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Peru





Peru

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A. Legislation and rules

A.1 Legislation

International arbitration in Peru continues to be governed by Legislative Decree No. 1071 of 2008, based on the UNCITRAL Model Law (the 1985 Model Law with its amendments in 2006) and the New York Convention. Peru has introduced a series of modern and innovative provisions to its arbitration law that have contributed to the recognition of Peru as one of the Latin American states with more developed national and international arbitration procedures.

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

Since this modification, no further amendment has been made to the Peruvian arbitration law.

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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: (i) the implementation of rules that promote speed in arbitration proceedings and the use of technology; (ii) the implementation of emergency arbitrator provisions; and (iii) rules for arbitrations with plurality of parties and contracts.

The Arbitration Center of the Pontifical Catholic University of Peru has also recently amended its rules to adapt more to international standards. These amendments entered into force on 15 June 2017. The main innovations of these rules include provisions on expedited arbitration procedures when justified by the circumstances of the case, the complexity of the dispute and the amount involved. This expedited arbitration procedure can be proposed by the General Secretariat, or by agreement of the parties.

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 *The Renco Group, Inc. v. Republic of Peru*⁴

This was the first international investment arbitration case under the Investment Chapter of the Peru-US FTA, which 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.

During the course of the arbitration, Peru presented preliminary objections, which included 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 US 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.

⁴ UNCT/13/1, UNCITRAL arbitration, administered by ICSID.

B.2 *Bear Creek Mining Corporation v. Republic of Peru*⁵

This was the first international investment arbitration case under the Investment Chapter of the Peru-Canada FTA, related to the operation of a mining concession granted in 2007 in the Puno Region in Peru. Bear Creek Mining Corporation (the “Claimant”) began exploration work and an environmental social impact assessment. However, strong social protests by the communities in the area began to take place, which ended in a Presidential Decree suspending the project and terminating the mining concession granted within 50 kilometers of the border, under the grounds that it was no longer in the national interest.

The Claimant filed its Request for Arbitration in 2014 before ICSID, after receiving a judgment in its favor from Lima’s First Constitutional Court establishing that the company’s rights had been violated by the Peruvian government measures. The Claimant alleged breaches by Peru of its treaty rights under the Investment Chapter of the Peru-Canada FTA, such as fair and equitable treatment, full protection and security, and indirect expropriation.

The tribunal found that Peru committed indirect expropriation since its actions had an economic impact on the Claimant’s investment and it interfered with the company’s reasonable investment expectations. Since the tribunal found an indirect expropriation, it established that there was no reason to analyze if there was a breach of the fair and equitable treatment or full protection and security standards.

Of the USD 522.2 million in damages requested by the Claimant for unlawful expropriation, the tribunal granted only USD 30.4 million, which was the amount invested by the Claimant plus interest. Also, the tribunal ordered Peru to pay 75% of Claimant’s arbitration costs, which were equivalent to USD 5.9 million, plus interest.

⁵ ICSID Case No. ARB/14/21.



However, Professor Philippe Sands, Peru's appointed arbitrator, issued a partial dissenting opinion indicating that the Claimant failed to obtain a social license from the communities, which contributed to the social unrest that caused the project to be unviable. According to this arbitrator, the Claimant's contribution to the social problems was significant and material, so the damages amount should be reduced by one half. In addition, this arbitrator mentioned that the costs of the proceeding should be split equally between the parties.

C. Funding in international arbitration

Peruvian arbitration law does not regulate third-party funding. Also, the Arbitration Rules of the Arbitration Center of the Lima Chamber of Commerce, the Arbitration Center of the Pontifical Catholic University of Peru and AmCham do not contain provisions on this matter. There is also no specific law on the topic.

However, there is a company in Peru already providing these type of services — Lex Finance. This company provides financing for national and international arbitrations. We consider that third-party funding will become a growing feature of arbitration practice in Peru.