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## **THE SALEM TRIALS REDUX?**

### **PERU & ARBITRATOR'S MISCONDUCT: A COMMENTARY ON THE FERNANDO CANTUARIAS CASE**

by Paula Juliana Tellez

#### **I. INTRODUCTION**

In December 2020, The Institute for Transnational Arbitration (ITA) and The Latin American Association of Arbitration (ALARB), with support from the Brazilian Arbitration Committee (CBAr) and the International Chamber of Commerce (ICC), held a virtual conference on arbitrators' immunity, conflicts in relation to the immunity and criminal liability, and the new challenges on the role and duties of arbitrators, particularly in Latin America.<sup>1</sup> One panel was held specifically on the “Fernando Cantuarias Salaverry's Paradigmatic Case.” The panel, in which Alfredo Bullard (Bullard Falla Ezcurra +, Lima) and Mario Reggiardo (Payet, Rey, Cauvi, Pérez Abogados, Lima) were interviewed by Estefania Ponce (Posse Herrera, Bogotá), presented the main facts and details of the case and the criminal accusations from 2019. The panel also addressed the case in the context of the Odebrecht corruption scandal in the region and provided their opinions on the effects of this case and the lessons learned, both in Peru and in Latin America.

In this article we will start by recalling the specifics of Peru's arbitration law and the Odebrecht scandal in Latin America as a general background to better revisit Bullard's and Reggiardo's unique insights on the Cantuarias case, which will allow us to analyze the consequences and effects that this scandal has had on Peruvian arbitration since 2019.

#### **II. THE SPECIFICS OF ARBITRATION IN PERU**

Peru has historically implemented and promoted arbitration, and it is quite safe to say it is a pro-arbitration jurisdiction: Arbitration is expressly recognized in Article 139 of the Peruvian 1993 Constitution, and the current arbitration act in force, which

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<sup>1</sup> ITA-ALARB Americas Workshop, THE CTR. FOR AM. AND INT'L L., <https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2020/ita-alarb-conference.html>.



regulates both domestic and international arbitrations, the *Decreto Legislativo* No. 1071, is based on the UNCITRAL Model Law. Peru is a member state of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 Convention on the Settlement of Investment Disputes (ICSID), and the Lima Chamber of Commerce is a main Latin-American arbitration institution.

One particularity of the jurisdiction, that is relevant to the Cantuarias case, is the fact that Article 45 of the public procurement Law No. 20225 of 2014,<sup>2</sup> provides that arbitration is mandatory to resolve disputes arising out of any public procurement contract, and it stipulates special regulations for this type of arbitration. The law also gives the parties the autonomy to choose between *ad hoc* and institutional arbitration. The fact that arbitration is mandatory for the State under such contracts, has been related to the advancement of arbitration in Peru, and the growth of international investment to the country.<sup>3</sup> However, as Bullard and Reggiardo explained in the conference, the fact that the parties have to go to arbitration instead of the national courts, and that they are allowed to choose between *ad hoc* and institutional arbitration, caused misunderstandings among the public, the media, and criminal judges, who started to see arbitration as a corrupt method to resolve disputes, meant to escape and hide from justice.<sup>4</sup>

### III. THE BROADER CONTEXT: THE ODEBRECHT CORRUPTION SCANDAL AND OPERATION “LAVA JATO”

As explained by Bullard and Reggiardo, “Lava Jato” or “Car Wash”<sup>5</sup> was an operation launched by Brazilian law enforcement in 2014,<sup>6</sup> related to corruption and

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<sup>2</sup> L. 20225/2014, July 11, 2014, NORMAS LEGALES (Colom.), <https://portal.osce.gob.pe/osce/sites/default/files/Documentos/legislacion/ley/Ley%2030225%20Ley%20de%20contrataciones-julio2014.pdf>.

<sup>3</sup> *Peru's Oil & Gas Investment Guide 2017/2018*, EY, 2017, [https://www.investinperu.pe/RepositorioAPS/0/0/JER/GUIA\\_INVERSION/Guia\\_oil\\_gas\\_2017\\_2018.pdf](https://www.investinperu.pe/RepositorioAPS/0/0/JER/GUIA_INVERSION/Guia_oil_gas_2017_2018.pdf).

<sup>4</sup> Alonso Bedoya, *Lessons from Peru's Legacy in Public Procurement: A Successful Approach to Follow and Mistakes to Avoid*, KLUWER ARB. BLOG, Dec. 14, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/12/14/lessons-perus-legacy/>.

<sup>5</sup> Fergus Shiel & Sasha Chavkin, *Bribery Division: What is Odebrecht? Who is Involved?*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, June 25, 2019, <https://www.icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/>.

<sup>6</sup> *Lava Jato Case*, MINISTÉRIO PÚBLICO FEDERAL, <http://www.mpf.mp.br/grandes-casos/lava-jato/entenda-o-caso/entenda-o-caso>.



money laundering. This operation originated on the illegal procuring of infrastructure contracts by Odebrecht,<sup>7</sup> a Brazilian infrastructure company, with the Brazilian national oil company Petrobras (and other companies), as well as the procurement for other main infrastructure initiatives in Brazil such as a nuclear plant. This led to the unveiling of a major corruption scandal involving 12<sup>8</sup> different Latin American countries, with requests for cooperation from the Brazilian authorities to over 58 countries around the world, in order to gather evidence and apprehend those involved.<sup>9</sup>

From 2005 to 2014<sup>10</sup> Odebrecht, under the direction of CEO Marcelo Odebrecht (sentenced to 19 years in prison for the scandal),<sup>11</sup> paid at least US\$700M in bribes to high government officials and political parties, in order to obtain and maintain infrastructure contracts in the region (such as highways in Colombia and Peru, or the Caracas metro in Venezuela), through a complex financial scheme and an official bribery department within the company.<sup>12</sup> The investigations related to this corruption scandal are still ongoing in most countries and several government officials across the continent have been charged with crimes.

#### IV. THE SPECIFICS OF PERU'S ODEBRECHT SCANDAL AND FERNANDO CANTUARIAS' CASE

##### A. General Context of Peru's Odebrecht Scandal

In Peru, Odebrecht<sup>13</sup> administered 24 major construction contracts over a period

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<sup>7</sup> Odebrecht is a Brazilian construction company operating since the 1940s, that continues to exist and operate under the name Novonor. *Nossa história*, NOVONOR, <https://novonor.com/pt/a-novonor/nossa-historia>.

<sup>8</sup> The scandal reached several Latin American countries where investigations continue to this day. Javier Lafuente, *Los tentáculos de la compañía Odebrecht en América Latina*, EL PAÍS, July 30, 2015, [https://elpais.com/internacional/2015/07/28/actualidad/1438104065\\_276346.html](https://elpais.com/internacional/2015/07/28/actualidad/1438104065_276346.html).

<sup>9</sup> *Lava Jato Case*, *supra* note **Error! Bookmark not defined.**

<sup>10</sup> Bedoya, *supra* note **Error! Bookmark not defined.**

<sup>11</sup> *Marcelo Odebrecht pasará el resto de su condena de 10 años en una mansión*, RPP NOTICIAS, Dec. 19, 2017, <https://rpp.pe/mundo/latinoamerica/marcelo-odebrecht-pasara-el-resto-de-su-condena-de-10-anos-en-una-mansion-noticia-1094855>.

<sup>12</sup> The company created an entire division—the Division of Structured Operations—primarily dedicated to making corrupt payments. Shiel & Chavkin, *supra* note **Error! Bookmark not defined.**

<sup>13</sup> *Los contratos de Odebrecht en Perú*, IDL-REPORTEROS, March 21, 2016, <https://www.idl-reporteros.pe/los-contratos-de-odebrecht-en-peru/>.



of 15 years and made over US\$10,000,000. According to Marcelo Odebrecht's confession, over US\$29,000,000 was paid in bribes to high-ranking government officials (three former presidents of Peru and two former Lima mayors have been involved in the investigations, among many other politicians).

But the Peruvian case has an additional component, which is that bribes were also given to arbitrators, in commercial institutional and *ad hoc* arbitration cases, of Odebrecht against the Peruvian State. Between 2003 and 2016, Odebrecht initiated 41 arbitrations and was awarded over US\$254,000,000 in 34 of the awards.<sup>14</sup>

Arbitrator Jorge Horacio Cánepa Torre,<sup>15</sup> appointed by Odebrecht in 17 arbitrations and a member of the tribunal in 19 of the cases, admitted to receiving bribes in exchange for obtaining a unanimous decision in favor of Odebrecht and against the Peruvian State. The bribes were paid to Cánepa through offshore companies and accounts in Andorra, and it was his duty to send the payments to the other arbitrators and state officials involved in the arbitration bribes.<sup>16</sup> Due to the confession in Cánepa's case, all of the arbitrators that participated in arbitrations against the Peruvian State involving Odebrecht or its subsidiary companies or consortiums, are being investigated by the Peruvian government, whether evidence of bribery has been found or not.<sup>17</sup> In total, 19 arbitrators were apprehended and sent to provisional detention before they were charged with a crime.<sup>18</sup> As Bullard and Reggiardo pointed out, and as analyzed further below, this decision appeared to be uninformed and meant for the media in order to ease the public amid the corruption scandal.

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<sup>14</sup> *Arbitrajes a la Odebrecht*, IDL-REPORTEROS, Sept. 29, 2016, <https://www.idl-reporteros.pe/arbitrajes-a-la-odebrecht-lavajato/>.

<sup>15</sup> Carlos Ríos Pizarro, *Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators*, KLUWER ARB. BLOG, Dec. 10, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/>.

<sup>16</sup> *Los sobornos de Odebrecht en Perú, al descubierto*, IDL-REPORTEROS, Sept. 30, 2017, <https://www.idl-reporteros.pe/los-sobornos-de-odebrecht-en-peru-al-descubierto/>.

<sup>17</sup> *Caso Laudos arbitrales a favor de la empresa Odebrecht*, MINISTERIO PÚBLICO-FISCALÍA DE LA NACIÓN, [https://www.fiscalia.gob.pe/equipo\\_especial/caso\\_laudiosarbitrales\\_odebrecht/](https://www.fiscalia.gob.pe/equipo_especial/caso_laudiosarbitrales_odebrecht/).

<sup>18</sup> *Id.*



## B. *Fernando Cantuarias' Case*

As Cánepa's confession and the evidence collected from Andorra proved, it is true that corruption has tainted some arbitrators and arbitration proceedings involving Odebrecht in Peru. However, unlike Horacio Cánepa's case, Fernando Cantuarias has not been charged with any crimes and there is no evidence that the award rendered by the Cantuarias tribunal was a product of bribes.

A brief overview of the main facts of the case is instructive here. Cantuarias is under a preliminary investigation (even in 2022 he has not yet been charged) and was detained in a prison from November 4, 2019 to November 29, 2019<sup>19</sup> for the crimes of bribery and criminal conspiracy, for allegedly having received a disguised bribe from Odebrecht through artificially increased arbitrator fees. These crimes have not yet been proved.

The detention and investigation against Cantuarias arose from an *ad hoc* arbitration initiated by IIRSA Norte S.A., a company owned by Odebrecht, against the Peruvian Ministry of Transport and Communications, concerning additional costs in a highway construction project in the Peruvian Amazon. Cantuarias was a co arbitrator alongside President Franz Kundmüller Caminiti and Horacio Cánepa. The award was rendered in favor of Odebrecht on August 21, 2013. The tribunal ordered a payment of US\$23,000,000 out of over US\$26,000,000 claimed.<sup>20</sup>

As Bullard and Reggiardo pointed out, both during the conference but also in news articles<sup>21</sup> and in an *amicus curiae* brief that several members of the Peruvian arbitral community sent to the Peruvian courts, the reasoning from the prosecution and the court to detain and investigate Cantuarias has several failures.

First, the prosecution considered that the fees received by Cantuarias for the *ad*

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<sup>19</sup> *Fernando Cantuarias es liberado tras revocatoria de prisión preventiva*, LA REPÚBLICA, Nov. 29, 2019, <https://larepublica.pe/politica/2019/11/29/odebrecht-arbitrajes-abogado-fernando-cantuarias-salaverry-es-liberado-tras-revocatoria-de-prision-preventiva-mtc-poder-judicial-ministerio-publico/>.

<sup>20</sup> *Concesionaria Iirsa Norte S.A. v. Miniterio de Transportes y Comunicaciones*, LCC Case No. 3094, Award (Aug. 23, 2013).

<sup>21</sup> Alfredo Bullard, *Resumen: Caso Fernando Cantuarias Salaverry*, VALOR.PE, Nov. 8, 2019, <https://valor.pe/resumen-caso-fernando-cantuarias-salaverry/>.



*hoc* arbitration were abnormally high, which would necessarily mean that the fees were inflated to include a bribe from Odebrecht, a so called “indirect bribe.” Second, the prosecution considered the fact that the tribunal and the parties met before the hearings to discuss procedural aspects of the arbitration, such as the appointment of the President of the Tribunal, and that the arbitrators called each other over their mobile phones, was indicative of a criminal conspiracy.

However, for the first argument, the prosecution made several mistakes in its reasoning and calculation: the prosecution used the 2019 Lima Chamber of Commerce institutional fees to calculate the allegedly correct fees. However, the award was rendered in an *ad hoc* arbitration (so the arbitrators had no obligation to refer to the LCC fees), and the proceedings were conducted during 2012 and 2013, not 2019, when values for the LCC fees were very different and significantly lower. Also, the prosecution ignored the 18% VAT, which is a considerable difference. Last, the prosecution did not calculate the fees based on the amount of the claims, but on the amount awarded, which is lower than the claims, and did not consider the complexity of the case (which was bifurcated, had a partial award rendered, and the request and response were modified).

As a result, the real difference between what the fees would have been in an institutional arbitration before the LCC and the actual *ad hoc* arbitration, is not US\$30,000 per arbitrator, as presented by the prosecution to the court, but around US\$10,000, which as any arbitration practitioner knows, is not an exorbitant amount. Actually, as both panelists pointed out, it is easy to verify that an ICC or an ICSID arbitration would have probably meant even higher fees and that what the arbitrators received in this case is not out of the ordinary.

On the second fact, any arbitration practitioner knows that case management conferences are not only usual but also necessary steps in the proceedings, particularly in *ad hoc* arbitrations where the parties and the tribunal must set out the rules for the proceedings, and that these meetings have nothing to do with criminal conspiracy.

It becomes clear that the prosecution and the judge that ordered the detention of



Cantuarias, had very little knowledge of how arbitration proceedings operate and how and why fees are set by the arbitrators, which led them to confuse perfectly normal and legal practices for crimes.

Due to this confusion, the judge of the case agreed to detain Cantuarias and 18 other arbitrators. For over 20 days, Cantuarias was held in a high security prison, even though he has not been charged with a crime to this day. The measure had to be reversed by the judge, who has denied further requests by the prosecution, due to a possible violation of fundamental rights. In Peru the detention as an interim measure must comply with specific criteria, such as absolute necessity and proportionality of the measure to the crime perpetrated. Since there is not enough evidence to convince the judge that Cantuarias is guilty, he has no previous convictions, and there is no danger of Cantuarias escaping,<sup>22</sup> there is no reason for Cantuarias to be detained as a criminal. Even if the investigation is still ongoing, no evidence has arisen to lead to any doubt as to whether Cantuarias complied with his duties as an arbitrator or to suspect that the fees he received were other than the correct amount considering the duties performed and the dispute solved.

## **V. EFFECTS OF THE CANTUARIAS CASE ON THE PERUVIAN ARBITRATION ENVIRONMENT**

### **A. Arbitration Community**

A positive effect can be drawn from the Cantuarias case: the arbitration community, both in Peru<sup>23</sup> and internationally, came together in unprecedented acts of unity in support of Cantuarias. Not only did several members of the Peruvian arbitral community sign the *amicus curiae* explained by Reggiardo in the conference,<sup>24</sup> but there were also several communications sent to the Peruvian

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<sup>22</sup> 'Caso Arbitrajes': PJ rechazó pedido de la fiscalía para dictar prisión preventiva a ocho abogados, GESTIÓN, Aug. 27, 2021, <https://gestion.pe/peru/politica/caso-arbitrajes-odebrecht-poder-judicial-declaro-infundado-pedido-de-la-fiscalia-para-dictar-prision-preventiva-a-8-abogados-nndc-noticia/?ref=gesr>.

<sup>23</sup> Perú-Odebrecht: Surgen Voces en Defensa de Algunos Árbitros ante Orden de Prisión Preventiva, CIAR GLOBAL, Nov. 5, 2019, <https://ciarglobal.com/peru-odebrecht-surgen-voces-en-defensa-de-algunos-arbitros-ante-orden-de-prision-preventiva/>.

<sup>24</sup> Piden la Libertad de Fernando Cantuarias, uno de los Árbitros en Prisión por Caso Odebrecht en Perú, CIAR GLOBAL, Nov. 11, 2019, <https://ciarglobal.com/piden-la-libertad-de-fernando-cantuarias-uno-de-los-arbitros-en-prision-por-caso-odebrecht-en-peru/>.



authorities by lawyers and institutions across the globe,<sup>25</sup> such as the International Bar Association (IBA) and the Club Español del Arbitraje (CEA),<sup>26</sup> and even the ICC,<sup>27</sup> pleading for Cantuarias' safety and integrity and defending arbitration as a legal, effective, and positive dispute resolution mechanism. These lawyers and institutions further explained that the Peruvian authorities misunderstood this case due to a lack of knowledge of the principles and common practices of arbitration.<sup>28</sup>

#### B. General Public

Sadly, as pointed out by Reggiardo in the conference, the main adverse effect of the case was that the general Peruvian public and mainstream media do not understand the technicalities of the arbitral proceedings. Therefore, they see arbitration as a corrupt mechanism to escape national justice, and arbitrators who participated in any arbitration related to any Brazilian companies, as corrupt. This view is difficult to justify even though it is true that some arbitrations were tainted by corruption, as Cánepa himself confessed and other evidence has shown. Due to the general lack of knowledge about arbitration among the public, this brings a very negative outlook on arbitration.

#### C. Consequences on Arbitration Regulation and Institutional Tools

The most direct legal consequence of the corruption scandal on Peruvian arbitration is that the government, in a speedy action to appease the public,<sup>29</sup> issued an emergency decree, the Decreto de Urgencia N° 020-2020 in January 2020 that

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<sup>25</sup> *Impactos del Arbitraje en 2019: Las Cosas Buenas del Proceso Contra Árbitros en Perú*, CIAR GLOBAL, Jan. 13, 2020, <https://ciarglobal.com/impactos-del-arbitraje-en-2019-las-cosas-buenas-del-proceso-contra-arbitros-en-peru/>.

<sup>26</sup> *Cantuarias suma más Apoyos: La IBA, El CEA y Catherine Rogers Condenan el Trato Recibido por el Árbitro Peruano*, CIAR GLOBAL, Nov. 15, 2019, <https://ciarglobal.com/cantuarias-suma-mas-apoyos-la-iba-el-cea-y-catherine-rogers-condenan-el-trato-recibido-por-el-arbitro-peruano/>.

<sup>27</sup> *Ante Proceso contra Árbitros en Perú, Alexis Mourre y Carlos Matheus Alegan Desconocimiento del Arbitraje*, CIAR GLOBAL, Nov. 8, 2019, <https://ciarglobal.com/ante-proceso-contra-arbitros-en-peru-alexis-mourre-y-carlos-matheus-alegan-desconocimiento-del-arbitraje/>.

<sup>28</sup> *Instituto Peruano de Arbitraje y Cámara de Comercio de Lima Denuncian Situación de Árbitros en Caso Lava Jato*, CIAR GLOBAL, Nov. 15, 2019, <https://ciarglobal.com/instituto-peruano-de-arbitraje-y-camara-de-comercio-de-lima-denuncian-situacion-de-arbitros-en-caso-lava-jato/>.

<sup>29</sup> Rafael T. Boza, *Protectionist Amendments to Peru's Arbitration Law Disguised as Transparency*, KLUWER ARB. BLOG, May, 4, 2020, <http://arbitrationblog.kluwerarbitration.com/2020/05/04/protectionist-amendments-to-perus-arbitration-law-disguised-as-transparency/>.



modifies several provisions of the Peruvian Arbitration Act. The aim of the decree is to ensure that the Peruvian State will not be harmed in the arbitrations it becomes part of. The decree states that its purpose is to modify the arbitration act in relation to the arbitrations in which the Peruvian State is a party to prevent the further spread of malpractice that may cause harm to the Peruvian State.<sup>30</sup> This is controversial because the law is not supposed to favor either of the parties. Instead, it is supposed to ensure and maintain fairness and due process.<sup>31</sup>

Consistent with the aim mentioned above, the decree introduced a series of limitations to the Peruvian arbitration act. These limitations include a restriction on *ad hoc* arbitration to claims less than US\$13,000, a broadened criteria as to when an arbitrator might lack impartiality or independence, and the establishment of a registry of arbitrators before the justice ministry.

It is relevant to note that, as stated above, arbitrations arising from contracts in which the Peruvian State is a party are not only mandatory but also regulated by the Public Procurement Law No. 20225 of 2014. As such, if the State really needed to make substantial changes to the law in order to protect itself, it could have done so in the Public Procurement Law, since those are the special provisions that are still mandatory in State-contractor disputes. As it is, there are doubts as to whether the new changes to the arbitration act will influence the arbitrations of the Peruvian State with international contractors and, therefore, besides being a measure that might seem like an improvement for the media and the public, who do not understand arbitration, it does not seem to be an effective measure to protect the interests of the State.

Another effect of the Cantuarias case on Peruvian arbitration is the development of a “faro de transparencia” or “beacon of transparency” tool by the Lima Chamber of

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<sup>30</sup> The original text is as follows “Que, resulta urgente y necesaria la modificación del marco normativo vigente, en los procesos arbitrales en los que interviene como parte el Estado peruano, a fin de fortalecer la institución del arbitraje y evitar la proliferación de casos en los que las malas prácticas resten eficacia al arbitraje y causen graves perjuicios al Estado peruano.” L. 20/2020, Jan. 24, 2020, NORMAS LEGALES (Colom.), <https://www.gacetajuridica.com.pe/boletin-nvnet/ar-web/DECRETO%20DE%20URGENCIA%20N%20020-2020.pdf>.

<sup>31</sup> *Comentarios y Críticas al DU 20/2020 que Modifica la Ley de Arbitraje*, CIAR GLOBAL, Dec. 23, 2020, <https://ciarglobal.com/comentarios-y-criticas-al-du-20-2020-que-modifica-la-ley-de-arbitraje/>.



Commerce.<sup>32</sup> Contrary to the speedy urgency decree, the beacon of transparency seems to be a helpful online platform, that gives access to a vast amount of information on arbitrations administered by the LCC since 2012. The public can freely access a list of registered arbitrators and some of the statistics regarding their performance as arbitrators (number of tribunals they have been a part of, current tribunals, challenges, an estimated time of award rendering, and all of the case files of the arbitrations administered by the LCC), the tribunals that are constituted, any sanctions by the LCC on arbitrators, a list of annulled awards, awards where the Peruvian State is a party and abstracts of commercial arbitration awards.

It seems to be a useful tool for parties wishing to appoint an arbitrator and for the public to have control over the tribunals in State-related arbitrations by making easily recognizable situations as Horacio Canepa's repeated appointment by Odebrecht that, in itself is not an illegal practice, but can be useful to determine the impartiality and independence of an arbitrator.<sup>33</sup>

## VI. LESSONS LEARNED

At the end of the conference, Bullard and Reggiardo gave their opinions on the current state of arbitration in Peru and the consequences and the lessons that can be learned from the Cantuarias case. Reggiardo pointed out that, regarding the current state of arbitration in Peru, Peruvian public entities feel very powerful in their current arbitration proceedings, especially in domestic arbitrations. The counsel for the private contractors generally has to accept continuous and excessive requirements of the public entities, such as introducing evidence after the set timeframe or requesting a postponement of a hearing on the same day, in order to avoid risk of a further set aside of the award.

As a lesson learned, Reggiardo considers that the case put in the spotlight the fact that local criminal prosecutors have no knowledge of arbitration and were more interested in a giving a show for the media due to the corruption scandal. The task

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<sup>32</sup> *Faro De Transparencia*, CENTRO DE ARBITRAJE, <https://www.arbitrajeccl.com.pe/farodetransparencia>.

<sup>33</sup> José Carlos Reyes, CADE 2019: "Buscamos evitar que empresas como Odebrecht tengan árbitros caseritos", *promete la CCL*, GESTIÓN, Nov. 29, 2019, <https://gestion.pe/peru/cade-2019-buscamos-evitar-que-empresas-como-odebrech-tengan-arbitros-caseritos-promete-la-ccl-noticia/>.



for the arbitration community in Peru is, therefore, to educate people on how arbitration works in order to avoid bad publicity.

Bullard agreed that he personally learned much about criminal justice in Peru, but also realized how arbitration can be badly misunderstood and realized that arbitrators and lawyers now have the task of educating judges and prosecutors about arbitration. Arbitrators and lawyers must also have a better understanding of criminal law and how criminal courts work in order to avoid the superficial approach the Peruvian prosecution had on arbitration. He concluded by warning that case occurred in Peru, but that it could happen in any country in Latin America if we do not properly educate those outside the arbitration community on arbitration.

I would also add to Bullard's and Reggiardo's insights that the Peruvian experience exposed, that speedy legislative changes may not be good for the jurisdiction and that changes must come from a deep understanding of arbitration and how it works. The LCC displayed this understanding with the *Faro de Transparencia*, that addresses the concern for transparency from within the arbitration community.

## VII. CONCLUSIONS

Just as Bullard concluded in the conference, it would not be surprising that the consequences of the Cantuarias case will be seen across Latin America, especially in the countries that have also been hit by the Odebrecht corruption scandal. It is not only up to the Peruvian arbitration community to better educate the public and media on what arbitration is and how it works. It is also for the rest of the Latin American arbitration community to ensure that each country has a fair understanding of arbitration, its advantages, and its proceedings. This is especially true in jurisdictions such as Colombia, which is in the process of adopting a new law that modifies its arbitration act.<sup>34</sup> Similar to Peru, Colombia's proposed amendment has mandated arbitration for public infrastructure contracts<sup>35</sup> and has adopted the UNCITRAL

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<sup>34</sup> A draft version of this new law is available at [https://img.lalr.co/cms/2021/07/22171156/Proyecto-de-Ley-Arbitraje\\_julio-2021.pdf](https://img.lalr.co/cms/2021/07/22171156/Proyecto-de-Ley-Arbitraje_julio-2021.pdf).

<sup>35</sup> The Law 1682 of 2013, modified by Law 1742 of 2014, have special provisions on mandatory dispute adjudication boards and arbitration in infrastructure projects. L. 1682/2013, Nov. 22, 2013, DIARIO OFICIAL (Colom.), [https://www.ani.gov.co/sites/default/files/ley\\_1682\\_de\\_2011.pdf](https://www.ani.gov.co/sites/default/files/ley_1682_de_2011.pdf); L. 1742/2014, Dec. 26, 2014, DIARIO OFICIAL (Colom.), [https://www.ani.gov.co/sites/default/files/ley\\_1742.pdf](https://www.ani.gov.co/sites/default/files/ley_1742.pdf).



Model Law in order to attract international investment, increase competitiveness in the region, and relieve pressure on the courts. It is important to educate the public about arbitration, so it views arbitration as a way of improving justice rather than avoiding it.<sup>36</sup>



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<sup>36</sup> As stated in the explanatory memorandum of the Colombian arbitration act available at [http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/Ponencias/2011/gaceta\\_542.pdf](http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/Ponencias/2011/gaceta_542.pdf).



# INSTITUTE FOR TRANSNATIONAL ARBITRATION

of

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