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Comments on the recent modifications to the Peruvian Arbitration Law

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As is public knowledge, *Emergency Decree No. 020-2020* (ED) has just modified seven articles and incorporated a new one to the *Peruvian Arbitration Law* (PAL), which apply to those *arbitrations* in which the state is a party.

And notwithstanding the stated (and I understand well-meaning) objectives of the aforementioned ED contained in its "whereas", I find remarkable the establishment of a treatment that is protective and advantageous for the state within an arbitral proceeding. It was allegedly required because the previous PAL regulation was not adequate to ensure transparency, nor prevent corruption and bad practices, in the arbitrations in which the state is a party.

It is this new panorama for arbitration in Peru which motivates the following reflections regarding the main modifications carried out.

First, it should be noted that this ED has modified the PAL, which regulates commercial arbitration and applies to any *arbitrable* dispute that is not, in turn, regulated in a specific arbitration law.

Evidently, in the event that an arbitrable dispute is regulated in a specific arbitration law, this specific regulation will prevail over the general one of the PAL. In addition, as Article 1(1) of the PAL states, the PAL is of supplementary application to the specific arbitration laws (a criterion that is reiterated in the fourth whereas of the ED itself). Consequently, in those specific arbitrations that lack certain arbitration rules, the PAL will be applied in a supplementary manner.

By way of example, in the case of administrative arbitration, in which the state is a party to the arbitration, it is regulated by the *Law on State Contracting* (LSC) and by the *Regulations of the*

LSC (RLSC). Therefore, the rules contained in the LSC and the RLSC apply to this specific arbitration. Only if there is a gap in said regulations will the PAL be applied in a supplementary manner, as indicated in Article 45.11 of the LSC.

Second, the arbitration will necessarily be an *institutional arbitration* if the amount in dispute exceeds 10 Peruvian Tax Units (US $12,780). In addition, arbitration will always be arbitration in law, except in the case of *public private partnership* projects in which arbitration in equity may be used. Obviously, such rules entail the violation of the constitutional principles of party autonomy and equality within the arbitration process, and they would also threaten the procedural, economic and professional interests of the private party.

Third, when the state is the affected party by an *interim measure*, the private party shall offer as an appropriate security an unconditional bank guarantee, for the duration of the arbitration. The amount may not be less than the guarantee of faithful compliance that has been granted on the occasion of the contract from which the dispute arises. It is clear that such a rule violates the constitutional principle of equality, which is part of due process in arbitration, and also collides with another of the interim measure requirements, that of reasonableness. Likewise, the bad technical construction of this rule extends even to its own location in the PAL. This is because, by its content, it is not a matter of competence for the issuance or execution of interim measures; rather, it is one of its requirements, which is regulated in Article 47 of the PAL.

Fourth, those who have previously participated in the case, having acted as a lawyer or *expert* for one of the parties, are unable to act as *arbitrators*. This is also the case for professionals in another field who have personal, labour, economic or financial interests that could be in conflict with the exercise of the role of arbitrator. I must specify that the location of this rule in the PAL is a mistake, since Article 21 of the PAL regulates the issue of the *arbiter impeditus* (affected by an incompatibility) and not that of the *arbiter suspectus* (of violating his or her independence and impartiality), which is contained in Article 28. This is absolutely unnecessary, since the requirement of independence and impartiality of the arbitrator is already regulated in the aforementioned Article 28. Article 28 applies to any arbitration, without discrimination regarding the condition of the parties, nor of the arbitrators.

Fifth, the abandonment of the arbitration process will be declared, either ex officio or at the parties' request, when no procedural act has been carried out by the parties for four months. In an *ad hoc arbitration*, such a declaration shall be made by the sole arbitrator or the chairman. In institutional arbitration, it will be carried out by the General Secretariat of the arbitral institution. Furthermore, abandonment prevents the initiation of another arbitration for a period of six months. If the abandonment is declared a second time, the right expires. We note that this rule, in addition to its attempt to judicialise arbitration, illustrates a lack of knowledge of the PAL's own terminology (which never uses the term "arbitration centre", but that of "arbitral institution"), and entails the fracture of the constitutional principles of party autonomy and equality within the arbitration process. It also collides with the temporal effectiveness of the *arbitration agreement*, which is the source of arbitration's lifeblood, and which only ends due to the extinctive prescription or the expiration of the arbitration agreement, the latter being that which gives life to the process, and not vice versa, as intended with this rule.

Sixth, it is not possible to impose administrative or similar fines, or other charges, beyond the *costs of arbitration*. Regarding this rule, arbitral tribunal orders aimed at stopping any guerrilla or dilatory tactics by the parties would be ineffective, since their coercive force lies precisely in the ability to impose a fine. As these orders do not exist, such tactics would allow the parties (here, the state) to turn the arbitration into pandemonium.

Finally, once our new Congress of the Republic is installed, it would be convenient if it evaluated the constitutionality and legislative continuity of this ED. As Montesquieu once said, “One thing is not fair because it is law. It must be law because it is fair.”