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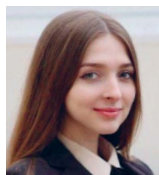
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CORRUPTION IN STATE ARBITRATION IN THE REPUBLIC OF PERU: CASES, LESSONS AND POSSIBLE SOLUTIONS



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This article will analyze a series of events, scandals, cases and initiatives that took place in the Republic of Peru as of 2019 to date, which are related to allegations of corruption brought against several Peruvian arbitrators.

In order to understand this aspect of the Odebrecht Case in the Republic of Peru, this article starts with a brief analysis of arbitration with the State, and then, a review of the most relevant facts related to corruption in the arbitration system. In particular, we will analyze the case of arbitrator Mr. Fernando Cantuarias, evidencing the huge knowledge gap that exists among the ordinary courts regarding arbitration, which led the court to order preventive custody without having enough grounds to do so.

Lastly, the main institutional and legislative reforms aimed at eliminating corrupt practices in Peruvian arbitration will be reviewed.

Brief analysis of arbitration with the state in the Republic of Peru

In 1998, through the enactment of the Law 26.850 of Contracts and Procurement of the State, the Republic of Peru shifted the focus of the admin-

istration of justice in any disputes that could occur in relation to the performance of contracts entered into by the State.

Article 41 of the Law 26.850 expressly provided that works, purchase or service contracts, must include a dispute resolution clause, indicating that these should be resolved *“through either out-of-court settlement or arbitration procedures, whichever the parties may agree upon”*.

To quote the Peruvian author Mario Castillo, *“this evidently implies that the arbitration procedure was more adequate than the ordinary justice itself to settle these disputes, given the excessive length of judicial procedures on these matters”*¹.

Currently, article 40 of the or State Procurement Law, requires that the dispute resolution clauses are included under the same terms than formerly, adding that *“in case the corresponding clause is not included in the bidding documents or the contract, then the model clause set forth by the Regulations shall be deemed incorporated therein by operation of law”*.

Hence, this becomes a mandatory arbitration, since, upon entering into a contract with the State, the private person does not have any possibility to negotiate the terms of the dispute resolution procedure, being obligated to submit themselves to the arbitration procedure that the ancillary Regulations set forth.

¹ CASTILLO, Mario. *“Arbitration in the Peruvian State”*. p. 2. *The length of the ordinary procedure in the Republic of Peru is approximately 7 years.*

In broader terms, participation of the Republic of Peru in arbitration procedures is regulated by the Legislative Decree 1071, Law of Arbitration.

In particular, article 4 of the Law of Arbitration regulates the State's participation in arbitration procedures under the following terms:

1. *For the purposes of this Legislative Decree, the reference made to the Peruvian State entails the National Government, Regional Governments, Local Governments and their corresponding agencies, as well as the legal persons under public law, state enterprises under public law, private law, or partly state-owned companies, as well as legal persons under private law which exercise state functions pursuant to law, delegation, concession or authorization of the State.*
2. *Disputes arising from the contracts and agreements entered into between these state entities may be submitted to national arbitration.*
3. *The State may submit to national arbitration procedures those disputes arising from contracts it enters into with nationals or foreign individuals domiciled in the country.*
4. *The State may also submit to international arbitration, whether in the country or abroad, those disputes arising from the contracts it enters into with nationals or foreign individuals domiciled abroad.*
5. *In the case of financial activities, the arbitration procedures may be carried out in the country or abroad, even with foreign individuals domiciled in the country.*

The provisions of this article aid to determine the limits of the scope of Article 40 of the State Procurement Law, since they set forth or allow to identify: a) The acts of the State that may be submitted

to arbitration; b) the parties that may be parties to arbitration proceedings with the State; and c) arbitration type and seat where the proceedings would be carried out.

The arbitration proceedings may only be applied in those “cases where the State is acting as an entity subject to private law”², wherein a distinction must be made between the acts deriving from the *ius imperium* (Government agencies) and those related to the *ius gestionis* (the State as a private entity)³.

From the perspective of the comparative law, it is noteworthy that “the arbitration procedures not only are established to resolve disputes between the State –and its agencies– and third parties, that is to say, a private person [...], but also between governmental agencies”⁴.

It is interesting to note that the Peruvian State is also authorized to participate in national and international arbitration, whose seat may be in Peru or any other country. As it was already explained in an earlier publication, Peru is a country that leans towards a unitary regulation, despite the fact that it acknowledges differences between national and international arbitration⁵. As a side point, Peru's case is noteworthy in Latin America, since the Peruvian State uses to stipulate arbitration clauses in favor of ICSID arbitration by contractual means, beyond its regulation through investment bilateral treaties.

Additionally, just as in many countries around the world, arbitration proceedings taking place in Peru, between private parties and also those with the State, may be resolved in institutional arbitration⁶, or otherwise, before an *ad hoc* arbitral tribunal. As will be analyzed below, this distinction turns out to be fundamental to understand the case of Mr. Cantuarias. We will also explain the most recent reform aimed at reducing the usage of *ad hoc* arbitration procedures.

² CASTILLO, Mario. “Arbitration in the Peruvian State”. p. 5.

³ GARCÍA-CALDERÓN MOREYRA, Gonzalo. *The International Arbitration*. Lima: CECOSAMI, 2004; p. 88. In CASTILLO, Mario. “Arbitration in the Peruvian State”. p. 5.

⁴ CASTILLO, Mario. “Arbitration in the Peruvian State”. p. 5.

⁵ MEREMINKSAYA, Elina. “РОСТ И ЗАДАЧИ МЕЖДУНАРОДНОГО КОММЕРЧЕСКОГО АРБИТРАЖА В ЛАТИНСКОЙ АМЕРИКЕ”, *Arbitration.Ru*, December 2018, № 4, p. 49.

⁶ *General Law of Arbitration of Peru, Fourth Supplementary and Transitory Disposition: “The Arbitration Institutions shall incorporate to their Rules of Arbitration, provisions on their activity as entities appointing arbitrators. For those purposes, the aforementioned institutions shall approve the necessary statutory dispositions within sixty (60) days as of the effective day of this Law, and they shall publicize them through the media outlets they deem appropriate”.*

Lastly, we observe that arbitration is highly relevant in Peru when resolving disputes between private parties as well as with the State. Since the participation of the latter is mandatory, arbitration has become a key element of the administration of justice.

Official research –albeit somewhat biased– estimate that “*the State lost 70% of the arbitration procedures it subjected itself to in order to resolve disputes arising from public procurement*”⁷. At the same time, it is hardly a secret that the State’s non-performance of contracts is the main explanation of its losses in arbitration. In turn, the need to follow the administrative procedures and the fear of the suspicion of corruption prevent the public officials from resolving disputes on a non-adversarial basis⁸.

Corruption in State arbitration in the Republic of Peru

During the last decade one of the biggest corruption cases in Latin America was uncovered, the “Odebrecht Case”⁹. The latter company was involved in one of the most shocking bribery scandals in Latin America. To date, Odebrecht has acknowledged having paid US\$788 million in bribes in 12 Latin American and African countries¹⁰. Specifically, it paid “US\$200 million (€172 million) in illegal commissions to politicians, officials, entrepreneurs, and alleged front

men in eight Latin-American countries through Banca Privada d’Andorra”¹¹.

The Republic of Peru is among the countries most heavily hit by the corruption attributed to Odebrecht. Even four former Peruvian Presidents were corrupted by bribery payments by Odebrecht: one of them committed suicide when being arrested, another one is detained, yet another is at large, and the last one is prohibited from leaving the country¹². Not only were bribes paid to public servants, but also arbitration has been compromised, which has called into question the integrity and trustworthiness of that dispute resolution method.

1. Statements of Horacio Cánepa and effective collaboration procedure

The Spanish journal “El País” revealed that the accounts of the Banco Privado d’Andorra were used by Odebrecht to make bribe payments. This revelation allowed to ascertain that one of the accounts was linked to the Peruvian lawyer and arbitrator Horacio Cánepa, who received US\$ 435,000 in total with the purpose of favoring Odebrecht in at least 17 awards, all of them to the detriment of the Peruvian State¹³.

After Horacio Cánepa’s situation was unveiled, he decided to strike a deal with the Prosecutor’s Office in order to act as an “effective collaborator”¹⁴ and uncover the details of how the arbitration procedures were handled to favor the Brazilian company, and, in particular, to reveal the names of those involved¹⁵.

According to Horacio Cánepa’s own declaration, he had been in charge of making payments to other arbitrators involved in the corruption net-

⁷ See: <https://gestion.pe/economia/perdido-70-arbitrajes-contrataciones-publicas-82936-noticia/>.

⁸ See: <https://larepublica.pe/archivo/868675-estado-pierde-los-arbitrajes-porque-incumple-contratos/>.

⁹ A Brazilian company present in 26 countries. See: <https://www.odebrecht.com/es/home>.

¹⁰ See: <https://rpp.pe/mundo/actualidad/como-afecta-el-caso-odebrecht-a-cada-pais-de-latinoamerica-noticia-1029652>.

¹¹ See: https://elpais.com/internacional/2017/11/08/actualidad/1510141304_297529.html.

¹² See: <https://www.nytimes.com/es/2019/04/17/espanol/america-latina/peru-expresidentes-corrupcion-odebrecht.html>.

¹³ See: <https://elcomercio.pe/politica/claves-investigacion-arbitros-habrian-favorecido-odebrecht-noticia-604959-noticia/?ref=ecr>.

¹⁴ Articles 472 et seq. of the Criminal Procedure Code and the Legislative Decree 1301 provide for the special procedure of efficient collaboration. This is a special and autonomous procedure, based on the principle of consensus between parties and negotiated criminal justice. Its objective is to effectively investigate and prosecute crime.

On their part, an efficient collaborator is an individual who may or may not be under investigation or accused of a crime, or who, having been convicted, has dissociated themselves from criminal activities, and who appears before the prosecutor, or accepts the latter’s proposition to provide useful information, thereby obtaining benefits, which are granted strictly in accordance to the information that can be corroborated as provided by the efficient collaborator. See: PROSECUTOR’S OFFICE OF PERU. https://www.mpfj.gob.pe/equipo_especial_colaboracion_eficaz/.

¹⁵ See: <https://larepublica.pe/politica/1209798-canepa-acusa-a-lourdes-flores-de-recibir-us-500-mil-de-odebrecht/>.

work¹⁶. Jorge Barata -representative of Odebrecht in Peru- confirms this in his capacity as “efficient collaborator”, stating that the only arbitrator that received bribes from Odebrecht was Mr. Cánepa¹⁷.

By means of Horacio Cánepa’s confession, the Prosecutor’s Office initiated investigations on 19 other Peruvian arbitrators, who were allegedly linked to the Odebrecht Case. Among some Peruvian arbitrators with an outstanding professional background are included: Fernando Cantuarias Salaverry, Franz Kundmüller, and Mario Castillo.

2. Fernando Cantuarias Salaverry’s case

During 2012, Fernando Cantuarias Salaverry, a Peruvian lawyer and arbitrator, participated as arbitrator in the *ad hoc* arbitration procedures captioned 32-2012/MARC, the parties of which were Odebrecht and the Republic of Peru. These procedures ended on August 21, 2013 with an unanimous award favorable to the Brazilian company.

Horacio Cánepa “told the Prosecutor’s Office that, in April 2012, there was a meeting at the office of the then Transport and Communications Minister, Celso Gamarra Roig, where Mr. Horacio Cánepa, arbitrator, his colleague Cantuarias Salaverry and Odebrecht’s lawyer Ronny Javier Loo Campoverde participated”¹⁸. According to the deposition of Horacio Cánepa, an agreement was reached during the meet-

ing, in the sense that Fernando Cantuarias would issue a decision favorable to Odebrecht¹⁹.

Due to the statements made by the “efficient collaborator”, Fernando Cantuarias, along with other arbitrators, he is currently under trial, charged with bribery²⁰ before the Third Permanent National Preliminary Investigation Court Specialized in Corruption Crimes Committed by Public Servants²¹.

During the hearing (broadcasted on live television) the judge only ordered preventive custody for the charges of bribery. Surprisingly, 24 hours later, he made the written decision public, adding three other charges, including “criminal association”, whereby Fernando Cantuarias was deemed the leader of a criminal group, and -together with other arbitrators on trial-sent to a maximum security prison²².

Some weeks later, by means of Resolution No.6 dated November 25, 2019, the First National Criminal Appeals Chamber Specialized in Corruption Crimes Committed by Public Servants, revoked the order of preventive custody of lawyers Fernando Cantuarias, Mario Castillo Freyre, Humberto Abanto, Ramiro Rivera, Franz Kundmüller, Marcos Ricardo Espinoza, Alfresco Zapata and Daniel Martín Linares²³.

3. Arbitration fees as constituent element of bribery in State Arbitration

¹⁶ Case file No. 29-2017-33-5002-JR-PE-03, Resolution No. 6 dated November 25, 2019, issued by the First National Criminal Appeals Chamber Specialized in Corruption Crimes Committed by Public Servants. See also: <https://elcomercio.pe/politica/claves-investigacion-arbitros-habrian-favorecido-odebrecht-noticia-604959-noticia/?ref=ecr>.

¹⁷ See: <https://larepublica.pe/politica/2019/11/02/barata-declaro-fiscal-odebrecht-solo-pago-a-arbitro-horacio-cane-pa-lava-jato-german-juarez-atoche-mtc/>.

¹⁸ See: <https://peru21.pe/politica/sala-confirma-congelamiento-bienes-arbitro-fernando-cantuarias-caso-odebrecht-462292-noticia/>.

¹⁹ See: <https://peru21.pe/politica/sala-confirma-congelamiento-bienes-arbitro-fernando-cantuarias-caso-odebrecht-462292-noticia/>.

²⁰ Article 394 of the Criminal Code of Peru. The official or public servant who accepts or receives any donation, promise, or any other inappropriate advantage or benefit in order to carry out an action pertaining to his/her office or position, without infringing his/her obligations, or as a consequence of an action already carried out, shall be subject to imprisonment for a period no shorter than four years and no longer than six years, as well as prohibition [to hold a public office] pursuant to sections 1 and 2 of Article 36 of the Criminal Code, and between 180 and 365 day-fines.

²¹ Case file No. 29-2017-33, Resolution No. 8 dated November 4, 2019, issued by the Third Permanent National Preliminary Investigation Court Specialized in Corruption Crimes Committed by Public Servants. Resolution No. 12 dated November 5, 2019, issued by the Third Permanent National Preliminary Investigation Court Specialized in Corruption Crimes Committed by Public Servants.

²² BULLARD, Alfredo. “Summary: The Fernando Cantuarias Salaverry’s case”. See: <https://valor.pe/resumen-caso-fernando-cantuarias-salaverry/>.

²³ Case file No. 29-2017-33, Resolution No. 8 dated November 4, 2019, issued by the Third Permanent National Preliminary Investigation Court Specialized in Corruption Crimes Committed by Public Servants.

Among the allegations made against Fernando Cantuarias, the Prosecutor's Office argued that the payments of bribes by Odebrecht were concealed behind an increase in the total arbitration fees. To prove this, the Prosecutor's office indicated that arbitrator Cantuarias received a bribe amounting to S/ 105,934.69 (approximately US\$32,000) by means of disregarding the reference fee table of the Lima Chamber of Commerce²⁴.

In simple terms, the Prosecutor's Office argued that according to the reference table of the Lima Chamber of Commerce, the arbitration fees corresponded to the hypothetical amount of S/ 100, whereas Fernando Cantuarias charged S/ 150²⁵.

However, the reasoning of the Prosecutor's Office regarding the alleged bribery crime contains several errors²⁷.

In the first place, the Prosecutor's Office calculated the arbitration fees based on the amount ordered to be paid by the award instead of the amount originally claimed. This fact constitutes a gross error on the part of the Prosecutor's Office, inasmuch as it is unaware of this custom in the arbitration practice.

Secondly, the Prosecutor's Office used the fees table of the Lima Chamber of Commerce as a reference to calculate the fees allegedly received by Fernando Cantuarias. Nevertheless, the arbitration was an *ad hoc* arbitration procedure, therefore, there was no obligation to calculate the fees according to the fees proposed in the aforementioned table. Use of such table is absolutely voluntary in arbitration procedures not administered by the Lima Chamber of Commerce.

Finally, the sentence that upheld arbitrator Cantuarias' appeal indicates that there is not sufficient evidence to sustain the detention. It also indicates that the amount of the fees, although exceeding the amount that according to the fees table

of the Arbitration Center of the CCL should have been accorded, "*the aforementioned table is not referred to therein, due to the fact that it was an ad hoc arbitration procedure, which means that determination of the fees must be made pursuant to the amount of the lawsuit or the claimed amount, or even based on the complexity of the matter submitted to arbitration [...]. Therefore, up until this stage of the investigation, it cannot be reasonably concluded that there is strong suspicion that the arbitration fees originated from an illegal covenant.*"²⁸

Thus, the lack of understanding of the Prosecutor's Office regarding these fundamental aspects of arbitration led to put a person, who remains innocent, under preventive custody.

The Transparency Lighthouse of the Lima Chamber of Commerce as a possible solution to avoid corruption in arbitration

In Latin America, except for Chile, the majority of the countries trend is to resort to collegiate arbitral tribunals, where each party is entitled to appoint a co-arbitrator. Lack of transparency in appointments, or plainly the non-disclosure of relevant information by the candidates, is what has allowed situations such as Horacio Cánepa's case.

In order to address this situation, and specifically, to avoid a situation with consequences similar to Odebrecht, the National and International Arbitration Center of the Lima Chamber of Com-

²⁴ Case file No. 29-2017-33, Resolution No. 8 dated November 4, 2019, issued by the Third Permanent National Preliminary Investigation Court Specialized in Corruption Crimes Committed by Public Servants.

²⁵ Nuevo sol, Peruvian currency.

²⁶ BULLARD, Alfredo. "Summary: The Fernando Cantuarias Salaverry's case". See: <https://valor.pe/resumen-caso-fernando-cantuarias-salaverry/>.

²⁷ BULLARD, Alfredo. "Summary: The Fernando Cantuarias Salaverry's case". See: <https://valor.pe/resumen-caso-fernando-cantuarias-salaverry/>.

²⁸ Case file No. 29-2017-33-5002-JR-PE-03, Resolution No. 6, dated November 25, 2019, issued by the First National Criminal Appeals Chamber Specialized in Corruption Crimes Committed by Public Servants.

merce launched in 2019 the so-called Transparency Lighthouse²⁹.

This is a digital platform that gives its users further information on the cases managed by the arbitral institution. In particular, it reports: International and National arbitrators' roster; Arbitrators that make up the Arbitration Tribunals for each particular case, and the manner of their appointment (by the parties, co-arbitrators or the institution); Fines applied to the arbitrators; Annulled awards, Awards of cases a governmental agency was a party to, and; Reviews on awards on commercial matters³⁰.

The immediate impact of this platform is the possibility to verify the appointments a particular arbitrator has received, and the party or the lawyers appointing him. Undoubtedly, this contribution to transparency results as useful to fight corruption in arbitration, since it prevents signs thereof to be concealed, such as recurring appointments.

Emergency decree

No. 02-2020

Suddenly and surprisingly for the arbitration community of Peru, on January 24, 2020, the Executive issued an Emergency Decree No. 20-2020 Amending Legislative Decree No. 1071 Establishing Rules on Arbitration (hereinafter the "Decree")³¹. The Emergency Decree—conceptually conceived as an exceptional measure regulating economic or financial matters—was approved taking advantage of the closure of Congress ordered by the current President, Mr. Vizcarra, two days prior to the extraordinary elections of Congress³².

The "Whereas" of the Decree indicate:

Whereas, the legislation currently in force on arbitration matters is fit for arbitration procedures between private parties, since it has been designed from a model that rules the private sector; nevertheless, given the particularities of the arbitration procedures the Peruvian State is a party to,

it turns out to be unfitting to guarantee transparency of procedures and thereby preventing corruption practices or situations affecting the interests of the State, which cause serious economic consequences for the country;

Whereas, it is urgent and necessary to amend the legal framework currently in force, in the arbitration procedures the Peruvian State is a party to, in order to strengthen the institution of arbitration and to prevent the proliferation of cases in which bad practices result in less-efficient arbitration procedures, causing immense damage to the Peruvian State.

Then, the Decree introduces a series of amendments to the Arbitration Law that seem to be questionable, at least from the perspective of the legislative technique or coherence with the general rules, the most remarkable among them we mention hereafter:

It restricts the application scope of *ad hoc* arbitration to an amount of approximately US\$13,000. For amounts exceeding this sum, institutional arbitration applies. The question arises as to how should it be reflected in the arbitration clause, since the claim amount is not known at the time the clause is stipulated.

If a precautionary measure is requested during an arbitration procedure the State is a party to, an injunction bond must be submitted for an amount not below the performance bond. The question arises, as to why is this measure giving an advantage to the State enacted, and how is this measure related to fighting corruption. (Art. 8 DL No. 1071).

The concept of incompatibilities of arbitrators is expanded, including an element as broad as "*the fact of having personal, work, economic or financial interests which may conflict with the performance of their arbitration powers, whether as lawyers, experts, and/or professionals in other matters*" (Art. 21 DL No. 1071).

The possibility to declare the abandonment of action in cases against the State whenever the parties do not further the procedures for a period of 4 months. This declaration may be done

²⁹ See: <https://gestion.pe/peru/cade-2019-buscamos-evitar-que-empresas-como-odebrech-tengan-arbitros-caseritos-promete-la-ccl-noticia/>.

³⁰ See: <https://www.arbitrajeccl.com.pe/tipo-de-consultas>.

³¹ See: <https://busquedas.elperuano.pe/normaslegales/decreto-de-urgencia-que-modifica-el-decreto-legislativo-n-1-decreto-de-urgencia-n-020-2020-1848882-4/>.

³² See: <https://www.bbc.com/mundo/noticias-america-latina-49887706>.



Stop corruption. By Naberacka on Flickr. <https://www.flickr.com/photos/naberacka/8027822868/>

by the tribunal on its own motion, even by the arbitration institution. Nevertheless, upon the lapse of a term of 6 months, new arbitration procedures may be initiated over the same matter (Art. 50-A DL No. 1071).

Additionally, in case of annulment of the award issued in arbitration procedures the Peruvian State is a party to, before a new award is issued, either party may request the substitution of the arbitrator appointed by such party or request to challenge the arbitrators that issued the annulled award (Art. 65 DL No. 1071). It is not clear what would be the legal grounds to proceed with such challenge.

Likewise, a single registry of arbitrators and arbitration centers which may participate in disputes the Peruvian State is a party to is created. (Decree, Art. 1 Transitory). On the other hand, the arbitration agreement the Peruvian State is a party to must be drafted in coordination with the Office of the National Attorney General³³.

Conclusion

We can all agree that the threat of corruption is deadly to arbitration. On the other hand, the case of Fernando Cantuarias and other accused arbitrators demonstrates that a deep division may exist between an entire section of the administration of justice and the world of arbitration, with dire consequences such as preventive custody and the ongoing criminal investigation for some arbitrators.

The efforts used by the private and public sectors seek to eradicate situations that may become breeding grounds for corruption. While the initiative of the Transparency Lighthouse of the Lima Chamber of Commerce has received broad support, the legislative reform is being received with a high level of skepticism. We hope that, in spite of its shortcomings, it succeeds in returning the necessary trust and peace to the users.

³³ The Office of the National Attorney General is the agency in charge of the legal representation and defense of the Ministry of Economy and Finances, pursuant to the provisions of the Law of the System of Legal Defense of the State, and all its corresponding rules of application, supplementary dispositions and amendments. See: <https://www.mef.gob.pe/es/quienes-somos/organizacion/organo-de-control--defensa-juridica?id=562:procuradoria-publica&catid=310>.