



THE ARBITRATION AGREEMENT IN PERUVIAN LAW

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I. Introduction

To understand the importance of this concept within the field of arbitration law,¹ it should undoubtedly be pointed out first of all that the origin of arbitration is to be found in the arbitration agreement—which is justified by the principle of free will—without which it will not be possible to find any potential value in it,² or to put it another way, there cannot be any arbitration without an arbitration agreement.³

II. Definition

Although the learned authorities vary as to their definition of the arbitration agreement,⁴ it may be seen as a bilateral legal negotiation outside contract law, providing a procedure for the settlement of a "dispute".⁵ It is therefore a separate legal negotiation which does not lead to the consequences of the contract itself, but rather to the extra-contractual consequences of the "dispute" to which it relates.⁶

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1. For a better understanding of the subject see Antonio María Lorca Navarrete and Carlos Alberto Matheus López, *Tratado de Derecho de Arbitraje* ("A Treatise on Arbitration Law"), Instituto Vasco de Derecho Procesal, San Sebastián, 2003, pp.69 et seq.

2. Carlos Alberto Matheus López, *Tratamiento del Arbitraje en el Sistema Jurídico Peruano* ("Treatment of Arbitration in Peruvian Law"), in *Diritto e Giustizia*, issue 31, Giuffrè, Milano, 2003; a similar view is held by Silvia Gaspar Lera, *El ámbito de Aplicación del Arbitraje* ("The Scope of the Application of Arbitration"), Aranzadi, Pamplona, 1998, p.61.

3. Carlos Alberto Matheus López, *Consideraciones Fundamentales sobre el Arbitraje* ("Fundamental Thoughts on Arbitration"), in *Revista Peruana de Derecho Procesal*, issue 5, Lima, 2003, p.385; similarly Carlos Alberto Matheus López, "Pautas para una Tutela Arbitral del Medio Ambiente en el Sistema Jurídico Peruano" ("Guidelines for Environmental Protection Arbitration in the Peruvian Legal System"), in *Revista de la Corte Española de Arbitration*, Madrid, 2003.

4. Thus for some it is merely a contractual covenant or clause under which the parties may opt for arbitration (Francisco Ramos Méndez, *Enjuiciamiento Civil* ("Civil Procedure"), Vol.II, José María Bosch, Barcelona, 1997, p.1122). Others see it as a contractual stipulation by the parties, according to which they agree to have recourse to arbitration should any conflict arise out of their contract or legal relations (J. Montero Aroca; M. Ortells Ramos; J.L. Gómez Colomer, *Derecho jurisdiccional* ("The law of jurisdiction"), Vol.II, Bosch, Barcelona, 1995, p.846); whereas for others again the agreement creates the arbitration, that is to say, it is the private law contract that forms the basis of the institution (Gaspar, *op. cit.*, p.54).

5. Our General Law of Arbitration uses the term "dispute" [*controversia*] to refer to a legal conflict for which the parties are free to choose a means of settlement, also using—to a lesser degree—the expression "issue".

6. For a different opinion see L. Fernando Reglero Campos, *El Arbitraje (el convenio de arbitraje y las causas de nulidad del laudo en la Ley de 5 de Diciembre de 1998* ("Arbitration (arbitration agreements and grounds of nullity of arbitration awards in the Law of December 5, 1998"), Editorial Montecorvo, Madrid, 1991, p.71. He defines the arbitration agreement as "A contract according to which the parties agree to submit any disputes that arise or may arise from the legal relations specified therein, whether contractual or not ... to the decision of one or more arbitrators"; a similar opinion is expressed by Faustino Cerdón Moreno in *El Arbitraje en el Derecho español: Interno e Internacional* ("Arbitration in Spanish Domestic and International Law"), Aranzadi, Pamplona, 1995, p.57. He points out that "the arbitration agreement, which is a contract, must be distinguished from arbitration itself, which is an institution ..."

It is possible to find a definition of the arbitration agreement⁷ in our current general law of arbitration,⁸ which proves its undoubted status as a form of negotiation⁹ outside the law of contract.¹⁰ Similarly, it makes the laudable suggestion that the arbitration agreement should be adopted as a technically self-sufficient conceptual category, so that the "dispute" can be submitted to the arbitral settlement procedure.¹¹

III. Form

The arbitration agreement contained in our general law of arbitration is characterised by freedom of form, allowing the parties to record it in writing in whatever

manner they see fit,¹² dispensing with the requirement of a public deed.¹³

Similarly, the freedom of form to be used for the arbitration agreement, as adopted by the general law of arbitration, not only allows the parties independence in the way in which it is signed, but also makes it possible to classify the various forms of arbitration accepted by the law.¹⁴

It should further be explained that, while our general law of arbitration lays down a general rule that the arbitration agreement must be in written form,¹⁵ as required *ad solemnitatem* (as a formal condition of its validity), because if it were not the agreement would be void,¹⁶ it will nevertheless be observed that the wording of the general law of arbitration relating to the manner in which the arbitration agreement is to be formalised is highly rigid, inasmuch as it must be in writing, but also extraordinarily flexible and fluid, since it resolves any kind of query relating to written form within the context of the new media of communication.¹⁷ Thus there emerges a new way of interpreting and applying the freedom of form of the arbitration agreement *ad*

7. Thus Art.9 of our GLA states that "The arbitration agreement is a contract according to which the parties agree to submit any disputes that arise or may arise from the legal relations specified therein, whether contractual or not, and whether or not they are the subject of legal proceedings, to the decision of one or more arbitrators ..."

"This Article is apparently derived from Art.7 of the "UNCITL Standard Law on International Commercial Arbitration", which indicates that "the arbitration agreement is a contract according to which the parties agree to submit any disputes, or certain disputes, that may arise or have arisen between them, in respect of specific legal relations, whether contractual or not, to arbitration ..."

8. It should be pointed out that an incipient definition already existed in Art.4 of the 1992 General Law of Arbitration (Decree Law 25935), now repealed. That law, however, made no reference to the extra-contractual character of the arbitration agreement.

9. Thus it can be clearly observed that Art.9 GLA does not allude to the contract but rather to the "agreement by which the parties ..." (my emphasis).

10. For an understanding of the various definitions of the arbitration agreement, which have a bearing on the nature of arbitration, see Matheus López, Carlos Alberto, *Compulsión Crítica entre el Proceso Jurisdiccional y Arbitral en el Sistema Jurídico Peruano* ("A Critical Comparison between the Jurisdictional and Arbitral Process in the Peruvian Legal System") in *Revista de Derecho Internacional and del Mercosur*, issue 4, Buenos Aires, 2003, p.39.

11. Since the 1992 General Law of Arbitration, the old and problematic dichotomy between "Settlement Clause" and "Arbitration Clause" contained in the 1984 Civil Code, which frequently rendered arbitration inoperative, in view of the curbing effect of the "settlement clause" on the initiation of the latter, as a result of which only the "arbitration clause" was appropriate to start up the arbitration process, had been resolved. It should also be indicated that this duality of concept already existed—in a similar way—in the 1912 Code of Civil Procedure, which differentiated between an "Arbitration Covenant" and an "Arbitration Agreement".

12. This freedom was already recognised to some extent in the 1984 Civil Code, Art.1910 of which stated that "The arbitration undertaking must be in writing, failing which it shall be void ..." and subsequently by the 1992 General Law of Arbitration, Art.5 of which—like the present GLA—provided that "The arbitration agreement must be in writing, failing which it shall be void ..."

13. This requirement did exist under the 1912 Code of Civil Procedure, Art.552 of which—relating to arbitration undertakings—stated that "The agreement must take the form of a public deed, failing which it shall be void ..."

14. It is clear that the parties are free to determine in the arbitration agreement the type of arbitration they wish to use, deciding whether the agreement is to be legally binding or a matter of conscience, and whether the arbitration shall be institutional or *ad hoc*.

15. As laid down in the first paragraph of Art.10 GLA, which states that "The arbitration agreement must be in writing, failing which it shall be void ..."

16. A similar opinion is expressed by Reglero, *op. cit.*, p. 184; likewise Cordón, *op. cit.*, p.69.

17. As may be observed from the contents of the second paragraph of Art.10 GLA, where it is stated that "... The arbitration agreement shall be deemed to have been made in writing not only where it is contained in a single document signed by the parties, but also where it is evidenced by an exchange of letters or any other means of communication or correspondence which unequivocally creates a documentary record of the intention of the parties to submit to arbitration ..."

probationem (as evidence of its existence),¹⁸ but not *ad solemnitatem*.¹⁹

18. This significant flexibility in formal requirements may be observed in Comparative Law, in statutes such as the German Law of Arbitration of December 22, 1997—amending Book X of the German Code of Civil Procedure, para.1031 of which states that: “1. The arbitration agreement must be indicated in a document signed by the parties or in an exchange of letters, telexes, telegrams, or any other means of telecommunication capable of proving its existence. 2. The requirement as to form laid down in the preceding paragraph shall be considered to have been fulfilled if the arbitration agreement is recorded in a document which has been sent by one party to the other or by a third party to both parties and which, according to usual commercial practice, is valid as an agreement applicable to the case unless an objection is raised within a certain time limit. 3. A reference in a contract to a document which contains an amicable settlement clause shall be regarded as an arbitration agreement, provided that the said contract shall have been made in the form prescribed in para. 1 or 2 and that the reference is such that it makes the clause a part of the contract (...) 6. Lack of form can be secured with a defence on the legal merits”. Similarly, Art.7 of the Greek Law of International Commercial Arbitration (No.2735/1999 of August 18, 1999) states that: “ ... 3. Arbitration agreements must be in writing and must be recorded in a document signed by the parties or in an exchange of letters or telex communications, or any other means of telecommunication which confirms its existence. The agreement must also be in written form where, in an exchange of written submissions, one containing a claim and the other a reply, one party alleges the existence of an agreement and this is not contested by the other. 4. The arbitration agreement shall be considered to be in due form where a verbal arbitration agreement is recorded in a document sent by one party to the other or by a third party to all the parties and where the contents of the said document, to which no objection has been raised within a reasonable period of time, can be considered as an element of the contract according to the usual commercial practice. 5. A reference in a contract to a document which contains an amicable settlement clause shall be equivalent to an arbitration agreement, provided that the contract is in writing and that the reference is such that it makes the clause a part of the contract (...) 7. Lack of due form may be made good where the parties participate unconditionally in the arbitration process”. Similarly, Art.9 of the Spanish New Law of Arbitration (Law 60/2003 of December 23, 2003)—published in issue No.309 of the *Boletín Oficial del Estado* of 26 de December—states that: “ ... 3. The arbitration agreement must be evidenced in writing, in a document signed by the parties or in an exchange of letters, telegrams, telexes, faxes or any other means of telecommunication which leave a record of the agreement. This requirement shall; be considered to have been fulfilled where the arbitration agreement is recorded and accessible for subsequent consultation in electronic, optic or any other form. 4. Where an arbitration agreement consists of a document to which the parties shall have referred in any of the forms specified in the preceding paragraph, it shall be deemed incorporated in the agreement between the parties. 5. An arbitration agreement shall be considered to exist where, in an exchange of writs of action and reply, such an agreement is claimed to exist by one party and not denied by the other ... ”

19. A similar opinion is expressed by Reglero, *op. cit.*, p.184. He says: “Although it has been said that the

IV. Forms of wording

We can say with regard to forms of wording of the arbitration agreement that, provided it is in writing, there is no unanimous modal definition in our general law of arbitration, but rather that the following variations may be observed:

1. *Arbitration agreement by reference*: this is where it takes the form of a clause—whether or not of a general contractual nature—incorporated in a standard-form contract.²⁰
2. *Uni-documentary arbitration agreement*: where it takes the form of a single document, either in a separate agreement or as a clause incorporated in a principal contract.²¹
3. *Multi-documentary arbitration agreement*: where it is created by an exchange of letters or any other means which creates a documentary record of the parties’ intention to submit to arbitration, abandoning the use of a single deed.²²

On the basis of the foregoing, it should be stated that in the three forms governed by the law, the document, or

purpose of the formal requirements relating to the arbitration agreement is to ensure that the parties are aware that they have submitted to arbitration, in my opinion the fundamental role of the written form is still simply as a means of proof that an arbitration agreement has been entered into”; likewise María del Carmen Gete-Alonso y Calera, *La caracterización del convenio arbitral en la Ley 36/1988 de 5 de diciembre, de Arbitraje* (“Definition of the arbitration agreement in law 36/1988, of December 5, the Law of Arbitration”), *La Ley*, May 2, 1990, p.1041. She indicates that “With regard to the manner in which the requirement of written form is considered satisfied, (...) this has been liberalised (...) The Law has decided to accept the means of communication used in the present-day business world. The only thing that matters is that the evidence of the contractual intention to submit to arbitration should be produced in documentary form, but it does not eliminate the need for form”.

20. This form is governed by Art.11 GLA, the contents of which state that “Without prejudice to the provisions of the preceding Article, arbitration agreements relating to General Contractual Clauses or Standard-Form Contracts shall be enforceable between the parties in so far as the said agreements were or could have been known to the other party by the use of ordinary diligence ... ”

21. Contained in Art.10 (1) GLA, which states that the arbitration agreement “ ... may be in the form of a clause included in the contract or that of a separate agreement ... ”

22. This form is governed by Art.10 (2) and (3) GLA, the contents of which state that “ ... The arbitration agreement shall be deemed to have been made in writing not only where it is contained in a single document signed by the parties, but also where it results from an exchange of letters or some other means of communication or correspondence which unequivocally creates a documentary record of the parties’ intention to submit to arbitration. An arbitration agreement is also deemed to have been made in writing where, although there is no prior agreement, a dispute is submitted on the initiative of one of the parties involved to one or more arbitrators who agree to settle the dispute, subject to the subsequent agreement of the other party or parties to the arbitration”.

documents, in which an arbitration agreement is signed has or have a function *ad probationem*, but not *ad solemnitatem*, which presupposes that, should the original contract be assigned, the assignee will not be bound by his succession to the arbitration agreement, unless he unequivocally expresses his intention to accept it.

Furthermore, although it is an invariable requirement that the agreement must be in writing, the general law of arbitration nevertheless fully recognises the principle of freedom as to the form of the arbitration agreement, which means that the wording it takes is not subject to any specific form *ad solemnitatem* which is necessary to its very existence as an act in the law.²³ Furthermore, as we have observed, it is possible to enter into an arbitration agreement without its being physically signed in a single written document, provided that there is a record, created by any other means of communication or exchange between the parties, of their unequivocal intention to submit to arbitration.

V. Capacity to treat

Since the general law of arbitration makes no mention of the capacity to enter into an arbitration agreement, and bearing in mind the extra-contractual nature of such an agreement,²⁴ we may define its requirements as to capacity as those stated in the Civil Code²⁵: *the capacity to benefit*²⁶ and *the capacity to exercise the right*.²⁷

Similarly, the capacity (to exercise the right) to enter into an arbitration agreement has an indisputable justifying function—to submit the creation, regulation, modification and extinction of legal relations over which the parties have free rights of disposal to an extra-judicial settlement procedure—which makes it possible to indicate the legal status and capacity of the party signing it,²⁸ meaning the legal status of a person capable of

entering into an arbitration agreement in order to obtain a procedural solution in respect of his legal relations and the subject-matter of the dispute, of which he claims to be the owner.

It should therefore be observed that the capacity to exercise the right to enter into an arbitration agreement thereby legally entitles the subject to have access to the settlement of the "dispute" by procedural means.

Furthermore, the proposed means of negotiation—the arbitration agreement—has not changed its position within the ambit of private negotiations, normally being inserted as a contractual clause further into the contract. This, however, will not be an ancillary negotiation clause, since it is an identifiable negotiating concept²⁹ which is separate from the contract in which it is contained.³⁰ This is the reason why the arbitration agreement is not affected by the causes of contractual invalidity and also why any "disagreements" that may arise after the expiry of the contract are included within its scope.³¹

In addition, with regard to the possibility of an agent entering into an arbitration agreement, a distinction should be drawn between statutory and voluntary representation, since the former will require evidence that leave has been granted by the court,³² whereas in the latter an express power of attorney, or subsequent ratification by the principal,³³ will be required.³⁴

Finally, with regard to those persons who are qualified to enter into an arbitration agreement, it should be stated

23. As was the case—as we have seen—under the 1912 Code of Civil Procedure, Art.552 of which required that an "arbitration agreement" be executed as a public deed before a notary.

24. Which, as a form of (bilateral) legal negotiation—must be signed by an *authorised agent* to be valid, according to Art.140 (1) of the Civil Code.

25. A similar criterion is cited by Gaspar, *op. cit.*, p.89.

26. Governed by Art.3 of the Civil Code, which states that "Every person shall be entitled to the benefit of civil rights, save as to the exceptions expressly laid down by the law" (my emphasis)

27. Provided for in Art.42 of the Civil Code, the contents of which state that "All persons over eighteen years of age shall have full capacity to exercise their civil rights, save as provided in Articles 43 (absolute incapacity) and 44 (relative incapacity)" (the words in brackets are mine).

28. It may be concluded from this that the arbitration agreement is a form of legal negotiation in which the extent of the subject's capacity to sign it is legally validated by the settlement of "disputed matters" with a substantive scope similar to those of legal negotiations in civil law, but with the peculiarity that the form of legal negotiations so defined is restricted in purpose to the settlement of "disputes", which makes it admissible as a form of negotiation.

29. A similar view is expressed by Cordón, *op. cit.*, pp.59–60.

30. As laid down by Art.14 GLA, where it says that "The non-existence, termination, rescission, nullity or total or partial voidability of a contract or any other act in the law containing an arbitration agreement does not necessarily result in the non-existence, ineffectiveness or invalidity of the latter ..."

31. A rule also contained in Art.14 GLA, which states that "... The arbitrators shall therefore have power freely to decide the dispute submitted to them, which may even relate to the non-existence, ineffectiveness or invalidity of the contract or act in the law in which the arbitration agreement is contained ..."

32. As indicated in Art.167 of the Civil Code, which stipulates that "Legal representatives shall require express authority to effect the following acts in respect of the principal's goods and property: (...) 3. Enter into arbitration agreements". Similarly, Art.448 states that "Parents shall also require the leave of the Court to effect the following acts on behalf of their children: (...) 3. To enter into compromise agreements, or stipulate amicable settlement or arbitration clauses". On the basis of the same criterion, Art.532 states that "A guardian shall also require the leave of the Court, which shall be granted subject to a hearing by the Family Council, to : 1. Effect the acts specified in Article 448". and, similarly, Art.568 says that "The rules governing general guardianship shall apply to guardianship *ad litem*, subject to the variations laid down in this chapter".

33. As laid down by Articles 155 and 162 of the Civil Code.

34. A similar opinion is expressed by Cordón, *op. cit.*, pp.131–132.

that these may be natural persons or corporate entities; nor can entities³⁵ with no legal personality³⁶ be excluded.

VI. Expression in the arbitration agreement of the unequivocal intention to submit to arbitration

In addition to the provisions previously mentioned, the arbitration agreement must contain an express and unequivocal statement by the parties of their intention to submit to arbitration any dispute or disputes that may arise from their legal relations.³⁷

This must be an unequivocal intention³⁸ with clear *ad probationem* effect, excluding subrogation from its scope. Obviously, being of a highly personal character, it also affects joint and several obligations.

The expression of an unequivocal intention to submit to arbitration is a matter which is concerned with the very existence and extent of such an intention, which means it must reflect the real and positive existence thereof and must be read widely in relation to the rest of the clauses to which the arbitration agreement is made subject, thus providing a factual, rather than legal, assessment of the unequivocal intention to submit to arbitration. At the same time, however, the expression of an unequivocal intention is undoubtedly of legal relevance as an *acto propio*³⁹ consisting of a statement of intention couched in conclusive and unequivocal terms, revealing the attitude of one who wishes—by means of that intention—to enter into an arbitration agreement, thus linking an act of consent intended to express the unequivocal intention to submit to arbitration in the arbitration agreement with the doctrine of estoppel.⁴⁰

35. Although the contents of Art.9 GLA do not refer directly to "natural persons or legal entities", but generally to "the parties".

36. A similar opinion is expressed by Córdón, *op. cit.*, pp.63–64. He says that in his opinion, "there should be no obstacles to allowing such entities to have recourse to arbitration, at least when they act through a person on whom they have conferred express powers of representation ..."

37. The same opinion is expressed by Reglero, *op. cit.*, p.83; likewise Córdón, *op. cit.*, pp.61–62.

38. This requirement may be observed from the rule laid down in Art.10 of the General Law of Arbitration.

(Art.10) "Form of the arbitration agreement—The arbitration agreement must be in writing, failing which it shall be void. It may be in the form of a clause included in the contract or that of a separate agreement. The arbitration agreement shall be deemed to have been made in writing not only where it is contained in a single document signed by the parties, but also where it results from an exchange of letters or some other means of communication or correspondence which unequivocally creates a documentary record of the parties' intention to submit to arbitration ..." (my emphasis).

39. Literally meaning "own act". The doctrine of *actos propios* is approximately equivalent to the English doctrine of estoppel.

40. Antonio María Lorca Navarrete and Carlos Alberto Matheus López, *op. cit.*, pp.85–86.

It will be observed that the creation of an agreement between the parties always requires a positive declaration on their part.⁴¹ For that reason, in the case of agents and those acting under powers of representation, the unequivocal intention to submit to arbitration requires an and specific mandate, although the lack of such a mandate can be subsequently remedied by the principal's ratification. With regard to subrogation—in cases where the contractual position is assigned—an assignee is not bound by an arbitration agreement included in the conditions of the contract, unless there is evidence that the subrogee unequivocally accepted the arbitration agreement.

VII. Expression of the dispute in the arbitration agreement

The subject matter of the arbitration agreement is a present or future dispute, that may arise between the parties on matters they are free to settle by whichever means they wish,⁴² the such a dispute being defined⁴³ by its open nature,⁴⁴ freedom of settlement, the contractual or extra-contractual character⁴⁵ of the dispute and

41. Since, as Córdón rightly points out, *op. cit.*, p. 62. "... I do not think tacit consent is possible in a legal system such as ours, which requires the arbitration agreement to be in written form as a prerequisite for its validity".

42. Likewise Córdón, *op. cit.*, p. 66.

43. These requirements may be observed from the rule laid down in Articles 1 and 9 of the General Law of Arbitration. (Art.1) "General Provision—Any specific or determinable disputes over which the parties have free powers of disposal may be submitted to arbitration (...) this may result in the extinction of existing legal proceedings relating to the said disputes or the prevention of any such proceedings from being instituted ..." (my emphasis).

(Art.9) "Definition of arbitration agreement—An arbitration agreement is an agreement according to which the parties agree to submit any disputes that may arise or have arisen between them, in respect of specific legal relations, whether contractual or not, and whether or not they are the subject of legal proceedings, to arbitration ..." (my emphasis).

44. Since the expression "dispute" enables us to indicate that the objective purpose of the arbitration agreement is not only a legal one, and therefore—because it may also be extra-judicial—it is possible to refer a material or economic dispute for a decision, the interpretation of specific lacunae or the adaptation of a contract [to] fresh circumstances by arbitrators; for a contrary view see Córdón, *op. cit.*, p.67. He states that the "dispute" between the parties "must be understood in the technical legal sense as a disagreement which must be resolved in favour of one of them (...) and must be a legal dispute—not merely material or economic—and real, not fictitious".

45. As we have seen, it is of no consequence whether or not the legal relations to be included in the arbitration agreement are contractual. The important thing is that the dispute need not be of a legal nature.

whether or not it is within or outside the legal procedure⁴⁶ are determined or determinable.⁴⁷

The arbitration agreement clearly has an objective purpose, but not a universal one,⁴⁸ in view of the fact that only such disputes as are determined by the express intention of the parties are comprised in it. It therefore contains two elements: the volitive element of the arbitration agreement, which presupposes that the disputes to be covered by the arbitration agreement are those determined by the express intention of the parties; and the objective element of the arbitration agreement, which presupposes that not all disputes will be covered by the arbitration agreement, but only those which are determined by the express intention of the parties, in the first place, and, which the parties are free to settle according to the law, in the second place, so that total and absolute uncertainty is excluded, although a certain laxity on this point should not represent any obstacle, since the general law of arbitration only appears to require that the legal relations submitted to arbitration should be identifiable on the basis of what is expressed in the actual arbitration agreement, and even then it need not be absolutely specific, but only reasonably or additionally inferable.

It should be stated that it is possible to view the objective purpose of the arbitration agreement from the point of view of the spirit of the law, since the arbitrators are not bound by a literal and restrictive

exegesis, which would turn them away from the task entrusted to them, and may settle not only those disputes which are specified in the arbitration agreement, but also those that should be considered to be involved in it by necessary inference from its wording, or which are a logical or obligatory consequence of those that have been placed before them. In practice, the lack of prescription of any formalities in the general law of arbitration as regards the wording of the arbitration agreement tends to have the result that, although an arbitration agreement may not contain the necessary statement of a specific legal relationship, on the other hand there is no absolute need for that relationship to be identified in it, in view of the lack of formal rules governing its wording, and therefore the legal relationship may be specified subsequently when the arbitration agreement reaches the procedural stage.⁴⁹

VIII. The "pathological" arbitration agreement

We give the name of "'pathological' arbitration agreements"—*clauses pathologiques*⁵⁰—to those which prevent arbitration from taking its normal course because they are defective, imperfect or incomplete. These in turn can be divided into those arbitration agreements which are invalid and those which can be validated. The first type includes those which are not really arbitration agreements at all, inasmuch as they are not designed to lead to arbitration. The second type may be blank or incomplete arbitration agreements inasmuch as they do not provide for the appointment of the arbitrators or specify the type of arbitration required, contain an erroneous reference to an arbitration institution, or mistakenly allude simultaneously to arbitration and legal proceedings (contradictory arbitration agreements), or they may be agreements relating to matters not capable of settlement by arbitration (ambiguous arbitration agreements). A "pathological" arbitration agreement is therefore one which has ambiguous, contradictory, deficient, incomplete or imperfect wording.

It should also be mentioned that the draft general law of arbitration is not listed or closed, and thus may yet

46. Since the dispute—or disputes—to which the arbitration agreement relates may or may not be the subject of legal proceedings.

47. The dispute need not be specifically identified or determined; it is sufficient that it should be determinable. The wording thus contemplates both those disputes that have already arisen (which are determined *per se*) and those that may arise in the future, which can only be determined by the requirement that the legal relations from which they arise must be specified in the arbitration agreement—expressly or by the inclusion of information that enables them to be inferred (For a similar opinion see Córdón, *op. cit.*, p.67).

It is thus demonstrated that an arbitration agreement covering future disputes is entirely feasible (a similar opinion is expressed by Reglero, *op. cit.*, p.87) and also makes it impossible to draw an agreement by which the parties decide to submit to arbitration any disputes that may arise from future legal relations between them (a similar opinion is expressed by Córdón, *op. cit.*, p.67). We must, however, except from this latter rule the situation where all disputes relate to a single legal relationship and those situations, not infrequent in trade, where relations are periodic and continuous, often subject to the rules of commercial practice or standard contractual conditions (a similar opinion is expressed by Reglero, *op. cit.*, p.88).

48. Since one of the purposes of the obligation of the parties to define the legal relations from which the dispute has arisen or may arise is to prevent total and absolute uncertainty, because that would imply a waiver of state jurisdiction in any legal disputes that might arise between private individuals, which would amount to waiving the constitutional right to legal protection, (a similar opinion is expressed by Reglero, *op. cit.*, p.87; likewise Córdón, *op. cit.*, p.67).

49. Antonio María Lorca Navarrete and Carlos Alberto Matheus López, *op. cit.*, pp.91–92.

50. The expression was originally coined by Frédéric Eismann, *La clause d'arbitrage pathologique* ("Defective arbitration clauses") in *Commercial Arbitration—Essays in memoriam Eugenio Minoli*, UTET, Turin, 1974, p.129. It should be pointed out that the majority of French-speaking academics continue to use this term (see Eric Loquin, "De la pathologie des clauses compromissaires" ("Defective amicable settlement clauses"), *Revue Trimestrielle de Droit Commercial et de Droit Economique*, Paris, 1993, p.301; "Des dangers des clauses d'arbitrage pathologiques", ("Dangers of defective arbitration clauses") *Revue Trimestrielle de Droit Commercial et de Droit Economique*, Paris, 1995, p.398; "Clauses compromissaires pathologiques (...) degré zéro.com" ("Defective amicable settlement clauses (...) for beginners.com"), *Revue Trimestrielle de Droit Commercial et de Droit Economique*, Paris, 2001, p.57).

include further different types of defect. Those expressly covered in it include the following:

Non-existent arbitration agreement

In its clearest semantic sense this means an arbitration agreement that does not exist, meaning no such agreement has been entered into.⁵¹ In a broader sense, however, it is assumed that the arbitration agreement does not exist because it does not possess certain of the elements that would give it reality as a legal instrument of negotiation; for example, the absence of an unequivocal expression of intention would render the agreement non-existent. An arbitration agreement is also non-existent where—in an assignment of a contract—the assignee does not unequivocally and formally accept it in writing.

Void arbitration agreement

Unlike a non-existent arbitration agreement, this type does exist, but it contains certain arbitration agreement is likewise non-existent where it should be found in the general conditions of the contract but is not specifically included therein.⁵² Irregularities which render it ineffective either under the terms of the general law of arbitration or outside it.⁵³

A void agreement results from invalid negotiating conditions, which may occur where the signatories to

the arbitration agreement do not possess the requisite legal capacity, or where the parties are not legally free to refer the subject matter of the agreement to arbitration⁵⁴; where the agreement signed is not in the form prescribed by the general law of arbitration—in writing⁵⁵—or where its content is so insignificant or insufficient that it makes arbitration impossible; where an even number of arbitrators is specified,⁵⁶ or where the agreement places one of the parties in a privileged position.⁵⁷

In addition to those that are void, an arbitration agreement is voidable⁵⁸ where it contains certain irregularities that create an appearance of validity which is only refuted when an application is made for a declaration holding it void, and thus the arbitration agreement will remain valid unless and until it is declared void.

It should be noted that both a void and a voidable arbitration agreement create an appearance of valid negotiating conditions *ab origine*; all that happens is that an application for the annulment of the voidable agreement is made by the party for whom its voidability represents an advantage, whereas a void agreement is defined as such by the general law of arbitration itself. A void agreement is therefore a case of invalid negotiating conditions, whereas a voidable agreement is merely threatened with the possibility that the negotiating conditions may be found to have been invalid. For that reason, an award that admits the voidability of an arbitration agreement creates a new legal situation,

51. Contained in Art.39 (2) of our General Law of Arbitration, which states that "A total or partial objection to arbitration on the grounds that the arbitration agreement is *non-existent*, ineffective or void or that there is no agreement to refer the matter in dispute to arbitration should be raised when the parties submit their initial claims ..." (my emphasis). It should further be observed that it is clear from the wording of the law that a non-existent arbitration agreement is not the same thing as an ineffective arbitration agreement, nor is it the same thing as an invalid arbitration agreement.

52. Antonio María Lorca Navarrete and Carlos Alberto Matheus López, *op. cit.*, pp.99–100.

53. A similar opinion is expressed by Reglero, *op. cit.*, pp.235–236. He says: "The causes that may render an arbitration agreement void are substantially the same as those that render any contract void (lack of legal capacity of one of the parties, existence of some defect of consent, agreement signed by a person not expressly empowered to do so, etc.), together with a number of specific causes, such as occurs where the parties are not legally free to refer the subject-matter of the agreement to arbitration (...), where there is no unequivocal evidence of the parties' intention to submit the matter in dispute to arbitration (...), where the specific legal relations to which the arbitration agreement relates are not defined (...), where the agreement has not been made in the requisite legal form (...), where one of the parties is in a privileged position as regards the appointment of the arbitrators ..." (my emphasis).

54. As prescribed by Art.1 of the General Law of Arbitration, which states that "Such specific or determinable disputes as are within the free disposal of the parties may be submitted to arbitration ..."

55. As prescribed by Art.10 of the General Law of Arbitration, which states that "The arbitration agreement must in writing, failing which it shall be void ..."

56. As prescribed by Art.24 of the General Law of Arbitration, which states that "An odd number of arbitrators must be appointed ..."

57. As prescribed by Art.14 (3) of the General Law of Arbitration, which states that "Any stipulation contained in an arbitration agreement which places one of the parties in a privileged position in relation to the other as regards the appointment of the arbitrators, the determination of their number, the matter in dispute or the rules of procedure shall be void".

58. A similar opinion is expressed by Cordon, *op. cit.*, p.127. He says: "The law makes no distinction between the causes that render an agreement void and those that render it voidable, and thus I consider that both are grounds for an application for the agreement to be set aside (...) An agreement will be void where it lacks any of the essential prerequisites that cause the agreement to come into being and voidable where it contains a defect that will only cause it to be declared void on an application by the interested party (e.g. where the consent of one of the contracting parties is defective or insufficient".

whereas one that admits that it is void declares its recognition of an existing one.⁵⁹

Lapsed arbitration agreement

Lapse requires an objective time limit within which the arbitration agreement must be implemented, usually 20 days after the closure of the period allowed for the submission of evidence,⁶⁰ but this does not, of course, exclude the possibility of a different *ad hoc* or standard period.

Lapse, as so understood, is not technically a procedural rule of the arbitration process, but one of the effects the arbitration agreement—a negotiating condition—under which the unequivocal intention of the parties that the arbitration process should be completed within a given period of time must be expressed. At the same time, a lapsed arbitration agreement becomes ineffective inasmuch as the negotiating conditions that justified it are no longer in force.⁶¹

IX. Optional contents of the arbitration agreement

Provision is made for the arbitration agreement to include an optional extension⁶² relating to the appointment of the arbitrators and the determination of the rules of procedure.⁶³ The possibility of appointing the arbitrators and determining the rules of procedure in the arbitration agreement is based on the principle of the free will of the parties, which is foremost in the

general law of arbitration, and on the principle of freedom of form which serves as a basis for the signature of the arbitration agreement by the parties who may wish to have recourse to arbitration. Since there are no formal rules as to the wording of the arbitration agreement, it will not normally refer to the appointment of the arbitrators or the determination of the procedural rules, which may indeed depend on the type of arbitration to be used. That is to say, in a case of *ad hoc* arbitration, it will normally be the parties themselves who decide both details, either at the outset, in the actual arbitration agreement, or subsequently. On the other hand, where arbitration is in the hands of an official institution, neither the appointment of the arbitrators nor the determination of the rules of procedure will normally be included in the arbitration agreement, but will be subject to the arbitration rules of the institution in question. Where arbitration is delegated it will normally be the third party who will appoint the arbitrators, who in turn will lay down the rules of procedure. For that reason these details will not be found in the arbitration agreement.⁶⁴

X. Effects of the arbitration agreement

The arbitration agreement has two fundamental legal effects: the so-called positive effect, consisting of the obligation of the parties to submit to arbitration any disputes that may arise or have arisen from specific legal relations, such as the obligation to abide by the arbitrators' decision; and the so-called negative effect, expressed in the prohibition against the hearing of such matters by the state's organs of jurisdiction.⁶⁵

59. Lorca Navarrete, Antonio María and Matheus López, Carlos Alberto, *op. cit.*, p.102.

60. As prescribed by Art.24 of the General Law of Arbitration, which states that "Unless otherwise provided in the agreement, or the procedural rules, or unless the parties authorise an extension, the arbitration award must be pronounced within twenty (20) days after the closure of the period allowed for the submission of evidence, or the completion of the formalities referred to in Article 34 (1), if there are no facts to be proved, unless the arbitrators consider an additional period necessary; any such period shall in no circumstances exceed fifteen (15) days" (my emphasis).

61. Lorca Navarrete, Antonio María and Matheus López, Carlos Alberto, *op. cit.*, p.105.

62. A similar opinion is expressed by Reglero, *op. cit.*, pp.95 *et seq.*

63. As is apparent from the contents—mainly—of Arts 8, 9, 14 and 33 of the General Law of Arbitration. In that respect, Art.8 of the General Law of Arbitration states that "... Notices sent by cable, telex, facsimile or similar means which create an unequivocal record thereof shall be valid unless otherwise provided in the arbitration agreement or the rules of the arbitration institution ..." (my emphasis). Similarly, Art.9 of the General Law of Arbitration states that, "... The arbitration agreement obliges the parties and their successors in title to do all such things as shall be necessary for arbitration to take place and have full legal effect and for the arbitral award to be complied with. The arbitration agreement may provide for sanctions to be imposed on a party who fails to do something

indispensable to render it effective, to provide security for due compliance with the arbitral award, or to confer special powers on the arbitrators to enforce the award in the event of default by the party thereby obliged ..." (my emphasis). Similarly, Art.14 of the General Law of Arbitration states that "... A stipulation contained in an arbitration agreement which places one of the parties in a privileged position in relation to the other as regards the appointment of the arbitrators, the determination of their number, the matter in dispute or the rules of procedure shall be void" (my emphasis). Article 14 of the General Law of Arbitration also states that "... The parties may agree on the place and the rules to which the relevant process shall be subject. They may also agree that the rules laid down by the arbitral institution to which they entrust the organisation of the arbitration process shall apply" (my emphasis).

64. Antonio María Lorca Navarrete and Carlos Alberto Matheus López, *op. cit.*, p.113.

65. A similar view is expressed by Reglero, *op. cit.*, p.207; likewise Cordón, *op. cit.*, p.71. He says: "The Law distinguishes two ways in which the arbitration agreement has legal effect: a positive effect, consisting of the obligation to submit the settlement of any dispute that may arise between them to the decision of one or more arbitrators, and a negative effect, a consequence of the foregoing, consisting of the removal of the dispute from the jurisdiction of the Courts".

According to our general law of arbitration the contents of the arbitration agreement oblige the parties to abide by the provisions thereof (positive legal effect) and simultaneously debar the courts from hearing disputes that have been submitted to arbitration⁶⁶ provided that the interested party pleads the existence of the arbitration agreement as grounds of objection (negative legal effect).⁶⁷

On the pleading of the arbitration agreement as a defence, the competence of the arbitrators and the "principle of the competence of competence"⁶⁸ (*Kompetenz Kompetenz*) designed to prevent disputes submitted to their "jurisdiction" (meaning that of the arbitrators) from being referred to the courts as a result of any competence that may be attributed to the state's jurisdiction, is reaffirmed on the basis that the arbitrator is competent to decide whether the arbitration agreement is non-existent or void or whether it has lapsed. The final result achieved is that of a purely chronological, positive and non-hierarchical effect, preventing the courts from assuming powers previously excluded by the parties when entering into the arbitration agreement, and

rendering any proceedings in the courts or before administrative authorities legally void.⁶⁹

XI. Waiver of the arbitration agreement

It may be observed that there are various possible ways, both by negotiation and by procedure, of waiving an arbitration agreement. Consequently a distinction should be made between an express and a tacit waiver.⁷⁰

We should first look at waiver from the point of view of negotiation, since the general law of arbitration provides that the parties may by "mutual agreement" render the arbitration agreement they have signed ineffective, or waive the arbitration agreement, which comes to the same thing.⁷¹ It should be observed that the legislator does not disguise his intention to treat the arbitration agreement as a form of legal negotiation, since the words he uses are that the parties may waive it "by negotiation", so that there is a clear intention to treat agreement and negotiation as the same thing.⁷²

Similarly, a waiver of an arbitration agreement may be seen as an implied intention to submit to the jurisdiction of the state, which has an undoubted procedural effect,⁷³ inasmuch as it gives access to "the due process" of the civil courts, the final result basically being procedural through the arbitration-trial process and more particularly with an essentially procedural institution such as

66. A similar view is expressed by José Luis González Montes, "La Excepción de Arbitraje" ("The Defence of Arbitration"), *La Ley*, May 2, 1990, p.1160. He says: "In general terms it may be said that the negative effect that results from the arbitration agreement is represented by the exclusion of the exercise by the Courts of their powers over its subject-matter. From that point of view, I must agree with those of the learned authorities who see this as a defence related to the subject-matter of the proceedings".

67. As may be observed from the provisions of Arts 9 and 16 of the General Law of Arbitration. Thus Art.9 states that "... The arbitration agreement obliges the parties and their successors in title to do all such things as shall be necessary for arbitration to take place and have full legal effect and for the arbitral award to be complied with" (my emphasis). Article 9 in turn provides that "Where a legal action is brought in connection with a matter reserved for the arbitrators' decision under the terms of the arbitration agreement or the settlement of which has already been submitted by the parties to that decision, that fact may be pleaded as a defence consisting of the existence of the arbitration agreement within the time limit laid down in each case ..." (my emphasis). Similarly, we must harmonise these provisions with Arts 446(13) and 451(5) of the Code of Civil Procedure. These respectively state that "The defendant may raise only the following objections: (...) 13. Arbitration agreement ... " and "Once a decision allowing one of the objections listed in Article 446 has been accepted or become absolute, the writ of objection is annexed to the principal writ and has the following effects: (...) 5. Annulment of the procedure so far and conclusion of the proceedings in the case of an objection pleading the existence of (...) an arbitration agreement".

68. Which also has two functions, positive and negative. First, it enables the arbitrators themselves to make the decision regarding their competence (positive effect). Secondly, it will be noted that although the arbitrators make the decision regarding their competence, that decision may thereafter be subject to judicial review (negative effect).

69. Lorca Navarrete, Antonio María and Matheus López, Carlos Alberto, *op. cit.*, pp.114-115.

70. As may be observed from the wording of Art.15 of the General Law of Arbitration, which states that "The parties may waive the right to arbitration by express agreement. An implicit waiver shall be deemed to exist where an action has been brought by one of the parties and the defendant does not plead the arbitration agreement as grounds of objection within the time limit laid down in each case".

71. Although certain authors point out that in this case the expression "waiver" is technically incorrect, because "technically, where the parties decide by mutual agreement to cancel a previous agreement, they are not waiving anything, since waiver is always a unilateral act in the law. What we are referring to here is really a mutual withdrawal (...) by means of which a previously existing contract is extinguished by agreement between the parties" (Gete-Alonso y Calera, *op. cit.*, p.1037).

72. As may be observed from Art.15(1) of the General Law of Arbitration, where it says that "The parties may waive the right to arbitration by express agreement ..." (my emphasis).

73. As confirmed by Art.15(2) of the General Law of Arbitration, which says that "... An implicit waiver shall be deemed to exist where an action has been brought by one of the parties and the defendant does not plead the arbitration agreement as grounds of objection within the time limit laid down in each case" (my emphasis).

the tacit submission defined by Art.15(2) of the general law of arbitration.⁷⁴

It is not possible to arrive at the procedural view of waiver of the arbitration agreement as provided by the general law of arbitration, unless we start from the premise that the arbitration agreement must be seen as a bilateral form of legal negotiation. Unlike the latter, however, waiver of an arbitration agreement depends exclusively on the willingness of one of the parties, who on the way encounters a bilateral response—procedural, not legal—from the defendant. The procedural aspect of waiver therefore implies that one of the signatories to the arbitration agreement is acting as plaintiff by virtue of the mere act of bringing proceedings in the state courts or before a state administrative authority.⁷⁵

Finally, it should be understood that an express waiver of an arbitration agreement—like withdrawal or suspension—may be effected at any point during the arbitration process, although this must be done before the arbitrators give notice of their decision.⁷⁶

XII. The arbitration agreement in international arbitration

We shall now examine the specific rules governing international arbitration in the Peruvian general law of arbitration, and the peculiarities of arbitration agreements at that level.

1. Rules of international arbitration

It should first of all be pointed out that the Peruvian general law of arbitration uses a dual system, in that its rules distinguish between national arbitration—section one—and international arbitration—section two—and that the wording has also been partially adopted in the UNCITL Model Law on International Commercial Arbitration.

Similarly, although international arbitration is undoubtedly “stateless”,⁷⁷ owing to its supranational character, our general law of arbitration expressly sets out the legal rules thereof in the second section, also incorporating the existing international rules on its contents.⁷⁸

In its turn, Art.91 of our law—adopted in full in Art.1(3) of the UNCITL Model Law—determines the scope of application of international arbitration, or (which comes to the same thing) when arbitration proceedings should be considered “international”.⁷⁹

Thus, the rules on international arbitration contained in our law do not conflict, but rather converge, with those contained in the international treaties that form part of

74. The contents of Art.15(2) of our General Law of Arbitration are therefore laudable in that, as a requirement—of a negative type—for tacit waiver, they stipulate the non-exercise by the defendant of the right to plead the arbitration agreement, since in other laws (such as the current Spanish Law of Arbitration—Law 36/1988) it is made a requirement—of a positive type—that the defendant should use another legal procedure rather than pleading that objection. This has given rise to a discussion, which does not exist in our law, as to whether, where the defendant combines an objection on grounds of an arbitration agreement with other means of defence—procedural or on the legal merits—submission to the courts is implied (a similar view is expressed by Cordón, *op. cit.*, p.75).

75. Lorca Navarrete, Antonio María and Matheus López, Carlos Alberto, *op. cit.*, p.123.

76. A similar opinion is expressed by Reglero, *op. cit.*, p.221. It should likewise be mentioned that this interpretation—since the rule governing waiver does not stipulate a time limit—is mainly based on the wording of Articles 15 and 43 of the General Law of Arbitration, which respectively state that “The parties may waive the right to arbitration by express agreement ...” and that “the parties may withdraw from the arbitration procedure at any time up to the moment when the arbitral decision is pronounced, by mutual agreement and provided that they notify the arbitrators accordingly. They may also suspend the procedure for such period as they may mutually agree ...” (my emphasis).

77. Thus Art.88 of the Peruvian General Law of Arbitration—adopting the style of Art.1.1) of the UNCITL Model Law on International Commercial Arbitration—establishes that “The provisions of this Section shall apply to international arbitration, without prejudice to any multilateral or bilateral convention currently in force in the Republic”.

78. Lorca Navarrete, Antonio María and Matheus López, Carlos, *op. cit.*, p.747.

79. Thus Art.88 of the Peruvian General Law of Arbitration—adopting the style of Art.1. 1) of the UNCITL Model Law on International Commercial Arbitration—establishes that “The provisions of this Section shall apply to international arbitration, without prejudice to any multilateral or bilateral convention currently in force in the Republic”.

79. In that respect, Art.91 of the Peruvian General Law of Arbitration states that “Arbitration is international where: 1. At the moment when an arbitration agreement is signed, the parties thereto have their places of residence for legal purposes in different States; or 2. One of the following places is outside the State in which the parties are legally resident: a) The place of arbitration, if determined in or pursuant to the arbitration agreement; b) The place of performance of a substantial proportion of the obligations under the relevant legal relations or the place with which the subject-matter of the dispute is most closely associated. For the purposes of this Article, if either of the parties has more than one legal address, his address shall be that most closely associated with the arbitration agreement; if one of the parties has no legal address, his usual place of residence shall be taken into account”.

Peruvian law on the subject, as they do—in particular⁸⁰—in the case of the New York Convention of June 10, 1958, on the recognition and execution of foreign arbitral decisions—unconditionally approved by Legislative Resolution No.24810 of May 12, 1988,⁸¹ the Panama Convention of January 30, 1975, on international commercial arbitration—approved by Legislative Resolution No.24924 of November 7, 1988—and the Montevideo Convention of May 8, 1979, on the extra-territorial efficacy of foreign arbitral decisions and awards—approved by Decree Law No.22953 of March 26, 1980.

The Peruvian laws on the recognition (by exequatur order) and (compulsory) execution of foreign arbitral awards is found in Arts 127,⁸² 128⁸³ and

129⁸⁴ of the general law of arbitration and the legislation contained in the New York, Panama and Montevideo Conventions.

It should further be mentioned that, with regard to investments, Peru has signed the 1985 Seoul Convention or Multilateral Investment Guarantee Agreement (MIGA)—approved by Legislative Resolution No.25312 of April 2, 1991, the 1965 Washington Convention, on the resolution of disputes relating to investments between states and nationals of other states ("ICSID")—approved by Legislative Resolution No.26210 of July 2, 1993, the 1992 Washington Convention, on investment incentives between the governments of Peru and the United States (OPIC)—approved by Legislative Resolution No.26187 of

80. Since there are other international arbitration conventions, to which Peru is a party, such as the 1878 Lima Convention—approved by Legislative Resolution of January 29, 1879, the 1889 Montevideo Convention on International Law—approved by Legislative Resolution of October 25, 1889, the 1911 Convention on the Execution of Foreign Judgments, approved by Legislative Resolution of October 22, 1915, and the 1928 Private International Law Code—approved by Legislative Resolution No.6442 of December 31, 1928.

81. Peru has not adopted any of the reservations contained in the text of the New York Agreement, under which awards made in any state, including states which are not parties to the Agreement, can be executed in this country, owing to the non-exercise by Peru of the "reciprocal reservation of rights", so that the New York Agreement is universally applicable in this country (Lorca Navarrete, Antonio María and Matheus López, Carlos Alberto, *op. cit.*, pp.619-620).

82. Which states that "An arbitration agreement, whatever the country in which it is made, shall be recognised as binding and, on submission of a written application to the Civil Division of the High Court within whose jurisdiction the defendant's address at the date of submission thereof is situated, or, where the defendant has no address within the territory of the Republic, that of the place where he has his property and assets, shall be executed in accordance with the provisions of this Section. The party seeking recognition of the award must submit the original award or a copy thereof, and the original agreement or a copy thereof. Where the award or agreement is not drawn in Spanish, the party must produce a Spanish translation of the said documents. In either case, the provisions of Article 96 shall apply".

83. The text of which states that "The Inter-American Convention on International Commercial Arbitration of 30 January 1975 or the Convention on the Recognition and Execution of Foreign Arbitral Decisions of 10 June 1958, or any other convention on the recognition and execution of arbitration awards to which Peru is a party, shall apply to the recognition and execution of arbitration awards made outside the national territory, whatever the date thereof, subject to the limitation periods prescribed in Peruvian law and to the fulfilment of the requirements for the application thereof. The convention to be applied shall, unless otherwise agreed between the parties, be that which is most favourable to the party applying for the recognition and execution of the arbitration award, without prejudice to the provisions of Article 129".

84. Which states that "This Article shall apply in the absence of any convention, or even where one exists, if the provisions hereof are more favourable to the party applying for the recognition and execution of the arbitration award, subject to the limitation periods prescribed in Peruvian law. The recognition or execution of an arbitration on an ex parte application, whatever the country in which it was made, shall only be refused where it is proved: 1. That one of the parties to the arbitration agreement was under some legal incapacity, or that the said agreement was not valid under the law to which the parties expressed it to be subject, or where there was no indication in that respect under the laws of the country in which the arbitral decision was given; or 2. The party against whom the arbitration award is pleaded has not received due notice of the appointment of an arbitrator or of the arbitration proceedings or has been unable, for any other reason, to exercise his rights; or 3. The award relates to a dispute not provided for in the arbitration agreement or contains decisions which go beyond the terms of the arbitration agreement. Nevertheless, where the provisions of the award which relate to the matters submitted to arbitration can be separated from those which do not, the former may be recognised and executed; or 4. The composition of the arbitration tribunal or the arbitration procedure was not in accordance with the agreement between the parties or, where no such agreement exists, with the law of the country where arbitration took place; or 5. The award is not yet binding on the parties or has been set aside or suspended by a Court in the country in which, or under the laws of which, the award was made. The High Court may also refuse recognition or execution where it is proved that, according to the laws of the Republic, the subject-matter of the dispute is not capable of being submitted to arbitration or the award is contrary to international public policy".

May 17, 1993—and the Bilateral Agreements for the Reciprocal Promotion and Protection of Investments (BITs⁸⁵).

2. International arbitration agreements

It may be stated that in international arbitration, the origin of the arbitration process lies in the arbitration agreement, the conceptual reality of which, as set out in Art.98⁸⁶ of our law, is no different from what Art.2 of the New York Agreement calls the "settlement agreement" or what Art.1 of the Panama Convention calls the "agreement".

It will furthermore be observed from the contents of Art.98⁸⁷ of our law and Arts 1⁸⁸ and II 2⁸⁹ of the Panama Convention respectively, that it is established as a general rule that arbitration agreements must be in writing, and it is also possible—in addition to agreements incorporated in a single document—for an arbitration agreement to be recorded in more than one document.

With regard to the effects of the arbitration agreement—particularly the so-called "negative arbitration agreement"—Art.99⁹⁰ of the law, which makes it possible to

85. Peru has entered into Bilateral Agreements for the Reciprocal Promotion and Protection of Investments with: Germany (approved March 31, 1995—Decree Supreme. 08-95-RE), Argentina (approved December 14, 1994—D.S. 28-94-RE), Australia (approved January 22, 1996—D.S. 003-96-RE), Bolivia (approved March 9, 1994—D.S. 03-94-RE), China (approved June 11, 1994—D.S.22-94-RE), Chile (approved August 14, 2000—D.S. 026-2000-RE), Colombia (approved June 20, 1994—D.S. 015-94-RE), Cuba (approved December 9, 2000—D.S. 039-2000-RE), Denmark (approved January 6, 1995—D.S. 03-95-RE), Ecuador (approved August 5, 1999—D.S. 043-99-RE), Spain (approved January 6, 1995—D.S. 01-95-RE), El Salvador (approved July 11, 1996—D.S. 025-96-RE), Finland (approved May 12, 1995—D.S. 15-95-RE), France (approved March 9, 1994—D.S.04-94-RE), Italy (approved June 20, 1994—D.S. 17-94-RE), Korea (approved March 19, 1994—D.S. 07-94-RE), Malaysia (approved November 2, 1995—D.S. 27-95-RE), Norway (approved May 3, 1995—D.S. 14-95-RE), Netherlands (approved January 6, 1995—D.S.02-95-RE), Portugal (approved January 10, 1995—D.S. 05-95-RE), Paraguay (approved March 9, 1994—D.S. 06-94-RE), United Kingdom (approved March 9, 1994—D.S. 05-94-RE), Czech Republic (approved April 8, 1994—D.S. 09-94-RE), Romania (approved June 20, 1994—D.S. 18-94-RE), Sweden (approved June 20, 1994—D.S. 16-94-RE), Switzerland (approved July 2, 1993—RES. LEG. 26209), Thailand (approved July 2, 1993—RES. LEG. 2609) and Venezuela (approved February 6, 1996—D.S. 04-96-RE).

86. Art.98 of this Law—the essential basis of Art.7 of the UNCITL Model Law on International Commercial Arbitration—states that "An arbitration agreement is an agreement by which the parties decide to submit to arbitration certain, or any, disputes that may arise, or have arisen, between them in connection with a specific contractual or non-contractual legal relationship. Arbitration agreements may take the form of a clause included in a contract or a separate agreement. Arbitration agreements must be in writing. An arbitration agreement shall be deemed to be in writing where it is recorded in a single document signed by the parties or in an exchange of letters, cables or telexes forming a documentary record of the agreement or in an exchange of writs containing a statement of claim and a reply in which the existence of an arbitration agreement is claimed by one party and is not denied by the other. A reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement provided that the contract is recorded in writing and the reference implies that the said clause forms part of the contract".

87. In that respect, Art.98, para.2 of the Peruvian General Law of Arbitration states that: "An arbitration agreement shall be deemed to be in writing wherever it is recorded in a single document signed by the parties or in an exchange of letters, cables or telexes forming a documentary record of the agreement or in an exchange of writs containing a statement of claim and a reply in which the existence of an arbitration agreement is claimed by one party and is not denied by the other ... " (my emphasis).

88. Thus Art.1 of the Panama Convention states that " ... The relevant agreement must be recorded in the document signed by the parties or in the exchange of letters, telegrams or telex message" (my emphasis).

89. Art.II 2. of the New York Agreement in turn alludes to a "settlement clause included in a contract or an agreement, signed by the parties or contained in an exchange of letters or telegrams".

90. The text of which states that "Where a legal action is brought in relation to the subject-matter of an arbitration agreement, the existence of the latter may be pleaded as a defence within the time limit specified for each form of action, and the judge must order the parties to submit to arbitration, unless it is proved that the said agreement is clearly void, according to the law to which the parties have agreed to submit, or in the absence of any such agreement the law of the place where the contract was made, or that the subject-matter is within the exclusive jurisdiction of the Courts of the Republic or is contrary to international public policy. Nevertheless, where the arbitration agreement complies with the formalities and requirements laid down in this Section, the defence cannot be set aside on those grounds. Where the matter has already been submitted to the arbitrators for examination, the judge must uphold the defence of existence of an arbitration agreement, unless the subject-matter is within the exclusive jurisdiction of the Courts of the Republic or is contrary to international public policy. Where an action such as that referred to in the preceding paragraph has been brought, it shall nevertheless be possible to institute or pursue arbitration proceedings and give a decision therein at any time while the matter remains pending in the Courts. Where the parties to a legal action voluntarily enter into an arbitration agreement, Article 17 shall apply and the judge shall not be empowered to object to the agreement, unless the subject-matter is within the exclusive jurisdiction of the Courts of the Republic or is contrary to international public policy."

plead an arbitration agreement as a defence, is particularly important. Similarly, our law allows both *ad hoc*⁹¹ and institutional⁹² arbitration.

Finally, we should not forget that the arbitration agreement in international arbitration rests on the principle of free will. Hence the only limit to the principle of free will enshrined in the arbitration

agreement lies in the due observation of the "principle of legality", which makes it obligatory to submit it to a specific jurisdiction.

In that respect, Arts V.1(a) of the New York Agreement and 5.1(a) of the Panama Convention provide that an arbitration clause can only be signed "pursuant to *the law applicable to them* [the parties]".

91. As is clear from the contents of (basically) Arts 101, 105, 108, 109 and 111 of the Peruvian General Law of Arbitration.

92. As is clear from the contents of Arts 93 (3) and (4), 94 (1), 102 and 103 of the Peruvian General Law of Arbitration.