

PERU

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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FOR FURTHER INFORMATION

[GAP TABLE OF CONTENTS](#) | [GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS](#) | [FULL GAP ONLINE](#)

[GAP COMBINED SUMMARIES FOR IN-HOUSE AND CORPORATE COUNSEL](#)

[GAP COMBINED SUMMARIES FOR ARBITRATION PRACTITIONERS](#)

[EN DELOS MODEL CLAUSES & LIST OF SAFE SEATS](#)

[ES DELOS CLÁUSULAS MODELO & LISTA DE SEDES SEGURAS](#)

[FR DELOS CLAUSES TYPES & LISTE DE SIÈGES SÛRS](#)

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
 - a. Framework ●
 - b. Adherence to international treaties ●
 - c. Limited court intervention ●
 - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

During the last two decades, Peru has adopted free-market policies to promote private investment. Several relevant changes were made in the Peruvian legal framework to implement those policies, which included the arbitration framework. After approximately 12 years of existence, in 2008, the 1996 General Arbitration Act ("**Law 26572**") based on the 1985 UNCITRAL Model Law was replaced by Legislative Decree 1071 based on the 2006 UNCITRAL Model Law. The current Peruvian Arbitration Law ("**PAL**") introduced several improvements in order to secure independence of the tribunal by limiting judicial intervention, expediting the setting aside, recognition and enforcement procedures, and providing an efficient set of rules applicable unless the parties agreed otherwise.

Key places of arbitration in the jurisdiction	Lima.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Arbitrations are confidential unless otherwise is agreed.
Requirement to retain (local) counsel?	No restrictions to use of foreign counsel.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No restrictions.
Party to the New York Convention?	Yes, without the reciprocity and commercial reservation.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.52

ARBITRATION PRACTITIONER SUMMARY

The Peruvian Arbitration Law ("**PAL**") is based on the 2006 UNCITRAL Model Law and applies to both international and domestic arbitration. The PAL has a modern approach on arbitration. The rules applicable protect the arbitration agreement limit the intervention of the courts during the course of the arbitration and the grounds for annulment are restrictive following the approach of the 2006 UNCITRAL Model Law. 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.

Date of arbitration law?	The PAL entered into force on 1 September 2008.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. No material changes have been introduced.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, the Superior Court of Lima has two chambers specialized in commercial matters, which are competent for set-aside applications and award recognition actions. Please note that these chambers are not exclusively dedicated to arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Courts are favorable to the competence-competence principle. It has been recognized as a principle by the Peruvian Constitutional Tribunal.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	No.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There is no case-law on this issue.
Other key points to note?	Under Peruvian law, all procurement contracts executed by the Peruvian State must be submitted to arbitration.

JURISDICTION DETAILED ANALYSIS

Arbitration in Peru is governed by Legislative Decree 1071 or Peruvian Arbitration Law (“**PAL**”), issued in 2008 and based on the 2006 UNCITRAL Model Law. The provisions of the PAL are subsidiary to any special applicable law or international treaty.¹ The main rules governing any domestic or international arbitration with seat in Peru are summarized below.

1. Scope of Application

The PAL applies to both domestic and international arbitrations seated in Peru.² In addition, certain specific provisions of the PAL 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, among others).³ For example, as set forth Article 8(2), Peruvian courts will be competent to adopt interim measures in arbitrations seated abroad if the measure must be enforced in Peru. In the same sense, according to Articles 8(1) and 45 of the PAL, Peruvian courts will be competent to assist in evidence matters (such as taking the testimony of a witness or experts) in arbitrations seated abroad in case the assistance is needed in Peru. In contrast to the UNCITRAL Model Law, the application of the PAL is not limited to commercial arbitration, including for example investment disputes, tax or legal stabilization agreements, among other issues.

2. International and Domestic Arbitration

Following generally Article 1 of the 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; and
- 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 PAL, 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.⁴

3. Arbitrability

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. Also, please note that the Peruvian State may submit its disputes to arbitration.

¹ PAL, Article 1.

² PAL, Article 1.1.

³ PAL, Article 1.2.

⁴ PAL, Article 5.

4. Form and Content of Arbitration Agreements

With respect to the definition of “arbitration agreement”, Article 13 of the PAL 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 “in writing” if it is recorded in any way.

Moreover, Article 13.4 states that the written nature of the agreement is met 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 defense 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.

Moreover, Peru has regulated the extension of the arbitration agreement to non-signatory parties. According to Article 14 of the PAL, 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 PAL.

Article 13.7 of the PAL –also applicable to arbitration procedures seated outside Peru⁵- has a similar content. Indeed, pursuant to Article 13.7, the agreement to arbitrate will be valid if it meets the requirements set: i) by the law applicable to the agreement; or, ii) by the law applicable to the merits; or, iii) by Peruvian (Arbitration) Law.

5. Enforcement of Arbitration Agreements

Pursuant to Article 16 of the PAL, 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.

⁵ This article will be applied to arbitration proceedings seated abroad in the context of a judicial claim filed before the Peruvian courts.

Article 16.4 of the PAL 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 PAL; 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 PAL (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 rule 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 analyze 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 PAL (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 PAL 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 seats abroad, while the judicial procedure seats 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.⁶

Article 16.4 of the PAL 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 favor 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 PAL, 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.⁷

6. Independence of the tribunal and extent of court intervention

Following Article 5 of the UNCITRAL Model Law, Article 3 of PAL establishes that no court shall intervene in the matters governed by the PAL except where so provided therein. Additionally, to reinforce the independence of arbitration, Article 3.2. of PAL establishes that the arbitration tribunal is independent and not subject to any order or decision that may affect its vested powers. No order or decision, except for a decision in setting aside procedure, may suppress the effects of an award as set forth Article 3.4 of PAL. Any judicial intervention directed to control an arbitral tribunal or interfere in the arbitration before the award is rendered is subject to liability. The main objective of these new provisions in the PAL is to protect arbitration from any sort of intervention (from any authority, including the judiciary). Judicial control is done *ex post* through a set aside application.

⁶ PAL, Article 16.4.

⁷ Pursuant to Article II.3 of the New York Convention, the court of a contracting State will not refer the parties to arbitration if it finds that the agreement is "null and void", but also, if it finds that the agreement is "inoperative" or "incapable of being performed".

7. Arbitrators

Following Article 10 of the UNCITRAL Model Law, PAL states the parties are free to determine the number of arbitrators. Failing such determination, the number of arbitrators will be three. Nationality is not an obstacle to act as an arbitrator, unless otherwise agreed by the parties. State officers cannot be arbitrators. In domestic arbitration that shall be decided according to law (as opposed to arbitrations in which the tribunal decides *ex aequo et bono*), the arbitrators must be lawyers unless otherwise agreed to. There is no need for the lawyer to be a member of any national or international bar or association. In international arbitrations, being a lawyer is not a requirement to be an arbitrator.

Article 32 of PAL provides a limitation to the civil liability of arbitrators stating that they will only be liable in case of willful or grossly negligent conduct.

7.1 Appointment

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 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 PAL 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.⁸ 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.

7.2 Independence and impartiality

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.⁹ 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.¹⁰

7.3 Challenges

An arbitrator may be challenged only if circumstances that give rise to justifiable doubts as to his or her impartiality or independence exist, or if the arbitrator does not possess qualifications agreed to by the parties or required by law. The parties can waive the reasons to challenge an arbitrator known to them, and in such case, they may not later challenge the arbitrator or apply for setting aside for such same reasons.¹¹ The waiver can be express or implied. A party may challenge an arbitrator appointed by them, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.¹²

⁸ PAL, Article 26.

⁹ PAL, Article 28.1.

¹⁰ PAL, Article 28.2.

¹¹ PAL, Article 28.4.

¹² PAL, Article 28.5.

The parties are free to agree on a procedure for challenging an arbitrator or agree to apply any institutional rules. Failing such agreement, the PAL regulates the applicable challenge procedure. The challenge must be made as soon as the circumstances that give rise to the challenge are known. The party making the challenge must justify the reasons for it and produce the documents supporting the challenge. The challenged arbitrator and the other party may submit the statements they deem convenient regarding the challenge within 10 days of being notified. If the other party agrees to the challenge, a substitute arbitrator must be appointed. If the other party does not agree to the challenge and the arbitrator denies the reasons for the challenge or remains silent:

- In case of a sole arbitrator, the arbitration institution that appointed the arbitrator decides on the challenge. If no institution appointed the arbitrator, the corresponding Chamber of Commerce decides on the challenge;
- If the tribunal has more than one arbitrator, the other arbitrators decide on the challenge by absolute majority without the vote of the challenged arbitrator¹³; and
- If more than one arbitrator is challenged on the same grounds, the corresponding Chamber of Commerce decides on the challenge.

According to Article 31 of PAL, the decision on a challenge is not subject to appeal. If the challenge is rejected, the challenging party may only contest the decision with a setting aside application.

8. Competence-Competence and Separability

As set forth on Article 41 of the PAL, only the arbitral tribunal can rule on its own jurisdiction, including any objections to the arbitration with regard to the existence, nullity or validity of the arbitration agreement. According to Article 41 of PAL, the arbitration agreement that forms part of a contract will be treated as an independent agreement, therefore disputes subject to arbitration may be referred to the annulment of the contract containing the arbitration agreement without affecting the validity of the arbitration agreement itself.

9. Court Assistance

In the context of arbitrations seated in Peru, the arbitral tribunal or a party (with the approval of the arbitral tribunal) may request assistance in taking evidence from a competent court. This rule is contained in Article 45 of the PAL, which closely follows Article 27 of the UNCITRAL Model Law. Article 45 of the PAL also extends to arbitration procedures seated abroad. If certain pieces of evidence are located in Peru, and the arbitration takes place abroad, the arbitral tribunal as well as the parties (authorized by the tribunal) can request the assistance of Peruvian courts in order to secure the taking of evidence.

Pursuant to Article 45.2, judicial assistance by Peruvian courts in the taking of evidence can be performed directly or indirectly. Direct assistance in the taking of evidence means that the competent court, upon request of the foreign tribunal or party, may have broad discretion to take the evidence in the manner it deems more effective. Indirect assistance in the taking of evidence means that the competent court, upon request of the foreign tribunal or party, may adopt specific measures with the purpose of allowing the arbitral tribunal to take the evidence directly. In other words, under the second option, Peruvian courts would place the evidence at the tribunal's disposal.

¹³ In case of tie, the President of the Tribunal will issue the decisive vote. However, if the President is the challenged arbitrator and there is a tie, the decision will be adopted by the arbitral institution (in case of administered arbitrations or the appointing authority) or the corresponding Chamber of Commerce (in case of ad-hoc arbitrations without appointing authority).

Article 45.3 of the PAL states that Peruvian courts lack the authority to establish the admissibility on the merits of the taking of evidence. The only grounds which may allow the courts to deny assistance are: i) if the request is contrary to public policy; or, ii) if the request is contrary to express prohibitive laws.

10. Interim Measures by Arbitrators

According to Article 47 of the PAL, 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.

11. Interim Measures by the court

Pursuant to Article 47.4 of the PAL (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 PAL –consistent with Articles 9 and 17 J of the 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*.

The rule contained in Article 47.4 is not included, however, amongst the list of provisions that, according to Article 1.2 of the PAL, are applicable to arbitration proceedings seated abroad. This may lead to the interpretation that in the context of arbitration procedures to be seated abroad, it would not be possible to request Peruvian courts for an interim measure before the arbitral tribunal is constituted. In other words, interim relief would only be available during the course of the proceedings taking place abroad, if the arbitral tribunal grants it. Said interpretation, however, has not been generally adopted by Peruvian courts.

Some Peruvian trial courts have interpreted that it is indeed possible to obtain interim measures (for example, attachments over assets located in Peru) before the beginning of an arbitration procedure that will seat abroad. This means that Peruvian courts make no distinction between the interim relief that may be available to parties in an arbitration seated in Peru and an arbitration procedure seated abroad.

If the court grants interim relief and the tribunal is later constituted (parties have the burden of making this information available), the court will forward the relevant documents to the arbitral tribunal, and the tribunal will then decide to ratify or reverse the decision.

Through this interpretation, Peruvian courts attempt to promote efficiency by allowing the requesting party to obtain temporary protection –during the period in which arbitrators are being appointed– from situations that may likely cause current or imminent harm affecting the requesting party, the arbitral process itself, or both.

12. Recognition of foreign interim relief

Article 48.4 of the PAL expressly states that measures granted by arbitral tribunals seated abroad shall be recognized and enforced by Peruvian courts. The measure will be enforced upon application and Peruvian courts lack discretion to review the merits of the decision. Peruvian courts, however, have the discretion to require the party that seeks the enforcement of the measure, to provide appropriate security if the arbitral

tribunal has not ruled on this issue or when such security is necessary to protect the rights of third parties potentially affected by the interim measure.¹⁴

As to the formalities, the party who is seeking recognition and enforcement of the interim measure rendered by a foreign arbitral tribunal has the duty to submit an original or a duly authenticated copy of the decision (under the laws of the country in which the decision is issued).¹⁵ According to Article 9.3 of the PAL, if the decision is drafted in a language other than Spanish, the party will have to submit a translated version of the decision. The judicial authority may request an official translation of the document only if necessary.¹⁶

The grounds for refusal of recognition or enforcement of a foreign decision on interim measures by Peruvian courts are the same as those applicable for the recognition and enforcement of foreign arbitral awards.

13. Evidence and Experts

The arbitral tribunal can determine the admission, relevance, production and weight of evidence and order parties to produce the evidence deemed necessary. According to Article 44 of PAL, the arbitral tribunal may rely on expert opinion on specific issues relevant to the dispute. Experts can be appointed at the tribunal's discretion or upon request by a party. Parties shall provide information or access to any documents that may be considered necessary.¹⁷

14. Award

According to Article 54 of the PAL, the tribunal decides the dispute in one award or in as many partial awards as it deems necessary, unless otherwise agreed by the parties. The award is final, not subject to appeal and mandatory for the parties once notified. Arbitral tribunals may have the authority to enforce the award if agreed by the parties, for example by ordering the Public Registry to register the transfer of property, unless public force is needed. In such scenario, the interested party may request the Judiciary to enforce the award. Under Article 56 of the PAL, the award has to state reasons unless otherwise agreed by the parties. Please note, however, that Peruvian courts have found that a proper reasoning is required under the constitutional right to due process. Thus, it is uncertain whether an award that fails to state reasons based on the agreement of the parties may be challenged under these constitutional due process grounds.

15. Set-Aside

Under Article 62 of the PAL, the application for setting aside is the only recourse against the award. However, as will be mentioned below, an "*amparo*" constitutional action is another possible recourse against the award.

15.1 Grounds

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 his 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 of rule is contrary to the mandatory provision of the PAL;
- (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;

¹⁴ PAL, Article 48.4.d.

¹⁵ PAL, Article 48.4.b.

¹⁶ PAL, Article 9.

¹⁷ PAL, Article 43, 44.

- (f) In an international arbitration, the subject matter of arbitration is impossible 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) can be the subject of an application 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 PAL 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.

If both parties to the arbitration are not domiciled in Peru and do not have assets in Peru, they can expressly waive their right to request the setting-aside of the award in Peru.

15.2 Procedure

The Superior Court decides on the application for setting aside. The Superior Court has 10 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 totally 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 6 months and a year. An additional period of between 6 months and a year usually applies to Supreme Court proceedings.

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.

PAL expressly forbids the Superior Court from ruling on the merits of the case when deciding on the request for setting aside.

15.3 Amparo

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,¹⁸ 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

¹⁸ Constitutional Tribunal, Sociedad Minera de Responsabilidad Ltda. *Maria Julia v. Superior Court of Justice of Lima* (Third Civil Chamber), Docket No. 00142-2011-PA/TC, September 21, 2011.

alternative that complements the judicial system.¹⁹ 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.²⁰ The court limited the grounds for challenging an arbitral award through an *amparo* action to three exceptional cases:

- When the award disregards a previous mandatory precedent of the Constitutional Tribunal;
- When the arbitration tribunal has decided a law is unconstitutional²¹ even though the Constitutional Tribunal had declared it constitutional previously; and
- 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.

16. Recognition and Enforcement of Foreign Arbitral Awards

16.1 Applicable law

Article 74.1 of the PAL 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 10 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 favorable 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 PAL will be applicable in the absence of a treaty or, if the provisions set forth in Article 75 are more favorable to the recognition and enforcement of the foreign award, when compared to an applicable treaty.

16.2 Grounds

Article 75 of the PAL 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 PAL, 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:

¹⁹ Constitutional Tribunal, *Sociedad Minera de Responsabilidad Ltda. Maria Julia v. Superior Court of Justice of Lima (Third Civil Chamber)*, Docket No. 00142-2011-PA/TC, September 21, 2011.Par. 22.

²⁰ Constitutional Tribunal, *Sociedad Minera de Responsabilidad Ltda. Maria Julia v. Superior Court of Justice of Lima (Third Civil Chamber)*, Docket No. 00142-2011-PA/TC, September 21, 2011, Par. 20. Also Avendaño, Juan Luis and Velasquez Raffo, "El Nuevo Precedente Constitucional sobre arbitraje, sobre la revisión judicial solicitada por terceros", *Anuario Latinoamericano de Arbitraje, Aplicación del convenio arbitral a partes no signatarias*, p. 195.

²¹ Under Peruvian Law, arbitrators have the authority to decline the application of a legal provision they find unconstitutional.

- (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).²²
- (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.²³
- (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.²⁴
- (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.²⁵
- (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. There is no case law regarding the recognition of annulled foreign awards.

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.

It seems that in some cases this “*ex officio*” analysis by the courts may have been extended beyond of what it is established in the PAL. For instance, in case 00161-2013-0-1817-SP-CO-02²⁶ where the defendant had not opposed the application for recognition by the claimant, the court analyzed whether during the arbitral proceedings the former had been notified correctly. Unless the court was indeed ascertaining whether the award was not contrary to public policy (which was not explicitly said in the decision), the aforementioned analysis could have only been made if the defendant had raised the issue during the enforcement procedure.

It is important to consider that the PAL has recognized the more-favorable-right provision of Article VII of New York Convention, in Article 78.1. According to this provision, the court is allowed to apply, in cases of recognition of arbitral award, the PAL if it favors recognition.

²² Article 75.4 of PAL states that none of the circumstances reflected in Article 75.2.a. will lead to refusing recognition of the award if the opposing party was also part of the arbitral procedure and failed to raise those objections or if the arbitration agreement is valid according to Peruvian law.

²³ Article 75.5 of PAL states that none of the circumstances reflected in Article 75.2.b. will lead to refusing recognition of the award, if the opposing party was also part of the arbitral procedure and failed to raise those objections.

²⁴ Article 75.6 of PAL states that none of the circumstances of Article 75.2.c. will lead to refusing recognition of the award if the matters submitted to arbitration are independent and separable from those not submitted. The result of this may be partial recognition and enforcement of the award.

²⁵ Article 75.7 of PAL states that none of the circumstances stated established in Article 75.2.d. will lead to refusing recognition of the award if the opposing party was also part of the arbitration procedure and failed to challenge the jurisdiction of the arbitral tribunal expressly based on the objections described above.

²⁶ Superior Court of Lima (Second Chamber), *Ecom USA Inc. v. Corporación Textil S.A.*, Decision No. 3, Docket No. 00161-2013-0-1817-SP-CO-02, March 4, 2012.

16.3 Recognition Procedure

Article 76 of the PAL 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.²⁷

According to Article 76.1 of the PAL, 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 PAL. Article 9 of the PAL 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.²⁸ 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 6 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.

16.4 Enforcement Procedure

Articles 77 and 68 of the PAL address the procedural issues regarding the enforcement of a foreign arbitration award. If the award debtor does not fulfill 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 PAL, 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.²⁹ It is important for the claimant to distinguish between recognition and enforcement of awards for purposes of filing before the competent court. The Superior Court of Lima in a decision rendered on March 29, 2012 declared that the application for enforcement raised by the claimant before the aforementioned court was inadmissible since it is the judge specialized in commercial matters the competent one to decide upon enforcement of arbitral awards.³⁰

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.³¹ The judge will immediately order the debtor to satisfy the award within a 5 business-day deadline.³²

²⁷ PAL, Article 8.5.

²⁸ However, where the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention") is applicable the aforementioned requirement will be substituted by the apostille.

²⁹ PAL, Article 8.3 See also, PAL, Articles 77 and 68.

³⁰ Superior Court of Lima (First Civil Chamber), *Consortio VAR Contratistas Generales SAO Ingenieros ERL v. El Ministerio de Educación Unidad Ejecutiva UE29*, Decision No.1 Docket 00110-2011-0-1817-SP-CO-01, March 29, 2011,

³¹ PAL, Article 68.1.

³² PAL, Article 68.3. According to Article 12 of the PAL time limits fixed by days should be interpreted as referring to business days.

Within the same deadline, pursuant to Article 68.3 of the PAL, 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 PAL, if the trial court rules in favor 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.

17. Funding arrangements

Under the PAL, there are no restrictions to use contingency or alternative fee arrangements or third-party funding.