

Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

International Arbitration

Peru

Payet, Rey, Cauvi, Pérez Abogados

[chambers.com](https://www.chambers.com)

2019

PERU

LAW AND PRACTICE:

p.3

Contributed by Payet, Rey, Cauvi, Pérez Abogados

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Payet, Rey, Cauvi, Pérez Abogados

CONTENTS

1. General	p.4	7. Procedure	p.9
1.1 Prevalence of Arbitration	p.4	7.1 Governing Rules	p.9
1.2 Trends	p.5	7.2 Procedural Steps	p.9
1.3 Key Industries	p.5	7.3 Powers and Duties of Arbitrators	p.9
1.4 Arbitral Institutions	p.5	7.4 Legal Representatives	p.9
2. Governing Law	p.5	8. Evidence	p.10
2.1 Governing Law	p.5	8.1 Collection and Submission of Evidence	p.10
2.2 Changes to National Law	p.5	8.2 Rules of Evidence	p.10
3. Arbitration Agreement	p.5	8.3 Powers of Compulsion	p.10
3.1 Enforceability	p.5	9. Confidentiality	p.10
3.2 Arbitrability	p.5	9.1 Extent of Confidentiality	p.10
3.3 National Courts' Approach	p.6	10. The Award	p.10
3.4 Validity	p.6	10.1 Legal Requirements	p.10
4. The Arbitral Tribunal	p.6	10.2 Types of Remedies	p.10
4.1 Limits on Selection	p.6	10.3 Recovering Interest and Legal Costs	p.11
4.2 Default Procedures	p.6	11. Review of an Award	p.11
4.3 Court Intervention	p.6	11.1 Grounds for Appeal	p.11
4.4 Challenge and Removal of Arbitrators	p.6	11.2 Excluding/Expanding the Scope of Appeal	p.11
4.5 Arbitrator Requirements	p.7	11.3 Standard of Judicial Review	p.12
5. Jurisdiction	p.7	12. Enforcement of an Award	p.12
5.1 Matters Excluded from Arbitration	p.7	12.1 New York Convention	p.12
5.2 Challenges to Jurisdiction	p.7	12.2 Enforcement Procedure	p.12
5.3 Circumstances for Court Intervention	p.8	12.3 Approach of the Courts	p.12
5.4 Timing of Challenge	p.8		
5.5 Standard of Judicial Review for Jurisdiction/ Admissibility	p.8		
5.6 Breach of Arbitration Agreement	p.8		
5.7 Third Parties	p.8		
6. Preliminary and Interim Relief	p.9		
6.1 Types of Relief	p.9		
6.2 Role of Courts	p.9		
6.3 Security for Costs	p.9		

Payet, Rey, Cauvi, Pérez Abogados is one of the leading law firms in Peru, with extensive experience in dispute prevention, management and resolution. The team specialises in designing procedural strategies to ensure a successful legal defence for client's interests in domestic judicial processes. Payet, Rey, Cauvi, Pérez Abogados is also a leading law firm in the field of commercial arbitration, with a recognised track record representing clients from diverse economic sectors like telecom, infrastructure and energy sector. At an international level, its alliances with foreign law

firms allow us to represent our clients before international arbitration centres such as the International Chamber of Commerce and the International Centre for Settlement of Investment Disputes, among others. Lawyers advise on Peruvian law matters in international arbitrations of the most recognised firms abroad.

We would like to thank the following people for their contribution: Ms. Laia Valdespino Méndez and Ms. María Fernanda Corrochano Choza, associates of the firm.

Authors



Domingo Rivarola Reisz is Partner of the firm, specialising in commercial dispute resolution, international and domestic arbitration, telecommunications, tort and contract law. He has extensive experience in general litigation, commercial litigation, regulatory litigation and civil and commercial arbitration. He is recognised for his successful career in various judicial and arbitration proceedings representing international and local companies. Mr. Rivarola has been appointed as an expert witness in foreign cases before courts of the United States and the United Kingdom. He has also advised companies in international arbitrations administered by the International Court of Arbitration of the CCI. He has authored numerous articles in industry publications.



Mayra Bryce Alberti is an Associate of the firm, specialising in civil and commercial litigation, civil rights litigation, administrative litigation, arbitration and dispute resolution. She has been an International Visiting Associate at the International Arbitration Area of Skadden, Arps, Slate, Meagher & Flom LLP in New York. She writes for specialist publications.

1. General

1.1 Prevalence of Arbitration

Article 5 of the Arbitration Law (Legislative Decree No 1071) establishes that the arbitration will be treated as “international” when one of the following circumstances occurs:

- if the parties have, at the moment of the conclusion of the agreement to arbitrate, domiciles in different states;
- if the place of the arbitration, determined in the arbitration agreement or in accordance with it, is located outside the state in which the parties are domiciled; and
- if the parties are domiciled in Peru and one of the following places are located outside Peru: (i) the place of performance of a substantial part of the obligation, or (ii) the place with whom the claims have a closer relationship.

It is not frequent for foreign companies to agree to international arbitration in Peru. Foreign companies operating in Peru, or having part of its business in Peru, tend to agree upon arbitration outside Peru for key contracts related to

their core business. Loans granted in connection with project financing are often handled with international arbitration outside Peru. For controversies involving substantive amounts that arise out from the development of large projects (construction or concession contracts) increasingly parties are choosing foreign arbitrators to solve disputes that do not lie within Article 5.

Foreign arbitrators are being progressively included in the roster of arbitrators of the main Peruvian arbitration centres. The Arbitration Law does not require arbitrators to possess a lawyer's degree duly validated in Peru for international or domestic arbitration, nor any other requirement, according to Article 22 of the Arbitration Law.

Furthermore, the Chamber of Commerce of Lima has established a system of arbitrator's confirmation following ICC's model, the aim of which is to control the quality of the party-appointed arbitrators.

1.2 Trends

The main trend influencing arbitration is the appointment of international arbitrators, as explained above in **1.1 Prevalence of Arbitration**. Moreover, the “Lava Jato” investigation (also known as “Operation Car Wash”) has severely impacted arbitration in Peru, as many local arbitrators are being challenged by the Peruvian government for the sole reason of having acted as arbitrators in a case between the government and Odebrecht. Therefore, the pre-existing trend towards the appointment of foreign arbitrators has been consolidated.

1.3 Key Industries

Disputes in the construction industry have considerably increased during the past few years. Concession contracts disputes have followed the same fate. Due to the “Lava Jato” investigation involving the construction industry, infrastructure projects are the most conflictive and litigated over by the parties involved.

1.4 Arbitral Institutions

The main arbitral institutions in Peru are: the Lima Chamber of Commerce Arbitration Centre, the Centre of Arbitration of the Pontificia Universidad Católica del Perú, the OSCE (an arbitration centre administered by an agency dependent on the executive branch and in charge of disputes arising out of public bids) and AMCHAM Peru.

2. Governing Law

2.1 Governing Law

The main law in Peru is the Arbitration Law (Legislative Decree No 1071) enacted in 2008, which has a high degree of similarity to the UNCITRAL Model Law. It is a monist law: its main procedural rules are applicable both to domestic and international arbitration with few exceptions. Many relevant Peruvian specialists categorise Legislative Decree No 1071 as resembling UNCITRAL Model Law in its main features.

However, Peruvian Arbitration Law has a unique feature: the judiciary has been displaced from its previous role as default arbitration appointment institution. Prior to Legislative Decree No 1071, the judiciary had the duty and power to appoint arbitrators by default. As from 2008, in the absence of an appointing institution chosen by the parties, the power to appoint lies in the chamber of commerce operating in the city chosen as the venue of the arbitration or in the city in which the agreement to arbitrate was executed. If the dispute qualifies as “international arbitration” and hence the Arbitration Law is applicable, the default appointing authority is the Lima Chamber of Commerce.

2.2 Changes to National Law

Lobbying has taken place in the past months with respect to draft legislation that may impact arbitration in Peru. The draft legislation indicates a trend to regulate appointing authorities selected by the parties to an agreement to arbitrate. The legislative intent is to suppress, as a matter of public policy, rosters of arbitrators and confirmation procedures offered by some of the most relevant appointing authorities in Peru. Pieces of draft legislation were pending to be discussed by the Congress’ Committee on Justice and Human Rights. Although it is unlikely that this legislation will gain political approval in the near future because it abridges freedom of contract, the risk of enactment should not be disregarded.

3. Arbitration Agreement

3.1 Enforceability

The arbitration agreement through which the parties decide to submit to arbitration all disputes or certain disputes that have arisen or may arise between them with respect to a certain contractual or other legal relationship must be in writing. It may take the form of a clause included in a contract or the form of an independent agreement. The written requisite is also fulfilled if evidence of the agreement exists in electronic communications. An agreement to arbitrate is also deemed valid and enforceable if the contract executed by the parties contains an explicit reference to an arbitration agreement existing in a separate document linked to that contract. Tacit agreements to arbitrate are also considered valid and enforceable if sufficient evidence of the party’s conduct is available.

When the arbitration is international, the arbitration agreement will be valid, and the dispute will be subject to arbitration, if it meets the requirements established by the legal rules chosen by the parties to govern the arbitration agreement, or by the legal rules applicable to the merits of the controversy, or by Peruvian law (namely, the Civil Code and Arbitration Law). Where Peruvian law is applicable, the arbitration agreement will be favoured. Indeed, Peruvian Arbitration Law favours arbitration, tending to recognise arbitration agreements concluded by different means because the “written form” standard has been relaxed.

3.2 Arbitrability

According to Article 2 of the Arbitration Law, claims related to unavailable rights to the parties, as well as those that the law or treaties or international agreements prohibit, may not be submitted to arbitration.

For example, it is not subject to arbitration disputes relating to marriage, legal capacities of a person or the validity of acts and agreements.

The general approach used in Peru to determine if a dispute is or is not “arbitrable” is to answer the following question: can the parties dispose of the rights in dispute? If the answer is yes, the dispute is arbitrable.

However, there is not a specific list of issues that can be subject to arbitration.

3.3 National Courts’ Approach

In Peru, there is no prior enforcement of the arbitration agreement, therefore the parties are not required with the enforcement of the duty to arbitrate before the judiciary. The request of arbitration can be directly filed.

If it is the case that a party files a lawsuit before the judiciary ignoring the arbitration clause, according to Article 16 of the Arbitration Law, the counterparty when served with said lawsuit can file an affirmative defence alleging the court lacks jurisdiction under the existence of an arbitration clause.

If the counterparty does not file this defense, according to Article 18 of the Arbitration Law, this will be understood as a tacit waiver of arbitration. This is because, being an arbitration clause to an agreement, it can be modified by the parties.

Moreover, if the parties did not agree an arbitration clause and initiate a judicial procedure, they can still refer the dispute to an Arbitration Tribunal by signing an agreement.

3.4 Validity

According to Article 41.2 of the Arbitration Law an arbitral clause is considered as an independent agreement. Therefore, the non-existence, nullity, invalidity or ineffectiveness of a contract containing an arbitration agreement or that refers to an arbitration agreement, does not necessarily imply non-existence, nullity, invalidity, or inefficiency of the latter.

4. The Arbitral Tribunal

4.1 Limits on Selection

According to Articles 20, 21 and 22 of the Arbitration Law, the only limits to selecting arbitrators are the following:

- the arbitrator must be in full exercise of his civil rights;
- the arbitrator cannot have any conflicts of interest with the dispute;
- the arbitrator must not have received a criminal conviction for a wilful crime;
- unless otherwise agreed, the nationality of the arbitrator will not be an obstacle for him to act as arbitrator;
- the officials and public servants of the Peruvian State have incompatibilities to act as arbitrators within the limits established by the respective rules of incompatibility;

- unless otherwise agreed, in national arbitrations governed by law, the arbitrator is required to be a lawyer (in ad hoc arbitrations or in international arbitrations, however, it is not necessary to be a lawyer).

Different arbitration rules establish additional limitations for the parties to select arbitrators. For example, the Arbitration Rules of the Lima Chamber of Commerce maintains an Arbitrator Registry which contains a list of arbitrators who have been approved by a selection process based on their professional prestige, academic degrees, publications, etc.

Moreover, according to Article 34.3 of the Arbitration Law, when the arbitration rules or parties’ agreement are insufficient, the Tribunal can apply general arbitration principles or usages that are applicable. Thus, in Peru it is very common to apply the Guidelines on Conflicts of Interest in International Arbitration of the International Bar Association (“IBA”) when assessing the appointment or challenge of an arbitrator.

4.2 Default Procedures

Each arbitration institution has its own mechanism for the selection of arbitrators that applies in case the parties have submitted to their rules or the procedure they have established fails.

If the parties are not subject to any rules, please see **2.1 Governing Law**, above.

4.3 Court Intervention

Please see **2.1 Governing Law**, above.

4.4 Challenge and Removal of Arbitrators

The parties are free to establish their own procedure for challenge or removal of arbitrators. In addition, each arbitration institution has its own procedure.

If the parties are not subject to any rules – on a default basis – the Arbitration Law applies, which provides the following procedure in Articles 28, 29 and 30.

Challenge of Arbitrators

- The challenge of arbitrators must be filed as soon as the cause that motivates it is known, duly justifying the reasons on which it is based and attaching the supporting documents.
- The challenged arbitrator and the appointing party may state what they deem appropriate within ten days after being served with the challenge.
- If the appointing party agrees to the challenge or the arbitrator resigns, the substitute arbitrator shall be appointed in the same way as the challenged arbitrator, unless an alternate arbitrator has been appointed.

- If the appointing party does not agree on the challenge and the challenged arbitrator denies the grounds for it or remains silent, the following procedure will be followed:
 - (a) in the case of a sole arbitrator, the challenge is decided by the arbitration centre that appointed him/her or, in default, by the corresponding Chamber of Commerce in accordance with the procedure for the selection of arbitrators explained above in **2.1 Governing Law**;
 - (b) in the case of an Arbitral Tribunal composed of more than one arbitrator, the challenge is decided by the other arbitrators by an absolute majority vote, without the vote of the challenged arbitrator; in the event of a tie, the chair of the Arbitral Tribunal shall decide, unless he is the challenged arbitrator, in which case it is decided by the arbitration centre that appointed him/her or, in default, by the corresponding Chamber of Commerce in accordance with the procedure for the selection of arbitrators explained above in **2.1 Governing Law**;
 - (c) if more than one arbitrator are challenged for the same reason, this is decided by the corresponding Chamber of Commerce in accordance with the procedure for the selection of arbitrators explained above in **2.1 Governing Law** – however, if the president is not among the challenged, it is up to the latter to decide the challenge.

The challenge procedure does not suspend the arbitration proceedings, except when the arbitrators so decide.

The decision on the challenge is final. If the challenge is dismissed, the challenging party may only, if applicable, question this decision by means of filing an annulment against the final award on this basis.

Removal of Arbitrators

When an arbitrator is prevented from exercising his functions, or for any other reason he does not exercise them within a reasonable time, he shall cease in his position if the parties agree to his removal.

If there is disagreement between the parties about the removal and they have not stipulated a procedure to overcome said disagreement, or they are not subject to any arbitration rules, the procedure provided in Article 29 of the Arbitration Law (challenge of arbitrators) is applicable.

This decision is final and cannot be challenged. Notwithstanding the foregoing, any arbitrator may be removed by agreement of the parties.

4.5 Arbitrator Requirements

According to Article 28 of the Arbitration Law, every arbitrator must be, and remain during the arbitration, independent and impartial. The person proposed to be an arbitrator must disclose all the circumstances that may give rise to justified doubts about their impartiality and independence. Regarding this disclosure and the assessment of such for the grounds of a valid challenge or not, the Guidelines on Conflicts of Interest in International Arbitration of the International Bar Association (IBA) are applied as explained above in **4.1 Limits on Selection**.

From his/her appointment, the arbitrator shall disclose to the parties, without delay, any new circumstance regarding possible conflict. Likewise, at any time during the arbitration, the parties may request the arbitrators to clarify their relations with one of the other parties or with their attorneys.

The parties may waive known grounds for challenge of the arbitrator; if so, these cannot serve as basis for any future annulment action of the award.

In addition to the general rules, the Arbitration Rules of the Lima Chamber of Commerce, the Rules of Ethics of said centre are also applicable to arbitrators in the exercise of their function. Said code resembles the aforementioned IBA Rules.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

According to Article 2 of the Arbitration Law, claims related to unavailable rights to the parties, as well as those that the law or treaties or international agreements prohibit to be subject of arbitration, may not be submitted to arbitration.

5.2 Challenges to Jurisdiction

The Peruvian Arbitration Law incorporates the principle of “Kompetenz-Kompetenz” in its Article 41.1. Thus, the Arbitral Tribunal is the only competent authority to decide on its own jurisdiction, including on the affirmative defences or motions to dismiss filed on the grounds of the non-existence, nullity, invalidity or ineffectiveness of the arbitration agreement or because the matter in dispute is outside the scope of the arbitration agreement or any other which seeks to prevent entering into the merits of the controversy.

Motions to dismiss or affirmative defences on the basis of statute of limitations, *res judicata* or claim preclusion, and any other that has the purpose of preventing the continuation of arbitration proceeding, are under the scope of the exclusive jurisdiction of the Arbitral Tribunal granted by this provision.

5.3 Circumstances for Court Intervention

There are three circumstances in which a court can address issues of jurisdiction of an Arbitral Tribunal:

- through a process of annulment of the award, when it is proven that the arbitration agreement is non-existent, null, invalid or ineffective – this cause only applies if it has been the subject of an express objection raised by the affected party before the Arbitral Tribunal prior to the issuance of the award, and this was dismissed;
- when a controversy is filed before the judiciary and the counterparty files an affirmative defence based on the existence of an arbitration agreement, requesting that the dispute should be known by an Arbitral Tribunal;
- when the recognition request of a foreign arbitral award is filed, and (i) it is noticed that the matter in dispute is not arbitrable under Peruvian laws and/or is contrary to public order, or (ii) there is a challenge on the basis that the arbitration agreement is non-existent, null, invalid or ineffective.

5.4 Timing of Challenge

The affected party must expressly object the jurisdiction of the Arbitral Tribunal in the first opportunity they have. If this claim is dismissed by the Arbitral Tribunal, this objection can then be brought before the Peruvian courts through a process of annulment of the award.

The Arbitration Rules of the International Arbitration Centre of AmCham Peru provides that if a partial award is issued and it is enforceable, it is possible to resort to the annulment process without waiting for the issuance of the final award.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

In Peru, according to Article 139 of the Political Constitution and to the Constitutional Court (Decision No 6167-2005-PHC/TC), arbitration is a recognised forum for dispute resolution. Therefore, the standard of judicial review for questions of admissibility and jurisdiction is deferential, meaning that it is equivalent to the “abuse of discretion” used by US courts to set aside a judicial decision.

In arbitration, courts could set aside an award for an “abuse of power” exercised by the Arbitral Tribunal, ie:

- issuing the award outside of the agreed term;
- addressing and deciding on matters not brought by the parties;
- not following the rules agreed by the parties or due process;
- issuing an award with contradictory reasoning or absence of reasoning regarding a matter in dispute;
- not taking relevant evidence into valuation;

- failing to provide the parties with equal opportunities of defence, among other essential breaches to procedural due process standards.

Moreover, the “Kompetenz-Kompetenz” principle implies that arbitrators can decide upon their own jurisdiction regarding each matter and that decision may only be questioned by means of an annulment procedure to challenge the arbitral award before the judiciary.

In addition, jurisdiction may be challenged before the judiciary in cases of fraudulent arbitration, or simulated arbitration, in which the arbitral institution does not really exist. Regarding this matter, the “Orellana” case has been one of the biggest cases of arbitration simulation in Peru. Rodolfo Orellana Rengifo was condemned for having had fraudulent arbitral awards through fraudulent arbitration centres, by means of which it illegally appropriated different properties. Moreover, in certain circumstances, the provision on non-signatory parties established in Article 14 of the Arbitration Law has also been used fraudulently as a tool for simulating arbitrations by incorporating arbitration entities or persons who didn’t really participate in the negotiation or elaboration of an arbitration award.

5.6 Breach of Arbitration Agreement

As explained above in 3.4 Validity, if a dispute subject to arbitration is filed before the judiciary, an affirmative defense based on the existence of an arbitration agreement can be filed by the affected party even if the arbitration has not begun. Peruvian Courts will declare founded this defense by the sole merit of the existence of the arbitration agreement, except when the agreement is manifestly void.

Because parties can renounce an arbitration proceeding, the arbitration agreement affirmative defense must be pleaded by the affected party and cannot be declared ex officio by the court.

5.7 Third Parties

According to Article 14 of the Arbitration Law, the arbitration agreement extends to those whose consent to submit to arbitration – according to good faith – can be extracted and evidenced by their active participation and decisive manner in the negotiation, performance, execution, or termination of the contract that includes the arbitration agreement or to which the agreement is related to. It also extends to those who seek to obtain rights or benefits of the contract. This provision is consistent with recognised doctrines such as alter ego participation, estoppel and good faith standards.

6. Preliminary and Interim Relief

6.1 Types of Relief

Preliminary injunctions and interim relief are available under Article 47 of the Arbitration Law where it is established how an arbitral tribunal in Peru is permitted to award preliminary/interim relief if requested by any of the parties. The types of reliefs that are awarded include innovative reliefs and not-to-innovate reliefs (status quo maintenance), as well as means to preserve evidence materially relevant for the case. Depending on the situation, the Tribunal can decide to grant the relief measure with prior notice to the counterparty or not.

The Arbitration Law also provides that, before the arbitration starts, the parties can file for preliminary injunctions/interim reliefs before the judiciary and this is not understood as a waiver of arbitration. However, the law requires for the request of arbitration to be filed in a ten-day term after the enforcement of the given measure and for the Arbitral Tribunal to be confirmed in a 90-day term from said date, or else the measure expires fully.

Furthermore, the Chamber of Commerce of Lima 2017 Rules of Arbitration has incorporated the figure of the “emergency arbitrator” which resembles the ICC procedure. This provision allows parties to request preliminary reliefs even before the arbitral tribunal is duly constituted before this arbitrator. The emergency arbitrator is then in charge of evaluating and granting the interim relief in these cases. However, this is still a new figure and therefore not enough information is available to ascertain if it is a successful mechanism.

6.2 Role of Courts

The courts play a role in preliminary or interim reliefs, as they may grant precautionary measures before the beginning of the arbitration (as explained above in **6.1 Types of Relief**).

Moreover, courts can provide judicial assistance on the enforcement of an arbitral decision, including preliminary or interim relief decisions, during the arbitration, if requested by any of the parties involved. The courts, however, limit themselves to verifying the order of the Arbitral Tribunal and cannot assess or interpret the scope of its decision.

6.3 Security for Costs

The figure of security for costs is not available in the Peruvian system. Nonetheless, if it is the will of the parties, it can be agreed by them to insert a security for costs provision in their arbitration agreement.

7. Procedure

7.1 Governing Rules

The law that governs the procedure of arbitration in Peru is the Legislative Decree No 1071, which is applicable to arbitrations that take place within the Peruvian territory (for both national or international arbitration), notwithstanding the provisions of treaties or international agreements of which Peru is a party or of laws that contain special provisions on arbitration, in which case the norms of the Legislative Decree shall be of supplementary application.

In addition, the parties are free to determine the rules to which the Arbitration Tribunal is subject in the proceeding. If these are not set by the parties or are not subject to previously approved rules, the Arbitration Tribunal will decide which rules it considers most appropriate considering the circumstances of the case.

7.2 Procedural Steps

According to Article 34 of the Arbitration Law, the parties are free to determine the rules of arbitration. The only limit to setting the rules/steps is that the parties are treated equally and each of them is given sufficient opportunity to assert their rights.

7.3 Powers and Duties of Arbitrators

Among the main powers that the arbitrators have is to decide on their own jurisdiction, issue precautionary measures and enforce the arbitration award (except in cases where the use of public force is required).

The main duty arbitrators have is to render an enforceable award. Thus, arbitrators have the duty to act with impartiality and independence in the process, not be involved in any action incompatible with the exercise of their function, to reveal to the parties any new circumstances, respect the rules of due process, and apply the rules of procedure fixed by mutual agreement of the parties.

7.4 Legal Representatives

According to the Arbitration Law, there are no particular qualifications or other legal requirements for legal representatives appearing in Peru except for the evidence of how they are duly granted with the powers to represent the given party.

In general, Arbitration Rules are flexible in terms of issuing a power of attorney (“POA”). We can, however, find a higher level of formality in Article 13 of the Arbitration Rules of the Conflict Analysis and Resolution Centre of the Pontificia Universidad Católica del Perú, which states that the powers granted abroad must be legalised by the Ministry of Foreign Affairs of Peru.

8. Evidence

8.1 Collection and Submission of Evidence

The general approach to the submission of evidence at the pleading stage is discovery, disclosure, privilege, use of witness statements, use of experts for technical matters, and cross examination. The evidence is offered with the parties' memorandums and, once incorporated into the arbitration, the Arbitral Tribunal, in co-ordination with the parties, schedules the correspondent hearings for all evidence to be duly actioned and cross-examined. Moreover, the Chamber of Commerce of Lima incorporated the affidavit in their 2017 rules (Article 30) which is applicable unless otherwise agreed in the arbitration agreement. The witness declaration must now be submitted in writing and duly signed, as happens with expert reports. Previously, witness declarations were only delivered at the correspondent evidence hearing.

It must be noted, however, that all evidence rules of procedure are usually conducted in appliance of IBA Rules on the Taking of Evidence in International Arbitration, which – as explained above in **4.1 Limits on Selection** – are considered generally accepted arbitration principles and usages that are applicable.

8.2 Rules of Evidence

The IBA rules on the Taking of Evidence in International Arbitration are generally applied in accordance to Article 34.3 of the Arbitration Law, unless otherwise agreed.

8.3 Powers of Compulsion

Generally, the arbitrators assign the responsibility for the filing and production of documents or attendance of witnesses to the party who controls the witness or is in possession of the document. Nevertheless, all parties may ask for judicial assistance, if needed, to secure witness attendance to a hearing or the exhibition of a given document.

9. Confidentiality

9.1 Extent of Confidentiality

Unless otherwise agreed, all parties involved in arbitration proceedings are required to maintain the confidentiality of its proceedings.

According to Article 51 of the Arbitration Law, waivers to said confidentiality duty are:

- when, due to legal requirements, it is necessary to make public the proceedings or the arbitration award to protect or enforce a right;
- to file an appeal for annulment or enforce the award before the Peruvian Court; and,

- the arbitration award in the processes in which the Peruvian State intervenes is public.

In this situation, Article 52 of the Law of State Contracts reinforces this attending to the principle of state transparency to strengthen the knowledge of state administration in the public sector. The Supervisory Organisation on State Contracts (*Organismo Supervisor de Contrataciones con el Estado* – OSCE) has a search tool to find all awards in which state contracts are involved.

Different Arbitration Centre rules refer to sanctions to be imposed in case of breach of the duty of confidentiality.

For example, Article 38 of the Arbitration Regulations of the Conflict Analysis and Resolution Centre of the Pontificia Universidad Católica del Perú, states that breach of the duty of confidentiality is sanctioned by a fine, without prejudice to legal actions that the aggrieved party may initiate. On the other hand, Article 9.4 of the Arbitration Rules of the International Arbitration Centre of AmCham Peru indicates that the non-observance of the duty of confidentiality constitutes a serious fault and, in that sense, the Arbitral Tribunal can make a negative inference regarding the interests of the party that infringes said duty and condemn it to the payment of the expenses of the arbitration.

10. The Award

10.1 Legal Requirements

Provided Articles 55 and 56 of the Arbitration Law, all awards must be in writing and signed by the arbitrators, who may express their dissenting opinion. When there is more than one arbitrator, the signatures of the majority of the members or only that of the president shall suffice provided that the reasons for the lack of one or more signatures are manifested. It will be understood that the award is in writing when its content and signatures are recorded and are accessible for further consultation in electronic, optical, or other form. It is understood that the arbitrator who does not sign the award or issue his or her dissenting opinion adheres to the decision in majority or of the president, according to the case.

Furthermore, all awards must be reasoned and motivated, unless the parties have agreed otherwise, or it is an award issued in the terms agreed by the parties in the form of a settlement.

10.2 Types of Remedies

An Arbitration Tribunal may award all the remedies that are established in the Peruvian legislation regarding the controversies that are subject to arbitration.

10.3 Recovering Interest and Legal Costs

The parties have the power to adopt, either directly or by reference to arbitration rules, rules related to the costs of arbitration. In the absence of an agreement, the Arbitration Law applies.

In addition, the parties can recover interests according to the applicable substantive rules of the matter in dispute. In the absence of a specific provision for the calculation of interests in the given matter, it is very common that the arbitrators will apply the legal interest.

11. Review of an Award

11.1 Grounds for Appeal

Against the arbitral award, the parties can only file for annulment before the judiciary to challenge and set aside the award. The validity of the award will be reviewed on the grounds exhaustively established in Article 63 of the Arbitration Law. Said grounds are based on the ones established in the 1958 New York Convention.

However, the given article establishes as a ground for annulment that *“one of the parties has not been duly served of the appointment of an arbitrator or of the arbitration proceedings, or has not been able, for any other reason, to assert its rights”*. Traditionally, it is through this ground that due process challenges can be brought, such as the examples illustrated in **5.5 Standard of Judicial Review for Jurisdiction/Admissibility**, above. Moreover, another ground for annulment under the Arbitration Law is that the award breaches the Peruvian public order.

The annulment of the award is not applicable if the cause invoked could have and was not previously brought by means of a file for rectification, interpretation, integration or exclusion of the award before the Arbitral Tribunal.

Peruvian courts are prohibited to decide on the merits of the controversy or about the content of the decision or qualify the criteria, motivations or interpretations exposed by the Arbitration Tribunal. However, as explained in **5.5 Standard of Judicial Review for Jurisdiction/Admissibility**, contradictory reasoning or absence of reasoning on a matter in dispute may be subject to annulment by the court.

Regarding the annulment procedure, this is set forth in Articles 64, 65 and 66 of the Arbitration Law which establish the following:

- The action of annulment must be filed before the Superior Court within 20 days after being served with the award. When the rectification, interpretation, integration, or exclusion of the award has been requested or has been made

at the initiative of the arbitral tribunal, the request for annulment must be filed within 20 days after being served with the last decision on these matters or after the term to resolve them has elapsed, without the arbitral tribunal having ruled.

- The filing of the 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 a stay of enforcement and complies with the requirement of the bond or bank security agreed by the parties or established in the applicable arbitration rules.
- When examining the admission of the annulment, the Superior Court will verify compliance with the requirement and, if applicable, grant the stay. If no requirement has been agreed upon, at the request of a party, the Superior Court shall grant the suspension, if an unconditional bond is established in favour of the other party with a validity of not less than six renewable months for the entire duration of the processing of the annulment and for an amount equivalent to the value of the decision contained in the award. If the award, in whole or in part, is purely declarative or is not recoverable in cash or if it requires liquidation or determination that is not just a mathematical operation, the arbitral tribunal may set a reasonable amount in the award for the constitution of the bank security.
- Once the appeal for annulment has been admitted, the other party has 20 days to file its defence. Only documentary evidence can be offered.
- Within the next 20 days, the Superior Court will schedule the oral hearing. At the hearing the Superior Court may suspend the judicial proceeding for a period of no more than six months in order to give the Arbitral Tribunal the opportunity to resume the arbitration proceedings or to adopt any other measure that, at the discretion of the arbitrators, eliminates the grounds alleged in the annulment. Otherwise, it will issue its decision within the following 20 days.
- Against the decision of the Superior Court, only an appeal for cassation is filed before the Civil Chamber of the Supreme Court, when the award has been annulled in whole or in part. If the award is confirmed, the only challenge available would be a constitutional claim against the judiciary decision.
- If the annulment is dismissed, the Superior Court, under responsibility, will deliver the bond to the winning party. Otherwise, under responsibility, it will be returned to the party who filed the annulment.

11.2 Excluding/Expanding the Scope of Appeal

In Peru, parties cannot agree to exclude or expand the scope of challenge of an arbitral award. The validity of the award will be reviewed on the grounds exhaustively established in Article 63 of the Arbitration Law.

Notwithstanding the above, Article 63.8 establishes that when none of the parties has Peruvian nationality nor has its usual residence in Peru, the parties can agree to waive the right to file for annulment.

11.3 Standard of Judicial Review

In Peru, arbitration is a separate jurisdiction from the judicial power, therefore Peruvian Courts are prohibited to review the merits of the case, in accordance with Article 62.2 of the Arbitration Law. For the deferential review available, please refer to 5.5 **Standard of Judicial Review for Jurisdiction/Admissibility**, above.

12. Enforcement of an Award

12.1 New York Convention

Peru ratified the New York Convention on 7 July 1988, by accession. Peru made no reservation to the Convention. Peru has also ratified the Inter-American Convention on International Commercial Arbitration. Both conventions have been recognised in the Arbitration Law as applicable to the Peruvian system by means of Article 74.

12.2 Enforcement Procedure

When it comes to international awards, their recognition is based on the New York Convention and the Panama Convention. Moreover, the Peruvian Arbitration Law has copied the grounds for not recognising and enforcing an award established in the New York Convention in its Article 75.

Article 8.6 of the Arbitration Law also provides that the judge with the jurisdiction to enforce an award in Peru will be specialised in commercial matters or, as default, specialised in civil matters located in the defendant's domicile (or, in case the defendant does not domicile in Peru, in the place where their goods are or where they exercise their rights).

12.3 Approach of the Courts

Regarding Peruvian legislation, with regards to the enforcement of national awards, courts can only review said awards and stay of enforcement based on a party's request of annulment, which will only proceed based on formal aspects or breaches against the national public order. Courts cannot review awards based on substantial aspects interfering with the criteria and reasoning process realised by the arbitrators.

With regards to the recognition and enforcement of international awards, the New York Convention is applied and the only grounds for not recognising the award or denying its enforcement are those established in the given convention, which includes, among others, the standard for refusing enforcement on public policy grounds. In that sense, international awards that are incompatible with public policy may not be enforced in Peru.

In sum, courts must recognise and enforce all valid awards, unless the nullity or non-enforcement of the award is granted by means of one of the processes mentioned above, or if it is decided due to the causes provided in the New York Convention.

Payet, Rey, Cauvi, Pérez Abogados

Victor A. Belaunde 147
Torre 3, Piso 12
Centro Empresarial Real
San Isidro
Lima
Peru

Tel: +51 1 6123202
Fax: +51 1 222 1573
Email: lexmail@prc.com.pe
Web: www.prc.com.pe

