
CHAMBERS GLOBAL PRACTICE GUIDES

International Arbitration 2023

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Peru: Law & Practice and Trends & Developments

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PERU

Law and Practice

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Rodríguez Angobaldo Abogados was founded in 1997 and is recognised as one of the most important litigation and arbitration firms in Peru, with more than 25 years of experience in the legal market. The law firm has a strong practice in disputes related to corporate, commercial, insurance, infrastructure, banking, telecommunications, oil and gas, mining, tax, real estate, public procurement and labour matters. The law

firm has four partners and 28 associates, with 70% percent of its senior attorneys being university professors or lecturers and conference speakers. Rodríguez Angobaldo Abogados' competitive advantage lies in its partners' holistic approach to designing strategies for disputes, alternative dispute resolution or conciliations.

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1. General

1.1 Prevalence of Arbitration

Arbitration is the dispute resolution mechanism most used for commercial disputes in Peru. It is widely preferred over litigation. Although this preference is mostly reflected in domestic arbitration, it is also true that international arbitration has a growing presence in the country, especially when one of the parties is a foreign company or is controlled by a foreign company, in which case it is not unusual to conclude arbitration agreements with at least one relevant foreign element.

According to Article 5 of the Peruvian Arbitration Act, which closely follows the 2006 UNCITRAL Model Law, an arbitration is international when at least one of the following conditions is met:

- parties have their places of business in different states at the time they concluded the arbitration agreement;
- the seat of the arbitration is not located in the state in which the parties have their places of business; or
- a substantial part of the obligation is to be performed outside the country, or the matter in dispute is connected to a place overseas, when the parties have their places of business in Peru.

1.2 Key Industries

Although there is no official data to confirm if a particular industry is undergoing a growing or decreasing arbitration activity, for a number of years arbitration has a strong position in construction, oil and gas, mining, transport, financial services, among other industries.

The main reasons behind the preference for arbitration are related to the great flexibility it offers vis-à-vis litigation, for example:

- the expertise of arbitrators;
- the right to determine the rules of procedure;
- speedy resolution; and
- confidentiality.

1.3 Arbitral Institutions

The most frequently used arbitral institutions in Peru are:

- the Centre for National and International Arbitration of the Lima Chamber of Commerce;
- the Centre for Dispute Resolution of the Catholic University of Peru; and
- the Centre for National and International Arbitration of the American Chamber of Commerce (AMCHAM).

These three institutions are all situated in Lima and have renowned national and foreign arbitrators on their lists.

A foreign arbitral institution that is also frequently used in international arbitration by Peruvian parties is the Court of Arbitration of the International Chamber of Commerce.

There is no data regarding new arbitral institutions in Peru for the year 2021-2022. Although the Ministry of Justice has created a national database of arbitral institutions, registration is not compulsory.

1.4 National Courts

In Peru's national courts, any matter related to arbitration is heard by the commercial judge and/or the commercial court. In the case of domestic arbitration, if the dispute is connected to a place in which there is not a commercial court division,

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the competent judge will be the civil judge and the civil court.

Depending on the matter at hand, the dispute will be heard by a judge or directly by the high court. For example, in order to enforce an award the request has to be filed before the judge (first instance judge); but if a party is seeking to set aside an award, then the request can only be addressed to the court, a three-member judicial body that usually acts as a court of appeal (second instance).

Neither the commercial judge nor the commercial court are exclusively devoted to arbitration disputes.

2. Governing Legislation

2.1 Governing Legislation

The national legislation governing both national and international arbitration is contained in Legislative Decree No 1071 (the Peruvian Arbitration Act). This statute entered into force in September 2008 and is largely based on the 2006 UNCITRAL Model Law.

2.2 Changes to National Law

Since its enactment in 2008, the Peruvian Arbitration Act remains almost unchanged, apart from two amendments in 2015 and 2020. These changes did not affect the general pro-arbitration stance of the Peruvian legislation, since they mainly addressed arbitration proceedings that have the state as a party in order to avoid the risk of corruption.

In this context, the most important amendment occurred with the enactment of the Urgency Decree No 020-2020, which conveyed some

important changes addressed to arbitrations in which the state is a party, such as the following.

- Ad hoc arbitrations are only possible when the amount of the dispute does not exceed of ten tax units (approximately USD13,000). Otherwise, the arbitration has to be administered by an arbitration institution.
- A person who has had previous involvement in the dispute as a lawyer or as an expert, or has a personal, professional, economic or financial interest in the outcome of the procedure, cannot be appointed as arbitrator.
- A party requesting interim relief against the state must provide a bondability letter for the amount determined by the judge as a guarantee.
- The procedure will be considered abandoned and will be terminated if there is no activity for more than four months.
- The arbitration proceedings and the award are made public after the conclusion of the arbitration procedure. Before 2020, only the award was published.

There are some attempts from time to time to make other amendments to the Peruvian Arbitration Act, but the consensus among specialists is to avoid unnecessary changes.

3. The Arbitration Agreement

3.1 Enforceability

For an arbitration agreement to be valid and enforceable under Peruvian law, it has to be in writing. This requirement is met when:

- the content of the agreement is recorded in any form, regardless of how it was concluded;

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- the agreement is contained in an electronic communication and is accessible for consultation and subsequent reference;
- the agreement is alleged by one party and not denied by the other (when they exchange the statement of claim and the statement of defence); and
- a contract contains a reference to the existence of the arbitration agreement, and the reference leads to the belief that it is part of the contract.

The scope of the requirement therefore covers an extensive range of situations, clearly following the 2006 UNCITRAL Model Law.

Additionally, an arbitration agreement in international arbitration will be valid and enforceable in Peru if it complies:

- with the law governing the arbitration agreement;
- with the law governing the matter in dispute; and
- with Peruvian laws (Article 13 of the Peruvian Arbitration Act).

3.2 Arbitrability

There is not an exhaustive formal list of matters excluded from arbitration. Instead, there is a general rule set forth in Article 2(1) of the Peruvian Arbitration Act stating that any matter related to a right over which the parties are lawfully free to dispose (or even waive) can be referred to arbitration. Besides this general principle, a second rule states that any matter authorised by law or by international treaties may be referred to arbitration.

The aforementioned rules clearly excludes all criminal matters or family matters from the arbitration system.

3.3 National Courts' Approach

According to Article 13(7) of the Peruvian Arbitration Act, the law governing the arbitration agreement is:

- the law chosen by the parties;
- the law applicable to the merits; and
- the Peruvian laws.

National courts are inclined to respect the parties' agreements and enforce the arbitration clauses, but they also respect when both parties decide to refer the matter to the judge despite having a previous arbitration agreement.

3.4 Validity

According to Peruvian law, the validity of the arbitration agreement will not be affected by any dispute over the validity of the main contract. This principle is stated in Article 41(2) of the Peruvian Arbitration Act, which follows Article 16(1) of the 2006 UNCITRAL Model Law. Under this provision, an arbitration clause shall in all cases be treated as an independent agreement, regardless of the contract in which it might be contained.

Therefore, an arbitral tribunal can render a valid award even if the final decision is that the main contract is null and void.

4. The Arbitral Tribunal

4.1 Limits on Selection

The selection of arbitrators by the parties is one of the most attractive features of the arbitration system. Consequently, the parties' autonomy to appoint an arbitrator is only limited by a few basic issues related to the candidate's profile.

First, in order to be appointed as arbitrator a person needs: (i) to have the legal capacity to exercise their rights; and (ii) not have been the subject of a criminal conviction (Article 20 of Peruvian Arbitration Act).

Secondly, public officials cannot be appointed as arbitrators, pursuant to the limitations of their specific categories.

Furthermore, in arbitrations in which one of the parties is the state, any person with a previous connection to the dispute as a counsel or an expert, or with any personal, professional, economic or financial interest in the outcome of the arbitration, cannot be appointed as arbitrator (Article 21).

4.2 Default Procedures

The method for selecting arbitrators can be freely decided by the parties in the arbitration agreement. Notwithstanding, it is very common that, instead of drafting a detailed clause on this issue, parties simply agree to apply the rules of an arbitration institution, which include a procedure for selecting arbitrators. In that context, the only aspect usually decided by the parties in the arbitration clause is whether the dispute will be decided by a sole arbitrator or by a three-member panel.

The Peruvian Arbitration Act contains a default procedure in case the parties do not agree on the method for selecting arbitrators.

- If the dispute is to be decided by a sole arbitrator, the parties have 15 days to reach an agreement on the person to be appointed.
- If the dispute is to be decided by a three-member panel, each party must appoint an arbitrator within 15 days. The two appointed arbitrators will then have 15 days to appoint

the third member, who will become the chair of the tribunal.

- In the case of multiparty arbitrations, the parties sharing the claimant's position will have 15 days to reach an agreement on the appointment of one arbitrator. The same rule applies to the parties in the respondent's position. Immediately after that, the two appointed arbitrators will have 15 days to designate the third member and chair of the panel.
- If for any reason it is not possible to appoint one or more arbitrators, the appointment will be made, upon the request of any party, by the Chamber of Commerce of the seat of the arbitration. If there is not a Chamber of Commerce in that place, the request must be addressed to the Chamber of Commerce of the nearest city.

4.3 Court Intervention

The Peruvian Arbitration Act is particular in the sense that courts do not play a role in the selection of arbitrators. The appointing authority if the chosen method to select an arbitrator fails is, according to Peruvian law, the Chamber of Commerce of the place of the arbitration.

4.4 Challenge and Removal of Arbitrators

Arbitrators must be and remain independent of and impartial to the parties. They have a duty to disclose any circumstances that may give rise to doubts about their independence and impartiality. The duty to disclose covers any new relevant circumstance after their appointment and acceptance.

Accordingly, an arbitrator can be challenged if: (i) there are circumstances that give rise to doubts about their independence and impartiality; (ii) they do not have the qualifications required by

the parties, the arbitration institution, or the law, in order to act as arbitrator.

Unless the parties agree otherwise, it is not possible for the parties to challenge an arbitrator in the final phase of the procedure (draft of the award). Notwithstanding, in that case the arbitrator must consider resigning if they find themselves in a circumstance that may give rise to justifiable doubts about their independence and impartiality.

4.5 Arbitrator Requirements

Peruvian law does not provide a definition of what is to be understood by independence and impartiality. There is a consensus that independence means to be free of any relationship with the parties that might affect the arbitrator's decision, while impartiality is to act with objectivity.

An arbitrator who does not comply with the standard of independence and impartiality can be challenged by the parties.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

As explained in 3.2 **Arbitrability**, there is not an exhaustive formal list of matters excluded from arbitration. The general rule is that any matter related to a right over which the parties are lawfully free to dispose can be referred to arbitration.

5.2 Challenges to Jurisdiction

In Peru, the principle of competence-competence is fully applicable and respected. According to Article 41(1) of the Peruvian Arbitration Act (which closely follows the UNCITRAL Model Law), only the arbitral tribunal can rule on its own

jurisdiction, even if the existence or validity of the arbitration agreement is challenged.

Any objection to the tribunal's competence shall be raised until the statement of defence is submitted; and the tribunal can rule over such objection either in a preliminary question or in the award on the merits. In either case, if the tribunal decides in favour of its own jurisdiction, such decision can only be challenged in the set aside procedure after the award has been rendered.

5.3 Circumstances for Court Intervention

Peruvian courts can only address issues of jurisdiction of an arbitral tribunal if they have been previously raised before the tribunal. Once the tribunal has issued a decision over its own jurisdiction, it can only be reviewed by the courts in the set-aside procedure after the award has been rendered. Apart from this particular situation, courts cannot interfere in the tribunal's decisions.

National courts do not review negative rulings on jurisdiction by arbitral tribunals.

5.4 Timing of Challenge

As explained in 5.3 **Circumstances for Court Intervention**, parties can only challenge the jurisdiction of the arbitral tribunal before the courts when:

- the requesting party has raised the issue before the arbitral tribunal;
- the tribunal has ruled in favour of its own jurisdiction; and
- the award has been rendered.

Only in the set-aside procedure against the award can the parties request the review of the

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decision taken by the tribunal over its own jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Peruvian courts will only analyse issues of admissibility and jurisdiction after the conclusion of the arbitration in the post-award set-aside procedure. In that procedure, the judges cannot review the merits of the case, the content of the award, or the criteria, motives or interpretations adopted by the arbitral tribunal. It is therefore a deferential review.

5.6 Breach of Arbitration Agreement

The Peruvian courts will first hear the defendant's position before ruling on the continuation or termination of the court proceeding. When a party commences a court proceeding in breach of an arbitration agreement, the other party can either object to the proceeding or accept it.

If the defendant files an objection based on the existence of an arbitration agreement, then the judge will close the court proceeding altogether without further analysis. Notwithstanding, if the defendant does not raise an objection against the court proceeding, the judge will consider that the defendant has implicitly renounced to enforce the arbitration agreement and, therefore, the court proceeding might continue.

The judge cannot assess the validity of the arbitration agreement (which is part of the arbitral tribunal's competence) unless it is very obviously an invalid or non-existent clause.

5.7 Jurisdiction Over Third Parties

Jurisdiction over third parties is regulated in Article 14 of the Peruvian Arbitration Act. The Act provides that the arbitration provision extends to any party which consents to submit to arbitra-

tion, in good faith. This can be determined from their participation (active and decisive) in the negotiation, execution, performance or termination of the contract containing the arbitration agreement or to which the agreement relates.

The arbitration agreement will also extend to those who intend to derive any right or benefit from the contract, pursuant to its terms.

6. Preliminary and Interim Relief

6.1 Types of Relief

Before the arbitrators are appointed and the tribunal is in place, the parties to an arbitration agreement can seek preliminary or interim relief before the judge. Consequently, once the arbitration tribunal is in place, the tribunal will have exclusive competence to grant any interim relief and it is no longer possible to go to the judge.

The decision granting relief is binding on the parties, but this is not necessarily the case vis-à-vis third parties. This is an important point because, in order to be effective, the relief might need the co-operation of other people outside the arbitration proceedings. Therefore, depending on the specific relief, the tribunal's decision might need judicial assistance in order to be obeyed by third parties and become fully effective.

The types of relief that an arbitral tribunal may grant, according to the Peruvian Arbitration Act, follow those contained in the UNCITRAL Model Law. A tribunal might therefore order to one party to:

- maintain or restore the status quo until the final resolution of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current

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- or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

In general terms, any order that is addressed directly to the parties will be immediately effective, since the parties are part of the procedure. Nonetheless, if the order is addressed to third parties, it usually needs some kind of judicial assistance in order for those third parties to comply.

6.2 Role of Courts

When parties have agreed to resort to arbitration, national courts can only play the two following roles regarding interim relief:

- a judge can grant an interim measure before the arbitrators are appointed and the tribunal is in place; or
- a judge can assist the arbitral tribunal in the enforcement of the interim measure when a judicial intervention is needed in order to make it effective.

Judges cannot interpret the content or the scope of the interim measure granted by an arbitral tribunal. If a clarification is needed, the judge or the party shall request such clarification from the tribunal.

In the case of foreign-seated arbitrations, there are two possible scenarios, as set out below.

- With the previous authorisation of the arbitral tribunal, a party might request interim relief directly from the national court during the course of the arbitral proceedings.

- An interim relief ordered by the foreign-seated arbitration tribunal might be recognised and enforced in Peruvian territory pursuant to a procedure similar to that of the recognition and enforcement of awards, with some particularities.

- (a) The requesting party shall submit the original or a copy of the tribunal's order, according to the conditions set out in Article 9 of the Peruvian Arbitration Act, related to its authentication and language, among other aspects.
- (b) The judge may ask the requesting party to submit a guarantee if the tribunal did not ask for it, or when a guarantee is needed to protect the rights of a third-party. If the requesting party does not comply with the judge's order, the interim measure might not be recognised.
- (c) The judge may refuse to recognise the interim relief if it is incompatible with its sphere of competence, unless the judge decides to adjust the relief in order to make it compatible and enforceable.

National legislation does not have any provision regarding emergency arbitration, but some arbitral institutions have already set forth the rules for that special arbitration proceeding. Therefore, emergency arbitration is currently a valid mechanism in Peru, and it is available to parties who have agreed to apply the rules of one of the arbitral institutions that already cover that type of proceeding.

The decisions of the emergency arbitrator are binding on the parties, since they agree in the parties' agreement to accept such mechanism.

The commencement of an emergency arbitration should not prevent a party from going before the judge to seek interim relief, since the judge is

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only prevented from granting interim measures when the arbitral tribunal (not the emergency arbitrator) is appointed. Notwithstanding, if the party who requested the emergency arbitrator is the same party requesting interim relief from the judge, it can be considered as an abuse of procedure.

6.3 Security for Costs

Article 47(1) of the Peruvian Arbitration Act states that, in order to grant an interim measure, an arbitral tribunal might ask for a guarantee from the requesting party in order to cover any damage caused by the measure.

Moreover, in court proceedings, it is mandatory that the party requesting an interim measure submits a guarantee along with their request. Nonetheless, the code of civil procedure covers different kinds of guarantees, not all of them as effective as a letter of bondability.

7. Procedure

7.1 Governing Rules

The rules governing the procedure of arbitration in Peru are contained in Legislative Decree No 1071, enacted on 27 June 2008 and entered into force on 1 September 2008. This single set of rules governs both domestic and international arbitration.

It is important to take into consideration that in domestic arbitration, when a party is a public entity (state), there is an additional set of rules contained in the Public Procurement Act that will be applicable and also govern some important aspects of the arbitration proceeding.

7.2 Procedural Steps

The principle of party autonomy will govern the arbitral proceeding, within the principles of due process and equal treatment.

7.3 Powers and Duties of Arbitrators

According to the Peruvian Arbitration Act, some of the most important powers granted to arbitrators include:

- deciding on the merits and any connected matters;
- deciding on their own competence and ruling on any objections;
- scheduling any hearings they deem necessary;
- determining the admission, pertinence and weight of evidence;
- appointing experts; and
- adopting interim measures.

As for their duties, arbitrators must:

- respect the confidentiality of the proceedings;
- act in a fair and impartial manner, treating both parties equally; and
- disclose any circumstances that might give rise to doubts about their independence and impartiality.

7.4 Legal Representatives

In the field of arbitration, there are fewer compulsory requirements for legal representatives than in court proceedings. In arbitral proceedings, it is not necessary to be a qualified lawyer in order to represent a party. The only requirement is that the appointment of representatives must be in writing.

It is important to note that there is no restriction on foreign lawyers appearing in arbitration proceedings in Peru.

8. Evidence

8.1 Collection and Submission of Evidence

The parties are free to choose the applicable rules of evidence. Fifteen years ago, it was very common for domestic arbitrations to follow and mirror the practice in court proceedings, in which the submission of documents is the most important type of evidence.

For some years now, parties are submitting other types of evidence in line with a more international approach. It is now common practice to have a document production phase, the submission of witness statements and expert reports, among others, in arbitral proceedings.

The specific rules applicable to the collection and submission of evidence will be those agreed by the parties. In general terms, the Peruvian Arbitration Act states that parties have to submit all their documentary evidence with their statements.

8.2 Rules of Evidence

The parties shall submit all documentary evidence with their statement of claim or statement of defence. That rule is nonetheless flexible, since the tribunal has the power to accept the submission of additional documents at a later stage.

For other types of evidence, the rules will be set up by the parties or the arbitral tribunal at the beginning of the proceedings. It is also common practice to apply the rules set forth by the arbitral institution when the proceedings are under its administration.

Article 43 of the Peruvian Arbitration Act states that the arbitral tribunal has the power to deter-

mine the admissibility, relevance and weight of any evidence.

8.3 Powers of Compulsion

Arbitrators do not have any powers of compulsion other than the authority they have over the parties and the procedure. Notwithstanding, the arbitral tribunal may request the assistance of the court for the attendance of witnesses. This request may be filed by the parties themselves, in which case they have to submit their request to the judge along with evidence of the existence of the proceeding and the tribunal's authorisation to seek such assistance.

Unless the assistance would affect public order or a prohibitive law, the judge shall comply with the request for assistance without delay.

9. Confidentiality

9.1 Extent of Confidentiality

Unless otherwise agreed, the arbitrators, the tribunal's secretary, the arbitral institution, the witnesses, experts and any other person involved in the proceedings are obliged to respect the confidentiality of the proceedings, the award and any other information they have access to.

The duty to respect the confidentiality of the arbitration proceedings applies to the parties, its representatives and advisers, unless a legal provision states otherwise.

It is important to mention that in arbitrations in which the state is one of the parties, the proceeding and the final award will be published afterwards.

10. The Award

10.1 Legal Requirements

The main requirements for an arbitral award are that:

- it has to be in writing;
- it has to be signed by the arbitrators; and
- it shall state the reasons upon which the decision is based.

There are no general time limits for the delivery of the award other than those established by the parties, the arbitral institution or the arbitral tribunal itself.

10.2 Types of Remedies

Arbitrators may award the same type of remedies as a judge, that is, all remedies recognised under Peruvian law, ie, actual damages, loss of profits, ulterior damages and moral damages. They can also order the performance of obligations or render a declarative award. Since punitive damages are not recognised by Peruvian law (although there have been some discussions thereon), they shall not be awarded by arbitrators.

10.3 Recovering Interest and Legal Costs

Pursuant to Article 73(1) of the Peruvian Arbitration Act, parties may recover legal costs related to the proceedings. The distribution of costs is decided by the arbitral tribunal taking into consideration the agreement of the parties and, if there is no agreement, the costs will be assumed by the defeated party.

Notwithstanding, the arbitral tribunal can always distribute the costs between the two parties, pursuant to different considerations.

The recovery of interest is possible, but the parties must request it expressly, and justify the interest rate they ask the arbitral tribunal to apply.

11. Review of an Award

11.1 Grounds for Appeal

In Peru, an award is final and binding from the moment it is received by the parties. The possibility of an appeal is legally excluded. Notwithstanding, after the receipt of the award, the parties can request the interpretation, correction, integration or the exclusion of any aspect of the award. These are specific requests that are addressed to (and will be decided by) the arbitral tribunal and cannot modify the award in any substantial form.

The only recourse available to the parties is the set-aside procedure, which can be filed only upon some very specific situations:

- the arbitration agreement does not exist or is not valid;
- a party was not given notice of the appointment of an arbitrator or was not informed of the arbitral proceedings, or was otherwise unable to present their case;
- the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement or rule is contrary to the mandatory provision of the law;
- the award deals with a matter that was not submitted to the tribunal;
- in domestic arbitration, the subject matter of arbitration is clearly not subject to adjudication by arbitration according to the law;

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- in international arbitration, the subject matter of arbitration is not subject to settlement by arbitration under the laws of Peru or the award conflicts with international public order; and
- the award was rendered after the deadline that was established by the parties or in the applicable institutional rules.

The filing of the set-aside procedure does not affect the validity and the binding effect of the award. In order to have the award suspended, a request has to be filed along with a bank guarantee for a sum equivalent to the award amount.

11.2 Excluding/Expanding the Scope of Appeal

As explained in **11.1 Grounds For Appeal**, it is not possible to file an appeal against an arbitral award.

11.3 Standard of Judicial Review

In the set-aside procedure, judges cannot review the merits of the case, the content of the award or the criteria, motives or interpretations adopted by the arbitral tribunal. It is a deferential review standard.

12. Enforcement of an Award

12.1 New York Convention

The Republic of Peru has signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without reservations, as well as the 1975 Inter-American Convention on International Commercial Arbitration; both are relevant to the recognition and enforcement of foreign awards.

12.2 Enforcement Procedure

When recognising and enforcing awards, Peruvian courts shall apply the most favourable convention among:

- the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without reservations;
- the 1975 Inter-American Convention on International Commercial Arbitration; and
- any other treaty ratified by the Republic of Peru.

The request for recognition is filed before the commercial court (second instance); and, once the award has been recognised, the enforcement will be conducted by the commercial judge (first instance).

According to the Peruvian Arbitration Act, an award that has been set aside in the seat of the arbitration cannot be recognised or enforced. The same rule applies to an award whose effects have been suspended in the seat of arbitration by a competent judge.

12.3 Approach of the Courts

Peruvian courts have a good record in recognising and enforcing foreign awards. Thus, the public policy argument is carefully analysed.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There are no specific provisions for class action arbitration or group arbitration.

13.2 Ethical Codes

The Peruvian Arbitration Act does not provide for ethical rules, other than the principles of independence and impartiality.

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Counsel are obliged to comply with the ethical rules of their professional associations (the Bar). Peruvian Bar associations have issued a Code of Ethics, which was enacted on 14 April 2012 by Resolution No 001-2012-JDCAP-P.

13.3 Third-Party Funding

The Peruvian Arbitration Act does not regulate third-party funding. Therefore, there is no regulation preventing it.

13.4 Consolidation

According to Article 39(4) of the Peruvian Arbitration Act, the arbitral tribunal cannot consolidate separate arbitral proceedings, unless the parties agree otherwise. Notwithstanding, some arbitral institutions have more specific rules by which the possibility of consolidation is permitted under some conditions. For example: (i) the arbitrations are related to the same arbitration agreement; and (ii) the arbitrations were commenced under different arbitration clauses, but they are compatible. It is also relevant during the proceedings to state if all the arbitrators have been appointed.

13.5 Binding of Third Parties

Third parties can be bound by an arbitration agreement and therefore the subsequent award, if they are covered by the scope of Article 14 of the Peruvian Arbitration Act.

Trends and Developments

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Rodríguez Angobaldo Abogados

Rodríguez Angobaldo Abogados was founded in 1997 and is recognised as one of the most important litigation and arbitration firms in Peru, with more than 25 years of experience in the legal market. The law firm has a strong practice in disputes related to corporate, commercial, insurance, infrastructure, banking, telecommunications, oil and gas, mining, tax, real estate, public procurement and labour matters. The law

firm has four partners and 28 associates, with 70% percent of its senior attorneys being university professors or lecturers and conference speakers. Rodríguez Angobaldo Abogados' competitive advantage lies in its partners' holistic approach to designing strategies for disputes, alternative dispute resolution or conciliations.

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Arbitrations Against the State

A prolific practice in the field of arbitration in Peru revolves around the performance, fulfilment and termination of public contracts. According to Peruvian law, any dispute arising between a state entity and its suppliers, contractors or sub-contractors has to be resolved via arbitration, as the exclusive dispute resolution mechanism, with just a couple of exceptions. It comes as no surprise therefore that the state is by far the most frequent user of the arbitration system in the country, usually appearing as a respondent rather than a claimant.

Although arbitration against the state falls under the scope of the Peruvian Arbitration Act, some special and more specific sets of applicable rules are contained in the Public Procurement Act, which governs every aspect of public contracts from the tender process to the termination of contracts. Should any changes be introduced to this sub-system, one could also expect that the Public Procurement Act would be amended.

Notwithstanding, three years ago Emergency Decree 020-2020 amended the Peruvian Arbitration Act, considering exclusively arbitrations in which the state is one of the parties. The recital to Emergency Decree 020-2020 emphasised that although the Peruvian Arbitration Act was well suited to arbitrations between private persons or private companies, it might not be

suitable for arbitrations involving the state, as it would not be effective in preventing corruption or other situations affecting the state's interests.

The reform presented itself as a reaction to some corruption scandals, notably the Lavajato case that started in Brazil and spread throughout Latin America a few years ago.

As a result of the amendment, the Peruvian Arbitration Act currently contains some peculiar rules applicable to arbitrations in which the state is a party, some of which are presented and explained in this article.

The Right to Automatically Challenge an Arbitrator

Article 65(1)(b) of the Peruvian Arbitration Act (amended by Emergency Decree 020-2020) provides that, if an award rendered in an arbitration involving the state is set aside by the Superior Court, then any party to the arbitration automatically has the right to challenge the arbitrators. The basis for that challenge is the objective of setting aside the award. It has nothing to do with the arbitrators' qualities or any doubts concerning their independence or impartiality. Once the judgment setting aside the award is notified to the parties, the timeframe for challenging the arbitrators automatically restarts.

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According to the administrative body ruling on the challenges of arbitrators, the new rule must meet the following requirements.

- The judicial decision setting aside the award shall be definitive.
- The annulment of the award shall be based on the cause contained in Article 63(1)(b) of the Peruvian Arbitration Act: “[i]f one of the parties was not given notice of the appointment of an arbitrator, or of the arbitration proceeding or if, for any other reason, it was unable to defend its rights”.
- The parties can restart the arbitration proceedings with the same arbitrators, if they so choose. The challenge of the arbitrators is neither automatic nor compulsory.
- The timeframe for challenging the arbitrators is determined pursuant to the rules applicable to the arbitration in which the award was issued.

The party challenging the arbitrators for the setting aside of their award does not have to justify their request on any other ground.

Moreover, in Peru’s legal system there is a document called the “Statement of Reasons” which explains the motives, purposes and goals behind the enactment of certain statutes and amendments. The Statement of Reasons in relation to Emergency Decree 020-2020 explains the reasons for this new ground for challenging arbitrators, stating that if the same arbitrators were to take control of the proceedings after the setting aside of their award, they would probably try to issue a second award containing the same decision they took before (with minor changes) as arbitrators are inclined to reconfirm their previous decisions.

This Statement of Reasons makes it clear that the amendment seeks to allow for the possibility of having a very different award the second time.

Rejection of Ad Hoc Arbitrations

With the introduction of Emergency Decree 020-2020, the state has practically banned ad hoc arbitrations for state entities. They are only possible when the amount in dispute is not higher than ten tax units (approximately UDS13,000). In practice, such a low threshold means that ad hoc arbitrations are not trusted mechanisms. In the Statement of Reasons for this Decree, it is clearly expressed that institutional arbitrations are preferred over ad hoc arbitrations since arbitral institutions provide for a set of rules, a table of fees and expenses, and general administrative supervision that make the costs of the proceeding much more predictable.

Moreover, it is stated that institutional arbitrations characteristically:

- provide transparency during the proceedings and after the proceedings;
- take responsibility for the conduct of arbitrators, arbitral secretaries and other institutional bodies; and
- offer a set of rules and organisation.

This overwhelming preference reflects the good reputation some arbitral institutions in Peru have gained over the years. Although the award is rendered by independent arbitrators, institutions play an important role in some key aspects of the procedure. The most renowned arbitral institutions in Peru are also recognised for having a very modern set of rules and considerable international arbitration know-how. Therefore, this new rule can be understood as recognition by the state of the important work those institutions are achieving.

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Publicity Over Confidentiality

In those arbitrations in which the state is a party, confidentiality is clearly less important than transparency and publicity. The only conditions that need to be met in order to make such publicity possible are: (i) the publicity comes after the arbitration proceedings have ended; (ii) the publicity might be subject to some exceptions as stated in the applicable law. Besides these conditions, Emergency Decree 020-2020 clearly seeks to throw light on all proceedings involving the state.

It is important to note that, before Emergency Decree 020-2020, every award rendered in arbitration proceedings in which the state was a party was subject to publication by a central administrative authority. Every time a state entity is involved in an arbitration proceeding, it shall officially inform the central authority of the proceeding and, afterwards, submit a copy of the final award for publication. Thus, there is an important public database of awards related to public contracts that goes back as far as 20 years. The study and statistics in relation to these awards have driven some of the changes made to the legislation, as the overriding preference was for institutional arbitration over ad hoc arbitrations.

The new rule contained in Emergency Decree 020-2020 extends the publicity of the award to the entire arbitral proceeding (all stages), although it is not possible to see any results of this thus far.

Requirements for a Precautionary Measure Affecting the State

Any request for a precautionary measure that might affect the state has to be filed along with a bond that shall be held until the end of the arbitration proceeding. Without such guaran-

tee, it is not possible to grant any precautionary measures. The amount of the bond is to be determined by the arbitrator or the judge to whom the request for a precautionary measure is addressed but shall not be less than the amount of the performance bond of the contract. If there is no such performance bond, then the arbitrator or the judge shall determine the sum of the bond to be filed.

According to the Statement of Reasons for Emergency Decree 020-2020, this new rule was needed given “the abusive use of precautionary measures by contractors”, which often affected the execution and development of public works. Thus, the requirement to submit a bond as a condition for requesting a precautionary measure is aimed at covering any potential damage caused to the state by such measure and, therefore, reducing abusive requests.

This new rule is coherent with another rule introduced in 2017 by which a party seeking to set aside an award shall submit a bank guarantee if the award was rendered in an arbitration in which one of the parties was the state. An important difference is that the 2017 rule was a result of amending the Public Procurement Act, not the Arbitration Act.

In general terms, beyond the opinion one might have about these new legal provisions, the arbitration system in Peru remains largely coherent with the principles of the UNCITRAL Model Law.

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