The private equity investors have enforced the first four awards in the district Court. The US Court of Appeals for the Second Circuit upheld confirmation of the first award in February last year.

The Hernandez parties have appeals pending with the Second Circuit challenging confirmation of the third partial award and the rejection of its request to disqualify the tribunal.

Gaitán was imprisoned in Guatemala earlier this month along with his father, following an extradition request made from the El Salvador authorities related to criminal complaints that the arbitral tribunal had dismissed as “false” in the second final partial award. Peppertree has described the accusations against Gaitán as “politically motivated”.

In the ICDR arbitration (Case no 01-21-0000-4309)

Telecom Business Solution, Latam Towers and AMLQ Holdings v Terra Towers Corp, TBS Management, DT Holdings, Jorge Hernandez, Alberto Arzu, William Mendez and Alejandro Sagastume

Tribunal

- **Marc Goldstein** (US) (chair)

- **Richard Ziegler** (US) (appointed by the claimants)
- **Mélida Hodgson** (US) (appointed by the respondents)

Counsel to Continental Towers (nominal party)

- Gelberg Schachter & Greenberg

Partner **Adam Schachter** in Miami

- Dechamps Law

Partner **Jean Paul Dechamps** in London

Counsel to Telecom Business Solution and Latam Towers

- UB Greensfelder

Partners **Michael Ungar**, **Katherine Poldneff** and **Ashtyn Saltz** in Cleveland, **David Landman** in New York and **Christiane McKnight** in Chicago

Counsel to AMLQ

- Ropes & Gray

Partners **Daniel Ward** in Boston and **Andrew Todres** and **Gregg Weiner** in New York

Counsel to Terra Towers, TBS Management and DT Holdings

- GST

Partners **Diego Gosis** and **Quinn Smith** in Miami

- Carey Rodriguez (ceased acting)

Juan Rodriguez in Miami

- SFL Law (ceased acting)

David Levine

- FIDJ Law (ceased acting)

Allan Joseph

- Mayora & Mayora (ceased acting)

Rafael Briz

- Arktouros (ceased acting)

Clay Porter

- Rottenstreich Farley Bronstein Fisher Potter Hodas (ceased acting)

Jonathan Lupkin

- Dunning Rievman & MacDonald (ceased acting)

Brian Dunning**Documents**

- Terra TBS appendix including first to fourth partial awards
- Terra TBS fifth partial award