

MAIN FEATURES OF ARBITRATION IN PERU

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I. INTRODUCTION

Sustained economic growth cannot be achieved if the State does not protect two fundamental pillars that allow private agents to create wealth: contracts and property rights.¹ Every State must protect, respect, and

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1. *Lesson 2: Property Rights and the Rule of Law 2*, FOUNDATION FOR TEACHING ECONOMICS, <http://www.fte.org/teacher-resources/lesson-plans/is-capitalism-good-for-the-poor/lesson-2-property-rights-and-the-rule-of-law/> (last visited Feb. 13, 2017).

enforce these two fundamental pillars. In order for these to be assured, the judiciary must play a fundamental role.² Given the inherent weaknesses of the judicial system—evidenced by its deficiency, strict formalism, and corruption—the States acknowledge that the monopoly of justice should not rely on judges.³

States have recognized that people, elected by private agents, can settle disputes regarding contracts and property rights.⁴ In fact, states promote and allow their own citizens, or citizens of other states, to solve their disputes through a private procedure for dispute resolution characterized by its flexibility, efficiency and informality.⁵ Such dispute resolution mechanism is known as arbitration.⁶ Arbitration seeks to make resolution of disputes more efficient.⁷ It is derived from contracts and property rights with the purpose of being enforced according to the common intention of the parties.⁸ As expected, renowned Professor Gary Born affirmed that: “international arbitration is the least bad mechanism for resolving international disputes.”⁹

Arbitration in Peru is effective, unlike other states that remain hostile towards arbitration.¹⁰ In Peru, arbitration is useful to the parties and is successful for dispute resolution.¹¹ It works due to three great reasons: (i) the arbitration law—Legislative Decree 1071 (Peruvian Arbitration Law); (ii) the court’s respect of the law—conduct of the courts; and (iii) the user’s respect for the law—arbitration practice.

This article will not address all the reasons why arbitration works in Peru. After a review of the main textbooks and the provisions of the Arbitration Law, it can be shown that Peruvian Arbitration Law contemplates everything in order to be a favorable forum for arbitration.

2. Autumn Fisher, *Courts – Weakest Branch of Government*, VOTE 18–24.ORG 2 (Dec. 1, 2015), <http://f15ap.18-24.org/courts-weakest-branch-of-government/>.

3. *Id.*

4. FOUNDATION FOR TEACHING ECONOMICS, *supra* note 1, at 4.

5. Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes* 1, http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

6. *Id.*

7. *Id.*

8. *Id.*

9. Gary Born, *BITS, BATS and BUTS: Reflections on International Dispute Resolution* 8, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf (last visited Feb. 13, 2017).

10. Carlos Paitan et al., *Arbitration 2016*, LATIN LAWYER REFERENCE ¶ 59 (Apr. 13, 2016), <http://latinlawyer.com/reference/topics/45/jurisdictions/19/peru/>.

11. *Id.*

What we intend in this article is to comment on some interesting and innovative features that are regulated by the Peruvian Arbitration Law, which makes Peru the pacific lighthouse of arbitration.

II. NON-DUAL SYSTEM

Peruvian Arbitration Law follows the main postulates of the United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration (1985) with amendments adopted in 2006.¹² Thus, the Peruvian Arbitration Law regulates fundamental provisions for the correct development of arbitration. These developments consist of the separability presumption of the arbitration agreement, the competence-competence principle, the obligation of judges to refer parties to arbitration, the prohibition of reviewing the merits of a dispute, the noninterference of the courts during an arbitration proceeding, and other provisions, which will be addressed in other sections of this article.¹³ It should be noted that unlike other laws, such as those in Italy or France, Peru has not followed the route of regulating a dual system that differentiates domestic arbitration from international arbitration.¹⁴

In Peru, a dual system with parallel standards does not exist.¹⁵ As the “*Exposición de Motivos*” of the Peruvian Arbitration Law indicates:

12. Jose Daniel Amado et al., *The Arbitration Review of the Americas 2016: Peru*, GLOBAL ARB. REV. 3 (Aug. 27, 2015), <http://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2016/1036932/peru>.

13. Cristian Conejero Roos, Conferencia de Clausura: II Congreso Peruano Internacional de Arbitraje Lima, Perú "El arbitraje internacional: dinamismo, convergencia y conflicto" [Closing Conference: II International Peruvian Arbitration Congress Lima, Peru "International Arbitration: dynamism, convergence and conflict"], INSTITUTO PERUANO DE ARBITRAJE 377 (2008), http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_7_2008.pdf.

14. *National arbitration laws: What legislation applies to arbitration in your jurisdiction?*, LEXOLOGY, 2–3, <http://www.lexology.com/library/detail.aspx?g=1cf87c7e-6912-4498-8ab0-5baeb0abd8e7> (last visited Feb. 16, 2017); *Italy: International Arbitration 2.2*, INTERNATIONAL COMPARATIVE LEGAL GUIDES, (July 29, 2016), <https://www.iclg.co.uk/practice-areas/international-arbitration/international-arbitration-2016/Italy>.

15. INTERNATIONAL COMPARATIVE LEGAL GUIDES, *Latin America Overview: A Long Road Travelled; A Long Road to the Journey's End: International Arbitration 4* (July 29, 2016), <https://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2016/Italy>; Fernando Canturias Salaverry & Roque J. Caivano, *La Nueva Ley de Arbitraje Peruana: Un Nuevo salto a la modernidad*, INSTITUTO PERUANO DE ARBITRAJE 54 (2008), http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_7_2008.pdf.

One of the substantial changes of the new law is the transition from a dual system to a monist system of regulation of national and international arbitration. Although the dualist system had its *raison d'être* in the 1996 arbitration law, when the arbitration practice in Peru was almost non-existent, the truth is that it is no longer justified and the most appropriate is to proceed with the adoption of a monistic arbitration legislation. That is, legislation that establishes the same rules of play for both local and international arbitrations, reserving, however, for the latter, some particular provisions which are required by their very nature.¹⁶

The existence of a single system allows the incorporation of international standards into Peruvian domestic arbitration practice.¹⁷ In Peru, it is common for foreign arbitrators to solve both international and domestic disputes.¹⁸ The international trend and best practice adhere to the Peruvian arbitration practice, making it a benchmark in the vanguard of arbitration.

Another important consequence of Peru's monistic system is the increasingly frequent use of conflicts of interest and evidence rules in arbitrations such as: the IBA Guidelines on Conflicts of Interest in International Arbitration or the IBA Rules on the Taking of Evidence in International Arbitration.¹⁹ These guidelines are usually accepted in procedural orders as mandatory in the arbitration.²⁰ If the guidelines are not agreed upon, they constitute either the maximum referent of soft-law used by the arbitrators or the arbitral institutions to resolve challenges, as well as to clarify discussions of evidence that can occur during proceedings.²¹ For example, the Lima Chamber of Commerce, one of the most recognized arbitration institutions in Peru, recommends its application in the arbitration procedures held before the Chamber.²²

Notwithstanding, Peru has adopted a single system in which there is no separation between domestic and international arbitration.²³ There are

16. Salaverry, *supra* note 15, at 54.

17. Paitan, *supra* note 10, at ¶ 1.

18. Peruvian Arbitration Law No. 1071 art. 2, § 1, Sept. 1, 2008, DIARIO OFICIAL [D.O.] (Peru).

19. Faustino Cordón Moreno, *Notas sobre la imparcialidad de los árbitros en la ley española*, INSTITUTO PERUANO DE ARBITRAJE 162–63 (2008), http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_7_2008.pdf.

20. *Id.*

21. *Id.* at 164.

22. Salaverry, *supra* note 15, at 56.

23. *Id.* at 54.

some small differences introduced in the Peruvian Arbitration Law regarding international arbitration. Regarding the definition of international arbitration, Article 5 of the Peruvian Arbitration Law copies the definition of international arbitration regulated in Article 2 of the UNCITRAL Model Law.²⁴ The definition of international arbitration in Peruvian legislation is as follows:

1. An arbitration is international if any of the following circumstances are met:
 - a. The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their domiciles [domicilios] in different States.
 - b. The place of arbitration as determined in the arbitration agreement, or pursuant to it, is situated outside the country in which the parties have their domiciles.
 - c. The place of performance of a substantial part of the obligations of the legal relationship, or the place with which the subject matter of the dispute is most closely connected, is situated outside the national territory, where the parties are domiciled in Peru.
2. For the purposes of the above, if any of the parties has more than one domicile, the domicile is that which has the closest relationship to the arbitration agreement.²⁵

In the event that a party initiates a judicial proceeding, while there is an existing arbitration agreement but prior to the initiation of the arbitration, the courts must refer the parties to arbitration.²⁶ If the court finds that the arbitration agreement is manifestly null or void under the law chosen by the parties to regulate it, or the law applicable to the merits of the dispute, the court will not refer the parties.²⁷ In case that the arbitration agreement complies with the provisions of Peruvian law, the courts must refer the parties to arbitration unless it determines that the matter in controversy is against international public policy.²⁸

Arbitrators in international arbitration do not need to be lawyers; unlike national arbitration, which must be resolved in law. In that case, the arbitrators are required to be lawyers unless the parties have agreed that

24. United Nations Commission on International Trade, UNCITRAL Model Law on International Commercial Arbitration 1985, art. 2 (Jan. 2008).

25. Peruvian Arbitration Law No. 1071 art. 5, §§ 1–2 (2008).

26. *Id.* art. 16, § 1.

27. *Id.* art. 16, § 4.

28. *Id.*

arbitrators will not be lawyers.²⁹ Where there is a sole arbitrator, the Chamber of Commerce shall consider appointing another arbitrator whose nationality is different than the parties.³⁰

Additionally, if the arbitration is ongoing, the arbitral tribunal may authorize the parties to request an interim measure to the competent judicial authority.³¹ The arbitration award may be annulled if the arbitration agreement is invalid under the choice of law provisions, the law applicable to the merits of the dispute, or under Peruvian law, whichever is more favorable to the validity and effectiveness of the award.³² The arbitration award may also be annulled if the matter is not subject to arbitration or if the award violates Peru's international public policy. Whereas, under domestic arbitration, the violation of public policy is not a ground for annulment.³³

In short, Peru has adopted a monistic non-dual system to incorporate international best practices into Peruvian Arbitration Law.³⁴ However, Peruvian Arbitration Law maintains some specific features applicable to international arbitration.³⁵

III. NON-SIGNATORIES

Peruvian arbitration legislation is the pioneer and—to the best of our knowledge—the only legislation on arbitration in the world that has incorporated a specific regulation allowing parties that did not execute the arbitration agreement to be parties to the arbitration.³⁶ Peruvian legislation sought to incorporate this rule to be consistent with international arbitration practice, which for decades has allowed the possibility of participation in arbitration of a party that did not sign the arbitration agreement.³⁷ The reason for this legislative decision is due to the complexity of the legal relationships among parties and non-parties.³⁸ Non-parties may be required

29. *Id.* art. 22, § 1.

30. Peruvian Arbitration Law No. 1071 art. 25, § 7 (2008).

31. *Id.* art. 57, § 2.

32. *Id.* art. 63, § 1.

33. *Id.* art. 63, § 5.

34. Salaverry, *supra* note 15, at 54.

35. *Id.* at 55.

36. INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *ICCA's Guide to the Interpretation of the 1958 New York Convention* 58 (Pieter Sanders ed., 2011).

37. *Dow Chemical France v. Isover Saint Gobain*, Interim Award No. 4131, ¶ 136 (1982); *see also Thomas-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d. Cir. 1995).

38. Paitan, *supra* note 10, ¶ 12.

to perform obligations derived from agreements they personally did not enter into or may seek to attain rights from a contract they did not execute.³⁹

In addition, the rule seeks what is widely recognized in civil doctrine as the existence of consent without the execution of the agreement.⁴⁰ Moreover, Article 14 of the Peruvian Arbitration Law sets forth that:

The arbitration agreement comprises 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 comprises all those who seek to attain any rights or benefits from the contract, pursuant to its terms.⁴¹

There are two situations embodied under this Article. The first situation refers to the non-parties' behavior, which acts as a means of consent to arbitration rather than to a judicial proceeding.⁴² Thus, in order for a non-party to an arbitration agreement to be a party to the arbitration, it is required that: (1) there is an arbitration agreement between two parties; (2) there is a party that did not sign the document containing the arbitration agreement; (3) the non-signatory party has participated in the life of the document containing the arbitration agreement, whether in the negotiation, execution or termination thereof; (4) participation is active and legally relevant; and (5) through a bona fide interpretation, it is possible to appreciate that the non-signatory party has agreed to be a party of the arbitration agreement.⁴³ Cases of implied consent, estoppel, group of companies, alter ego or veil-piercing, among others, are also included in this category.⁴⁴

The second situation seeks to protect the rights and interests of the non-parties under the arbitration agreement. This category covers cases of

39. INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 36.

40. Paitan, *supra* note 10, ¶ 13.

41. Alfredo Bullard, *Arbitration Guide IBA Arbitration Committee: Peru*, INT'L BAR ASS'N 7 (2012), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=BC90E22B-3A24-4B9B-86F20B9744A936F5>.

42. *Id.*

43. Rafael T. Boza, *Caveat Arbitrator: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?*, 17 CURRENTS: INT'L TRADE L. J. 65, 67 (2009).

44. *Id.*

third-party beneficiaries, subrogation, subrogation action, and succession, among others.⁴⁵

As has been shown, the innovative Peruvian Arbitration Law allows non-parties to be included in the arbitration as long as the requirements in Article 14 are met.

IV. INTERACTION BETWEEN ARBITRATION AND COURT

Properly functioning arbitration requires more than just good lawyers, arbitrators, or arbitration legislation. It requires that the judiciary cooperates, rather than interfere, before or during the arbitration.⁴⁶ In Peru, these roles are evidently defined in the law, and as such, are supported by judiciary's continued duty to respect the law.⁴⁷ In this respect, it is well established that good arbitration law must contemplate: (1) the competence-competence principle; (2) the separability presumption of the arbitration agreement; (3) enforcement of arbitration agreement, or so-called arbitration agreement objection; and (4) collaboration of the courts with the arbitration.⁴⁸

A. *Competence-Competence*

Article 41(1) of the Peruvian Arbitration Law, recognizes the so-called principle competence-competence (*i.e. kompetenz-kompetenz*).⁴⁹ Under this principle, the arbitrators have jurisdictional authority to assess the grounds of the allegations of nullity, annuability, invalidity, inefficiency or non-existence of the arbitration agreement. In other words, the arbitrators must first resolve if the arbitration agreement is null, non-existent or invalid.⁵⁰ The purpose of the competence-competence principle is to protect the authority of the arbitration tribunal and prevent the parties from escaping arbitration by merely contesting the agreement before the courts.⁵¹ This principle puts judges on notice that the arbitrators are the competent authority to resolve disputes regarding the arbitration agreement. As such,

45. James Otis Rodner & Angélica Marciano, *Jurisdiction of the Arbitral Tribunal in the Case of Multiple Contracts*, 24 J. ARB. STUD. 1, 1 (2014).

46. Fernando de Trazegnies Granda, *Peru: Arbitration and the Courts*, TRANSNAT'L DISP. MGMT. 5, 1 (2006), <https://www.transnational-dispute-management.com/article.asp?key=927>.

47. CONSTITUTION OF PERU [C.P.] art. 62.

48. Paitan, *supra* note 10, ¶¶ 36–39.

49. Bullard, *supra* note 41.

50. Peruvian Arbitration Law No. 1071 art. 41, § 1 (2008).

51. *Id.* art. 41.

only after an arbitrator has rendered an award regarding the arbitration agreement may a party contest that decision with the court.⁵²

Thus, for example, if one of the parties alleges the non-existence of the arbitration agreement because it did not sign the contract containing the arbitration agreement, that claim will be resolved by the arbitrators.⁵³ However, if the arbitrators do not agree, the losing party may file an annulment request against the arbitration award on the ground of the non-existence of the arbitration agreement.⁵⁴ Therefore, the party alleging the non-existence of the arbitration agreement cannot initiate a judicial proceeding before or during the arbitration procedure until after the arbitration tribunal has issued an award.⁵⁵

B. *Separability Presumption of the Arbitration Agreement*

Article 41(2) of the Peruvian Arbitration Law establishes that although the arbitration agreement is part of a contract, the allegations of nullity, annullability, invalidity, ineffectiveness or termination of the contract, do not necessarily mean the arbitration agreement will in fact be deemed moot.⁵⁶ Arbitrators are given full discretion and authority to determine issues that arise within the contract.⁵⁷ Hence, the intent of the arbitration agreement's autonomy is to avoid the courts from deciding any issues of the contract. In this manner, the common intention of the parties to arbitrate is preserved.⁵⁸ In other words, if a party alleges nullity of the contract and the nullity of the arbitration agreement, then such claim must be determined by the arbitrators and never by the courts.

C. *Enforcement of Arbitration Agreement*

Additionally, the Peruvian Arbitration Law provides that if a party raises an objection to arbitration, the courts will refer the parties to arbitration based on the existence of an arbitration agreement.⁵⁹ If the arbitration has not commenced yet, the courts can deny referral to arbitration when it has been proven that the arbitration agreement is

52. *Id.* art. 41, § 5.

53. *Id.*

54. *Id.*

55. Peruvian Arbitration Law No. 1071 art. 41, § 5 (2008).

56. *Id.* art. 41, § 2.

57. *Id.*

58. *Id.*

59. *Id.* art. 16

manifestly null or void.⁶⁰ However, if the arbitration has already begun, the courts must refer the parties to arbitration.⁶¹ In the case of international arbitration, the rules explained above will apply.

In sum, these rules seek to avoid the interference of the courts before and during the arbitration procedure, by respecting the common intention of the parties to settle their disputes in the arbitration forum and not in the judicial forum.⁶²

As has been shown, a temporary non-interference priority rule is established favoring the development of arbitration.⁶³ These rules are contained in the Peruvian Arbitration Law, and have also been applied in the Peruvian Constitutional Tribunal—“Tribunal Constitucional.” Indeed, in the precedent “Cantuarias Salaverry,” the high interpreter of the Peruvian Constitution determined that:

60. “The objection of the existence of an arbitration agreement, whether it is pleaded before or after the commencement of the arbitration, shall be admitted on the sole ground of the existence of the arbitration agreement, except in the first case, if the arbitration agreement is manifestly null and void.” Peruvian Arbitration Law No. 1071 art. 16, § 3 (2008).

61. *Id.*

62. *Id.*

63. *Id.*

The arbitral tribunals, therefore, within the scope of their jurisdiction, are entitled to reject any intervention and/or interference of third parties - including administrative and/or judicial authorities - to commit to matters submitted to arbitration, on merit of the existence of an arbitration agreement and the voluntary decision of the parties.”

It is for this reason that the Court considers it appropriate to reiterate the full applicability of the principle of "kompetenz-kompetenz" (. . .) “which entitles the arbitrators to decide on matters within their competence, and (. . .) arbitrators to hear and resolve, at all times, the dispute issues that are argued during the arbitration process, including the allegations regarding to the validity and effectiveness of the agreement. This Collegiate emphasizes the very practical importance of this principle, in order to avoid that one of the parties, which does not want to submit to the arbitration agreement, by arguing arbitration decisions and / or the arbitrators' jurisdiction over a given dispute, intends the participation of ordinary judges, through the submission of any action, and to move the dispute to the judicial field.⁶⁴

In summary, the Peruvian State has preferred that the judiciary serve a protective role in the arbitration process by respecting the mutual assent of the parties and submitting their disputes to the arbitral jurisdiction.⁶⁵ In this way, the judiciary should not obstruct the arbitration, but it is obligated to guarantee its proper development.⁶⁶

D. Evidence

Lastly, the Peruvian Arbitration Law also facilitates a relationship between the judiciary and the arbitral tribunal when intervention is necessary for evidentiary purposes.⁶⁷ The arbitral tribunal or any party approved by the arbitral tribunal may request legal assistance from the competent judicial authority.⁶⁸ In such case, the court must comply without delay unless deemed against public policy or governing law.⁶⁹

64. Tribunal Constitucional [T.C.] [Constitutional Court], 28 febrero 2006, “Fernando Cantuarias Salverry,” Rol de la causa: 6167-2005-PHC/TC, REVISTA DE JURISPRUDENCIA Y DOCTRINA [R.J.D.] No. 3 ¶¶ 12–13 (Peru).

65. *Id.*

66. *Id.*

67. Peruvian Arbitration Law No. 1071 art. 45 (2008).

68. *Id.*

69. *Id.*

V. APPOINTMENT OF ARBITRATORS

The Peruvian Arbitration Law has preferred that the designation of arbitrators, which in some foreign jurisdictions is the responsibility of the courts, be performed by the Chambers of Commerce.⁷⁰ Indeed, the Peruvian Arbitration Act states that if the parties have chosen *ad hoc* arbitration and have not named an arbitrator nominating authority, the designation will be made by the Chamber of Commerce at the location where the arbitration would take place or by the nearest Chamber of Commerce.⁷¹ In addition, the Chamber of Commerce will also resolve matters pertaining to an arbitrator in *ad hoc* cases when: “(1) the sole arbitrator is challenged; (2) the arbitral tribunal's chairman is challenged and there is a tie between the other arbitrators regarding the challenge; or (3) more than one arbitrator is challenged under the same reason.”⁷² Furthermore, the Chamber of Commerce also designates the arbitrator removed by the other arbitrators due to unwillingness.⁷³ Therefore, the Peruvian rule seeks to avoid the courts designating the arbitrator.⁷⁴ Otherwise, leaving the appointment to the courts would take much longer.⁷⁵

VI. INTERIM MEASURES

Dispute resolution mechanisms should grant the arbitrator the power to issue interim decisions without the threat of their final decisions being rendered inadequate.⁷⁶ In Peru, arbitrators are allowed to issue interim measures during the arbitration.⁷⁷ Indeed, Article 47 of the Peruvian Arbitration Law sets forth that:

70. Peruvian Arbitration Law No. 1071 art. 23 (2008); see generally *Guide to International Arbitration*, LATHAM & WATKINS, <https://www.lw.com/thoughtleadership/guide-to-internationalarbitration-2014> (last visited Feb. 12, 2017).

71. Peruvian Arbitration Law No. 1071 art. 23(d) (2008).

72. *Id.* art. 29(2)(d).

73. *Id.* art. 30, § 3.

74. *Id.* art. 23(d).

75. *Id.* art. 23(a).

76. Peruvian Arbitration Law No. 1071 art. 47, § 2 (2008).

77. *Id.*

1. Once constituted, the arbitral tribunal may, at the request of a party, grant the interim measures it deems necessary to ensure the effectiveness of the award. It may require the guarantees it deems appropriate to ensure compensation for the damages and harm that may be caused by the enforcement of the measure.
2. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - a. Maintain or restore the status quo pending determination of the dispute;
 - b. Take action to prevent any current or imminent damage or prejudice to the arbitral process or refrain from taking actions that are likely to cause such damage or prejudice to the arbitral process;
 - c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - d. Preserve evidence that may be relevant and material to the resolution of the dispute.⁷⁸

In addition, the parties are permitted to request the courts' assistance for interim measures prior to the constitution of the arbitral tribunal.⁷⁹ If the measure is granted, the favored party has the obligation to initiate arbitration in ten days unless it has already done so.⁸⁰ If it does not do so or the arbitral tribunal is not constituted in ninety days, the precautionary measure ceases its effects.⁸¹ The prevailing party by the interim measure has the obligation to inform and deliver the file to the arbitrators.⁸² In addition, the arbitrators have the authority to overrule the precautionary measure issued by the courts.⁸³

VII. RECOURSES AGAINST THE ARBITRAL AWARD

In Peru, awards are definitive, binding, non-appealable, mandatory, and protected by *res judicata*.⁸⁴ Peruvian law and practice only admits the annulment recourse and the “*amparo*” action—constitutional action—as

78. *Id.*

79. *Id.* art. 47, § 1.

80. *Id.* art. 47, § 4.

81. Peruvian Arbitration Law No. 1071 art. 47, § 4 (2008).

82. *Id.* art. 47, § 5.

83. *Id.* art. 47, §§ 5–6.

84. *Id.* art. 59.

mechanisms for challenging the arbitral award.⁸⁵ Each of them will be explained below.

A. *Annulment Action*

The annulment action is the mechanism provided in the Peruvian Arbitration Law to challenge the arbitral award for any of the grounds provided in the Peruvian Arbitration Law.⁸⁶ The grounds for annulment are the same as those contemplated in the UNCITRAL Model Law.⁸⁷ In other words, Peruvian annulment grounds are international standard annulments.⁸⁸ These grounds are restrictive and exhaustive.⁸⁹ Moreover, the arbitrator must be provided notice of grounds for the annulment.⁹⁰ In that regard, under the annulment procedure, the judiciary is neither to question the merits of the controversy nor question the wisdom of the arbitrators.⁹¹ Courts are precluded from second-guessing the merits of the discussion.⁹²

Much like Belgium, Switzerland, Sweden, Turkey and Tunisia, Peru also allows the parties to waive all or some of the grounds for annulling arbitration awards.⁹³ This is only a valid option when there is an express

85. POLITICAL CONSTITUTION OF PERU [C.P.] art. 200, § 2.

86. Peruvian Arbitration Law No. 1071 art. 63, § 1 (2008).

87. UNCITRAL Model Law, *supra* note 24, art. 36.

88. *Id.*; Peruvian Arbitration Law No. 1071 art. 63, § 1 (2008).

89. *Id.*

90. *Id.*

91. “The application is resolved by declaring the validity or invalidity of the award. It is prohibited to rule on the merits of the dispute or on the contents of the decision or to examine the criteria, motivations or interpretations expressed by the arbitral tribunal.” *Id.* art. 62, § 2.

92. *Id.*

93. By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having his domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium. CODE JUDICIAIRE [C.JUD.] art. 1718 (Belg.); If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2). *Federal Statute on Private International Law*, SWISSARBITRATION.ORG, https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf (last visited Feb. 13, 2017); Where none of the parties is domiciled, or has its place of business in Sweden, such parties may in commercial relationships through an express agreement exclude or limit the application of the grounds for setting aside an award. *The Swedish Arbitration Act*, UNI-KIEL.DE, <http://www.unikiel.de/leobalt/Datenbank/Schweden/The%20SSwedis%20Arbitration%20Act%20of%201999.htm> (last visited Feb. 13, 2017);

agreement, and neither party is Peruvian nor has its domicile, place of habitual residence or place of main activities in Peru.⁹⁴

Generally, in Peru, the grounds for annulment are applied correctly without an excessive interference by the courts.⁹⁵ However, it should be noted, that there are some instances when the judiciary may apply an excessively high standard upon the arbitrators to justify an annulled arbitral award.⁹⁶ Nonetheless, courts are rather supportive of arbitration. That is why, roughly speaking, only 1% or 2% of awards are annulled, around 20% of the awards are taken to courts to seek annulment, and approximately 10% of them are set aside, totally or partially.

B. *Amparo Action*

The Political Constitution of Peru recognizes that arbitration is a jurisdiction such as the judiciary.⁹⁷ Therefore, it is understood that the arbitrators play the same role as judges.⁹⁸ The Peruvian Constitution includes *amparo* as a remedy for the violation of constitutional rights.⁹⁹ After a series of debates about the scope of the *amparo* in regards to arbitration awards, in the “María Julia” decision, the Constitutional Tribunal held that the annulment action is the specific way to challenge violations of constitutional rights¹⁰⁰ and determined that the *amparo* action is only appropriate in the following instances:

(...) parties may, in part or in full, renounce the right to initiate an action for setting aside the award. A party whose domicile or habitual residence is not in Turkey may renounce that right completely in an express clause in the arbitration agreement or in writing, following the signature of the arbitration agreement. Alternatively, in the same manner, the parties may renounce the above right for one or more of the reasons as set forth above for setting aside the award. LAW NO. 4686 [T.I.A.L.] art. 15 (Turkey); The parties who have neither domicile, principal residence, nor business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award. LAW NO. 93-42 of 1993 (Tunisia Arbitration Code), *al-Jarīdah al-Rasmīyah*, 26 Apr.1993, art. 78(6) (Tunisia).

94. Peruvian Arbitration Law No. 1071 art. 63, § 8 (2008).

95. *Id.* art. 63.

96. *Id.* art. 63(1).

97. POLITICAL CONSTITUTION OF PERU [C.P.] art. 139, § 1.

98. POLITICAL CONSTITUTION OF PERU [C.P.] art. 139, §§ 1-2.

99. POLITICAL CONSTITUTION OF PERU [C.P.] art. 200, § 2.

100. Tribunal Consitucional [T.C.] [Constitutional Court], 28 septiembre 2011, “Sociedad Minera de Responsabilidad Ltda. Maria Julia,” Rol de la causa: 00142-2011-PA/TC, REVISTA PERUANA DE ARBITRAJE [R.P.A.] No. 2 ¶ 20(a) (Peru).

- (i) When the award violates binding precedents of the Constitutional Court.
- (ii) When the arbitrators do not apply a rule declared constitutional by the Constitutional Court.
- (iii) When a third party who is not part of the arbitration clause, sustains the direct violation of his constitutional rights as a consequence of the award.¹⁰¹

It should be noted that *amparo* is an extraordinary resource and is provided for specific cases of violation of constitutional rights.¹⁰² It is clear that under the *amparo* action, the courts cannot resolve the substance of the dispute.¹⁰³

VIII. ARBITRATION WITH THE PERUVIAN STATE

Another interesting aspect of the Peruvian arbitration practice is that it allows for disputes arising from contracts, in which the Peruvian State is a party to be referred to arbitration.¹⁰⁴ In Peru, there is a widespread culture dedicated to the arbitration of public contracts.¹⁰⁵ In fact, there are numerous arbitration institutions, specialized arbitrators, an academic culture, and lawyers who are experts in public procurement disputes.¹⁰⁶ The Peruvian Constitution recognizes that the Peruvian State may submit its disputes to arbitration.¹⁰⁷ The State may submit to arbitration cases involving investment contracts regarding hydrocarbons,¹⁰⁸ public works of infrastructure, public services,¹⁰⁹ and those regarding legal stability agreements¹¹⁰ reached with investors.

101. *Id.* ¶ 21(a–c).

102. POLITICAL CONSTITUTION OF PERU [C.P.] art. 200, § 2.

103. *Id.*

104. Peruvian Arbitration Law No. 1071 art. 4, § 2 (2008).

105. See generally *AlDia*, OSCE, <http://portal.osce.gob.pe/osce/sites/default/files/Documentos/Banner/Enlaces/Revista%20ArbitraAr.pdf> (last visited Feb. 13, 2017).

106. See generally *Instituciones Arbitrales en el Perú*, PERUARBITRAJE.ORG, http://www.peruarbitraje.org/2_1.html (last visited Feb. 13, 2017).

107. “(...) The State and other public corporation may submit controversies arising from their contractual relations to courts specially established by virtue of treaties in effect. They may also submit them to national or international arbitration in the manner provided by law.” POLITICAL CONSTITUTION OF PERU [C.P.] art. 63.

108. Law No. 26221 art. 67–68, Organic Law for Hydrocarbons, Aug. 19, 1993, DIARIO OFICIAL [D.O.] (Perù).

109. Supreme Decree N°059-96-PCM-Single Uniform Text of the Regulations with Force of Law Governing the Granting in Concession of Infrastructure and Utilities Public Works to the Private

Furthermore, since 1998 the State has actually been required to submit to arbitration in all contracts for the acquisition of goods, services, and works (procurement) entered into with contractors, even absent an arbitration clause.¹¹¹ In this way, arbitration is the mandatory mechanism of dispute resolution for procurement contracts. In short, Peruvian provisions on public procurement allow an investor or a contractor to have a neutral forum to assert its claims against the State, and thus circumvent the state courts.

IX. CONCLUSION

In conclusion, the Peruvian Arbitration Law makes it possible to understand that Peru has established an ideal destination for national and international arbitration. The Peruvian courts have a harmonious relationship with and respect for the arbitral tribunal. Additionally, Peru has a vibrant arbitration culture. As such, it is reasonable to conclude that Peruvian arbitration is developed according to the common intention of the parties without the interference or obstruction of judicial power, but rather the full collaboration of its courts.

Sector, PROINVERSION.GOB.PE, http://www.proinversion.gob.pe/RepositorioAPS/1/0/arc/SD_059_96/D%20S%20%2059-96-PCM.pdf (last visited Feb. 13, 2017).

110. Legislative Decree N°757, Nov. 13, 1999, DIARIO OFICIAL [D.O.] (Peru).

111. Law No. 26850 art. 41, July 9, 1997, DIARIO OFICIAL [D.O.] (Peru); Peruvian Arbitration Law No. 1071 art. 40, Sept. 7, 2008, DIARIO OFICIAL [D.O.] (Peru); Law No. 30225 art. 45, Dec. 10, 2015, DIARIO OFICIAL [D.O.] (Peru).

