

Legal Framework

Closer look at regulations for corporations and workers

Rights and obligations for local and foreign investors

Changes to labour legislation for non-citizen employees

Authorities adopt a preventative approach to corruption





There are different incorporation rules for subsidiaries and branches

Stable foundations

An examination of business, investment and property laws

Peru is governed by a stable legal framework established by the constitution, which was ratified in 1993 and serves as the backbone of the economic model that has sustained the country's structural reforms over the years. Peru's principle laws have remained largely the same since the 1990s, although there have been some new regulations introduced in more recent times, including legislation aimed at boosting Peru's attractiveness as a business and investment destination.

CORPORATE LAW: Companies are regulated under Law No. 26887, or the General Law of Companies, which allows for the incorporation of several types of companies, with differing features depending on issues ranging from the number of shareholders to corporate structure. With regard to foreign investment, the issue of whether to incorporate a subsidiary or a branch is a recurring topic. Incorporation rules for a subsidiary (i) and a branch (ii) differ in certain areas such as:

- **Legal personality:**
 - (i) The subsidiary has its own legal personality, which means the parent company cannot be held liable for the former's debts, unless it undertakes to do so by means of a contract.
 - (ii) Branches share the same legal personality with their parent company, which means that the latter can be held liable, in a court of law, for the debts of the branch.
- **Corporate tax:**
 - (i) In principle, all companies domiciled in Peru are subject to corporate tax, even if their income comes from foreign revenue. The corporate tax for companies and its subsidiaries is the same, at 29.5%.
 - (ii) A branch in Peru is only subject to corporate tax on revenue obtained from a Peruvian source, or generated by business activities in Peruvian territory. The tax rate for companies and branches is 29.5%.
- **Tax on dividends:**
 - (i) Tax on dividends for a subsidiary is 5% and applied either when the shareholders vote to do so, in a

shareholders' general meeting, or when the dividends are distributed among shareholders.

(ii) In the case of branches, the tax on dividends (5%) is due when profits are deemed to be distributed, after the application of income tax solely with the annual income tax return, which is filed each year to the National Superintendency of Tax Administration between the end of March and the beginning of April.

- **Incorporation:**

(i) The incorporation of a subsidiary is faster than that of the branch. Less documentation is required, especially the one issued in the country of origin.

(ii) The incorporation of a branch takes more time, insofar as its existence must be validated. This process requires a certain number of apostilled documents, such as by-laws, registry files and minutes.

- **Public tenders:**

(i) Concerning public tenders, the experience of the parent company is not always acknowledged in benefit of its subsidiary, given the different legal personality.

(ii) Concerning companies who wish to participate as candidates to a public tender, the incorporation of a branch offers the advantage of it being able to claim the experience of the parent company as its own during the process.

ANTI-CORRUPTION LAW: Little has changed since the passage of Law No. 26887 in 1997 in terms of the regulation of companies; however, major obligations have since been implemented with regards to liability since the passage of Law No. 30424, which regulates the responsibility of legal persons for corrupt practices.

Law No. 30424 was passed in 2016 and came into effect on January 1, 2018. It is one of the main provisions passed by the previous administration in order to prevent corrupt practices. The scope of the law applies to legal persons whose shareholders, directors, managers, legal representatives, attorneys or natural persons under the control of the aforementioned legal person

engage in practices such as bribery, laundering or otherwise possessing or transporting money obtained from illegal sources. As for the sanctions, these may range from the application of fines of no less than double the benefit obtained from the bribe to the dissolution of the company itself. A company may exempt itself from responsibility for any corrupt practices committed by any of its agents if it implements a system of prevention, which must include:

- A person in charge of prevention appointed by the highest management body of the legal person. The person in charge must exercise his or her function with autonomy. In the case of micro- and small enterprises, this role can be directly assumed by the management body.
- The identification, evaluation and reduction of risks to prevent bribery.
- The implementation of a procedure for reporting this type of crime.
- The periodic promotion of the system of prevention, and the training of personnel in how it works.
- A constant analysis and vigilance of the system of prevention.

LABOUR LAW: Labour relations in Peru are regulated by the Law on Labour Productivity and Competitiveness passed by Supreme Decree No. 003-97-TR, and other more specialised texts. The following provisions are worthy of note, where regulation of labour contracts is concerned:

- **Duration:** Indefinite, as a general rule. Contracts may be subject to limited terms under special circumstances such as:
 - i) if the contract is concluded during the first three years of business activity or due to an increase of such activities (term of three years);
 - ii) if the contract is concluded due to market necessities, arising from substantial variations in market demands (term of five years); and
 - iii) in the event of corporate restructuring (term of two years), among others.
- **Probation period:** As a general rule, the probation period is three months, during which the employee will be protected against arbitrary dismissal. In the case of qualified workers who share confidential information with the management of the company, this period can be extended up to six months. In the case of management personnel, the probation period can last up to one year.
- **Minimum wage:** Peruvian legislation has established a minimum wage of PEN930 (\$282) a month. Employees who work graveyard shifts must earn at least PEN1255.5 (\$380) – the minimum monthly wage plus an increase of 35%. All work performed between the hours of 10.00pm and 6.00am are graveyard shifts.
- **Dismissal:** Employees in Peru are protected from arbitrary dismissal. Labour legislation establishes a closed list of reasons for which an employer might dismiss an employee, such as serious misconduct. Thus, if an employee is dismissed for any other reason, they may sue the employer for arbitrary dismissal and request a compensation equal to one-and-a-half times the



Legislative Decree No. 1350 expands the scope of permitted activities under certain categories for foreigners

monthly salary for each complete year of service, with a maximum of 12 allowances. Exceptionally, the employee might demand their reposition if their dismissal can be proven to have been motivated by:

- i) their joining a union;
 - ii) having acted as a representative of the employees;
 - iii) issuing a complaint or taking part in a legal procedure against the employer;
 - iv) discrimination; and
 - v) pregnancy.
- **Foreign employees:** Foreign employees may not exceed 20% of the personnel of a Peruvian company and their combined salaries may not exceed 30% of the company payroll.

FOREIGNERS & VISAS: Changes to labour legislation were introduced in 2017 in order to make the hiring of foreigners easier. This was achieved partly through procedural changes, but mainly by means of Legislative Decree No. 1350, which expanded the scope of permitted activities under certain categories and created new ones in order to facilitate the hiring of foreigners. Among the most important categories of visas are:

- **Business visa:** This visa is granted for a period of 183 cumulative days in a term of 365 days. It enables the beneficiary to sign contracts and provide specialised technical assistance. Citizens from the Schengen Area may be exempt from this visa when entering Peru for a 90-day period.
- **Designated worker visa:** Granted to expatriated workers who come into Peru to carry out a specific function or labour, and who have been seconded by a foreign company to a local company that requires specialised professional, commercial or technical knowledge. Depending on the term of the contract, this visa can be granted for a period of 183 days or 365 days, and is renewable.
- **Temporary/resident worker visa:** Granted to foreigners who wish to carry out remunerated activities in Peru by means of a labour contract. Depending on

the term of employment, this visa can be granted for a period of 183 days or 365 days, and is renewable.

- **Relative of resident:** Granted to the spouse, children and parents of a Peruvian resident. It is granted for a period of 365 days to the relatives of foreigners who are residents in Peru and for a period of two years to the relatives of Peruvian citizens. Both periods are renewable, and the relative of a Peruvian resident is authorised to work in Peru.

FOREIGN INVESTMENT LAW: Foreign investment in Peru is protected at the constitutional level through a series of provisions, which establish the same rights and obligations for local and foreign investors. Discrimination on the basis of local or foreign shares of the investment is expressly forbidden. The same text also guarantees the freedom to hold and dispose of foreign currency. There is no exchange control regulation.

The constitution recognises that private enterprise is free and exercised in a market-based social economy, and limits the power of government with regard to its role in the economy. Article 62 of the constitution recognises the right of all persons to enter into valid agreements, and establishes that these may not be modified by law or any other kind of provision, thereby guaranteeing the right to freedom of association.

Furthermore, the constitution, which was ratified in 1993, has also created the legal figure of the Law Contract – stability agreements that freeze the legal tax and labour regimes under which foreign investors make their investments. These stability agreements have been further regulated under Legislative Decree No. 662, also known as Approving the Juridical Stability System for Foreign Investment, and Legislative Decree No. 757, known as Approving the Framework Law for Private Investment Growth. The following rights can be subject to guarantees through a stability agreement:

- Stability of the non-discrimination right;
 - Stability of the income tax system, applicable to investors in force at the moment the agreement is executed; and
 - Stability of the system of free trade of foreign currency and transfer of profits, dividends and royalties.
- Conversely, stability agreements may grant the following guarantees to the entity receiving the investment:
- Stability of the labour hire system in force at the time agreement is executed;
 - Stability of the system of export promotion applicable at the time the agreement is concluded; and
 - Stability of the income tax system.

Stability agreements have a maximum term of 10 years, except in the case of contracts resulting from public tenders, in which case the agreement shall remain in force until the contract is concluded or terminated.

PROPERTY LAW: Article 70 of the constitution guarantees the right to private property. Real estate property can be freely acquired and transferred by Peruvians and foreigners alike; although it should be noted that for national security reasons, no foreigner may own property located within 50 km of the borders. Eminent domain may only be used exceptionally, in the event of national security or public need, and only with prior and

fair compensation paid in cash. The compensation must include damages caused to the owner.

The government guarantees the enforcement and defence of private property through the National Superintendency of Public Registries (Superintendencia Nacional de los Registros Públicos, SUNARP). The role of this entity is to register all real estate transactions in a database with public access in order to assure security and accuracy in all transfers. In order to do this, SUNARP has strict rules regarding the recording of transfers of properties and other related rights. First, all transfers registered with the entity are presumed to be true, unless proved otherwise in a court of law. Second, only the proprietary is entitled to make transfers and transactions regarding the property. If by any chance one owner forgot to register his acquisition before selling it to the next person, SUNARP would deny the registry of the ensuing transfer until the previous transfer had been properly registered. Third, in order to prevent fraud, properties registered with SUNARP can only be transferred by the person whose exact name and ID it is registered to. This means that any error in the name or ID of a deed of purchase could result in a denial or challenge to the registry application by SUNARP.

Though registering transfers of property with SUNARP is not mandatory by law, it is highly recommended and almost unavoidable as not many people would be willing to purchase property through a private contract alone. Having deeds registered with SUNARP is the safest and most effective way to protect property and/or enforce property rights through a court of law.

Regardless, there are two exceptions to the acquisition of private property: notably, squatting and eminent domain. With regard to the first, the Peruvian Civil Code allows any person who occupies another person's property for a certain period of time, in a public and non-violent fashion, to acquire the rights to said property. If the property was occupied in good faith – that is, when there is a legitimate cause to believe the person from whom it was acquired was the owner – then the occupant shall only need to spend five uninterrupted years on it to acquire the rights to the property. If the property was occupied in bad faith, then they will have to occupy it for 10 uninterrupted years.

In the case of eminent domain, it can only be declared by law in an event of national security or public need, and with prior cash payment of the appraised value. Eminent domain is regulated by Legislative Decree No. 1192, under which people whose property is subject to eminent domain are entitled to a compensation, which includes the commercial value of the property, and reparation for any damage caused by any consequential damages and lost profits.

Although the main provisions have remained the same over the years, the law was recently changed to include an incentive equal to 20% of the offered price for people who accept the initial appraisal report of their property. Likewise, the scope of what may be considered lost profits now include criteria such as whether the property is rendered uninhabitable, loses functionality of goods or ends outstanding lease agreements.



Peru has seen almost three decades of uninterrupted economic growth

Striking a balance

Officials seek to end corruption while cutting excessive red tape

Peru has maintained the legal framework adopted by the constitution of 1993, favouring a free market economy designed to promote and attract private investments. Indeed, it is through this framework that Peru has seen almost three decades of uninterrupted economic growth, despite the effects of the global financial crisis of 2008.

FIGHT AGAINST CORRUPTION: Nevertheless, there have been some challenging times as the country's legal system has been put to the test by recent corruption scandals involving the payment of bribes to Peruvian politicians by Odebrecht, the biggest engineering and contracting company in Latin America. Indeed, in the wake of the corruption allegations that swept the country, which encompassed politicians across the political spectrum indistinctly, the current administration has fought to maintain balance between passing comprehensive regulations and trying not to stifle growth through excessive bureaucracy.

The challenge has not been easy to overcome, given that the undertaking of these efforts is happening in the midst of a political crisis. Delays and obstruction have become common tools at the hands of political agents not wanting to lose leverage or be held accountable. Thus, the reforms are taking place, albeit at a slow pace as they progress through Congress and other branches of government.

Despite this, it is worth to note that the mood of the country has largely contributed to the fight against corruption, and that notable changes have been brought about as a result. Indeed, rather than simply adopting a retaliatory approach towards the parties and institutions that allowed corruption to thrive and flourish, the current administration has sought to make prevention a priority, whilst retaining the spirit of simplicity in the drafting of new laws.

In that regard, the current trend has been to locate and close the loopholes that allowed the parties involved to exploit the system to their advantage, as

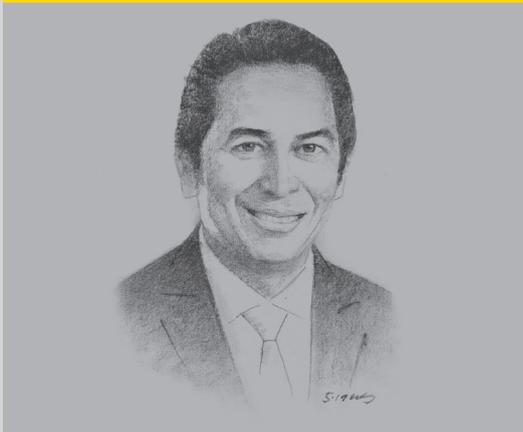
well as to increase the accountability of public and private agents who engage in acts of corruption. As a result, the country has seen recent changes in its corporate and public tender laws, with a heavy emphasis on prevention. Though burdensome at first glance, these laws are designed to prevent corruption by establishing oversight responsibilities for companies in regard to all of their agents and personnel.

In that sense, the government's approach has not been to limit or reform the existing system but rather to implement mechanisms that will allow the authorities to detect instances of corruption and sanction them effectively. This approach does not delegate all of the responsibility upon the government; it also grants citizens the tools to report acts of corruption anonymously in order to prevent any retaliation against them. Thus, the approach to end corruption can best be described as a shared responsibility between the government and its citizens.

NEW JUDICIAL BODY: Additionally, it should be noted that the judiciary is also undergoing a process of reform, which has resulted in the creation of a new independent entity charged with appointing and removing both judges and prosecutors at all levels. Though still in progress at Congress, this reform effort is expected to continue beyond the current administration.

OPEN FOR BUSINESS: Reform efforts have not just been limited to the fight against corruption. The current administration has also remained committed to reducing unnecessary regulation. One of the most significant legal overhauls is the country's recent openness to immigration and foreign capital. Since 2017 the administration has sought to pass a comprehensive immigration reform, expanding the scope of visas to allow foreigners to work in the country, coupled with changes to laws regarding the hiring of foreign workers.

OBG would like to thank RGB Avocats for their contribution to THE REPORT Peru 2019



Ricardo Guevara Bringas

Attractive framework

Ricardo Guevara Bringas, Corporate Lawyer and Partner, RGB Avocats, on support for foreign and private investment

How widespread is arbitration in the legal system?

GUEVARA: The World Bank's "Doing Business 2019" report ranked Peru 70th out of 190 economies in terms of enforcing contracts. Collecting debt takes an average of 426 days, given the excessive time Peruvian courts take to evaluate claims. As such, the use of arbitration to settle business disputes has become widespread and is now common practice in Peru. Public bodies, as well as the state, submit their cases to arbitration. For instance, for cases that are related to public procurement, arbitration is compulsory under Peruvian law.

In addition, Peru is a member of a number of international arbitration mechanisms, such as the International Centre for Settlement of Investment Disputes, the Overseas Private Investment Corporation and the Multilateral Investment Guarantee Agency.

How is foreign investment encouraged?

GUEVARA: Peru has adopted a series of provisions at the constitutional level to guarantee freedom of trade and limit the powers of government when it comes to economic activities, foreign investment and contracts in general. Thus, no law may establish any type of discrimination between local and foreign investors, and people are free to hold and dispose of foreign currency. There is no doubt that the constitution has shifted its views on the government's role in economic activity. Indeed, Article 60 states that the government may only engage in business activities in a subsidiary way, whether directly or indirectly, and then only for reasons of public interest or national benefit.

Foreign investors have the right to trade and to engage in all economic activities. They may also decide upon the organisation of the business related to their investment. Thus, any legal provision establishing forms of production or productivity are prohibited, except for the ones related to hygiene and industrial security, environmental protection and health. They may also freely decide upon the distribution of profits or dividends,

and have the right to receive all profits and dividends they are entitled to without prejudice to the obligations concerning the workers' shareholding, the legal reserve and relevant tax obligations. They also have the right to transfer their share capital, dividends and any royalties abroad in freely convertible foreign currency without previous authorisation or prior payment of legal taxes.

What major judiciary reforms can be expected after the December 2018 referendum?

GUEVARA: The National Board of Justice, the entity previously in charge of appointing judges at all levels, has been replaced by the National Justice Committee, which will elect judges through a public exam. Despite the overwhelming results of the 2018 referendum, it is still too early to speak of major changes. In May 2019 a member of Congress declared that the reforms would not be ready any earlier than 2021.

What makes the country's legal framework attractive to private investment?

GUEVARA: Peru has had almost three decades of uninterrupted growth, mainly thanks to the constitution of 1993. Through it, the government was reformed to take on a subsidiary role in the economy, rather than directing it. The framework rests upon the protection of certain key rights, such as the right of all people to enter into valid agreements, and equality under the law for both local and foreign investors. Stability agreements have also played a key role in protecting investment and offering a certain degree of predictability for investors.

Additionally, Peru has an estimated infrastructure deficit of \$160bn. In an effort to close this gap, the use of public-private partnerships (PPPs) has become very common. PPPs are regulated under Legislative Decree No. 1362, through which the government is able to efficiently contract with private entities for these types of investment. There are 58 pending projects over the 2019-21 period, worth an estimated total of \$10.3bn.