

Daily Business REVIEW

LAW ♦ REAL ESTATE ♦ FINANCE

MIAMI • THURSDAY, JULY 1, 2004 — \$2.00

VOL. 79, NO. 16

TELECOMMUNICATIONS

Bad connection

Contract dispute pitting Miami, Ecuadorean companies illustrates case for international arbitration

by AnaMaria Colmenares

A Miami telecommunications company is locked in a politically charged contract dispute with a state-owned Ecuadorean phone company that is demanding the arrest of the U.S. firm's executives in Ecuador.

The U.S. company's Miami attorney, Leoncio de la Peña of de la Peña and Associates, said the legal dispute has become so heated that the Ecuadorean phone company has filed a criminal complaint against his client's executives and attorneys. In addition, he said the U.S. Embassy in Quito has warned him that he wouldn't be safe traveling in Ecuador since he could also face imprisonment.

None of the U.S. company's executives are currently in Ecuador, including Latin American Telecom president Jorge Welch, who spends most of his time in Miami and Chile.

Some observers say the case illustrates why U.S. companies strongly desire a neutral venue for resolving disputes in Latin America, such as the arbitration system proposed under the Free Trade Area of the Americas draft agreement.

In February, LAT, a long-distance carrier focusing on the Latin American market, filed a lawsuit in U.S. District Court in Miami against Pacifictel S.A. That company is owned by the Ecuadorean government through a trust, which shares a percentage of the profits with the country's poor people. Pacifictel is based in Guayaquil and provides service to the southern part of that nation.

LAT and Pacifictel entered into a contract in October 2000 to jointly offer international telecom services between Ecuador and the United States. Under the contract, Pacifictel authorized LAT to operate as a

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Miami lawyer Leoncio de la Peña, registered agent for Latin American Telecom.

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ECUADOR

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provider of telecommunications in Ecuador for telephone traffic originating in the United States.

The lawsuit, which names executives of Pacifictel along with the company, claims that Pacifictel breached its contract by giving more favorable treatment and preferential rates to other carriers. The lawsuit also claims that Pacifictel violated the Florida Antitrust Act of 1980 and the Florida Security of Communications Act by affecting the supply and price of telephone calls to Ecuador and maliciously shutting down wire communications to and from LAT.

The complaint also alleges that Pacifictel and its executives sought to drive LAT out of business by giving an LAT competitor in Miami essentially free service.

According to the suit, after LAT's attorneys confronted Pacifictel on these issues, the Ecuadorean carrier retaliated by twice shutting down LAT's telephone traffic to and from Ecuador.

The dispute also is being litigated in the Court of Arbitration in Guayaquil, as required under the contract. The court is part of the local chamber of commerce.

Pacifictel contends that the U.S.

company acted in bad faith and committed unlawful acts in Ecuador, including refusing to pay Pacifictel \$16 million that it claims LAT owes since 2001.

In the criminal case, Ecuadorean Judge Teresa Gavilanez de Cazares on June 18 refused Pacifictel's request that she order the arrest of LAT's executives and attorneys. Judge Cazares said there was not enough evidence. Because of that refusal, Pacifictel has filed a complaint about Cazares' decision to an Ecuadorean agency that oversees judicial conduct.

In a telephone interview from Guayaquil, Pacifictel's attorney, Calixto Vallejo, accused LAT of operating illegally in Ecuador. "In order for a company to be able to operate in Ecuador, it needs to have a representative who is legitimately established in the country," Vallejo said. LAT's legal representative in Ecuador, Joffre Coello, did not fulfill this requirement, he argued.

But Coello said in an interview that because LAT is not operating in Ecuador, it isn't legally required to have a branch office in Ecuador.

Fernando Margarit, a partner at Hunton & Williams in Miami who is not involved in the case, said the case

highlights the need for a credible arbitration process for commercial disputes between U.S. companies and Latin American countries.

"People use arbitration to protect themselves from what could be unfriendly jurisdictions, in this case, a U.S. corporation being brought into litigation in Ecuador by the main telecom company," Margarit said. "The likelihood that it would not get a fair trial is out there."

Lower rates to rivals

In its lawsuit in Miami, LAT, a privately held company incorporated in Florida in 1997, claims that since the beginning of its contract in 2000, Pacifictel charged it rates twice as high as it charged its competitors. LAT claims that other carriers were paying Pacifictel 4 cents a minute while they were paying 11 cents a minute.

But Vallejo, the attorney for Pacifictel in Ecuador, said LAT has no right to preferential rates since the Miami company is a reseller of telephone minutes abroad. Resellers are operators without a network of their own that buy services from established providers or traditional telephone to resell to individuals or companies.

"There is no regulation or law that anticipates that resellers should obtain equal treatment in terms of telecommunications," Vallejo said.

According to the contract, the two companies agreed to accept the decision issued by the Court of Arbitration in Ecuador as final.

De la Peña said the arbitration panel usually has 150 days to reach a decision. If the arbitrators need more time, they can request an extension of another 150 days. De la Peña said that the court of arbitration, which already requested an extension, is supposed to decide on the matter by July 6. The case has been before the Court of Arbitration since 2001, but the case has moved extremely slow, de la Peña added.

But de la Peña, a Republican Party activist who is serving as the Miami-Dade County chair of Bill McCollum's U.S. Senate campaign, said he's not optimistic about the pending decision in the Ecuadorean arbitration court. That's because Pacifictel executives are conducting an aggressive public and private campaign against his client. That, he said, has included releasing

confidential information to the Ecuadorean news media.

"The purpose is to intimidate the arbitrators to a point that they either do not reach a decision or reach a decision against my client," he said.

Reputation for corruption

In the criminal case filed by Pacifictel, Vallejo said evidence has been given to Ecuadorean prosecutors and the case is currently under investigation. Coello said Pacifictel has accused his client, LAT, of misusing Ecuadorean public funds.

The dispute has been widely publicized in the Ecuadorean news media. Some news stories have portrayed LAT as a ghost carrier with no assets in Ecuador, no contracts with any carriers in other countries and unknown shareholders. But Florida public records show that LAT was incorporated in Florida since 1997, with de la Peña's firm listed as its registered agent.

Ecuador hardly has a sterling reputation for honest business dealings. According to Transparency International, an international non-governmental organization devoted to combating corruption, Ecuador's corruption perception index last year was 2.2 on a scale of 0 to 10, with 0 being the most corrupt. Other countries with a comparable score were the African nations of Uganda and Sierra Leone.

That's at least partly why de la Peña is trying to bring the case to Florida. He said the U.S. District Court in Miami has proper jurisdiction because the defendants did business in Florida by directing telephone traffic to clients in Florida.

De la Peña said that while LAT's phone traffic to and from Ecuador currently is shut down, the company has no intention of halting business in that country.

"Ecuador is very important market because there are a lot of Ecuadoreans in the U.S., he said. "It is a lucrative market to be in because the demand is there. It is a market that LAT wants to continue to be there." ♦

AnaMaria Colmenares can be reached at acolmenares@floridabiz.com or at (305) 347-2025.



Fernando Margarit