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Peruvian Arbitration System Before and After the Covid-19 Pandemic

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Summary

IN SUMMARY

Peru has always been recognised as a country that strongly protects arbitration. Before the covid-19 pandemic, institutional arbitral rules were adopting important changes that would allow them to provide effective protection of rights and faster procedures. Emergency arbitration was one of the most innovative methods introduced in the referred rules. In this chapter, we will analyse the proceedings related to this method and cases related to its application. Also, we have included an important revision of the last amendments introduced into the Peruvian Arbitration Law, by Emergency Decree No. 020-2020, entered into force on 25 January 2020. Finally, we will reveal the full picture of the main changes applied by the most important arbitral institutions, as a response to the covid-19 pandemic.

DISCUSSION POINTS

- Peruvian arbitration system.
- Emergency arbitration.
- Amendments to Peruvian arbitration law.
- Legal changes for arbitration based on state-contracts.
- Arbitral institutions' response to the pandemic lockdown.
- Digitalisation of arbitration processes.

REFERENCED IN THIS ARTICLE

- Peruvian arbitration law.
- UNCITRAL Model Law.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).
- Arbitration Centre of the Lima Chamber of Commerce – Arbitration Institution Rules.
- Arbitration Centre of the Pontificia Universidad Católica del Perú – Arbitration Institution Rules.
- Amcham Arbitration Institution Rules.
- Emergency Decree No. 020-2020.
- The Peruvian Public Procurement Law.
- The Private-Public Partnership Law.

THE PERUVIAN ARBITRATION FRAMEWORK

A Developed And Arbitration-friendly Legal Framework

In Peru, the arbitral jurisdiction is well-recognised and protected. As a consequence of the open market economy and the liberalised juridical regime that promotes foreign and domestic investments,[1] the 1993 Peruvian Constitution expressly states that, in addition to judiciary, arbitral and military forums also enjoy jurisdiction.[2] To this regard, the Peruvian Constitutional Tribunal[3] – the highest constitutional authority in Peru – assessed the arbitral jurisdiction and concluded that it shall be protected by the principle

of non-interference, preventing national courts from assuming jurisdiction over arbitrable disputes or obstructing arbitration procedures.

The current 2008 Peruvian Arbitration Law (PAL), enacted by Legislative Decree No. 1071, was inspired by the 2006 amended UNCITRAL Model Law and is considered to be even more developed and arbitration-friendly than previous arbitral legislation.[4] Two examples of this are the following:

- Broad arbitrability: almost every matter can be submitted to arbitration as long as the conflict involves rights of free disposal, that is, those contractual or non-contractual disputes that can be waived by parties[5] or any other matter in which its non-arbitrability is expressly stated by law.
- Courts' non-intervention but support of arbitration: national courts do not intervene in arbitration[6] except in particular supportive situations previously and expressly determined by law. Due to the principles of competence-competence and separability,[7] courts are prevented from intervening or assessing the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement[8] during the arbitral procedure; this may only be permitted to courts in annulment procedures. Yet, judges cannot review the contents or motivations of the arbitral decision or pronounce over the merits of the dispute.[9]

Nevertheless, as long as arbitration arises from the parties' agreement, it is necessary to protect its efficacy with an appropriate judicial enforcement alternative. Indeed, if the losing party does not comply with an arbitral award – which is final, binding and not subject to appeal[10] – the winning party should be entitled to enforce it before the judiciary. In this context, a restricted approach to what an 'award' is may deem it as a final decision on the merits. In contrast, a broader approach extends it to other arbitral decisions, such as interim measures. Therefore, the approach taken by each national judiciary affects the possible enforcement of arbitral decisions and, accordingly, the efficacy of arbitration itself.

Although the PAL does not provide a definition of 'award', the Peruvian jurisprudence has addressed this issue. For instance, in ***DP Trade SA v Metalyck SAC,*** dated 5 March 2018, the Lima High Court of Justice observed that 'award' is an undefined term not only in Peruvian legislation but also in the New York Convention and other international instruments. As long as '[t]here is no internationally accepted definition of the term "award"',[11] the determination of which arbitral decisions should be treated as 'award' must be done in a case-by-case basis taking into consideration the efficacy of the arbitral procedure. As a consequence of this criterion, Peruvian courts have recognised and enforced interim measures or decisions regarding evidence requirements.

Foreign arbitral awards also have an arbitration-friendly framework in Peru. When an enforcement request is submitted before Peruvian courts,[12] they must apply the most favourable international treaty in an attempt to achieve the recognition and enforcement of the award.[13] Besides, the grounds for rejecting recognition[14] are basically the same as the ones provided by article V of the New York Convention. Thus, Peruvian courts are forbidden to review the merits but limit their assessment to formal considerations[15] and to whether the award violates 'objective arbitrability' or international public policy.[16]

Due to this pro-arbitration framework, courts have refused the recognition and enforcement of foreign awards in very few cases. As Professor Cantuarias has confirmed, until as recently

as 2018, '[t]here are only 11 known court decisions on recognition and enforcement of foreign arbitral awards in Peru. All the decisions have correctly applied the New York Convention and have recognised the foreign award'.[17]

The Peruvian arbitration framework is still looking to develop. A sample of this tendency is the novel emergency arbitration (EA) mechanism, provided by two of the most important Peruvian arbitral institutions.

Peruvian Emergency Arbitration

When a conflict arises, it is usually within its first days when interim measures are most needed to protect the efficacy of the future final arbitral decision on the merits. Howard Holtzmann has described this situation while affirming that '[w]hat happens in that relatively short period in the early days of a case may have a crucial effect on the entire arbitration'.[18] However, if the arbitral tribunal is not constituted, it cannot grant interim measures; thus, the parties are obliged to request them before the judiciary.

EA[19] attempts to avoid the undesirable situation of requesting reliefs before courts when the parties have intended to exclude such judicial intervention. Through EA, parties can request urgent interim measures that cannot wait for the arbitral tribunal constitution, 'within the arbitral forum, thus contributing to the autonomy and effectiveness of arbitration'.[20]

In Peru, the EA mechanism was provided by the Arbitration Centre of the Lima Chamber of Commerce (LCC) in 2017,[21] and the Arbitration Centre of the Pontificia Universidad Católica del Perú (PUCP) in 2019.[22] Some of the main Peruvian EA features are the following:

- Prima facie jurisdiction: once the EA request is filed, it is subject to a sort of preliminary screening.[23] Thus, the arbitration institution assesses whether the case is suitable for an emergency relief considering, mainly, the existence of an arbitration agreement between the parties and the non-constitution of the arbitral tribunal.[24] However, even if the arbitral institution accepts the request, such a decision does not bind the emergency arbitrator who, once appointed, should verify its prima facie jurisdiction according to the competence-competence principle.
- Appointment and objections over emergency arbitrators: once the arbitral institution appoints an emergency arbitrator, the arbitral parties have the right to challenge. While LCC rules provide for challenges within three days of appointment,[25] PUCP rules grant one day.[26] In any case, as long as the emergency arbitrator has the duty to ensure the protection of both parties' due process right, he or she can agree with the parties on a different timetable. This is why EA procedures will always be hung between the need for efficiency and the need to protect the due process.
- Possible requirements of an EA request: there are no requirements expressly established in the LCC or the PUCP rules. However, they should be similar to those assessed by arbitral tribunals plus a special 'urgency' element understood as the necessity for a relief 'that cannot await the constitution of an arbitral tribunal'.[27]
- No prejudgment on the merits and prima facie findings: Emergency arbitrators, like arbitral tribunals, cannot prejudge on the merits. Although the 'no prejudgment on the merits' requirement does not necessarily apply to emergency arbitrators who should be focused on prima facie findings regarding the merits of the emergency measure 'to preserve these merits for a further analysis',[28] an assessment over the probability of success on the merits is usually done.

- The emergency arbitrator flexibility: emergency arbitrators should determine the best manner to conduct EA procedures as long as it protects the parties' right to be heard. While the LCC gives emergency arbitrators vast flexibility over the conduct of the procedures while just requiring it '[i]n an appropriate manner',[29] the PUCP focuses on whether the proceedings should be conducted in an ex parte manner, giving its emergency arbitrators the chance to determine it on each particular case. In any case, this flexibility may result in an advantage over judges who are restricted to the rules established in the Code of Civil Procedure.
- The extent of the emergency arbitrator assignment: the emergency arbitrator assignment does not end with the issuance of its decision but when the arbitral tribunal is constituted.[30] Accordingly, it may be possible for the parties to request emergency arbitrators to modify or even to cancel his or her previous decision as long as the arbitral tribunal is not yet constituted.

The EA mechanism has been used by arbitration practitioners for almost three years now. However, it is too early yet to have statistics regarding the Peruvian EA experience.

NEW AMENDMENTS TO THE PAL REGARDING ARBITRATION PROCEDURES WHERE THE PERUVIAN STATE IS INVOLVED

On 24 January 2020, Emergency Decree No. 020-2020 (the Decree) was published in the Peruvian Official Gazette). The Decree modifies articles 7, 8, 21, 29, 51, 56 and 65 of the PAL and incorporates a new article 50-A. The enactment of this Decree is a consequence of the famous Odebrecht corruption scandal, which led to the pre-trial detention of 14 arbitrators for allegedly having taken bribes to favour such company in several arbitration cases (involving the Peruvian government), costing the state more than US$250 million.

The Decree's purpose is to ensure transparency and avoid bad practices within arbitral procedures in which the state acts as a party, yet the amendments it introduces into the PAL do not accomplish that goal. As the PAL focuses mainly on private parties' arbitration, the amendments were supposed to be introduced toin the state's special arbitral legislation, such as the following:

- the Peruvian Public Procurement Law (PPL),[31] which contains a mandatory arbitration provision for disputes arising from public works, purchases or service contracts subscribed between private parties and the state; and
- the Private-Public Partnership Law (PPP),[32] which provides arbitration clauses for private investor-state contracts.[33]

The Decree's amendments should have been included in the PPL and the PPP instead of the PAL, as the formers contained specific regulations for private-state arbitrations.

A possible explanation for this could be that there was the intention to cover any situation involving the state, regardless of any specific regulation. However, such intention duplicates legal frameworks and creates a potential conflict between the specific legislation (PPL or PPP) and the PAL. In any case, the former should apply over the latter.

Hereunder, we will address briefly the most important aspects of the main changes introduced to the PAL:

The Sacrifice Of The Ad Hoc Arbitrations

In January 2019, the PPL Regulation limited ad hoc arbitrations for contractual amounts that do not exceed US$1.4 million. Later on, by December 2019, this amount was fixed based on the referential value of the selection process.

Currently, the Decree includes an additional provision in article 7 of the PAL, limiting ad hoc arbitrations for amount controversies that do not exceed 10 Peruvian Tax Units, equivalent in 2020 to US$12.2 million.

Based on this double framework, ad hoc arbitration has been basically banned for public entities. There is a first lock based on the referential value of the selection process and a second one based on the limited amount of the particular dispute. Another possible interpretation could be that there is a conflict between the Decree's amendment introduced in the PAL and the PPL, in which case only the latter should apply.

To avoid potential annulment of the award, it is recommendable to follow both limitations.

An Exclusive State Benefit

The Decree also includes a new paragraph in article 8 of the PAL addressing judicial procedures in aid of arbitration. Thereby, Peruvian courts shall require financial security to grant a provisional measure against the state (bond, letter of credit or similar). The amount of such security should not be less than the performance bond.

In this particular case, the Decree has tipped the balance exclusively in favour of the state's benefit. According to the Peruvian Civil Procedure Code, any sort of guarantee should be based upon the assessment of the particular circumstances and the potential damages against the party affected by a provisional measure.

Now, even if the relief does not result in any kind of damages, courts will still have to require financial security, dismissing – by law – any other more suitable and less costly kind of guarantees. What is more, the amount of these financial securities cannot be less than the performance bond, which, under the PPL, would be equivalent to 10 per cent of any state contract amount. Depending on the case, this requirement may become a barrier to obtain provisional measures against the state.

The Challenge To Arbitrators

The Decree has also incorporated a new paragraph in article 29 of the PAL, preventing the arbitral tribunal from deciding over challenges against one of its members and conferring such duty on the arbitral institution or the respective Chamber of Commerce. However, this conflicts with the PPL, which provides that it is the state's contracting supervisory body in charge of resolving those challenges. As already mentioned, the latter should apply.

Conclusion Of Arbitration Proceedings For Abandonment

According to the new article 50-A of the PAL, if the arbitration procedure paralyses during a period of four months, the General Secretariat of the arbitral institution will be able to declare ex officio its abandonment. Consequently, the claimant will not be able to file a new claim, based on the same controversy, in the following six months. If the party files the claim again after this period and it concludes for the same reason, the claimant's right expires.

In general terms, this is a positive measure because it will allow for arbitration cases to move along. However, the decision of the conclusion should not rely upon the arbitration institution.

This decision can only be made by the arbitrators, who are the only ones competent to decide upon the conclusion of the arbitration proceedings – all the more if a potential consequence of the conclusion for abandonment is the expiration of rights.

Arbitration Award

The Decree includes a second paragraph in article 56.2 of the PAL under the following terms: 'there is no imposition of administrative or similar fines, or other concepts other than the costs of arbitration'.

An excessively protectionist interpretation of this provision could lead to understand that arbitral awards cannot order payments against the state, besides the ones related to the costs of the arbitration procedure. Even though it sounds unreasonable, such interpretation could be supported by the fact that the Odebrecht arbitrator's scandal was based on the issuance of arbitral awards ordering the Peruvian state to pay significant amounts of money, in favour of the referred company. Despite the fact that this goes against the very essence of arbitration, the unfortunate text of the Decree paves the ground for this kind of interpretation.

The Annulment Of The Arbitration Award

According to the new article 65.1.b of the PAL, in arbitrations were the state is involved, any of the parties is allowed to request the substitution of the appointed arbitrator, following the same rules set out for such appointment; or, if it is the case, challenge the arbitrator or arbitrators that issued the award that has been set aside by the court.

There have been several interpretations of this article; basically, because it seems to include a new cause for a challenge: the annulment of an award. However, this lecture contradicts article 28.3 of the PAL, which only allows parties to challenge an arbitrator on the basis of justified doubts over his or her impartiality or independence.

The Decree's amendment in this case, has been introduced in the article of the PLA that refers to the annulment of an award for infringement of the rights of defence. When this happens, and the award is set aside, the arbitration proceeding is set back to the moment before the violation originally occurred. Due to the time gone in between, it is possible that one or more arbitrators could be in conflict and are therefore unable to reassume activities. Based on this particular situation, the Decree has only restated that the parties will be able to challenge such an arbitrator in this new phase of the proceeding, in case of conflict.

THE RISE OF VIRTUAL ARBITRATION IN PERU, AS A CONSEQUENCE OF COVID-19

As a consequence of the covid-19 pandemic, the Peruvian government entered into a state of national emergency, as approved by Supreme Decree No. 044-2020-PCM (published on 15 March 2020),[34] which today has been extended until 30 June 2020.

So far, Peru has been under lockdown for over three months. This situation has definitely forced arbitration institutions to adapt and start implementing different online tools and technology resources to avoid keeping arbitration proceedings suspended.

At the beginning of the emergency period, the main arbitral institutions in Peru – such as the LCC, the PUCP and the American Chamber of Commerce (Amcham) – announced the suspension of all their activities and procedural deadlines. However, soon after, they began to adopt action in favour of arbitration continuance. One of the most remarkable and efficient response was adopted, in general, by Amcham.

On 30 April 2020, Amcham announced the approval of amendments to its regulation to include 'provisions that facilitate the virtual processing of arbitration cases submitted to its administration'.[35] This way, these virtual modifications could be directly applied to the arbitration proceedings. As part of this proactive plan, Amcham also issued a 'Guide to Virtual Arbitrations', adapted to all arbitration matters, including those cases in which the Peruvian state is a party. This Guide contains important guidelines for electronic processing that focus on the following aspects:

- electronic communications and notifications by emails;
- submission of new arbitration requests by email. Such requests can be notified by the Secretariat to emails that appear in the contract or that have been used to exchange communications in relation to the dispute;
- appointment of arbitrators. The parties can have, by telephone or videoconference, interviews with referring candidates to establish whether they have no impediment to accept the order;[36]
- adaptation of rules for each arbitration. The Secretariat may invite the parties for virtual coordination meetings;
- conduction of virtual hearings. Amcham has acquired the licence of the following videoconference's platforms, which are available to the parties: Cisco Webex, Microsoft Teams, BlueJeans and Zoom. Before any hearing, arbitral tribunals should convene a conference call with the parties to prevent technological contingencies; and
- awards can be signed using digital means and sent by email to the general Secretariat for notification.

Due to the benefits and advantages offered by the virtual processing of arbitration, Amcham will continue to digitise all the documentation of the arbitration cases that have been physically developed to date and will conform electronic case files for each case.

In terms of the LCC, this is the only arbitral institution that currently works with an intranet platform, allowing parties to upload documents and get access to electronic case file. On 25 April 2020, the LCC announced its decision to lift the suspension of the arbitration proceedings under its administration, starting on 4 May 2020, unless a decision is taken to the contrary by the arbitral tribunal.[37] To that end, the LCC issued Practical Note No. 1/2020 for the implementation of virtual means,[38] which contains virtual proceedings for the main aspects of the proceedings.

PUCP still has some complexities to solve, because most cases are related to state contracts. To date, public prosecutors have been refusing to lift the arbitration proceeding's suspension, based on the following limitations: law personnel working remotely; lack of a virtual copy of the arbitration file; lack of technical equipment; lack of knowledge in the use of technological tools; absence or weak internet connectivity; and cybersecurity.

All of these issues will have to reach a solution to avoid the stoppage of public works, representing almost 59.5 per cent of state disputes.[39]

FINAL REMARKS

As a general perspective of all the above, it is possible to say that covid-19 has dramatically accelerated the digitalisation of the arbitration proceedings in Peru. Now, it is an imperative

for public entities to implement all the necessary changes to avoid being left behind in this revolutionary process; mainly because most cases of arbitration proceedings are related to state contract disputes. This challenge also includes the judicial authorities, since their intervention is crucial not only for the assistance of precautionary measures but for the enforcement of the awards. Maintaining the judicial procedure's enforcement effectiveness is what brings confidence to the arbitration proceedings, for both domestic and international arbitration.

It is time for Peru to become an important seat of arbitration in Latin America. To achieve this goal, our country requires not only a favourable legal framework but also the complete support and full commitment of the courts to set us apart.

Endnotes

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