

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN PERU

A propos the Questionnaire on “Alternative dispute resolution in administrative matters” of the International Association of Supreme Administrative Jurisdictions (I.A.S.A.J.)

Introduction

In Peru, we have the following **traditional** alternative dispute resolution mechanisms that are **regulated** by Peruvian law:

1. Out-of-court conciliation, and
2. Popular arbitration

It is important to note that in Peru none of the **traditional** alternative dispute resolution **mechanisms** that are regulated by Peruvian law are dependant of the Judiciary, nor are under its organizational structure, but rather depend upon the executive branch. Even special mechanisms that co-exist (such as **administrative labor conciliation** and **arbitration** on public procurement matters (among other) are monitored and even provided by the executive branch without the intervention of the Judiciary.

Judicial intervention occurs only to demand compliance and execution of an agreement contained in a conciliatory act or arbitration award, if either party is reluctant (execution of a conciliatory act or execution of the arbitration award) or in order to declare the nullity of the conciliatory act or arbitration award, in case it would have incurred in a defect of nullity.

It is also important to emphasize that the Justices of Peace¹ of the Peruvian Judiciary have the power to settle disputes through **conciliation**. **The conciliation settlement they issue constitute an enforceable document**, just as the minutes of a traditional out-of-court conciliation. In addition, Magistrates Courts (professional Peace Courts), specialized or mixed courts, may not hear cases in which there is already a settlement issued by a Justice of the Peace.

Notwithstanding the above mentioned, the Judiciary of Peru would like to comply with the request for information on “Alternative dispute resolution in administrative matters” by presenting the following information on the most salient features of dispute resolution mechanisms in our country, highlighting the respective competent institutions of our executive branch:

In Peru, the Ministry of Justice and Human Rights (executive branch) is the governing body for these traditional mechanisms.

¹ Peruvian Justices of Peace (Jueces de Paz) are lay, community-based and are part of the Judiciary.

Within this Ministry, the Directorate of Out-of-Court Conciliation and Alternative Means of Dispute Resolution (DCMA) is **responsible for implementing out-of-court conciliation, popular arbitration and other alternative mechanisms of conflict resolution** at the national level, as well as for ensuring its promotion and use, and for certifying, registering, authorizing, renewing, preparing, monitoring, and penalizing the operators of the conciliation system. It also authorizes and oversees the issuance of education and training courses for conciliators.

Conciliation

The out-of-court conciliation system in Peru has four operators: 1) The Out-of-Court Conciliators and 2) Out-of-Court Conciliation Centers where they operate --these centers may be: the Ministry of Justice (its services are free) or Private Centers (its services have a cost) and 3) the Trainers in Conciliation Techniques and 4) the respective Conciliator Education and Training Centers --these centers can be: the Ministry of Justice or private. In all cases, Ministry of Justice and Human Rights has authority over accreditation of the conciliation operators, their supervision and penalization.

In Peru we have both, a **mandatory** and an **optional** out-of-court conciliation.

The attempt to conciliate in civil matters² is **mandatory** by law prior to filing a lawsuit in court, otherwise the judge declares the claim inadmissible due to apparent lack of interest to act. Its entry into force is progressive. The process started in 2011 and to date the attempt to conciliate is mandatory only in part of Peru.

In most of Peru the attempt to conciliate is still optional, in other words, individuals can resort directly to the Judiciary to resolve their conflicts. It is also **optional** to go to **conciliation** to resolve conflicts in **a) family matters** (alimony, ownership and other derived from the family relationship that are freely available to the parties); **b) in public procurement and acquisitions** matters, where the parties have previously agreed in the contract to resolve their conflicts via out-of-court conciliation procedures; **c) in labor matters**, provided that the principle of inalienability of workers' rights is respected.

It is important to highlight that "**administrative conciliation** " also co – exists in **labor matters** which, as opposed to "out-of-court conciliation in labor matters", is mandatory and is administered by labor authorities (the Ministry of Labor and Promotion of Employment of the executive branch), who summon the employer and the worker in order to help them resolve their disputes, in which instance the State has a protective role with respect to the worker, regarding his labor rights claim and looking for a fair and mutually beneficial solution .

² The most common are: eviction, payment, compensation, termination of contract, breach of contract, division and partition, among other available to the conciliatory parties.

Additionally, in Peru there is **another public institution that makes conciliations: The Ministry of Women and Vulnerable Populations of the executive branch** --through the Municipal Ombudsmen for Children and Adolescents (Defensorías Municipales del Niño y Adolescente), who also has the power to function as conciliation centers in **family matters** (alimony, custody and visiting arrangements).

Arbitration

Arbitration in Peru is constitutionally recognized as a **separate jurisdiction from the Judiciary**, and is an alternative to the settlement of property disputes with free disposition pursuant to law.

This is an alternative dispute resolution mechanism through which **the parties decide to resolve their conflicts voluntarily submitting to the decision of an arbitrator or expert tribunal** in the matter of the dispute. According to the Peruvian General Arbitration Act, they may submit to arbitration disputes for which the parties have **free disposition pursuant to law**, as well as those authorized by law or international treaties or agreements. Likewise, the **agreement to submit to an arbitration jurisdiction** and waive the jurisdiction of the Judiciary must be in writing and based on consensus (civil and commercial arbitration, consumer arbitration, securities arbitration, etc.).

Arbitration in Peru is a simple, short and less formal process that ends with the arbitration award that decides the dispute. Arbitration awards are **final and there's no recourse available against them**, except in the case of arbitration awards that have incurred in one of the causes for annulment, usually associated with the violation of due process, in which case the person can appeal to the Judiciary.

Arbitration on public procurement deserves a special mention. **Any dispute between the parties on the implementation, interpretation, termination, absence, ineffectiveness or invalidity of the contract are resolved by conciliation or arbitration**, as agreed by the parties. **When disputes relate to the invalidity of the contract** they may only be resolved via arbitration. However, **in practice all disputes are resolved via arbitration**.

The purpose of legally submitting to arbitration on public procurement is to effectively resolve disputes generated during the execution of contracts signed by the State with suppliers or contractors and to solve the problem in time, for example, a construction duly completed or having the required supplies.

According to the rules governing arbitration in Peru, **arbitration on public procurement may be ad hoc or institutional**, depending on whether its organization and implementation have been put in charge or not to an arbitration institution, pursuant to the agreement reached by the parties in the arbitration agreement. Institutional arbitration is conducted in an **arbitration institution accredited by the Supervisory Board for State Procurement**

(Organismo Supervisor de las Contrataciones del Estado -OSCE) of the executive branch.

It is important to note that **to be an arbitrator and an Arbitration Secretary** it is required to be **enrolled in the National Register of Arbitrators and the National Register of Arbitration Secretaries** (as appropriate) both administered by the **OSCE**. Registration is automatically approved, subject to subsequent control.

Additionally, it is also pertinent to note that prior to contracting (**during the contractor selection process and even before the contract comes into force**) **disputes may also arise, which are resolved administratively by appeal. The appeal** is heard and decided by the **Public Procurement Tribunal (Tribunal de Contrataciones del Estado) which is part of the OSCE** (when the reference value exceeds 65 UIT³ –equivalent to US\$75,833) or by the head of the institution (when the reference value is less than 65 UIT⁴). The resolution that resolves the appeal puts an end to the administrative proceeding and clears the way for recourse, if applicable, before the Judiciary, by means of filing an administrative action.

It is also legally allowed to directly contest, before the Public Procurement Tribunal, acts declaring nullity at official initiative and other acts, issued by the head of the institution, affecting the continuity of the selection process, other than those that resolve appeals.

³ The Peruvian Tax Unit (UIT or “Unidad Impositiva Tributaria”) is a reference value used in Peru to calculate the taxes, fines, among other. The current value of one UIT is US\$1,166.

⁴ Idem.