



The Arbitration Review of the Americas

2022

Peru

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.


Other nuggets include:

- helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
 - an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
 - a similarly helpful summary of recent Canadian court decisions;
 - another on Mexican court decisions that showed a rather mixed year; and
 - the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.
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Explore on **GAR** 

Peru

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IN SUMMARY

Although there were no amendments to Peruvian arbitration law in the past year, changes to the Peruvian arbitration market have continued. This article discusses updates in arbitration concerning a bill that intends to modify the Public Procurement Law and the issuance of new arbitration rules by the Arbitration Centre of the American Chamber of Commerce of Peru (Amcham). The article will also address the decisions rendered by Peruvian courts concerning the annulment of arbitral awards, establishing criteria in favour of arbitration. Finally, this article will briefly discuss Peru's situation regarding investment arbitration before the International Centre for Settlement of Investment Disputes.

DISCUSSION POINTS

- Bill of Law of the Public Procurement Law
- New arbitration rules issued by Amcham
- Current arbitration jurisprudence issued by Peruvian courts
- Investment arbitration and Peru

REFERENCED IN THIS ARTICLE

- Arbitration Law
- Public Procurement Law
- International Centre for Settlement of Investment Disputes
- International Chamber of Commerce
- Amcham
- 2021 Amcham Arbitration Rules
- 2013 Amcham Arbitration Rules
- Kluwer Law International

PERUVIAN ARBITRATION REGULATIONS

The Peruvian Arbitration Law (PAL)^[1] has not been amended within the past year; therefore, the regulations applicable to domestic and international arbitration remain the same as those in force when the previous edition of this book was published.

However, a bill that seeks to modify the Public Procurement Law (PPL)^[2] has been published, proposing some modifications to the section regarding arbitration.

On 30 April 2021, the Ministry of Economy and Finance published a new bill that intends to modify the PPL.^[3] The purpose of publishing the bill was to encourage the public to give their comments and suggestions on the new legislative proposal.

This bill has two important proposals for amending the section on arbitration.^[4] One proposal is the regulation on a list of non-arbitrable disputes (in case a dispute arises from the execution of a public contract); however, considering that this list will be regulated later in

the PAL Regulations, the public has not been able to comment and give suggestions on a more extensive way.

The other proposal is the regulation on the statute of limitations to initiate an arbitration. The bill states that the statute of limitations will be regulated in the PAL Regulations. This proposal has no legal basis, considering that the statute of limitations in Peru can only be established by law and not by mere regulations.

The bill is currently being discussed for possible approval.

AMCHAM ARBITRATION RULES OF 2021

Arbitration in Peru has developed consistently in the past decade. This might be because of the 'internationalisation of the Peruvian arbitration' (eg, many cases of domestic arbitration have international arbitrators, allowing international experience to arrive in Peru faster).

In a context where the Peruvian arbitration market attempts to follow the current and best international arbitration practices, the Arbitration Centre of the American Chamber of Commerce of Peru (Amcham) has enacted new arbitration rules that attempt to be considered within the national and international vanguard.

The 2021 Amcham Arbitration Rules will be in force from July 2021 (the 2021 Amcham Rules), replacing the Arbitration Rules of 2013 (the 2013 Amcham Rules). The most relevant aspects of these rules will be described as follows.

Scrutiny Of Awards

The scrutiny of awards is not new in foreign arbitral institutions. The International Chamber of Commerce (ICC) has had this measure for decades to ensure the quality of awards and its enforcement (a low-quality award might have problems in its enforcement). The evidence shows that those goals have been achieved by the ICC in the past few years.

Amcham has decided to incorporate this rule into the Amcham Rules 2021, being the first Peruvian arbitral institution regulating the scrutiny of awards. In accordance with this rule, the Court of Amcham must review any award (before signing by the arbitrators) and make recommendations to any part of it, while 'respecting the arbitral tribunal's liberty of decision'.^[5]

Unlike the ICC rule, the Court of Amcham cannot 'lay down modifications as to the form of the award'.^[6] It can only make recommendations to any part of the award (either of form or substance). Both the ICC and Amcham arbitration rules agree that in respect of points of substance, the courts only have the powers to make recommendations.

To some Peruvian arbitration practitioners, the incorporation of the scrutiny of awards by Amcham may be a first step forward in the Peruvian arbitration market. In addition to promoting competition among the arbitral institutions, it opens the possibility for other arbitral institutions to introduce this important rule.

Multiple Parties, Multiple Contracts And Consolidation

Some of the main developments in the 2021 Amcham Rules, are the regulations related to the joinder of additional parties, claims between multiple parties, multiple-contract arbitrations and consolidation of arbitration. Although most of those measures had been applied before without regulation, the new rules may help the parties have predictable arbitration and a clear picture of the proceedings.

Joinder Of Additional Parties

With regard to the joinder of additional parties,^[7] a request for arbitration must be submitted and decided by the arbitral tribunal (once constituted). The request must be submitted before the constitution of the arbitral tribunal, after which the incorporation of additional parties is subject to acceptance by the additional party and the arbitral tribunal.

Claims Between Multiple Parties

With regard to claims between multiple parties (proceedings with more than two parties),^[8] any party can submit claims against any other in a single proceeding.

The new regulation also provides clear rules regarding the composition of the arbitral tribunal in multiple arbitration cases. In those cases, the arbitral tribunal must be constituted according to the agreement between the parties. If there is no agreement, the group of claimants must nominate an arbitrator, and the group of defendants must do the same.

In the absence of an agreement by the parties, it is the Court's duty to appoint only the left arbitrator or all the arbitrators (depending on the circumstances of the case).

Multiple-contract Arbitrations

Any claim or claims arising out of or in connection with more than one contract (multiple-contract arbitrations)^[9] may be made in a single arbitration, irrespective of whether the claims are made under one or more arbitration agreement. The Court must decide on the compatibility of all the arbitration agreements.

Consolidation Of Arbitration

The Court of Amcham can consolidate two or more pending arbitrations into a single arbitration in accordance with the 2021 Amcham Arbitration Rules.^[10] The consolidation of two or more arbitrations is possible in the following cases:

1. all the claims in the arbitration were made under the same arbitration agreement or agreements; or
2. the claims in the arbitration were not made under the same arbitration agreement or agreements, but the Court finds the arbitration agreements to be compatible.

In the case in point (2), the Court must consider if the claims arise in connection with the same legal relationship or if the legal relationships are connected.

Empowerment Of The Secretary General And Confirmation Of The Arbitrators

The 2021 Amcham Rules granted new faculties to the Secretary General, namely confirming the co-arbitrators (whether they are listed in Amcham's list of arbitrators) once nominated by the parties^[11] and complementing the nomination proceedings of the arbitral tribunal.^[12]

The Court of Amcham is in charge of confirming the arbitrators if the secretary decides not to confirm a co-arbitrator, as well as when the arbitrators make any declaration of 'reserve' or if any of the parties submits an objection owing to impartiality, availability or independence.

Management Of The Case And Procedural Issues

The 2021 Amcham Arbitration Rules have incorporated some new regulations on the road to promoting faster proceedings. Two of the main incorporations are the following.

A Previously Informed Counterclaim

According to the 2021 Amcham Arbitration Rules, any counterclaim must be previously informed in the 'answer to the request'; otherwise, the defendant will not be able to submit its counterclaim unless the arbitral tribunal considers there to be a reasonable cause to admit it.^[13]

Before the 2021 Amcham Arbitration Rules, it was not mandatory for the defendant to notify in the answer to the request whether a counterclaim was going to be submitted (it was only optional).^[14] The defendant had the possibility of adding a final counterclaim in the answer to the lawsuit.

This change may help facilitate the management of the procedural timetable and allow for more predictable proceedings.

Time Limit For The Final Award

According to the 2021 Amcham Arbitration Rules, the final award must be rendered within 10 months of the notification of the arbitration rules. The Court is able to extend the time limit if needed.^[15]

This modification may favour faster decisions from the tribunal and, accordingly, satisfy the interests of the parties in a shorter period.^[16]

Transparency

Seeking new instruments to ensure transparency, Amcham has included the following regulations:

- unless otherwise agreed by the parties, after six months have passed from the submission of the final award, Amcham may order its publication,^[17]
- any of the parties has 30 working days after submission of the final award to raise an objection for its publication or to ask for the suppression of specific parts containing sensible, commercial or industrial information,^[18] and the Court makes the final decision on the petition; and
- Amcham will make public the composition of the arbitral tribunal and cases on their charge, as well as the information on the parties and their attorneys.^[19]

The above measures may allow for better follow-up on any possible conflict of interest that could appear in any arbitration. This may also enhance transparency from the tribunal and the parties and attorneys during all stages of the arbitration.

CURRENT ARBITRATION JURISPRUDENCE

Some important judicial criteria related to arbitration have been made by Peruvian Courts in recent months. These criteria remark arbitration as an independent jurisdiction by which Courts cannot act as an appeal instance, empowering the arbitral tribunal and forbidding the judicial extension of non-arbitrable matters.

MTC V Azteca Comunicaciones Perú SAC[20]

The Ministry of Transport and Communications (the Ministry) signed a concession contract with Azteca Comunicaciones Peru SAC (Azteca) related to the project *Red Dorsal Nacional de Fibra Óptica: Cobertura Universal Norte, Cobertura Universal Sur y Cobertura Universal Centro*.

During the execution of the contract, a dispute emerged concerning whether Azteca was obliged to provide (build and implement) an additional facility. Arbitration proceedings were initiated.

The final award on the merits was partially favourable to Azteca; therefore, the Ministry sought the annulment of the arbitral award before the Peruvian courts, alleging the violation of section 63.1.b of the PAL.^[21] Azteca claimed that there were faults concerning the motivations of the award.

Nevertheless, the Second Commercial Chamber of the Superior Court of Lima dismissed the annulment request,^[22] as the courts have limited functions over the arbitral award, which prevents them from evaluating the criterion adopted by the arbitral tribunal. Consequently, the court concluded the following:^[23]

[i]n this sense, this collegiate is legally prohibited from issuing a judicial ruling on the merits of the dispute, the content of the decision or the qualification of the criteria, motivations or interpretations; and even if this collegiate may or may not agree with the reasoning, criteria, legal position or concepts used by the arbitral tribunal, it cannot review then, except in the strictly formal sense, since, as has been indicated, it is an independent jurisdiction, which must be respected.

The criterion established in the ruling confirms a positive tendency in the Peruvian judicial jurisprudence over the courts' faculty in respect of revised arbitral awards. The judiciary should not intervene with the considerations taken by the arbitral tribunal to decide a case.

Daniel Martinez V ADINEL SA^[24]

Daniel Martinez Reluz and Empresa de Administración de Infraestructura Eléctrica SA (ADINELSA) subscribed a contract by which the former was obliged to supervise electrical work for the latter. Several conflicts arose from the work's execution, which eventually led to ADINELSA's decision to terminate the contract.

Martinez initiated arbitration proceedings before the Chamber of Commerce of Lima (CCL) to challenge the termination; however, he did not file a complaint within the time limit set by the sole arbitrator. Accordingly, the arbitration proceedings continued exclusively in respect of the claims proposed by ADINELSA.

The sole arbitrator rendered an arbitral award by which ADINELSA's claim for compensation was partially founded. Martinez challenged the award before Peruvian Courts alleging that:

- ADINELSA sued outside the term agreed in the arbitration agreement;
- general arbitration rules rather than expedited arbitration rules were supposed to be applied but; and
- the arbitrator decided to continue the proceedings in respect of ADINELSA's damage claim and not Martinez's claims without reason.

The First Commercial Chamber of the Superior Court of Lima dismissed the annulment request. The Court stated, among other considerations, that Martinez did not object to any of his current allegations during the arbitration proceedings, which, under sections 11^[25] and 63.2^[26] of the PAL, means a waiver of his right to object.

In conclusion, the waiver and preclusion principle, by which '[i]f a party fails to object to a particular procedure during the arbitration, it cannot ordinarily later challenge the award on the basis if that procedure',^[27] is well assessed by Peruvian courts.

Obrainsa V Provias Nacional[28]

As a rule, any controversy arising from public procurement contracts is arbitrable.^[29]

The non-arbitrability exception is expressly established in the PPL. In this regard, section 45.4 of the PPL declares the non-arbitrability of, among other things, the state's decision on whether to approve an additional work.

In the present case, arbitration was initiated by Obras de Ingeniería SA (Obrainsa) claiming for costs and expenses deriving from the extension of the contractual term, which, at the same time, had its origin in an additional work approved by Proyecto Especial de Infraestructura de Transporte Nacional (Provias).

The arbitral award favoured Obrainsa. Accordingly, Provias initiated an annulment procedure before the First Commercial Chamber of the Superior Court of Lima, alleging that the arbitral tribunal decided over a non-arbitrable matter. In particular, Provias alleged that those costs and expenses, although they cannot be deemed as additional work, are related to that matter.

However, the Court dismissed the claim stating:^[30]

[the non-arbitrable matters] limit the parties' right to activate the arbitration forum, thereby they shall be interpreted in a restrictive manner and not in extension or by analogy, to include matters different from additional works such as extension of the contract terms.

The criterion adopted by the Court is positive. It reaffirms the legislative intention to provide arbitration as a main dispute resolution mechanism in controversies deriving from the execution of public procurement contracts.

INTERNATIONAL INVESTMENT ARBITRATION AND PERU

Cases Against Peru

The number of investment arbitrations against Peru has risen significantly in the past few years. In 2020 and 2021, 11 investment arbitrations were initiated against Peru.^[31] This is important considering that the same number of proceedings had previously been initiated against Peru in a five-year period (between 2016 and 2019). However, most cases are pending.

One of the cases where the arbitral tribunal has ruled is the one initiated by Lidercón SL (Lidercón). The case and the final award issued by the tribunal are described below

Lidercón SL V Republic Of Peru[32]

The ICSID arbitral tribunal dismissed the claim submitted by Lidercón against Peru. In the tribunal's view, the state's National Vehicle Inspection Law (ITV) and the administrative and

judicial decisions that affect Lidercón's right to exclusively provide vehicle inspection services did not breach any state duty to guarantee fair and equitable treatment to foreign investors nor imposed any discriminatory measure

Facts And Origins Of The Arbitral Dispute Before ICSID

A concession contract was signed in 2004 between the Metropolitan Municipality of Lima (MML) and Lidercón. Under the contract, the MML granted to Lidercón the exclusive right to provide vehicle inspection services in Lima

In 2008, the MML terminated the contract while the state enacted the ITV. Pursuant to the ITV, the Ministry of Transport and Communications assumed sole competence over vehicle inspection concessions, which from that point were supposed not to be granted exclusively. Moreover, the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (INDECOPi)^[33] declared on many occasions that the exclusive right granted to Lidercón was a bureaucratic barrier that had to be banned. Those decisions were later upheld by Peruvian courts

Finally, in 2017, the Superior Court of Lima determined that an arbitral award favourable to Lidercón was partially unenforceable as the ITV deprived the MML competence over the contract

Owing to the above facts, Lidercón decided to initiate an international investment arbitration against Peru, under the Spain–Peru bilateral investment treaty (BIT). On the merits, Lidercón alleged that Peru violated the fair and equitable treatment provision in the BIT because the ITV affected its rights while administrative and judicial decisions related to its concession contract were unreasonable and inconsistent.^[34]

Decision Of The ICSID Arbitral Tribunal

The tribunal dismissed Lidercón's claims and ordered the claimant to pay Peru US\$4,006,516.64 on account of costs. Among other considerations, the tribunal concluded that Peru did not breach the BIT

Regarding legitimate expectations, the tribunal stated that the contract expressly stated that legislation could change^[35] and 'Lidercón could not have had an expectation that the Concession Contract would be insulated from legislative or regulatory changes, and did not have a Constitutional right to refuse to be inspected by the Minister'.^[36]

Furthermore, to the tribunal, INDECOPi's determinations were not inconsistent but reasoned in a different circumstance.^[37]

Finally, ICSID concluded that the court's decision to declare that the domestic arbitral award was partially unenforceable did not affect res judicata if 'the relevant party has been deprived through legislation of the ability to comply with the award or where it implicates the rights of third parties who are not bound by the relevant arbitration agreement'.^[38]

Endnotes

- 1 Enacted by the Legislative Decree No. 1071 on June 28, 2008. [^ Back to section](#)

- 2** The PPL regulates, among others, the way in which a dispute arising from a public contract will be managed. [^ Back to section](#)
- 3** By Ministerial Resolution No. 141-2021-EF/54. [^ Back to section](#)
- 4** Section 60 of the PAL. [^ Back to section](#)
- 5** Section 43 of the 2021 Amcham Rules. [^ Back to section](#)
- 6** Section 34 of the 2021 ICC Rules. [^ Back to section](#)
- 7** Section 14 of the 2021 Amcham Rules. [^ Back to section](#)
- 8** Section 15 of the 2021 Amcham Rules. [^ Back to section](#)
- 9** Section 16 of the 2021 Amcham Rules. [^ Back to section](#)
- 10** Section 18 of the 2021 Amcham Rules. [^ Back to section](#)
- 11** Section 24 of the 2021 Amcham Rules. [^ Back to section](#)
- 12** Section 19(2) of the 2021 Amcham Rules. [^ Back to section](#)
- 13** Section 13 of Amcham Rules 2021. [^ Back to section](#)
- 14** Section 13 of Amcham Rules 2013. [^ Back to section](#)
- 15** Section 40 of Amcham Rules 2021. [^ Back to section](#)
- 16** In the previous regulation, the award had to be submitted by the arbitral tribunal within a maximum of 30 working days after the final hearing, with a possible extension of 30 additional working days (Section 39 of Amcham Rules 2013). [^ Back to section](#)
- 17** Section 9(5) of Amcham Rules 2021. [^ Back to section](#)
- 18** Section 9(5) of Amcham Rules 2021. [^ Back to section](#)
- 19** Section 9(7) of Amcham Rules 2021. [^ Back to section](#)
- 20** File 639-2019. Award dated 30 November 2020. [^ Back to section](#)
- 21** Section 63.1.b of the PAL. [^ Back to section](#)
- 22** Ruling dated 30 November 2020. [^ Back to section](#)

- 23 Fernando Cantuarias Salaverry, 'Ministerio de Transportes y Comunicaciones v Azteca Comunicaciones Perú SAC, Superior Court of Justice of Lima, Case No. 639-2019-0-1817-SP-CO-02, 30 November 2020', A contribution by the ITA Board of Reporters, Kluwer Law International. [^ Back to section](#)
- 24 File 588-2019. Award dated 13 August 2020. [^ Back to section](#)
- 25 Section 11 of the PAL. [^ Back to section](#)
- 26 Section 63.2 of the PAL. [^ Back to section](#)
- 27 Gary Born, *International Arbitration: Law and Practice*, 2nd ed (Kluwer Law International BV, Netherlands: 2016), p. 398. [^ Back to section](#)
- 28 File 660-2018, dated 23 April 2019. [^ Back to section](#)
- 29 Section 45.1 LCE. [^ Back to section](#)
- 30 File 660-2018, point thirteenth. [^ Back to section](#)
- 31 These are the following cases: *APM Terminals Callao SA v Republic of Peru* (ICSID Case No. ARB/21/28); *Telefónica SA v Republic of Peru* (ICSID Case No. ARB/21/10); *Quanta Services Netherlands BV v Republic of Peru* (ICSID Case No. ARB/21/1); *Worth Capital Holdings 27 LLC v Republic of Peru* (ICSID Case No. ARB/20/51); *Lupaka Gold Corp v Republic of Peru* (ICSID Case No. ARB/20/46); *Desarrollo Vial de los Andes SAC v Republic of Peru* (ICSID Case No. ARB/20/18); *SMM Cerro Verde Netherlands BV v Republic of Peru* (ICSID Case No. ARB/20/14); *Freeport-McMoRan Inc v Republic of Peru* (ICSID Case No. ARB/20/8); *Odebrecht Latinvest Sàrl v Republic of Peru* (ICSID Case No. ARB/20/4); *Lidercon v Republic of Peru* (ICSID Case No. ARB/17/9); and *DP World Callao SRL, P&O Dover (Holding) Limited, and the Peninsular and Oriental Steam Navigation Company v Republic of Peru* (ICSID Case No. ARB/11/21). [^ Back to section](#)
- 32 ICSID Case No. ARB/17/9. [^ Back to section](#)
- 33 INDECOPI is the Peruvian competition and antitrust authority. Its function is to promote the market and protect the rights of consumers. It also encourages a culture of fair and honest competition in the Peruvian economy, holding harmless all forms of intellectual property from trademarks and author's copyright to patents and biotechnology. [^ Back to section](#)
- 34 Ina C Popova, Romain Zamour, Emily R Hush and Charlotte Bocage. 'Lidercón SL v Republic of Peru (Award), ICSID Case No. ARB/17/9, 06 March 2020'. A contribution by the ITA Board of Reporters. [^ Back to section](#)
- 35 Award, No. 241, p. 90. [^ Back to section](#)
- 36 Award, No. 206, p. 79. [^ Back to section](#)

37 Award, No. 248. p. 94. [^ Back to section](#)

38 Award, No. 255. p. 96. [^ Back to section](#)

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