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IBA ARBITRATION COMMITTEE

Arbitration Guide

PERU

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

In the last two and a half decades, Peru has increasingly reinforced its arbitration system; firstly, through the promulgation of Law No 26572 (General Arbitration Act) in 1996, and then with the approval of Legislative Decree 1071, which is Peru's current arbitration law, in 2008 (Peruvian Arbitration Law). The Peruvian Arbitration Law is based on the UNCITRAL Model Law of 1985 with the amendments of 2006.

With the modernization of the Arbitration system, in addition to the current legal framework, arbitration in Peru has really flourished. It is widely used for both private and public disputes. As all Peruvian State procurement contracts are referred to arbitration, there is a large volume of arbitration cases in Peru, thus a specialized arbitration culture has developed which is constantly evolving and improving.

Moreover, arbitration is commonly used, as it is seen as a faster and more efficient method of dispute resolution compared to the judicial system.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Peru does not have any official statistics to show the percentage of ad hoc and institutional arbitration cases. Based on our knowledge, most arbitrations are domestic, even though the number of international arbitrations is increasing.

The most commonly used institutions are the: (i) Arbitration Centre of the Lima Chamber of Commerce (Lima Chamber of Commerce – CCL); (ii) International Arbitration Center of the American Chamber of Commerce in Peru – AmCham (American Chamber of Commerce in Peru – AmCham); and (iii) Center for Analysis and Dispute Resolution of the Pontificia Universidad Católica del Perú (Pontificia Universidad Católica del Perú's Centre for Conflict Analysis and Resolution – PUCP-CARC) and their respective set of rules regarding the arbitral procedure.

(iii) What types of disputes are typically arbitrated?

The most commonly arbitrated issues are those related with disputes regarding procurement contracts (including State construction contracts, purchase of goods, services) and Public-Private Partnership Contracts. Under Procurement legal framework, it is mandatory to arbitrate disputes regarding State procurement contracts.

In our experience, the arbitration disputes mainly relate with the following economic sectors: (i) energy; (ii) construction; (iii) commercial; (iv) oil and gas; and (v) services, amongst others.

(iv) How long do arbitral proceedings usually last in your country?

Arbitral proceedings usually take between nine months and two years. This will depend on the complexity of the dispute, the conduct of the parties, and, especially, the administration of the proceeding by the members of the arbitral tribunal and the institution centre (if applicable).

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

Under Article 20 of the Peruvian Arbitration Law, nationality is not an impediment to act as an arbitrator unless otherwise agreed by the parties. Peruvian or foreigners may act as arbitrators. However, State officers cannot be arbitrators.

In domestic arbitration, this shall be decided according to law (as opposed to arbitrations in which the tribunal decides *ex aequo et bono*); in this case, the arbitrators must be attorneys unless otherwise agreed upon. The arbitration law expressly sets forth that there is no need for the attorney to be a member of any national or international bar or association.

If an arbitration is subject to the Peruvian State Procurement Law (Law No. 30225), presiding arbitrators in cases that have the State as a party are necessarily required to have experience in Peruvian administrative law, arbitration and in contracts with the state matters. It should be noted that this does not impede arbitrators who are not Peruvian lawyers to serve in arbitrations to which the State is a party, but it does require them to have proven experience on the matters mentioned above.

In international arbitrations seated in Peru, being an attorney is not a requirement to be an arbitrator. Article 32 of the Peruvian Arbitration Law provides a limitation to the civil liability of arbitrators stating that they will only be liable in case of wilful or grossly negligent conduct.

Under Article 37 of the Peruvian Arbitration Law it is not mandatory for counsel to be lawyers and there are no restrictions as regards foreign counsel.

II. Arbitration Laws

(i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

There are no major differences between the legislation for national and international arbitration, a situation that was present with the previous legal framework. The arbitration proceedings are governed by the Arbitration Law, issued in 2008 and based on the 2006 UNCITRAL Model Law. The Peruvian Arbitration Law applies to both national and international arbitrations, as stipulated in paragraph 1 of its first article.

There are a few non-transcendental distinctions, as there are some provisions that are only applicable to international arbitration.

In addition, certain specific provisions of the Peruvian Arbitration Law are applicable to arbitrations seated outside Peru (for example, provisions on judicial cooperation, arbitration agreement and its scope, recognition and enforcement of interim measures, and recognition and enforcement of awards, amongst others). For example, as set forth in Article 8(2), Peruvian courts will be competent to adopt interim measures in arbitrations seated abroad if the measure would be enforced in Peru. According to Articles 8(1) and 45 of the Peruvian Arbitration Law, Peruvian courts will be competent to assist in evidence matters (such as taking the testimony of a witness or expert) in arbitrations seated abroad in case the assistance is needed in Peru. In contrast to the UNCITRAL Model Law, the application of the Peruvian Arbitration Law is not limited to commercial arbitration, including, amongst others, investment disputes, tax or legal stabilization agreements.

(ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

As mentioned, the Peruvian Arbitration Law is based on the 2006 UNCITRAL Model Law and applies to both international and domestic arbitration. It has a modern approach on arbitration.

Following Article 1 of the 2006 UNCITRAL Model Law, an arbitration seated in Peru is considered international when:

- The parties to the arbitration agreement have their domiciles in different States at the time of the execution of that agreement;
- The seat of the arbitration (determined in, or pursuant to, the arbitration agreement) is situated outside the State in which the parties have their domiciles; or

- The parties are domiciled in Peru, and the place where a substantial part of the obligations of the legal relationship is to be performed or the place with which the subject matter is most closely connected, is outside Peru.

As set forth in Article 5 of the Peruvian Arbitration Law, if one of the parties has more than one domicile, the domicile for this purpose is that which has the closest relationship to the arbitration agreement.

There are some minor differences between a domestic and an international arbitration, which include (but are not limited to) the following:

- An international arbitration award seated in Peru can be annulled under the ground that it is contrary to international public policy, while a domestic arbitration award seated in Peru cannot be annulled under public policy grounds.
- In an international arbitration, when the designation of an arbitrator must be made by a Chamber of Commerce, in the case of a sole arbitrator or the president of the tribunal, the suitability of appointing an arbitrator of a different nationality to that of the parties shall be taken into account.
- As mentioned, in an international arbitration, in no case arbitrators are required to be attorneys, while in domestic arbitrations that must be decided by law, arbitrators must be attorneys.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

The following international treaties relating to arbitration have been adopted by Peru: (i) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958); the Inter-American Convention on International Commercial Arbitration (Panama Convention of 1975); and, (iii) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

According to Article 57 of the Peruvian Arbitration Law, in an international arbitration the arbitral tribunal must decide the dispute in accordance with the legal provisions chosen by the parties as applicable to the merits of the dispute. It shall be understood that any reference to the law or legal system of a given State is, unless expressed otherwise, referring to the substantive law of that State and not to its rules of conflict of laws. This allows parties agree to apply *lex mercatoria* or non- State law. If the parties do not indicate the applicable legal rules, the arbitral tribunal shall apply those it deems appropriate.

The tribunal shall decide in equity or conscience (*ex aquo et bono*) only if the parties have expressly authorized it do so.

Furthermore, in all cases, arbitrators shall decide the dispute in accordance with the terms of the contract and must take into account the applicable customs and practices.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Articles 13 and 14 of the Peruvian Arbitration Law regulate the form, content and parties of arbitration agreements.

With respect to the definition of ‘arbitration agreement’, Article 13 of the Peruvian Arbitration Law closely follows the definition contained in Article 7 (option I) of the 2006 UNCITRAL Model Law. Article 13.1 defines the arbitral agreement as the agreement in which the parties submit to arbitration all or certain disputes that have arisen or may arise between them with respect to a defined legal relationship, whether contractual or not.

As to the formalities of the arbitration agreement, Article 13.2 states that the agreement shall be in writing and may be in the form of a clause included in a contract or in the form of a separate agreement. Article 13.3 states that an agreement will be deemed to be 'in writing' if it is recorded in any way. Moreover, Article 13.4 states that the written nature of the agreement is satisfied if an electronic communication is sent and the information contained therein is accessible for subsequent reference. An 'electronic communication' will be such communication made through data messages, and 'data message' refers to information sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to electronic data interchange, electronic mail, telegram, telex or telecopy.

Continuing with the formal aspect of the agreement to arbitrate, Article 13.5 states that an arbitration agreement will be 'in writing' if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party, and not denied by the other. Finally, pursuant to Article 13.6, the agreement will also be considered 'in writing' when a contract refers to any document containing an arbitration agreement, if the reference implies that clause is part of the contract.

Furthermore, Peru has regulated the extension of the arbitration agreement to non-signatory parties. According to Article 14 of the Peruvian Arbitration Law, the arbitration agreement binds all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement or to which the agreement is related. It also binds all those who seek to attain any rights or benefits from the contract, pursuant to its terms. This provision is fundamental to determine who is a party to the arbitration agreement in accordance with the Peruvian Arbitration Law.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Article 16 of the Peruvian Arbitration Law regulates the 'arbitration exception'. Thus, if a judicial claim is filed and the claim relates to matters falling within the scope of an agreement to arbitrate, the court shall dismiss the claim and refer the parties to arbitration. This is the general rule for arbitral procedures seated in Peru. Pursuant to Article 16.4, a similar rule is available if the arbitration is (or will be) seated abroad. If the arbitral procedure has not yet begun and a judicial claim over the same subject matter is brought before Peruvian courts, the party seeking to uphold the agreement to arbitrate will have to: i) file a motion to dismiss before the court where the judicial claim has been filed; and, ii) provide evidence of the existence of the agreement to arbitrate. On the other hand, the party wishing to settle the dispute before the court (thus avoiding the arbitration procedure) will have to prove that the agreement to arbitrate is manifestly invalid, in which case the court will retain jurisdiction over the case.

Article 16.4 of the Peruvian Arbitration Law establishes that if the agreement to arbitrate abroad meets the requirements set by: i) the law applicable to the arbitral agreement; or, ii) the law applicable to the merits; or eventually, iii) the Peruvian Arbitration Law, Peruvian courts shall dismiss the claims brought before them.

If an arbitral procedure is seated outside Peru, Peruvian courts should uphold the agreement to arbitrate if the formal requirements set in the Peruvian Arbitration Law (described in the previous paragraphs) are met. With this provision, if a party files a judicial claim before Peruvian courts, the party wishing to maintain the agreement to arbitrate abroad is allowed to argue the validity of the agreement under Peruvian law (which is almost identical to Option I of Article 7 of the UNCITRAL Model Law). This norm seeks to promote efficiency insofar as it would give the option to Peruvian courts to consider the validity of the agreement under Peruvian law, and not under a foreign law that would be subject to proof and would lead to delays in the decision and further costs. This is due to the fact that, under Peruvian law, parties have the burden of proving the existence and interpretation of foreign law. The court has limited discretion and shall endorse the agreement to arbitrate abroad and refer parties to arbitration, unless the court finds that the agreement is manifestly invalid. In order to make such determination, the court will have to analyse the agreement to arbitrate under: i) the rules applicable to the agreement; or, ii) the rules applicable to the merits. Nonetheless, if the arbitration agreement meets the formal requirements set in the Peruvian Arbitration Law (pursuant to Article 13), Peruvian courts will then have the duty to grant the motion to dismiss, thus upholding the agreement to arbitrate abroad. This means that the formalities that must be met by the agreement pursuant to the Peruvian Arbitration Law will also be relevant in the context of arbitration procedures seated outside Peru.

In the event that the arbitration procedure has already begun, and the parties find themselves facing parallel procedures in which the arbitral procedure is seated abroad, while the judicial procedure is seated in Peru, Peruvian courts will dismiss the judicial claim. The only exception to this rule is that the party acting as claimant before the courts is able to prove that the subject matter manifestly violates international public policy.

Article 16.4 of the Peruvian Arbitration Law is consistent with Article II.3 of the New York Convention as well as with Article 8 of the 2006 UNCITRAL Model Law, but also sets a higher threshold in favour of the enforcement of the agreement to arbitrate. Neither the Convention nor the Model Law include an explicit provision stating that only in manifest cases of invalidity, the agreement to arbitrate will not be enforced. The Peruvian Arbitration Law, in order to prevent local courts from making a full review of the agreement to arbitrate, makes explicit reference to the manifest nature of the invalidity, thus excluding the agreement's 'inoperativeness' and 'inability of being performed' as grounds for refusing to enforce the arbitration agreement.

(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are a common practice in Peru, as arbitration clauses may establish prior steps to arbitration, such as direct negotiation, that may be either compulsory or voluntary.

If the previous steps that the parties have agreed to are clearly mandatory and the arbitration proceedings have begun without regarding the previous steps, then the other party may raise a motion before the arbitral tribunal to dismiss the arbitration because of lack of jurisdiction or because of admissibility concerns, the arbitral tribunal must respect the agreements made by the parties.

Strictly, the Peruvian Arbitration Law does not regulate the enforcement of multi-tier clauses nor if there are any consequences for disregarding them; nevertheless, there is at least one decision of the Superior Court of Lima that dismisses the enforceability of multi-tier clauses.

(iv) What are the requirements for a valid multi-party arbitration agreement?

The same requirements that for an arbitral agreement, as described in the answer to question (i) in this section. In Peru, conversely to other jurisdictions that do not have an express recognition in their arbitration laws, non-signatories can be part of the arbitration agreement.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Conferring a unilateral right to refer a dispute to arbitration is not expressly prohibited under Peruvian law.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

As mentioned, under Article 14 of the Peruvian Arbitration Law it is expressly recognized that arbitration agreements may bind non-signatories. In fact, the arbitration agreement binds all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement or to which the agreement is related. It also binds all those who seek to attain any rights or benefits from the contract, pursuant to its terms. This provision is fundamental to determine who is a party to the arbitration agreement in accordance with the Peruvian Arbitration Law.

(vii) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Article 1 of the Peruvian Arbitration Law states that, unless stated otherwise, it applies to all arbitrations which are seated in Peru, be they local or international. As such, if an arbitration agreement stipulates that the arbitration is seated in Peru, but does not establish the applicable law, the Peruvian Arbitration Law will be applicable. Peruvian courts have not deviated from the Peruvian Arbitration Law in this sense and, as such, have not issued any relevant decisions on determining the law governing the arbitration agreement.

(viii) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

Yes. Article 35 of the Peruvian Arbitration Law allows arbitral tribunals to conduct hearings on a venue that is different from the seat of the arbitrations. As specified on Article 35(2), the arbitral tribunal may, after consulting the parties, meet at any place it considers appropriate for the hearing of witnesses, experts or parties, or for the examination or recognition of objects, documents or persons.

(ix) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

There are no specific regulations regarding blockchain and NFT-related disputes. Article 2 of the Peruvian Arbitration Law states that ‘disputes on matters of free disposal under the law, as well as those authorised by law or international treaties or agreements, may be submitted to arbitration’. Accordingly, blockchain and NFT-related disputes are considered arbitrable under the Peruvian Arbitration Law.

(x) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

Following the UNCITRAL Model Law, Article 13 of the Peruvian Arbitration Law states that arbitration agreements must reflect the intention to arbitrate any dispute deriving from any particular contractual or other legal relationship and must be in written form. If these requirements are not met, Article 63(1)(a) of the Peruvian Arbitration Law stipulates that an award may be set aside.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

In Peru, only disputes related to rights that can be freely surrendered or waived by the parties may be submitted to arbitration. In addition, any dispute may be submitted to arbitration if authorized by law or an international treaty, even if it relates to rights that cannot be waived or surrendered. Disputes related to rights that can be waived typically include disputes on contractual matters and commercial matters, and typically exclude criminal matters, legal capacity matters and family law matters. Considering the above, corporate law matters can be subject to arbitration. Competition Law issues, however, cannot be referred to arbitration. In addition, it is worth noting that the Peruvian State may submit its disputes to arbitration.

Moreover, Article 41 of the Peruvian Arbitration Law regulates the competence of the arbitral tribunal. It states that the arbitral tribunal is the only competent entity to decide over its own jurisdiction. Nevertheless, the decision of the arbitral tribunal about its own jurisdiction can be challenged through the request for annulment (setting aside proceeding) against the arbitration award. Thus, the courts will have the last say regarding arbitrability issues.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

As mentioned above, according to Article 16 of the Peruvian Arbitration Law, if a claim is filed in an ordinary court in respect to a matter that falls under an arbitration agreement, the other party may invoke the ‘arbitration exception’. The exception must be raised within the period established in each process and if no objection is filed, it will be understood that the party has waived the arbitration agreement. Thus, local laws do provide time limits for the interposition of the exception.

Article 18 of the Peruvian Arbitration Law establishes that the arbitration can only be waived validly if it is manifestly or tacitly expressed. When a party is brought before an ordinary court despite having an arbitration agreement regarding the dispute in question, and the party fails to invoke the arbitration exception within the time limit, then it shall be considered that the party has implicitly waived its right to submit to arbitration.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Article 41 of the Peruvian Arbitration Law expressly recognizes the principle of competence-competence as it states that the arbitral tribunal is the only one that is competent to decide on its own jurisdiction. The decision of the tribunal regarding its own jurisdiction can be challenged through the action of annulment and in this specific scenario, the courts can review de novo the decision of the tribunal. Thus, courts can be very intrusive in the control of the arbitral tribunal's jurisdiction.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Following Article 10 of the UNCITRAL Model Law, the Peruvian Arbitration Law states the parties are free to determine the number of arbitrators. Failing such determination, the number of arbitrators will be three.

Article 22.3 establishes that the parties may appoint the arbitrators or delegate the appointment to an institution or a third party, who may consult with the parties on any necessary information to comply with the appointment. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators or choose to apply the procedures provided by any institutional rules. However, Article 23 of the Peruvian Arbitration Law provides that the parties shall comply with the principle of equal treatment; if the arbitration agreement favours one party in the appointment of arbitrators, such appointment procedure is void. In case the parties fail to agree on the procedure for the appointment of an arbitrator or arbitrators, the parties will have 15 days to appoint the sole arbitrator counted from the date when the appointment is requested; or, in arbitrations with three arbitrators, each party will appoint an arbitrator within 15 days and the two arbitrators appointed shall appoint the third arbitrator within 15 days. In case the parties fail to appoint the arbitrators according to this procedure, the appointment will be made by the Chamber of Commerce of the seat of the arbitration or the place of execution of the arbitration agreement if the seat has not been determined. In international arbitrations, if the parties fail to appoint the arbitrators, the appointment is made by the Chamber of Commerce of the seat of the arbitration or the Chamber of Commerce of Lima (Lima Chamber of Commerce – CCL).

According to Article 26 of the Peruvian Arbitration Law, any agreement or provision that establishes a situation of privilege in the appointment of arbitrators in favour of one of the parties is considered null and void.

Courts do not play a role in the procedure for the appointment of arbitrators. On the other hand, and according to Articles 23 and 25 of the Peruvian Arbitration Law, if the parties do not agree on the appointment of the arbitrators, the appointments will be made by the Chamber of Commerce, provided the parties have not agreed otherwise.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Article 28.1. provides that arbitrators must be independent and impartial throughout the arbitral proceedings. The person who is proposed as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Once appointed, the arbitrator must disclose without delay any new circumstances that may give rise to justifiable doubts as to his or her ability to be impartial and independent. As mentioned above, courts do not play any role resolving challenges. However, courts will remain entitled to annul an award if justifiable doubts regarding the independence or impartiality of an arbitrator exists, and if the party unsuccessfully challenges the arbitrator in the applicable time limits.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

According to Article 20, any person can serve as an arbitrator provided he or she has no incompatibility to act as one and has not received a final criminal conviction for a criminal offense. According to Article 21, civil and public servants of the Peruvian State have incompatibility to act as arbitrators within the margins established by the respective incompatibility norms. In arbitrations in which the Peruvian State intervenes as a party, it has incompatibility to appoint as an arbitrator any person who has had personal, work related, economic, or financial interest that could be in conflict with the exercise of his or her arbitration function.

In institutional arbitrations, the arbitrators are automatically subject to the duties established in the institution's code of ethics. In any case, arbitrators will always remain committed to an ethical duty of independence and impartiality.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

As expressed in the answer above, in institutional arbitrations, a code of ethics is automatically imposed by the institutions to any arbitrations developed under the institution.

It is common that the IBA Guidelines on Conflicts of Interest in International Arbitration are used in Peruvian arbitration practice as illustrative criteria to resolve challenges to arbitrators or to define what arbitrators must disclose to the parties. Article 34(3) of the Peruvian Arbitration Law states that, if there is no applicable provision in the rules of the procedure or the Peruvian Arbitration Law, the tribunal may resort, at its discretion, 'to arbitration principles as well as customs and usages in arbitration matters'. Thus, if faced with a situation that has no applicable rules, the tribunal may resort to the application of soft law, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.

VI. Interim Measures and Emergency Arbitration

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

According to Article 47 of the Peruvian Arbitration Law, the arbitral tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure issued before the award by which the arbitral tribunal orders a party to:

- Maintain or restore the status quo pending determination of the dispute;
- Take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or refrain from taking action that is likely to cause such harm or prejudice to the arbitration process;
- Provide means of preserving assets that shall be needed for a subsequent award to be satisfied; or
- Preserve evidence that may be relevant and pertinent to the resolution of the dispute.

The interim measure can take the form of an award, or any other form and they can be enforced directly by arbitrators or through ordinary courts.

According to Article 48.2, in case of breach of the interim measure or when the use of public force is necessary, interim measures issued by arbitrators must be enforced in courts.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

Pursuant to Article 47.4 of the Peruvian Arbitration Law (applicable to arbitration procedures seated in Peru), it is possible to obtain interim relief from the courts prior to the constitution of the arbitral tribunal. Indeed, Article 47.4 of the Peruvian Arbitration Law – consistent with Articles 9 and 17 J of the 2006 UNCITRAL Model Law – states that it is compatible with an arbitration agreement: i) for a party to request the courts for an interim measure before the beginning of an arbitration procedure; and ii) for the courts to grant such measure. Typically, Peruvian courts issue interim measures *ex parte*.

Once the interim measure has been enforced, the beneficiary must initiate the arbitration within ten days, if it has not done so before. Failure to do so within this period, or if having complied with it, the arbitral tribunal is not constituted within 90 days of the enactment of the measure, it automatically expires.

After the tribunal is constituted, it is empowered to modify, substitute, and invalidate the interim measures that the court has issued, even in the case of final judicial decisions. This decision may be adopted either by one of the party's initiative or, in exceptional circumstances, on its own initiative prior notification to the parties.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

According to Article 45 of the Peruvian Arbitration Law, the arbitral tribunal or any of the parties may request judicial assistance for the production of evidence, provided that the existence of the arbitration has been proven, as well as the tribunal's permission to the interested party to resort to this assistance, when necessary.

Regarding provisional relief, courts may support arbitration in this regard as noted in the previous answer. There is no legal provision that requires the tribunal's consent regarding provisional relief by courts.

(iv) Are decisions by emergency arbitrators enforceable in your country?

To date, there are no public records on Peruvian courts deciding on the enforceability of decisions by emergency arbitrators. In any case, the Peruvian Arbitration Law does not differentiate decisions issued by arbitral tribunals and emergency arbitrators, so the enforcement procedure described on section XIII would apply.

(v) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

As explained above, Article 47 of the Peruvian Arbitration Law allows for arbitral tribunals to grant interim measures. These interim measures, as detailed above, may include 'maintaining [...] the status quo pending determination of the dispute'. Accordingly, tribunals are allowed to issue anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings until the arbitration proceeding is concluded. Article 48 of the Peruvian Arbitration Law allows arbitral tribunals to, if necessary, request the assistance of public force to execute interim measures.

(vi) Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

As explained above, Article 45 of the Peruvian Arbitration Law allows for courts to aid arbitral tribunals, expressly allowing it for the production or disclosure of documents.

Article 45 of the Peruvian Arbitration Law does not differentiate between assistance requests from local-seated arbitrations and foreign-seated arbitrations. As such, if a foreign-seated tribunal were to request judicial assistance it should, in principle, be granted.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

There is no specific regulation regarding disclosure of discovery in the Peruvian Arbitration Law. There is a general rule under Article 43.1 that provides that only the arbitral tribunal is entitled to determine the admission, relevance, production and weight of evidence and order parties to produce the evidence deemed necessary and a rule that gives the parties freedom to regulate the arbitration procedure. Thus, the types of disclosure or discovery will depend on the agreement of the parties.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

As in most civil law systems, in Peruvian civil court proceedings, the scope of disclosure or discovery is very restricted. Absence of an agreement to the contrary, arbitrators will have the freedom to decide the limits and scope of discovery. Some arbitration institutions like the Lima Chamber of Commerce – CCL, the American Chamber of Commerce in Peru – AmCham, and Pontificia Universidad Católica del Perú's Centre for Conflict Analysis and Resolution – PUCP-CARC incentivise parties to apply the use of the IBA Rules on the Taking of Evidence in International Arbitration, thus, the standard and limits of discovery will be the ones provided in such document.

(iii) Are there special rules for handling electronically stored information?

There are no special rules towards handling electronically stored information. In the case that electronically stored information becomes relevant in regard to a case, the arbitral tribunal will determine how it will be submitted and dealt with in each case.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

As stated in Article 51 of the Peruvian Arbitration Law, and unless otherwise agreed, the agents involved in the arbitration are obliged to maintain confidentiality over the course of the proceedings, including the award, as well as any information they might know through such actions.

However, the recently passed Emergency Decree 020-2020 sets forth that in arbitrations in which the Peruvian State is a party, the arbitration proceedings and the award must be made public once the arbitration process is finished.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

Article 51 of the Peruvian Arbitration Law stipulates that the arbitral tribunal, secretary, arbitral institution and, where appropriate, witnesses, experts and any others involved in the arbitral proceedings are bound to keep confidential the course of the arbitral proceedings, including the award, as well as any information they become aware of in the course of the arbitral proceedings, under liability.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

There are none.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Their adoption is not very common, but some Peruvian arbitration institutions, like the Lima Chamber of Commerce – CCL, the American Chamber of Commerce in Peru – AmCham, and Pontificia Universidad Católica del Perú's Centre for Conflict Analysis and Resolution – PUCP-CARC incentivise and promote their use.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

According to Article 42 of the Peruvian Arbitration Law, arbitral tribunals have full discretion as to when and if hearings will be adopted in an arbitration, unless the parties had agreed that no hearings will be held. Therefore, as long as the due process is respected, arbitral tribunals are allowed to govern the hearings held during the arbitration proceedings.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Testimonies are submitted as evidence and during hearings, cross-examinations, and oral direct examination can be allowed. The arbitrators may also question the witnesses. Still, the rules regarding witness testimonies are subject to what the parties have agreed to in the arbitration agreement, and if not, by the arbitral tribunal. The use of witness testimony presented as regulated by the IBA rules is increasingly becoming more common in Peru.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are none.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative, director or employee) and the testimony of unrelated witnesses?

The Peruvian Arbitration Law does not regulate the presentation of statements by witnesses, the rules by which they are delivered are decided by the arbitral tribunal in each case. Still, the tribunal evaluates each type of testimony and has the power to decide on the admission, relevance and weight of the evidence as well as the exclusion of the latter.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Expert opinion is presented as evidence, they may be called to give their professional opinion either by the arbitral panel or the parties. It is a common practice to ask the experts to submit a statement of impartiality and independence, so that they pledge to give only their objective and technical opinion. While the Peruvian Arbitration Law does not require this statement of impartiality and independence, most arbitration centres' rules expressly require experts to include them.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

The arbitral tribunal has the power to, either upon request by parties or on its own motion, appoint one or more experts to give their advice and knowledge on specific issues.

Currently there is no law that dictates or enforces the selection of experts from any particular list. Furthermore, the main arbitral institutions do not have a set expert list, which gives arbitrators a wide margin to designate them.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

'Hot-tubbing' can be used if the tribunal determines it is necessary or when the parties have agreed. In Peru 'hot-tubbing' is not prohibited, but it is not a frequent practice.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

The Peruvian Arbitration Law does not regulate the use of arbitral secretaries. However, their implementation is very common, and it is usually the rule in practice. We refer here to the secretary in charge of the administration of the proceeding, as opposed to the assistant of the president of the tribunal (which is not a common practice in domestic arbitration proceedings). Arbitral secretaries are appointed by the Arbitration Institution in cases that are institutional arbitrations.

In some arbitral proceedings where the State is a party, the OSCE, which is the Superior Organism for Contracting with the State, has a National Registry of Arbitral Secretaries in which the arbitral secretaries must be registered.

(x) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

As explained in sections V(iii) and V(iv), in institutional arbitrations, the arbitrators are automatically subject to the duties established in the institution's code of ethics. In any case, arbitrators will always remain committed to an ethical duty of independence and impartiality. The same standards are applicable to counsel. Additionally, for those colligated in Peru, counsel and arbitrators will be held to their respective Bar Associations' code of ethics.

(xi) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

No. Major arbitration institutions (ie, Lima Chamber of Commerce – CCL, American Chamber of Commerce in Peru – AmCham, Pontificia Universidad Católica del Perú's Centre for Conflict Analysis and Resolution – PUCP-CARC) have not implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons.

(xii) Has your jurisdiction adopted any rules with regard to remote hearings and have there been any court decisions on same?

Yes. The Peruvian Judiciary issued a Judicial-Power-Decision in which virtual hearings were permitted as of 2020. Said decision was then repeated by all major institutions.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

For an award to be valid it must be in writing and signed by the arbitrators, who may express their dissenting views. When there is more than one arbitrator, the signatures of only the president or of the majority of the members, will suffice, provided that the reasons for the lack of one or more signatures are stated. The award must also contain the date of issue and the place where the arbitration took place.

In the case of the arbitrations under the current American Chamber of Commerce in Peru – AmCham rules, the award must be submitted before the Centre for a scrutiny procedure before it can be valid and formally issued and notified to the parties. According to article 43(2) of the American Chamber of Commerce in Peru – AmCham Rules, no award may be considered valid if it has not completed the scrutiny procedure. Within the framework of this procedure, the court may make any recommendations it deems relevant to the content of the award, within the limits of the arbitrators' decision-making freedom.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

If the law applicable to the merits allows punitive or exemplary damages, arbitrators can award punitive damages. Peruvian law does not regulate such type of damages.

If the parties request it, arbitrators can also grant the appropriate interest provided in the applicable law.

If the compound interest is applicable under the applicable law and is requested, arbitrators can grant compound interest. Under Peruvian law, compound interest can only be granted if agreed in the context of a banking or trade transaction.

(iii) Are interim or partial awards enforceable?

Yes. Partial awards are enforceable, according to Article 54 of the Peruvian Arbitration Law, unless otherwise agreed to by the parties, the arbitral tribunal can decide the dispute in a single award or in as many partial awards as it deems necessary. Thus, partial awards will have the same treatment regarding their enforceability as a final award. Therefore, they are fully enforceable from the moment they are issued.

The only recourse that can be requested against a partial award is an annulment, as established in Article 63 of the Peruvian Arbitration Law. Still, pursuant to Article 66, the filing of a request for annulment does not suspend the obligation to comply with the award nor its arbitration or judicial execution, except if the party challenging the award requests the suspension and complies with the applicable warranty requirement agreed to by the parties or established in the arbitration regulation that applies. When examining the admission of the request, the Superior Court will verify the compliance with the warranty requirement and, if applicable, will grant the suspension.

If no requirement has been agreed upon, by request of a party, the Superior Court will grant the suspension, if an unconditional, self-executing and renewable joint bank guarantee is established in favour of the other party with a validity of no less than six months.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

According to Article 55 of the Peruvian Arbitration Law, arbitrators can express a dissenting opinion. This opinion must be in writing and signed.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

According to Article 50 of the Peruvian Arbitration Law awards by consent are allowed. If during the arbitration proceedings the parties reach an agreement that solves the entire or a part of the dispute, the arbitral tribunal shall terminate the proceedings in regard to the agreed points, and if both parties request it and the arbitral tribunal finds no reason to object, the agreement can be stated in the form of an award in the terms agreed to by the parties without motivation (as it expressly reflects the parties' accords). This award will have the same effectiveness as any other award issued on the merits of the dispute.

Article 60 of the Peruvian Arbitration Law states that the arbitral tribunal shall order the termination of arbitral proceedings when: (i) the claimant gives up his or her claim, unless the defendant opposes it and the tribunal recognizes a legitimate interest in obtaining a definitive solution to the dispute; (ii) the parties agree to terminate the proceedings; (iii) the tribunal verifies that the continuation of the proceedings is unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

According to Article 58 and unless a different agreement is made by the parties, the arbitral tribunal may, on its own initiative or at the parties' request, proceed to the rectification, interpretation, integration or exclusion of the award within the ten days following its notification.

When parties request the rectification, interpretation, integration or exclusion of the award, if the arbitral tribunal does not issue a specific decision it is to be considered that the request has been denied.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

According to Article 73, the tribunal will take into account what the parties have agreed to in regard of the distribution of costs of the arbitration.

If there is no such agreement, then the costs will be borne by the losing party. However, the arbitral tribunal may decide to apportion the arbitration costs between the parties if it deems it more reasonable under the circumstances. In practice, in Peru it is not very frequent to apply the rule of costs follows the event. Generally, the costs are equally distributed between the parties.

(ii) What are the elements of costs that are typically awarded?

Article 70 of the Peruvian Arbitration Law stipulates that arbitration costs include the following:

- (i) Fees and expenses of the arbitral tribunal and the secretary;
- (ii) Costs of the arbitral institution;
- (iii) Fees and expenses of experts;
- (iv) Reasonable expenses incurred by the parties in their representation;
- (v) Reasonable expenses incurred in the arbitration proceedings.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The tribunal has jurisdiction to decide on its own costs and expenses.

Nevertheless, it must always be taken into consideration that in ad hoc arbitrations the costs and expenses must be reasonable.

In institutional arbitrations, fee tables are established, so the fees are previously set by the institutions.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes, it does. As expressed in the answer to question (i) of this section.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Courts do not have the power to review the tribunal's decision on costs as the judicial control of an award is limited to the grounds of annulment that are determined by the article 63 of the Peruvian Arbitration Law. Under the grounds established by the mentioned article, the power to review a tribunal's decision on costs is not granted.

However, the court could be able to review the tribunal's decision on costs if a party requests a partial annulment of the award based on a determination of costs that has breached the party's agreement or has been awarded in contrary of the Peruvian Arbitration Law. Still, this case would be uncommon.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Awards can only be challenged through an appeal for annulment, as established in Article 62 of the Peruvian Arbitration Law. The request for annulment only evaluates the validity of the award under the grounds that the Article 63 of the Peruvian Arbitration Law specifically states. The grounds set forward in the mentioned Article are the same as the ones established by the 2006 UNCITRAL Model Law.

The grounds for setting aside are that:

- (a) The arbitration agreement does not exist or is not valid;
- (b) A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- (c) The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement or rule is contrary to the mandatory provision of the Peruvian Arbitration Law;
- (d) The award deals with a matter that was not submitted to the tribunal's decision;
- (e) In a domestic arbitration, the subject matter of arbitration is manifestly impossible of settlement by arbitration according to law;
- (f) In an international arbitration, the subject matter of arbitration is unresolvable of settlement by arbitration under the laws of Peru or the award is in conflict with international public policy; and

(g) The dispute was solved exceeding the deadlines the parties agreed to or stipulated in the applicable institutional rules.

Grounds (a), (b), (c) and (d) may be the subject of a request for setting aside only if they were raised during the arbitration by the affected party and were dismissed. In the case of grounds (d) and (e), the setting aside decision will only affect the matters that were included in the tribunal's decision but had not been submitted to the arbitration or those that cannot be settled through arbitration, as long as they can be separated. If it is not possible to separate them, the award will be set aside in its entirety. Ground (g) can only be invoked if the affected party raised such violation during the arbitration and it is not contrary with its own conduct in the arbitration.

The Superior Court decides on the application for setting aside. The Superior Court has ten days to admit the application which must indicate the grounds for setting aside. Once admitted, the other party will be given 20 business days to respond. At the hearing, the Superior Court may decide to suspend the judicial procedure for setting aside and grant the arbitral tribunal six months in which the tribunal may adopt any measures necessary to eliminate the grounds for setting aside. If the judicial procedure is not suspended, the court must decide in 20 business days. Only if the Superior Court decides to set aside the award completely or partially, such decision is subject to a cassation recourse, which is an extraordinary remedy decided by the Supreme Court that can only be based on the failure or errors in applying the law. In our experience, the proceedings before the Superior Court usually take between six months and a year. An additional period of between six months and a year usually applies to Supreme Court proceedings.

According to Article 66 of the Peruvian Arbitration Law, the filing of the request for annulment does not suspend the obligation to comply with the award or its arbitral or judicial enforcement, except when the party challenging the award requests the suspension and meets the requirement of the guarantee agreed upon by the parties, established in the applicable arbitration rules or as determined by default by the judge. Upon examining the appeal, the Superior Court will verify the compliance with the requirement and if so, will grant the suspension.

The application for setting aside an award may stay the enforcement of the award when the party that applies for setting aside specifically requests the stay and submits a security agreed to by the parties or established in the applicable arbitration rules. If this requirement is met, the Superior Court will issue a decision to stay the enforcement the effects of the award. If there is no security agreed to by the parties, the applicant must submit a letter of credit for the amount the party is ordered to pay in the award. If the payment of an amount is not ordered in the award, the arbitral tribunal or the Superior Court shall establish a reasonable amount for the letter of credit. The Peruvian Arbitration Law expressly forbids the Superior Court from ruling on the merits of the case when deciding on the request for setting aside.

Under case law by the Constitutional Tribunal, an arbitration award may be exceptionally challenged through a constitutional action or 'amparo'. Before 2011, the setting aside application had turned into a previous stage for initiating an amparo action in which violations to constitutional rights by the arbitration award were discussed. In the *Maria Julia* decision, the Constitutional Tribunal confirmed that arbitration cannot be understood as a mechanism that replaces the judiciary, nor as its substitute; instead, it should be understood as an alternative that complements the judicial system. It also established that the application for setting aside will be, as a general rule, a sufficient and adequate process for protecting the rights of a party that may have been affected by an arbitration award.

The court limited the grounds for challenging an arbitral award through an amparo action to three exceptional cases:

- i. When the award disregards a previous mandatory precedent of the Constitutional Tribunal;
- ii. When the arbitral tribunal has decided a law is unconstitutional even though the Constitutional Tribunal had previously declared it constitutional; and
- iii. When the party initiating the amparo was not party to the arbitration agreement (a third party), and his or her constitutional rights are affected by the award.

The amparo action may only result in the annulment of the award but never in the revision of the award by the court. Since the *Maria Julia* decision, it is clear under Peruvian law that the application for setting aside generally excludes the possibility of later initiating a constitutional action against the award.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

The Peruvian Arbitration Law does not prohibit parties from agreeing to allow for the possibility of appeal against the award. However, there is no case law regarding this issue. Nevertheless, according to Article 63.8 of the Peruvian Arbitration Law, if both parties to the arbitration are not domiciled in Peru and do not have assets in Peru, they can expressly waive or limit their right to request the setting aside of the award in Peru.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

No. It is not permitted by the Peruvian Arbitration Law.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

According to Article 65 of the Peruvian Arbitration Law, courts may remand an award to the arbitral tribunal if it has been annulled because one of the parties has not been duly notified or has not been able for any reason to assert their rights. In these circumstances, the arbitral tribunal must resume the arbitration from the moment the manifest violation of the right to defence was committed.

The remanding of an award depends on the grounds by which the annulment is being requested:

- If the arbitration agreement is non-existent, void, voidable, invalid or ineffective, the award cannot be remanded to the tribunal.
- If one of the parties has not been duly notified of the appointment of an arbitrator or arbitration proceedings, or has not been able for any other reason to assert their rights, the award is remanded to the tribunal and it must resume the arbitration proceedings from the moment that the violation was committed.
- If the composition of the arbitral tribunal or the arbitration proceedings have not been adjusted to the agreement between the parties or to the applicable arbitration regulations, unless said agreement or provision was in conflict with a provision of the Peruvian Arbitration Law from which the parties could not depart, or in the absence of said agreement or regulation, that they have not adjusted to what is established in the Peruvian Arbitration Law, parties can proceed to a new appointment of arbitrators; or, in any case, the tribunal must resume the arbitration in the state at the point in which the parties agreement, or the applicable law, was not properly observed.
- If the arbitral tribunal has ruled on matters that are not submitted to its decision, the matters not submitted to arbitration can be submitted to a new arbitration, if this was contemplated in the arbitration agreements.
- If in the case of international arbitration, the arbitral tribunal rules on a subject that according to the Peruvian law cannot be subjected to arbitration, or if the award is contrary to the international public order, the award cannot be remanded to the tribunal.
- If the dispute has been decided outside of the term agreed by the parties, the ones provided by arbitration regulations or established by the arbitral tribunal, the award cannot be remanded to the tribunal, and it is possible to begin a new arbitration proceeding.

It is important to draw attention to the Emergency Decree 020-2020 that states that, in the arbitrations in which the Peruvian State intervenes as a party, either party is entitled to request the replacement of the arbitrator they appointed, following the same rules that determined its designation, or where appropriate, request the disqualification of the arbitrator or arbitrators who issued the annulled award. The new provision does not provide how the challenge will be decided.

(v) Is there a specialist arbitration court in your jurisdiction?

Yes, as explained on answer section XII(i) above, pursuant article 8(4) of the Peruvian Arbitral Law, the Superior Court is the specialist arbitration court in Peruvian jurisdiction.

(vi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbor)? Could this be a basis to set aside the award?

It is not common for Peruvian courts to allow arbitrators to amend an/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbor). However, we know of at least one case in which a Peruvian court has allowed it.

Strictly speaking, the Peruvian Arbitration Law does not allow for the setting aside of an award for the incorrect invocation of a law. The Peruvian Arbitration Law only allows for the setting aside of formal matters and does not allow Peruvian courts to assess the merits of the award. It should be noted, however, that certain Superior Courts have interpreted setting aside cause 63(1)(b) to include the motivation of awards. This has allowed them to analyse the merits of an award and, in certain cases, set aside awards. Notwithstanding, this is uncommon.

XIII. Arbitrator Liability

(i) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

The Peruvian Arbitration Law does not expressly provide for general immunity for participants in the arbitration proceeding. In fact, the Peruvian Arbitration Law provides for three specific instances in which an arbitrator or other participant in the arbitration proceedings may be liable.

Firstly, Article 29(d)(iii) stipulates that an arbitrator may be liable if he or she does not consider his or her resignation when in a circumstance that affects their impartiality and independence.

Secondly, Article 32, titled 'Liability', establishes that acceptance of the role of arbitrator obliges the arbitrator to 'fulfil the assignment, and if they fail to do so, they shall be liable for any damages caused by fraud or negligence'.

Thirdly, Article 51 sets forth that the arbitral tribunal, secretariat, arbitral institution and, where appropriate, witness, expert, and any other who intervenes in the arbitral acts are bound to keep confidentiality about the course of the arbitral proceedings, (including the award) and any information which comes to their knowledge in the course of the arbitral proceedings, 'under liability'.

(ii) Does this immunity, if any, extend to criminal liability?

No. As explained above, the Peruvian Arbitration Law does not expressly provide for general immunity for participants in the arbitration proceeding. Criminal liabilities are possible under Peruvian law. For example, Criminal Code article 422 expressly includes arbitrators in the list of possible actors in bribery cases (*cohecho*).

XIV. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Article 74.1 of the Peruvian Arbitration Law states that awards issued outside of the Peruvian territory are considered foreign arbitral awards for the purposes of the law. It also states that foreign arbitral awards will be recognized and enforced according to the rules set: i) in the New York Convention; ii) in the Panama Convention; and, iii) under any

other treaty dealing with the recognition and enforcement of arbitral awards. The time limit to request the recognition of foreign award in Peru is ten years (counted from the date when the award was issued). Article 74.2 states that unless the parties have agreed otherwise, the applicable treaty will be the one most favourable to the party requesting the recognition and enforcement of the foreign arbitral award. Treaties are, therefore, the default source of law when it comes to recognizing/enforcing foreign arbitral awards. Article 75 of the Peruvian Arbitration Law will be applicable in the absence of a treaty or, if the provisions set forth in Article 75 are more favourable to the recognition and enforcement of the foreign award, when compared to an applicable treaty.

Article 75 of the Peruvian Arbitration Law does not allow Peruvian courts to review the merits of the award, and closely follows the grounds for refusal set in Article V of the New York Convention. Generally, validly-issued foreign arbitral awards should be recognized in Peru. Pursuant to Article 75 of the Peruvian Arbitration Law, recognition of a foreign arbitral award may be refused only if the opposing party is able to provide proof of any of the following circumstances:

- (a) The parties to the agreement were under some incapacity (according to the law applicable to them), or if said agreement is not valid (according to the law applicable to the agreement or, if no indication is made, to the law of the country in which the award was made).
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case.
- (c) The award deals with a controversy not contemplated by or not falling within the scope of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement to arbitrate.
- (d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- (e) The award has not yet become binding on the parties, or has been set aside or its enforcement stayed by a competent authority of the country in which, or under the law of which, that award was made.

Article 75.8 states that if a request to set aside or stay the enforcement of the award is filed before the competent courts of the country in which, or under the law of which, the award was issued; the Superior Court in charge of adjudicating the recognition request is entitled to delay its decision. Moreover, if the party seeking recognition so requires it, the court may order the opposing party to provide security.

According to Article 75.3 (similar to Article V.2 of the New York Convention), a court may refuse *ex officio* the recognition of a foreign arbitral award if the court finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under Peruvian law.
- (b) The award is contrary to international public policy.

Article 76 of the Peruvian Arbitration Law addresses the procedural issues of a request for recognition of a foreign arbitration award. The Superior Court (which in Peru has the function of a court of appeals) will have jurisdiction over the procedure, instead of a trial court.

According to Article 76.1 of the Peruvian Arbitration Law, the party seeking recognition shall present with its claim an original or a copy of the award complying with the requirements of Article 9 of the Peruvian Arbitration Law. Article 9 of the Peruvian Arbitration Law, for its part, requires that any foreign document shall be authenticated in conformity with the law of the country of origin of the document and shall be certificated by Peruvian diplomatic agents or similar. Furthermore, if the document is not in Spanish, a simple translation shall be provided unless the judicial authority considers that an official translation is necessary.

The party opposing recognition has 20 business days to object, and within 20 additional business days, a hearing will take place to discuss the grounds for refusing recognition. The Superior Court then has the power to issue a ruling immediately after the hearing, or to do so within 20 business days after the hearing.

In our experience, the proceedings before the Superior Court usually take between six months and a year.

Unlike the procedure for seeking recognition and enforcement of foreign judgments (subject to several levels of review), the decisions made by the court in the context of a recognition request will only be subject to appeal if the Superior Court denies the request for recognition. In other words, if the Superior Court recognizes the award, the decision will be final.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Articles 77 and 68 of the Peruvian Arbitration Law address the procedural issues regarding the enforcement of a foreign arbitration award. If the award debtor does not fulfil the obligations contained in the award issued abroad, and Peruvian courts have recognized the award, the award creditor is entitled to file a claim seeking the enforcement of the arbitration award.

According to Article 8 of the Peruvian Arbitration Law, the judge specialized in commercial matters, or failing the latter, the civil judge of the place of the arbitration or the place where the award should display its effects, is the competent judge to decide upon application for enforcement of an arbitral award.

The party applying for enforcement shall present before the court a copy of the arbitral award and any revision, interpretation, integration or exclusion of the latter rendered by the arbitral tribunal; as well as any enforcement measures taken by the arbitral tribunal. The judge will immediately order the debtor to satisfy the award within a five business-day deadline.

Within the same deadline, pursuant to Article 68.3 of the Peruvian Arbitration Law, the debtor can oppose to the enforcement by providing: i) evidence that a stay enforcement of the award has been ordered; or, ii) evidence that the award is vacated; or, iii) evidence that the award was satisfied. Additional arguments are not allowed.

According to Article 68.3 of the Peruvian Arbitration Law, if the trial court rules in favour of the opposing party, the decision can be subject to appeal, and the appeal will suspend the effects of the decision made by the trial court.

(iii) Are conservatory measures available pending enforcement of the award?

As mentioned, the Peruvian Arbitration Law allows the party subject to enforcement to stay the enforcement of the award if it is proven that it has filed a request for annulment and has complied with the provisions regarding the suspension set forth in article 66 of the Peruvian Arbitration Law.

Thus, an award's enforcement can be suspended, provided that the party making the request complies with the procedure set forth in Article 66, regarding the aforementioned suspension as described in the answer to question (i) of the section XII.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Regarding the enforcement of awards, Peruvian courts tends to be collaborative and have a positive attitude towards the enforcement of awards as they are keen to respect them.

There is no case law regarding the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

As stated in Article 68 of the Peruvian Arbitration Law the time that it should take to enforce and award should be short. However, it tends to take around a year.

According to Article 74 of the Peruvian Arbitration Law foreign awards will be recognized and enforced in Peru considering the statute of limitations set by the Peruvian law.

Furthermore, the Article 2001 of the Peruvian Civil Code states that the statute of limitations regarding personal actions is ten years, unless otherwise provided by law. Thus, it can be interpreted that under Peruvian law the time limit for seeking the enforcement of an award is ten years.

XV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

State parties do not enjoy immunities in Peru. Furthermore, Article 2 of the Peruvian Arbitration Law states that in the case of an international arbitration and where one of the parties is a State or a company or entity controlled by the State, that that party may not invoke the prerogatives of its own legal order to avoid complying with its obligations under the arbitration agreement.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

There are not any special rules regarding the enforcement of an award against a state or state entity. However, the Peruvian State has regulated and implemented special dispositions regarding the payment when the Peruvian State becomes the defeated party in an arbitration.

(iii) Are there any requirements for arbitrations involving sovereign entities?

None in particular. General requirements apply.

XVI. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Peru is a party to the Washington Convention.

(ii) Has your country entered into bilateral investment treaties with other countries?

Peru has signed Bilateral Investment Treaties as well as Free Trade Agreements that include specific investment protection chapters. To date, Peru has signed 36 international investment instruments with the following States: Argentina, Australia, Belgium, Bolivia, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czech Republic, Denmark, El Salvador, Finland, France, Germany, Honduras, Italy, Japan, Luxembourg, Malaysia, Mexico, Netherlands, Norway, Panama, Paraguay, Romania, Singapore, South Korea, Spain, Sweden, Switzerland, Thailand, United Kingdom, United States and Venezuela.

(iii) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

None.

XVII. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Recommended reference material includes the following:

- F. Cantuarias Salaverry, Commercial Arbitration and Investment (Lima, UPC, 2008); and
- C. Soto and A. Bullard, Comments on the Peruvian Law of Arbitration (Lima, Instituto Peruano de Arbitraje, 2011)

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The International Congress of the Peruvian Arbitration Institute and the Peruvian Arbitration Day held by the ICC.

XVIII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

In Peru, arbitration has become the real alternative to court proceedings. At present arbitration is the most prominent alternative dispute resolution method in Peru, it is a constitutionally recognised mechanism to solve disputes. Considering the burden and bureaucracy that are commonly found with judicial proceedings, arbitration has been key in alleviating this situation and contributing to a faster and more efficient dispute resolution.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Other trends such as mediation are not widely used.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

In January of 2020, Emergency Decree 020-2020 was passed. This Decree modified the Peruvian Arbitration Law. The new regulations to arbitration that have been implemented are for cases in which the State is a party. It modifies aspects like the confidentiality of arbitral proceedings and awards and the consequences of the annulment of an award in cases where the State is a party.

(iv) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

There are currently no official plans to reform the arbitration laws and practice.

- (v) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third party funder? Have there been any recent court decisions in your jurisdiction in relation to third-party funding?**

There are currently no rules governing third-party funding in Peruvian law. However, it should be noted that most arbitration institutions, such as the American Chamber of Commerce in Peru – AmCham, have adopted third-party funding rules on their internal arbitration regulations. There have been no recent court decisions in the Peruvian jurisdiction in relation to third-party funding.

- (vi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?**

Peru has not implemented a sanctions regime. Peruvian courts do not officially consider international economic sanctions as part of their international public policy. There have been no recent Peruvian court decisions in relation to the impact of sanctions on international arbitration proceedings.