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The Baker McKenzie **International Arbitration Yearbook**

Peru

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A. Legislation and rules

A.1 Legislation

On 27 June 2008, with the need to strengthen the growing arbitration industry in Peru, a new Arbitration Law was adopted through Legislative Decree No. 1071. This law became effective on 1 September 2008 (the "2008 Arbitration Law"). It replaced former Arbitration Law No. 26572 of 5 January 1996.

The 2008 Arbitration Law, based on the UNCITRAL Model Law (the 1985 model law with its amendments in 2006) and the New York Convention, introduced a series of modern and innovative provisions that contributed to the recognition of Peru as one of the Latin American states with more developed national and international arbitration procedures.

Among the most important developments of the 2008 Arbitration Law were: (a) the implementation of one system for national and international arbitration, in contrast to the former arbitration law,

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which consisted of a dual system with separate regimes for national and international arbitration[6]; (b) the removal of the appeal mechanism under the former arbitration law, having as the only challenge mechanism for an arbitral award the annulment action under specific circumstances; (c) the extension of the arbitral agreement of a contract to third-party non-signatories whose consent to submit to arbitration pursuant to good faith is determined by their active and decisive participation in the negotiation, execution or termination of a contract that includes the arbitral agreement; as well as the extension of the arbitral agreement to third-party non-signatories that derive rights or benefits from the contract according to its terms; and (d) specific provisions for the recognition and enforcement of foreign arbitral awards, either under the New York Convention or the Panama Convention, among others.

In 2015, Legislative Decree 1231 was enacted, changing certain arbitration regulations. Among the most significant changes were: (a) a person who has been convicted of a crime can no longer act as an arbitrator; and (b) when a controversy is related to acts or rights subject to registration in the Public Registry, the arbitral tribunal will order the registration of the arbitration proceeding in the record of the Public Registry.

With regard to disputes involving contracts with the state, since 1999, with former Procurement Law No. 26850, it became obligatory that every contractual dispute be solved under arbitration, which was one of the reasons arbitration proceedings in Peru had developed over the years. Also, all concession contracts between private parties and the state, as well as other types of contracts, like for instance license and service contracts for the exploration and exploitation of hydrocarbons, include arbitration clauses.

[6] Although the 2008 Arbitration Law includes some provisions specifically for international arbitration, such as, applicable law, possibility of waiving the annulment mechanism, and the recognition and enforcement of foreign arbitral awards.

Also in 2015, the new Procurement Law No. 30225 and its regulations, which are in Supreme Decree No. 350-2015-EF, were adopted. Among other matters, this new procurement legislation provided mechanisms to solve any disputes related to procurement activities. The most important change in dispute resolution is the possibility of having a Dispute Board for public work contracts that are valued at over PEN 20,000,000 (approximately USD 6,000,000). This will provide a faster mechanism to solve any dispute that may occur during the contract execution. The decisions by the Dispute Board will be binding, but can be challenged in arbitration.

With respect to international arbitration, over the past 10 years Peru has been an important participant in international investment arbitration, basically ICSID arbitration, achieving victories in almost all of its cases so far. As of today, Peru has 12 concluded and 4 pending ICSID arbitrations in different industries. This is the result of a strong state policy of promoting and attracting foreign investment in the country that began in the 1990s together with the conclusion of 33 BITs.

Also, after the Peru-US Free Trade Agreement (FTA) became effective in February 2009, Peru concluded many other FTAs containing investment chapters, with countries such as China, Canada, Chile, Costa Rica, South Korea, Japan, Mexico, Panama and Singapore. Also, Peru is part of the Pacific Alliance together with Chile, Colombia and Mexico, and it has recently signed the Trans-Pacific Partnership Agreement.

Recently, the first international investment arbitration against Peru under the Investment Chapter of the Peru-US FTA was concluded, with a complete victory for Peru based on jurisdictional grounds, in the case of *The Renco Group, Inc. v. Republic of Peru,*[7] an UNCITRAL arbitration administered by ICSID. Also, Peru is currently facing other international investment arbitrations under the investments chapters of FTAs in the cases of *Bear Creek Mining*

[7] UNCT/13/1.

Corporation v. Republic of Peru[8] (Peru - Canada FTA) and *Grammercy Funds Management LLC and Grammercy Peru Holdings LLC v. Republic of Peru*, UNCITRAL arbitration (Peru-US FTA).

In addition, international commercial arbitrations between private parties under the ICC Rules and before the Inter-American Commission of Commercial Arbitration (CIAC) are beginning to increase, with disputes related to hydrocarbons contracts and public works.

A.2 Institutions, rules and infrastructure

The three most important arbitration institutions in Peru are the Arbitration Center of the Lima Chamber of Commerce, the Arbitration Center of the Pontifical Catholic University of Peru, and the International Arbitration Center of the American Chamber of Commerce of Peru (AmCham).

The Arbitration Center of the Lima Chamber of Commerce is by far the biggest and the most active, with more than a decade of experience in the administration of arbitrations of all kinds. To date, it has organized almost 3,000 local and international arbitration proceedings, whose amounts in dispute have exceeded USD 2.4 billion. This arbitral institution has also recently amended its rules, and these amendments came into force on 1 January 2017. The new arbitration rules aim to raise arbitration practice in Peru to international standards. The main innovations of the new rules are, among others: (a) the implementation of rules that promote speed in arbitration proceedings and the use of technology; (b) the implementation of emergency arbitrator provisions; and (c) rules for arbitrations with plurality of parties and contracts.

The Arbitration Center of the Pontifical Catholic University of Peru, in addition to having the 2012 Arbitration Rules, also offers rules for dispute board resolutions, as a mechanism with which to settle disputes in construction contracts. The International Arbitration

[8] ICSID Case No. ARB/14/21.

Center of the American Chamber of Commerce of Peru (AmCham) is the least used of the three arbitral institutions mentioned, although its caseload is growing. The most recent regulation of this center came into force on 1 January 2013.

B. Cases

B.1 *Sociedad Minera de Responsabilidad Ltda. Maria Julia (Maria Julia) v. Aurífera Huachón S.A.C.*

Maria Julia and Aurífera Huachón S.A.C. followed an arbitration process, which Maria Julia lost. Maria Julia wanted to challenge the award but its request did not meet any of the specific conditions for annulment established in the 2008 Arbitration Law. Consequently, in 2009, Maria Julia filed an *amparo* action, which was declared inappropriate by the Judiciary Branch in first and second instances.

Maria Julia appealed to the Constitutional Court of Peru, which also dismissed its case on 22 September 2011. The Constitutional Court established a binding precedent, ruling that the *amparo* action may only proceed: (i) if the award contradicts a Constitutional Court's binding precedent; (ii) if the award implies the non-application of norms whose constitutionality was confirmed by the Constitutional Court or the Judiciary Branch; or (iii) if the award affected the constitutional rights of a third party (except in cases ruled by Article 14 of the Arbitration Law).[9]

This case is significant because it requires that awards in Peru must be respected and that their invalidity (with an annulment action or the *amparo* action) should be an exception.

[9] Article 14 of the 2008 Arbitration Law deals with the extension of an arbitral agreement and provides the following: "The arbitral agreement extends to those whose consent to submit to arbitration, pursuant to good faith, is determined by their active and decisive participation in the negotiation, celebration, execution or termination of the contract that includes the arbitral agreement, or to which the agreement is related. It extends also to those that pretend to derive rights or benefits from the contract according to its terms."

B.2 *Convial Callao S.A. and Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*[10]

Convial Callao S.A., a Peruvian subsidiary of Argentina's Compañía de Concesiones de Infraestructura (CCI), won a 30-year concession in 2001 to build and operate an expressway between Lima and Peru´s main international airport (Aeropuerto Internacional Jorge Chávez) located in the city of Callao. However, the project fell far behind schedule for reasons disputed by the parties. Thus, the Callao municipal government decided to terminate the concession contract in 2007 on the ground that it was not in the public interest to continue with the concession (a legal clause contemplated in the contract under which the Callao municipal government could terminate the contract for reasons of public interest).

In 2010, Convial Callao S.A. and CCI filed a USD 125 million ICSID claim under the Peru-Argentina BIT, arguing that the termination of the concession contract was politically motivated and an abuse of sovereign power. The claimants alleged that Peru breached the BIT provisions on fair and equitable treatment, expropriation, unfair and discriminatory measures, full protection and security and most-favored nation treatment.

The Tribunal[11] rejected all these claims on their merits, holding that the municipal government had exercised a contractual right by terminating the concession contract and had not abused its power. According to the Tribunal, the claimants failed to demonstrate any political pressure which supposedly led to the termination of the contract or that Peruvian authorities behaved in an arbitrary manner. The Tribunal also said that the Peru-Argentina BIT did not contain an umbrella clause, and that in the absence of such a clause, "mere contractual expectations" were not guaranteed by the BIT. Accordingly, the Tribunal stated that claimants had failed to

[10] ICSID Case No. ARB/10/2.
[11] The Tribunal comprised Yves Derains (president), Eduardo Zuleta Jaramiilo (appointed by the claimants) and Brigitte Stern (appointed by the respondent).

demonstrate that the termination of their concession amounted to a breach of the Peru-Argentina BIT. The Tribunal ordered the claimants to pay USD 2,117,489 for costs incurred by Peru.

This case demonstrates the differences between contract claims and treaty claims, and why without an umbrella clause in a BIT a claimant cannot expect to convert claims based on a contract under dispute into treaty claims.

B.3 *Caravelí Cotaruse Transmisora de Energía S.A.C v. Republic of Peru*[12]

In August 2008, Caraveli Cotaruse Transmisora de Energía S.A.C. ("CCTE"), a Peruvian company controlled by Spanish construction groups Elecnor and Grupo Isolux Corsán, signed two concession contracts for a 30-year term (Contract Machu Picchu-Cotaruse, and Contract Mantaro-Caravelí-Montalvo), for the construction of two power transmission lines in the south of Peru.

However, CCTE failed to provide the financing for the projects, which were never built, alleging that the impact of the 2008 global recession generated a large increase in the financing and interest rates for the project, which meant that their obligations under the contracts became "excessively onerous" under Peruvian law.

In April 2011, CCTE filed an ICSID claim under the concession contracts. CCTE requested the Tribunal to: (i) confirm that the concession contracts had became excessively onerous under the Peruvian Civil Code; and (ii) demand the modification of the concession contracts in order to grant CCTE a cumulative tariff rate increase in the concession and a new term for the construction of the project; and (iii) order the termination of the concession contracts if the parties did not reach an agreement in items (i) and (ii), and award claimant damages in the amount of USD 25 million.

[12] ICSID Case No. ARB/11/9.

Peru argued that the concessions had been granted through a competitive bid and could not be altered, particularly as other concessionaires had fulfilled their contracts under the same economic conditions.

The Tribunal[13] held that CCTE could not use the financial crisis to justify non-performance of two concession contracts or seek an increase in its tariff rates. Also, the Tribunal indicated that the cost of financing the projects was CCTE's responsibility, and noted that the interest rates in the second half of 2009 had returned to the same levels as to those prior to CCTE's presentation of its bid proposal.

In any case, the Tribunal concluded that CCTE's allegation that the concession contracts had become "excessively onerous" under Peruvian law was barred under Peru's statute of limitations. Accordingly, the Tribunal rejected the claimant's claims and awarded the Republic of Peru over USD 3 million in costs.

B.4 *The Renco Group, Inc. v. Republic of Peru*[14]

This was the first international investment arbitration case under the Investment Chapter of the Peru-US FTA, which was related to the operations of a metallurgical complex and to environmental matters. This case concluded with a partial award on jurisdiction in favor of Peru on 15 July 2016, and a final award on costs on 9 November 2016.

The Renco Group, Inc. (the "Claimant") alleged breach by Peru of different rights under the Treaty, such as fair and equitable treatment, discrimination, and expropriation of its investments, owned by its subsidiary, Doe Run Peru, a company that is currently undergoing bankruptcy proceedings in Peru.

[13] The Tribunal comprised Luis Olavo Baptista (president), Alexis Mourre (appointed by the claimant) and Horacio Grigera Naón (appointed by the respondent).
[14] UNCT/13/1, UNCITRAL arbitration, administered by ICSID.

During the course of the arbitration, Peru presented preliminary objections, which included among others, the submission by the Claimant of an invalid waiver, which is one of the requirements of consent by the state under the Treaty. The interpretation of the waiver provisions of the Treaty included three opinions by the U.S. State Department about the scope of the waiver provisions.

On 15 June 2016, the Tribunal rendered a partial award refusing jurisdiction over the claims presented by the Claimant, since the investor failed to comply with the waiver requirement under the Treaty by reserving its right to pursue their claims in other fora if the Tribunal declined to hear any of them on jurisdictional grounds. Then, on 6 November 2016, the Tribunal rendered a final award on costs, ordering that each party bear their own legal and other costs in relation to the arbitration.

This case has become an important precedent on the importance of submitting a valid waiver under the Peru-US FTA in order to have the consent of the state in an investment arbitration under this treaty.

C. Trends and observations

In the last 10 years, arbitration in Peru had undergone important and positive developments. The enactment of the 2008 Arbitration Law, based on the UNCITRAL Model Law and the New York Convention, together with the non-interventionist action of the Judiciary Branch in arbitration, has set a clear pro-arbitration policy in Peru.

The Peruvian Judiciary Branch has established a clear line in allowing the development of national and international arbitration in Peru, seeking to protect the guarantees of the process and the right of the parties but without allowing irrational interference in arbitrations. In this regard, *amparo* actions are available only in cases of manifest violation of fundamental rights, and an annulment action is the only available challenge to an award, without inciting a possible review by the court of the merits of the dispute, or a modification of the arbitrators' decision.

In this way, we consider that national and international arbitration in Peru will continue to develop in an environment that upholds best practices at a global level. Also, if it continues in this path, Peru will probably soon be considered one of the most appropriate arbitration seats for disputes involving Latin American parties.