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Aims & Scope

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A Comparative Analysis of the Setting Aside of Arbitral Awards from a Peruvian Perspective

CARLOS A. MATHEUS LÓPEZ*

*Party Autonomy – Effective judicial protection – Dispositive principle –
Arbitral award – Setting aside of arbitral awards – Grounds for annulment –
Consequences of annulment – Waiver of annulment remedies*

I. Foundations and limits

Party autonomy, effective judicial protection, and the dispositive principle constitute grounds and limits of an annulment, as well as the arbitration itself. We will analyze them below.

A. Party Autonomy

The Peruvian Civil Code of 1984 includes the principle of party autonomy in its articles 2095 and 2096, indicating respectively, that “*The contractual obligations are governed by the law expressly chosen by the parties and, failing that, by the law of the place of its fulfillment. However, if they must be fulfilled in different countries, they are governed by the law of the main obligation and, if this cannot be determined, by the law of the place of signing. If the place of fulfillment is not expressly determined or does not result unequivocally from the nature of the obligation, the law of the place of signing applies*”, and that: “*The applicable law, in accordance with the provisions of article 2095, determines the mandatory rules that apply and the limits of the party autonomy of the parties.*”

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It should be noted that party autonomy is the source of the arbitration,¹ which through the arbitration agreement gives rise to it, also allowing the parties to design the arbitration process according to their needs,² although according to certain limits, which are subject to jurisdictional control – generally – *ex post*.

Furthermore, from an economic perspective, party autonomy increases the efficiency of the arbitration, since the parties that have multiple options are better able to allocate their resources and attend to their needs.³ Likewise, the power of the parties to choose the law applicable to their contract involves an efficient approach to the problem of choice of law, since individuals are supposed to be rational maximizers of their own well-being and have personal knowledge about their preferences that no one else can access.⁴

Similarly, the jurisprudence of the Peruvian Constitutional Court tells us that “*Arbitration is an activity whose decisions have the particularity that they are built on party autonomy (...) To begin from a basic level, the origin of the power of the judges comes from the people. In this sense, Article 138 of the 1993 Charter, to dispel all doubts, indicates that said power “is exercised by the Judicial Power.” Meanwhile, the authority of the arbitrators comes from the will of the parties, who, by appointing them to decide a dispute, invest them with authority.*”⁵ In addition, “*to the extent that the arbitration procedure is based on*

¹ Similarly, Ana Fernández Pérez, ‘Contornos de la Autonomía de la Voluntad en la Configuración del Arbitraje’ (2013) 3 Arbitraje: Revista de Arbitraje Comercial y de Inversiones 844, states that: “The principle of party autonomy, it should be emphasized, is the foundation of the institution of arbitration and stands as a fundamental principle in the globalized world, in which it aspires to its own role, defining new legal realities and new conflict resolution procedures through the harmonization of the interests at play.”

² Similarly, Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 315, states that: “Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration”; in this sense Franco Ferrari & Friedrich Rosenfeld, ‘Límites a la Autonomía de las Partes en Arbitraje Internacional’ (2017) 2 Arbitraje: Revista de Arbitraje Comercial y de Inversiones 337, state that: “This party autonomy is not only the source of all adjudicatory authority of an arbitral tribunal, but also allows the parties to decide how that adjudicatory authority should be exercised.”

³ Similarly, Xandra Kramer & Erlis Themeli, ‘The Party Autonomy Paradigm: European and Global Developments on Choice of Forum’, in Vesna Lazić & Steven Stuij (eds), *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural* (Asser Press/Springer 2017) 32.

⁴ Similarly, Giesela Ruhl, ‘Party Autonomy in the Private International Law of Contracts. Transatlantic Convergence and Economic Efficiency’, in Eckart Gottschalk, Ralf Michaels, Giesela Ruhl & Jan von Hein (eds.), *Conflict of Laws in a Globalized World* (Cambridge University Press 2009) 176-177.

⁵ Order of the Peruvian Constitutional Court of March 1, 2018, Grounds for Magistrate Espinosa-Saldaña Barrera’s Vote, File N° 02275-2013-PA/TC LIMA. Available at <https://www.tc.gob.pe/jurisprudencia/2018/02275-2013-AA%20Resolucion.pdf>.

*the party autonomy, the rights to justice are not applied with the same intensity as they do in judicial processes.”*⁶

B. Effective judicial protection

A party opting for arbitration, is not renouncing the right to effective judicial protection,⁷ but is substituting – voluntarily – the person who must provide it.⁸ The guarantees that make up effective judicial protection in arbitration are controlled through the remedy of annulment.⁹

In this regard, the Twelfth Complementary Provision of the Peruvian Arbitration Law (PAL) indicates that “*For the purposes of the provisions of paragraph 2 of article 5 of the Constitutional Procedural Code, it is understood that the annulment of the award is a specific and suitable way to protect any constitutional right threatened or violated in the course of the arbitration or in the award.*”

Similarly, according to the jurisprudence of the Peruvian Constitutional Court, “*The annulment recourse provided for in Legislative Decree No. 1071, which regulates arbitration and, for temporary reasons, appeals and annulment resources for those processes subject to the General Arbitration Law (Law No. 26572), constitute specific procedural channels, equally satisfactory for the protection of constitutional rights, which determine the inadmissibility of the*

⁶ Judgment of the Peruvian Constitutional Court of September 21, 2011, Grounds for Judge Urviola Hani’s Vote, File N° OOI42-2011-PA/TC LIMA. Available at <https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.pdf>.

⁷ Similarly, José Carlos Fernández Rozas, ‘Arbitraje y Jurisdicción: Una Interacción Necesaria para la Realización de la Justicia’ (2005) 19 *Derecho Privado y Constitución* 78, states that: “The arbitration agreement does not involve the parties waiving the fundamental right to judicial protection, that is, the right to go to the judges and courts does not disappear at any time, it even becomes a guarantee for the parties at all times.”

⁸ In this sense, Fernández Pérez (n 7) 849, states that: “The effective protection of legitimate rights and interests is applicable in any area, including arbitration”; similarly, María Pérez-Ugena Coromina, ‘Garantía del Derecho a la Tutela Judicial Efectiva en los Sistemas Principales de Resolución de Conflictos Alternativos: Arbitraje y Mediación’ (2014) 1 *Estudios de Deusto* 185, states that: “We must understand that the arbitration process itself includes the mechanisms to guarantee the effective judicial protection that must be exercised by the parties.”

⁹ Similarly, Fernández Rozas (n 13) 72, states that: “Once said route has been chosen, this only means that the settlement of the disputed issues must be reached through the arbitrator’s decision, and that access to the legally established jurisdiction (...) will only be the annulment recourse of the arbitration award, and not any other ordinary process in which it is possible to re-raise the merits of the dispute as previously discussed in the arbitration process.”

amparo in accordance with article 5, paragraph 2, of the Constitutional Procedural Code, except for the exceptions established in this judgment".¹⁰

II. Nature of the annulment remedy

It should be noted that the so-called annulment recourse has a *sui generis* nature, which we will address below.

A. Not a recourse

Although the PAL calls it "annulment recourse",¹¹ this figure does not constitute a recourse, as it is not a procedural act by which a procedural instance is opened *ad quem*, so that a different court can examine the prosecution carried out by the procedural instance *a quo*.¹²

Furthermore, it does not have a devolutive effect, understood as the attribution of competence for the recourse to be heard by a different and higher court to the one that issued the challenged decision.¹³

It may be added that it is not a remedy or recourse without devolutive effect, since it is not reviewed by the court that issued the decision – which, in this case, is an arbitral tribunal.

¹⁰ Judgment of the Peruvian Constitutional Court of September 21, 2011, Twentieth Foundation, File N° OOI42-2011-PA/TC LIMA. Available at <https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.pdf>.

¹¹ Article 62 of the PAL states that: "1. Against the award only an annulment recourse can be filed. This recourse is the only way to challenge the award and is intended to review its validity for the grounds strictly established in Article 63. 2. The appeal is resolved by declaring the validity or nullity of the award (...)."

¹² Similarly, Antonio María Lorca Navarrete, *La Anulación de Laudo Arbitral. Una Investigación Jurisprudencial y Doctrinal sobre la Eficacia Jurídica del Laudo Arbitral* (Instituto Vasco de Derecho Procesal 2008) 55, states that: "There is no reason to equate the arbitration award to the judgment, and so that the arbitration award -as well as the judgment- can be filed as a recourse (...) technically, the request for annulment of the arbitration award is not a recourse."

¹³ In this sense, Antonio María Lorca Navarrete & Carlos Alberto Matheus López, *Tratado de Derecho de Arbitraje* (Instituto Vasco de Derecho Procesal 2003) 473, states that: "The request for annulment of the arbitration award is not a typical devolutive recourse in the manner of the LEC (Ley de Enjuiciamiento Civil) appeal, since the '*tantum devolutum*' as a consequence of the '*quantum appellatum*' does not respond to the design of functional competence in the LEC. In order to proceed with the execution of the *devolutum*, the arbitrator is not functionally competent but rather a state court."

B. Autonomous Petition and Process

The so-called “annulment recourse”¹⁴ is actually an autonomous petition that has a challenging character¹⁵ – of the extrinsic validity of the arbitration award¹⁶ –, whose purpose is to control the correct effective judicial protection in the arbitration.¹⁷ In this regard, article 62, paragraph 1, of the PAL tells us that the annulment of the award “... is intended to review its validity for the reasons specifically established in article 63.”

Furthermore, this autonomous petition and the subsequent jurisdictional process have the following characteristics:

First, it is an autonomous process that takes place in a single instance.¹⁸

Second, the request for annulment is declarative in nature.¹⁹ In this regard, Article 62, paragraph 2, of the PAL tells us that “The recourse is resolved by declaring the validity or nullity of the award ...”

Third, as we have seen before, this process does not admit multiple jurisdictional instances, and it is not possible to speak of a tribunal *a quo* as opposed to a tribunal *ad quem*.

¹⁴ It should be noted that, given that the PAL is inspired on the Model Law, it follows -in essence- the denomination used by the latter in its article 34, which refers to “*Recourse to a court against arbitral award.*”

¹⁵ Similarly, Lorca & Matheus (n 23) 402, state that: “There is technically no procedural instance of ‘recourse’ but rather a lawsuit for annulment of the arbitration award that can only be processed through the procedures that the LA (Ley de Arbitraje Española) classifies as ‘annulment recourse’.”

¹⁶ In this sense, José Fernando Merino Merchán, ‘Principio Dispositivo y Acción de Anulación’ (2017) 3 Arbitraje: Revista de Arbitraje Comercial y de Inversiones 788, states that: “it is a claim to challenge the extrinsic validity of the award.”

¹⁷ Similarly, Lorca & Matheus (n 23) 407, state that: “The request for annulment of the arbitration award basically fulfills a guarantee function: it guarantees that the arbitration is procedurally correct in accordance with essential principles that allow obtaining effective judicial protection.”

¹⁸ Similarly, Merino (n 26) 788, states that: “in turn, it gives rise to an independent and new process before the competent jurisdictional courts”; in this sense, Lorca (n 22) 57, states that: “What begins is a process to challenge the validity of the arbitration award as a ‘first and only instance’ that would imply that, before the request for annulment of the arbitration award, there is no jurisdictional court activity.”

¹⁹ Similarly, Lorca (n 22) 139, states that: “We are not in the presence of an appeal, but rather before a request for annulment of an arbitration award that is carried out through a ‘*sui generis*’ declarative process – which is nevertheless declarative – before a collegiate court that hears it in the first and only instance”; in this sense Lorca & Matheus (n 23) 402, point out that “the so-called ‘annulment recourse’ must be understood as a lawsuit for a declaration of annulment of the arbitration award based on the reasons established by the LA (...).”

Fourth, the request for annulment does not affect the merits of what was decided by the arbitral tribunal.²⁰ According to article 62, paragraph 2, of the PAL “... *It is prohibited [for the Court] under responsibility, to make pronouncements on the merits of the controversy or on the content of the decision or to qualify the criteria, motivations or interpretations presented by the arbitral tribunal.*”

Fifth, the request for annulment – as a rule – does not have suspensive effect. With this view, article 66, paragraph 1, of the PAL tells us that “*The filing of the recourse of annulment does not suspend the obligation to comply with the award or its arbitration or judicial execution, except when the party challenging the award requests the suspension and complies with the requirement of the guarantee agreed by the parties or established in the applicable arbitration regulations.*”

III. Grounds for annulment

We can classify the various grounds for annulment included in the PAL into three groups. The first one, which because it affects the contractual aspect of arbitration – the arbitration agreement –, we will call *in negotio*. A second one, linked to the procedural aspect of arbitration – to the effective judicial protection –, which we will call *in procedendo*. And a third one, related to international public policy.²¹

On the other hand, it should be noted that – given the global convergent rules of arbitration²² – these grounds coincide with those of article 34,

²⁰ In this sense, Merino (n 26) 788, states that: “always based on what was decided by the arbitrators without going into the merits of what was resolved by them.”

²¹ Similarly, Albert Jan Van den Berg, ‘Should the Setting Aside of the Arbitral Award be Abolished?’ (2014) 2 ICSID Review 267-268, classifies the grounds for annulment – of the Model Law – in the following manner “(a) Validity of arbitration agreement. This category includes: consent; written form; content of agreement; scope. (b) Due process. This category includes: equal treatment and the ability of a party to present its case. (c) Excess of authority regarding relief sought. This category includes an award in excess of or different from what is claimed. (d) Irregular constitution of the arbitral tribunal. This category includes: a constitution of the tribunal in violation of the applicable arbitration rules and, possibly, arbitration law; lack of impartiality and independence of the arbitrator. (e) Irregular procedure. This category includes a violation of the applicable arbitration rules and, possibly, arbitration law. (f) Arbitrability (dispute is capable of settlement by arbitration). This category comprises arbitrability *ratione materiae* and *ratione personae*. (g) Public policy. This category essentially relates to ‘the forum State’s most basic notions of morality and justice’.”

²² In this sense, Vladimir Pavic, ‘Annulment of Arbitral Awards in International Commercial Arbitration’, in Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch

paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) – by which the PAL is inspired – and of article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).²³

A. Grounds in negotio

The grounds for annulment *in negotio* are the following:

First, the ground of pathological arbitration clause, included in article 63, paragraph 1, subparagraph a), of the PAL, states that “The award may only be annulled when the party requesting the annulment alleges and proves: (...) That the arbitration agreement is non-existent, null, voidable, invalid or ineffective.”²⁴

Pathological arbitration clauses – *clauses pathologiques*²⁵ – are those that, due to defective, imperfect or incomplete conditions, prevent the normal development of arbitration. And, in this sense, they do not fulfill one or more of the four basic functions – according to Eisemann²⁶ – of any arbitration agreement: 1) Produce mandatory effects for the parties; 2) Exclude the intervention of state courts in the solution of controversies, at least before the award of the arbitration award; 3) Grant the arbitral tribunal the power to resolve disputes that may arise between the parties; and, 4) Allow the establishment of a procedure developed in

(eds.), *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2010) 132, states that: “lawyers who engage in arbitration have developed a sort of converging terminology and helped the creation of a converging legal environment in which arbitration takes place.”

²³ Similarly, Pietro Ortolani, ‘Article 34. Application for Setting Aside as Exclusive Recourse against Arbitral Award’, in Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez & Michael Polkinghorne, *UNCITRAL Model Law on International Commercial Arbitration. A Commentary* (Cambridge University Press 2020) 859, states that: “The pro-arbitration rationale underlying the Model Law requires that judicial review of arbitral awards be limited to a small number of well-defined situations. Consistently with this approach, the drafters used the New York Convention as a source of inspiration, indicating the situations listed in article V of the Convention as grounds for setting aside and introducing only a few adaptations.”

²⁴ This converges with that of article 34(2)(a)(i) of the Model Law and also converges with article V(1)(a) of the New York Convention.

²⁵ The expression corresponds originally to Frédéric Eisemann, ‘La Clause d’Arbitrage Pathologique’, in Association Italienne pour L’arbitrage, *Arbitrage Commercial – Essais in Memoriam Eugenio Minoli* (Unione Tipografico-Editrice Torinese 1974) 129.

²⁶ In this sense, Davis Benjamin, ‘Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria’ (1991) 4 *Arbitration International* 365-366.

the best conditions of efficiency and speed for the issuance of an arbitration award susceptible of judicial execution.²⁷

In international arbitration, according to article 63, paragraph 5, of the PAL, this cause “*will be assessed according to the rules chosen by the parties to govern the arbitration agreement, by the legal rules applicable to the substance of the controversy or by the Peruvian law, whichever is more favorable to the validity and effectiveness of the arbitration agreement.*”

Such provision converges with a consequence of the principle of separability of the arbitration agreement, that is, that the law that governs the arbitration agreement may be different from the law that governs the main contract. As a consequence, the concept of separability implies the possibility that the arbitration agreement is governed by a law other than the one that regulates the main contract, although in the absence of express choice of the parties, this will depend on the assessment of the location criteria, which will generally be the same as the main contract.²⁸

Second, the ground of violation of the objective scope of the arbitration agreement, included in article 63, paragraph 1, subparagraph d), of the PAL, prescribes that “*The award may only be annulled when the party requesting annulment allege[s] and proves: (...) [t]hat the arbitral tribunal has ruled on matters not submitted to its decision.*”²⁹

This ground, evidently, refers to the objective scope – or *ratione materia* – of the arbitration agreement, which is exceeded by the arbitration award issued, which violates the principle of congruence either in an *ultra-petita* or *extra-petita*³⁰ way. The assumption of incongruity *infra petita*³¹ remains out of the scope of this ground.

²⁷ For a better understanding of the subject see Carlos Alberto Matheus López, *La Extensión del Convenio Arbitral a Partes No Signatarias* (Instituto Vasco de Derecho Procesal 2018) 11-16.

²⁸ For a better understanding of the subject see Matheus (n 37) 24-25.

²⁹ This converges with that of article 34(2)(a)(iii) of the Model Law and also converges with article V(1)(c) of the New York Convention.

³⁰ Similarly, Lorca (n 22) 84, indicates with regard to this ground that “In the origin of the annulment of the arbitration award, there is an ‘*error in negotio*’ that, once produced, causes an *extrapetita* or *ultrapetita* inconsistency in the arbitration award, either because it was resolved in the arbitration award on what was not requested to be resolved, or because it was resolved in the arbitration award on what could not be resolved.

³¹ Similarly, Jonathan Hill, ‘Claims that an Arbitral Tribunal Failed to Deal with an Issue: The Setting Aside of Awards under the Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration’ (2018) 3 *Arbitration International* 393, points out that, a contrary interpretation is “controversial – it flies in the face of the wording of the provision in question – and there seems to be no reported case in which an *infra petita* award has

Third, the ground for ruling on non-arbitrable matters in domestic arbitration, included in article 63, paragraph 1, subparagraph e), of the PAL, indicates that “*The award may only be annulled when the party requesting the annulment alleges and proves: (...) [t]hat the arbitral tribunal has ruled on matters that, according to the law, are manifestly not susceptible to arbitration, in the case of a national arbitration.*”³²

This ground evidences³³ the violation of the objective scope – or *ratione materiae* – of the arbitration agreement, but this time due to the absence of arbitrability of the controversy. Arbitrability is understood as that condition of the dispute that makes it susceptible to arbitration and that is linked to its private rights.

Fourth, the ground for expiration of the term to render the award, included in article 63, paragraph 1, subparagraph g), of the PAL, indicates that “*The award may only be annulled when the party requesting the annulment alleges and proves: (...) [t]hat the controversy has been decided outside the period agreed by the parties, provided for in the applicable arbitration regulations or established by the arbitral tribunal.*”

This ground, in fact, is already contained in the one – which we will see later – of non-observance of the requirements and formalities requested for in the appointment of the arbitrators or in the development of the arbitral procedure. This is because when the arbitral tribunal exceeds the term to render the award, “*the arbitral procedure does not adjust to the agreement between the parties or the applicable arbitration regulations.*” This means that the time span of the arbitration, established by the parties in the arbitration agreement,

ultimately been set aside”; similarly, Pavic (n 32) 139, states that: “Without any doubt, acting beyond ‘terms of the submission to arbitration’ would cover situations where the award goes beyond the requests for relief actually submitted or grants something different (*ultra petita* or *extra petita*) (...) An award which does not address all submissions of the parties (*infra petita*) does not provide reason for annulment in the Model Law system.”

However, it should be noted that, during the drafting of the Model Law, the Working Group also considered incorporating this assumption as a ground for annulment, see *Note by the Secretariat: Model Law on International Commercial Arbitration: Draft Articles 37 to 41 on Recognition and Enforcement of Award and Recourse against Award (A/CN.9/WG.II/WP.42)* – of 25 January 1983 –. Available in <https://undocs.org/en/A/CN.9/WG.II/WP.42>.

³² This converges with that of article 34(2)(b)(i) of the Model Law and also converges with Article V(2)(a) of the New York Convention.

³³ Similarly, Lorca (n 22) 84, states that: “In both cases, the annulment of the arbitration award only affects the objective scope of the arbitration agreement. They allude to both the objective projection not included in the arbitration agreement, and that which is included in the arbitration agreement but not subject to arbitration.”

has expired, and therefore, also the competence of the arbitral tribunal to act as such and to decide the dispute.³⁴

Fifth, the ground for ruling on non-arbitrable matters in international arbitration, included in article 63, paragraph 1, subparagraph f), of the PAL, prescribes that “*The award may only be annulled when the party requesting the annulment alleges and proves: (...) [t]hat according to the laws of the Republic, the object of the controversy is not susceptible to arbitration (...)*.”³⁵

As mentioned before, regarding the equivalent ground in domestic arbitration, it could be added that – obviously – each national legal system will determine, in its own way, what is arbitrable³⁶ or not in its own territory.³⁷

B. Grounds in procedendo

The grounds for annulment *in procedendo* are the following:

First, the ground of lack of proper notice or failure to present the case, included in article 63, paragraph 1, subparagraph b), of the PAL, indicates that “*The award may only be annulled when the party requesting annulment alleges and proves: (...) [t]hat one of the parties has not been duly notified of the appointment of an arbitrator or the arbitral procedure, or has not been able for any other reason, to assert their rights.*”³⁸

³⁴ In this sense, Lorca & Matheus (n 23) 446, state that: “The request for annulment of the arbitration award pronounced after the deadline is justified in an “*error in negotio*” since the term set to pronounce the arbitration award must be inevitably respected, because it is the period of time during which the parties voluntarily renounce (contractually) the jurisdictional exercise of their differences, and endow the arbitrator with decision-making powers, after which the power of the same ceases, for having exceeded the term limits, and nullifies any untimely arbitration activity.”

³⁵ This converges with that of article 34(2)(b)(i) of the Model Law and also converges with Article V(2)(a) of the New York Convention.

³⁶ Similarly, Redfern, Hunter, Blackaby & Partasides (n 8) 138, states that: “Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policies.”

³⁷ Similarly, Andrew Rogers, ‘Arbitrability’ (1994) 3 *Arbitration International* 263-264, states that: “The restrictions on arbitrability rest on twin concepts imposed by the courts. First, it is accepted that certain disputes, by reason of their very character, fall to be determined by the courts and are inappropriate for arbitral decision. Secondly, there is the requirement that disputes be determined in accordance with certain mandatory obligations of the municipal law. The two concepts are related in that a principal reason for requiring determination by the courts was the perception that only a court could correctly interpret public law, particularly a statute, relating to the dispute and give effect to it in accordance with the wishes of the national Parliament.”

³⁸ This converges with that of article 34(2)(a)(ii) of the Model Law and also converges with article V(1)(b) of the New York Convention.

The “proper notice” converges with the guarantees of the effective judicial protection in the arbitration, this being a basic presupposition of the arbitration,³⁹ since as indicated in article 34, paragraph 2, of the PAL, it is necessary to “*treat the parties with equality and give each one of them sufficient opportunity to assert their rights*”. For this reason the “proper notice” – according to the party autonomy⁴⁰ or, alternatively, according to article 12 of the PAL – enables the exercise of the defense, and its absence equals failure to present the case. It is also necessary to make two additional clarifications.

First, this “proper notice” must not only be made on the occasion of “the appointment of an arbitrator” or “of the arbitral procedure”, but with respect to any arbitration action, “for any other reason.”⁴¹ And second, improper notice is not *per se* ground for annulment, but only when it has prevented a party from “asserting their rights.” Therefore, if despite the defective notice, such communication is corrected later, said party will not be able to allege this cause.⁴² All of this also converges with the waiver of the right to object, contained in article 11 of the PAL.⁴³

Second, the ground of non-observance of the requirements and formalities required for the appointment of arbitrators or in the development of arbitral procedure, included in article 63, paragraph 1, subparagraph c), of the PAL, prescribes “*The award may only be annulled when the party requesting the annulment alleges and proves: (...) [t]hat the composition of the arbitral tribunal or the arbitral procedure have not been adjusted to the agreement between the parties or to the applicable arbitration regulations,*

³⁹ Similarly, Ortolani (n 33) 873, states that: “Notice plays an important role to ensure the fairness of arbitration, since the Model Law allows the arbitral proceedings to take place even if one of the parties does not actively participate in them. In order for fundamental rights to be respected, hence, it is crucial that every party was duly informed about the existence of the proceedings and the possibility to participate in them.”

⁴⁰ Similarly, Pavic (n 32) 138, states that: “The adequateness of notice is checked against the rules that the parties have agreed upon – usually those are the rules of a particular arbitration institution, or some model rules. Failing such choice, notice has to be in compliance against the rules of the *lex arbitri*.”

⁴¹ Similarly, Lorca (n 22) 92.

⁴² Similarly, Pavic (n 32) 138, states that: “The fact that the notice has been inadequate is not in itself a reason for annulment. Rather, omission is checked against the effects it has produced and becomes relevant only if it prevented a party from presenting the case. If the subsequent notice cures the initially defective communication, a party may not invoke this ground.”

⁴³ This states that: “If a party knowing, or should know, that a rule of this Legislative Decree from which the parties may depart, or an agreement of the parties, or a provision of the applicable arbitration rules, have not been observed or have been violated, continues with the arbitration and does not object to its non-compliance as soon as possible, it will be considered that the party in question waives their right to object to the award due to said circumstances.”

unless said agreement or provision were in conflict with a provision of this Legislative Decree from which the parties could not deviate, or in the absence of said agreement or regulation, which have not been adjusted to the provisions of this Legislative Decree.”⁴⁴

This ground contains two sub-grounds that lead to the annulment of the arbitration award, justified in the breach of the agreement of the parties – direct or indirect⁴⁵ – with respect to “the composition of the arbitral tribunal”⁴⁶ or “the arbitral procedure.”⁴⁷ However, the annulment is appropriate when said agreement violates the mandatory rules of the PAL on the composition of the arbitral tribunal and development of the arbitral procedure. And, in the absence of said agreement – direct or indirect –, said composition and development must comply with the provisions of the PAL, and if otherwise, it also generates the annulment of the award.⁴⁸ We thus observe that the two sub-grounds relate to the will to disobey the procedural rules established for the composition of the arbitral tribunal or for the arbitral procedure.⁴⁹

Regarding the first sub-ground, it should be noted that “the composition of the arbitral tribunal” refers to various aspects of the positive and negative capacity of the arbitrator. Thus, for example, positive capacity requires, among others, that – according to article 20 of the PAL – the arbitrator be a natural person, that he is in “full exercise of his civil rights, and that he does not have “incompatibility to act” as such. Therefore, the violation of any of these three requirements will generate the annulment of the arbitration award. And with regard to negative

⁴⁴ This converges with that of article 34(2)(a)(iv) of the Model Law and also converges with article V(1)(d) of the New York Convention.

⁴⁵ It would be direct in the case of *ad hoc* arbitration, in which the parties involved establish said agreement, either in the arbitration agreement or in a subsequent act, while it would be indirect in the case of institutional arbitration, in which the parties agree to apply the rules of the arbitral institution.

⁴⁶ Similarly, Ortolani (n 33) 884, states that: “The parties have the possibility to agree on the mode of constitution of the tribunal, either expressly or implicitly (by referring to a set of arbitration rules regulating the composition of the tribunal).”

⁴⁷ Similarly, Ortolani (n 33) 885-886, states that: “The parties are free to shape the arbitral procedure in accordance with their needs and preferences. In practice, it is relatively unlikely, even for sophisticated commercial actors, to conclude an agreement which delves into the details of the procedure to be followed in the arbitration. More realistically, agreements on procedure are usually reached with the incorporation (by reference) of a set of arbitration rules in the clause.”

⁴⁸ Similarly, Pavic (n 32) 140, states that: “the arbitration does not exist in a legal vacuum and the parties enjoy their freedom precisely because a legal system allowed it. Consequently, their freedom is checked by the mandatory rules of the applicable law, *i.e. lex arbitri*. When party stipulations are contrary to such rules, arbitrators may safely disregard them and apply rules of the *lex arbitri* instead.”

⁴⁹ Similarly, Lorca (n 22) 110.

capacity, *inter alia*, this requires – in accordance with article 28, paragraph 1, of the PAL – that the arbitrator be and remain “independent and impartial.”⁵⁰ Therefore, in the event that one or more of the members of the arbitral tribunal is dependent and / or partial,⁵¹ the award will be annulled.

In relation to the second sub-ground, it should be specified that “the arbitral procedure” refers to the affectation of the established procedural rules, an irregularity that must be opportunely objected, due to the operation of the waiver of the right to object contained in article 11 of the PAL. But such an irregularity – according to article 34, paragraph 2, of the PAL – must affect the basic procedural guarantees, such as – *inter alia* – hearing, contradiction and equality, generating a failure to present the case and a specific damage derived from said violation.⁵² Therefore, in the event that an arbitration award does not address the relevant issues – factual and legal – raised by the parties, nor is it reasonably sufficient and understandable for them, the arbitral tribunal would not have complied with the duty to state reasons established in article 56, paragraph 1, of the PAL,⁵³ thus proceeding with the annulment of the award.⁵⁴

⁵⁰ For a better understanding of the subject in the field of International Commercial Arbitration, see Carlos Alberto Matheus López, *La Independencia e Imparcialidad del Árbitro* (Instituto Vasco de Derecho Procesal 2009) 175-274. And, for a deeper understanding within the field of International Investment Arbitration, see Carlos Alberto Matheus López, *La Independencia e Imparcialidad del Árbitro en el Sistema Ciadi* (Instituto Vasco de Derecho Procesal 2013) 1-22.

⁵¹ For a better understanding of the circumstances that affect the independence and impartiality of arbitrators see Carlos Alberto Matheus López, *Independence and Impartiality of Arbitrators: A Comparative Perspective*, in Qiao Liu & Wenhua Shan (eds.), *China and International Commercial Dispute Resolution* (Brill/Nijhoff 2016) 99-127. And, to understand a practical model for managing the independence and impartiality of arbitrators, see Carlos Alberto Matheus López, *Independence and Impartiality of Arbitrators*, in Larry A. Dimatteo, Marta Infantino & Nathalie M.-P. Potin (eds.), *The Cambridge Handbook of Judicial Control of Arbitral Awards* (Cambridge University Press 2020) 12-28.

⁵² Similarly, Lorca (n 22) 113-116; likewise, Pavic (n 32) 140, states that: “there may be instances in which the agreement of the parties has been frivolous, or was not frivolous but its non-observance has not affected the case and the final outcome. It would not be prudent to treat such infractions as sufficient reason to annul the entire proceedings and wipe out the tribunal’s efforts in reaching the final award. Therefore, the irregularity invoked has to be the one which might have affected the final decision.”

⁵³ This tells us that “*Reasons for every award should be stated, unless the parties have agreed otherwise or it is an award made under the terms agreed by the parties in accordance with Article 50 (...)*.”

⁵⁴ Similarly, Hill (n 41) 397-398.

C. Ground of international public policy

On the other hand, the ground of an award being in conflict with international public policy, is included in article 63, paragraph 1, subparagraph f), of the PAL, which indicates that “*The award may only be annulled when the party requesting annulment alleges and proves: (...) the award is in conflict with international public policy, in the case of an international arbitration.*”⁵⁵

Public policy is an indeterminate legal concept⁵⁶ of an impermanent and flexible nature, which has two divisions, a procedural one – Procedural Public Policy,⁵⁷ which affects procedural guarantees during the development of

⁵⁵ This converges with that of article 34(2)(b)(ii) of the Model Law and also converges with article V(2)(b), of the New York Convention.

⁵⁶ However, some arbitration laws define what is public policy in their territory, as is the case of article 37, paragraph 2, of the Malaysian Arbitration Law of 2005 – amended in 2006 –, which states that “*Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where — (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred — (i) during the arbitral proceedings; or (ii) in connection with the making of the award.*”

⁵⁷ In this sense, Jack Beatson, ‘International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts’ (2017) 2 *Arbitration International* 188, states that: “Procedural public policy involves impartiality, independence and party equality (...), and possibly also the absence of fraud”; similarly, Nathalie Voser & Anya George, ‘Revision of Arbitral Awards’, in Pierre Tercier editor, *Post Award Issues* (Juris Publishing 2011) 63, state that: “Cases of procedural fraud are not so problematic, as they fall under the heading of procedural public policy and therefore constitute a ground for setting aside the award”; in this sense, Pierre Mayer & Audley Sheppard, ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 2 *Arbitration International* 256, state that: “An example of procedural public policy is the requirement that tribunals be impartial. Other examples of breaches of procedural public policy that are cited include: the making of the award was induced or affected by fraud or corruption; breach of the rules of natural justice; and the parties were on an unequal footing in the appointment of the tribunal. It may also be a breach of procedural public policy to enforce an award that is inconsistent with a court decision or arbitral award that has res judicata effect in the enforcement forum”; similarly, Hill (n 41) 395, states that: “It is widely assumed that the principles of natural justice are part of public policy; the twin pillars of natural justice – *audi alteram partem* (the ‘hearing’ rule) and *nemo iudex in causa sua* (the ‘bias’ rule) – may legitimately be regarded as fundamental in a public policy sense”; in this sense Michael Hwang & Kevin Lim, *Corruption in Arbitration Law and Reality*, in Michael Hwang, *Selected Essays on International Arbitration* (Academy Publishing 2013) 715, referring particularly to corruption, states that: “The international condemnation of corruption has never been more pronounced. The body of legal rules and authorities that have emerged over the past two decades make it almost inconceivable for any court to now deny that corruption contravenes international public policy, perhaps even transnational public policy.”

arbitration actions – and a material one – Material Public Policy,⁵⁸ which affects the merits of the decision contained in the arbitration award.⁵⁹ The application of public policy must be subsidiary and exceptional compared to the other grounds for annulment of the award.⁶⁰

Now, both article 63, paragraph 1, subparagraph f), of the PAL – related to the annulment of the award – and article 75, paragraph 3, subparagraph b), of the PAL⁶¹ – related to the recognition and enforcement of the award –, refer to “international public policy”. And since this last notion applies to both cases, the recognition and enforcement of an award may be denied for the same reason that justifies its annulment.

In order to define this phrase, it should be remembered that in international arbitration, according to private international law, the conflict rule may refer to (or the parties may choose to apply) a foreign law, whose material content could generate harmful effects on the Peruvian legal system. For this matter, International Public Policy that protects the fundamental principles of our regulations is necessary.⁶² Its purpose is to allow the state judge to annul – or deny the recognition and execution – of an award that

⁵⁸ In this sense Mayer & Sheppard (n 68) 256, states that: “An example of a substantive fundamental principle is the principle of good faith and prohibition of abuse of rights (especially in civil law countries). Other examples that are cited by courts and commentators include: *pacta sunt servanda*; prohibition against uncompensated expropriation; and prohibition against discrimination”; similarly, Inae Yang, ‘A Comparative Review on Substantive Public Policy in International Commercial Arbitration’ (2015) 2 Dispute Resolution Journal 51, states that: “Substantive grounds offered for objection have included payments of excessive interest or costs, violations of Islamic legal principles, violations of competition laws, violations of bankruptcy rules, violations of consumer protection laws, foreign exchange controls, illegal contracts, foreign policy, and the principle of comity.”

⁵⁹ Similarly, Ortolani (n 33) 893, states that: “From the substantive point of view, the concept of public policy should be relied upon with extreme caution to rule out the risk of *révision au fond*: the contents of an award should thus only be considered in conflict with public policy if they are incompatible with some of the most basic and fundamental principles of the State where the arbitration is seated. From the second point of view (‘procedural’ public policy), an award should only be set aside in case of serious violations of due process and the parties’ right to be heard.”

⁶⁰ Similarly, Ortolani (n 33) 892-893, states that: “Public policy is a notoriously porous notion and can in principle encompass both substantive and procedural aspects; in any event, however, it must be interpreted strictly and invoked only if exceptional circumstances are present.”

⁶¹ This indicates that “*the recognition of a foreign award may also be denied if the competent judicial authority verifies: (...) b. That the award is contrary to international public policy.*”

⁶² Similarly, Alfonso-Luis Calvo Caravaca & Javier Carrascosa González, *Derecho Internacional Privado* (Editorial Comares 2014) 525, define International Public Policy as “The exception to the normal functioning of the conflict rule, through which we discard the application of the foreign law that is contrary to the fundamental principles of the law of the country (...) which guarantees the legal cohesion of that country’s society.”

contradicts the fundamental principles of the social system of our country⁶³, although it is limited to the violation of fundamental principles of the legal system and seeks to safeguard the fundamental moral, economic, social and political interests of the country where the annulment, or the recognition and execution⁶⁴ of the arbitration award is requested.⁶⁵

IV. Analysis of the grounds

According to the dispositive principle, and the provisions of article 63, paragraph 1, of the PAL, the grounds for annulment must be raised by one of the parties for the purpose of being analyzed and resolved by the court.

For systematic purposes,⁶⁶ we can point out that the following grounds must necessarily be raised at the request of a party:

- Pathological arbitration clause (article 63.1.a of the PAL)
- Violation of the objective scope of the arbitration agreement (article 63.1.d of the PAL)
- Expiration of the term to render the award (article 63.1.g of the PAL)

⁶³ Similarly, Giuditta Cordero-Moss, ‘International Arbitration is Not Only International’, in Giuditta Cordero-Moss editor, *International Commercial Arbitration Different Forms and their Features* (Cambridge University Press 2013) 20; in this sense, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (United Nations 2016) 240, states that: “Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundamentals on which it is based.”

⁶⁴ Similarly, Mayer & Sheppard (n 68) 254, states that: “The body of principles and rules comprising international public policy should be those of the enforcement State.”

⁶⁵ Similarly, Julian D. M. Lew, *Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals* (CEU Ediciones 2018) 20; in this sense, Cordero-Moss (n 74) 21, states that: “public policy is usually defined by reference not to the legal system, but to basic notions of morality and justice, features essential to the moral, political or economic order of the country or to fundamental notions of morality and justice.”

⁶⁶ It should be remembered that article 63, paragraphs 1, 3 and 6, of the PAL, follows the structure of article 34, paragraph 2, subparagraphs a) and b), of the Model Law. In this sense, Ortolani (n 33) 865, states that: “there is also another important difference, concerning the role of party impulse in the setting-aside proceedings. Under letter (a), an award may only be set aside if ‘the party making the application furnishes proof’ about one of the grounds set forth in this part of the provision. The burden of proof, hence, is expressly placed on the applicant, and all powers of ex officio investigation and assessment by the court are expressly ruled out. Conversely, pursuant to letter (b), the award may be set aside if ‘the court finds that’ the subject matter of the dispute is not arbitrable, or the award is contrary to public policy.”

- Lack of proper notice or failure to present the case (article 63.1.b of the PAL)
- Failure to comply with the requirements and formalities required for the appointment of arbitrators or in the development of the arbitral procedure (article 63.1.c of the PAL)

And in turn, in accordance with article 63, paragraphs 3 and 6, of the PAL, the court may examine *ex officio* – even when they have not been raised by a party – the following causes:⁶⁷

- Ruling on non-arbitrable matters in national arbitration (article 63.1.e of the PAL)
- Ruling on non-arbitrable matters in international arbitration (article 63.1.f of the PAL)
- Conflict with international public policy (article 63.1.f of the PAL).

V. Formal requirements

The PAL establishes various formal requirements for filing the annulment appeal, depending on the grounds on which it is based.

First, according to article 63, paragraph 2, of the PAL, in the case of the following grounds, there must be a claim filed opportunely before the arbitral tribunal by the affected party, and it must have been rejected:

- Pathological arbitration clause (article 63.1.a of the PAL)
- Lack of proper notice or failure to present the case (article 63.1.b of the PAL)
- Failure to comply with the requirements and formalities required for the appointment of arbitrators or in the development of the arbitral procedure (article 63.1.c of the PAL)
- Violation of the objective scope of the arbitration agreement (article 63.1.d of the PAL)

Second, according to article 63, paragraph 4, of the PAL, when it comes to the cause of expiration of the term to render the award (article 63.1.g of the PAL), the affected party must state its claim unequivocally in writing before the arbitral tribunal and its behavior in subsequent arbitral procedures must not be incompatible with said claim.

⁶⁷ Similarly, Pavic (n 32) 141, states that: “While other grounds for review are examined only if raised by the party requesting annulment, a court will *ex officio* check whether the matter was arbitrable or if the award runs contrary to public policy.”

Third, according to article 63, paragraph 7, of the PAL, the annulment of the award will not proceed if the cause invoked was able to be corrected by means of a request for rectification, interpretation, integration or exclusion of the award, and the interested party did not comply with requesting it.

This last requirement applies – as appropriate – to all the grounds for annulment and, particularly, to those relating to rulings on non-arbitrable matters in domestic arbitration (article 63.1.e of the PAL), to rulings on non-arbitrable matters in international arbitration (article 63.1.f of the PAL) and to conflicts with international public policy (article 63.1.f of the PAL).⁶⁸

VI. Consequences of annulment

In accordance with the provisions of article 65 of the PAL, the consequences of the annulment of the award vary depending on the ground.

First, if it is annulled on the ground of a pathological arbitration clause (article 63.1.a of the PAL⁶⁹), the dispute that was the subject of arbitration may be brought before the competent court,⁷⁰ unless otherwise agreed by the parties.

Second, if the award is annulled due to lack of proper notice or failure to present the case (article 63.1.b of the PAL), the arbitral tribunal must restart the arbitration from the moment the violation of the right of defense was committed.⁷¹

⁶⁸ For example, in the case of an arbitration award that ruled on claims A, B and C, with C being of a non-arbitrable character. Given this, the party should have requested the exclusion of the part of the award relating to claim C. If the arbitral tribunal does not agree to its request, then the party may later request the annulment.

⁶⁹ It should be noted that Emergency Decree No. 020-2020 modified the PAL, adding to this subparagraph the following text “In arbitrations in which the Peruvian State intervenes as a party, any of the parties are empowered to request the replacement of the arbitrator that they appointed, following the same rules that determined their appointment; or, where appropriate, request the challenge of the arbitrator or arbitrators who issued the annulled award. In this case, the term to file a challenge is activated without admitting a norm or agreement to the contrary”. For an understanding of the poor technical construction of this modification, see Carlos Alberto Matheus López, ‘Apuntes Críticos a las Recientes Modificaciones al Decreto Legislativo que Norma el Arbitraje en el Perú’, (2020) 2 *Revista Vasca de Derecho Procesal y Arbitraje* 269-270.

⁷⁰ Similarly, Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2017) 222, states that: “If the award was vacated because the court held that the arbitration agreement itself was invalid, then, assuming there is no time bar, the prevailing party should be able to initiate a court action on the same issues.”

⁷¹ Sharing this criteria Moses (n 81) 222, states that: “If the award is vacated because of some major procedural irregularity, however, the question is whether the case will be remitted to the

Third, in the event of an annulment due to non-observance of the requirements and formalities required for the appointment of the arbitrators or in the development of the arbitral procedure (article 63.1.c of the PAL), the parties must proceed to a new appointment of arbitrators or, accordingly in this case, the arbitral tribunal must restart the arbitration from the point at which the agreement of the parties, the regulation or the applicable rule were not observed.

Fourth, if the award is annulled due to a violation of the objective scope of the arbitration agreement (article 63.1.d of the PAL), the matter not submitted to arbitration may be the subject of a new arbitration, if it were contemplated in the arbitration agreement. Otherwise, the matter may be brought before a court, unless otherwise agreed by the parties.

Fifth, if it is annulled by a ruling on non-arbitrable matters in national arbitration (article 63.1.e of the PAL), the matter not susceptible to arbitration may be brought before the courts.

Sixth, if it is annulled due to the expiration of the term to render the award (article 63.1.g of the PAL), a new arbitration may be initiated. Nevertheless, the parties could agree to appoint a new arbitral tribunal so that on the basis of the proceedings it may resolve the controversy. Or, in the case of domestic arbitration, within fifteen days following the notification of the resolution that annuls the award, they may agree that the Superior Court that heard the annulment appeal shall resolve in sole instance on the merits of the controversy.

The PAL is silent regarding the consequence of the annulment relating to two grounds: the ruling on non-arbitrable matters in international arbitration (article 63.1.f of the PAL) and conflict with international public policy (article 63.1.f of the PAL).

Regarding the first ground, we consider that the consequence would have to be established in accordance with private international law conflict rules that apply to the case, in order to determine which court will be the one that has to assume the dispute. However, and given the uneven regulation of arbitrability at a comparative level, the parties could also carry out a new arbitration – as an attempt to recognize and enforce it⁷² – in a seat other than

arbitrators, and if so, whether it will be to the same tribunal or to a different one. Courts are likely to favor some kind of remission, so that the parties will not have wasted the entire arbitration effort. If the problem with the award can be resolved short of declaring it null and void, most courts will try to choose a solution that will not require the parties to start all over again.”

⁷² Similarly, A. J. Van den Berg (n 31) 269, states that: “The effect that a setting aside in the country of origin has in other countries, i.e., a bar to enforcement, is not the same for a refusal of enforcement in the country of origin. Such a refusal in the country of origin is not a ground for refusal of enforcement abroad under the New York Convention”; in this sense,

that of the annulment. It should be noted that in order to avoid the recognition and enforcement of an annulled award, some academics have proposed incorporating into Article V of the New York Convention, a new ground for denial of recognition and enforcement of the award, consisting of the fact that the award has been annulled – by the court of the seat – for reasons equivalent to the grounds already regulated in said article, as well as the need to globally harmonize national laws and judicial practice.⁷³

In relation to the second ground, it is important to note that international public policy is divided into procedural and material international public policy. In the first case, the consequence of the annulment will depend on which component of procedural public policy leads to the annulment. For example, if an arbitrator violated the duty of independence and impartiality, the consequence will be that the parties will have to appoint a new arbitrator to replace him. Meanwhile in the second case, all the manifestations of material public policy – since the court cannot review or rule on the merits of the case – lead to the possibility that a new arbitration may be initiated. However, given that the content of international public policy – procedural or material – may vary from one country to another,⁷⁴ the parties could also carry out a new

referring the French case, Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 1 ICSID Review - Foreign Investment Law Journal 25, states that: "The setting aside of an award in the country in which it was rendered does not in itself constitute grounds for refusal of enforcement of the award in France"; similarly, Johannes Landbrecht & Andreas R. Wehowsky, 'Transnational Coordination of Setting Aside and Enforcement of Arbitral Awards – A New Treaty and Approach to Reconciling the Choice of Remedies Concept, the Judgment Route, and the Approaches to Enforcing Awards Set Aside?' (2020) 6 Journal of International Arbitration 693, states that: "As Article V(1)(e) NYC signals, precisely such recognition of the foreign setting aside decision is not guaranteed. In case the award is set aside, the court requested to enforce 'may' refuse enforcement, without further ado. But, in view of this wording 'may', it need not, from the perspective of the NYC, necessarily do so. This is also the approach an increasing number of jurisdictions follows, at least all those which have ultimately recognized and enforced awards that had been set aside at the seat, therefore rejecting the view of some commentators who, in essence, read 'may' as 'must'. Thus, under the NYC regime, a decision granting set aside does not necessarily have a binding effect abroad."

⁷³ Similarly, Meng Chen & Chengzhi Wang, 'Vanishing Set-Aside Authority in International Commercial Arbitration' (2018) 1 International and Comparative Law Review 147-152; in this sense, Robert C. Bird, 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2012) 4 North Carolina Journal of International Law and Commercial Regulation 1038-1043.

⁷⁴ Similarly, Maxi Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' (2013) 3 Journal of International Dispute Settlement 621, states that: "Put simply, 'the issue for the English court is that of English public order' and not that of foreign public order applied in the foreign recognition

arbitration – as well as attempt its recognition and enforcement⁷⁵ – in a seat other than that of the annulment. However, this will not be possible in those cases that have a universal global recognition.⁷⁶

Carlos A. MATHEUS LÓPEZ, *A Comparative Analysis of the Setting Aside of Arbitral Awards from a Peruvian Perspective*

Summary

This article addresses setting aside of arbitral awards, with an emphasis on the practice in Peru. The author analyses the nature of setting aside proceedings, the various grounds for annulment, those *in negotio*, *in procedendo* and those residing in international public policy. Finally, the article elaborates upon the formal and procedural requirements that apply to the setting aside and the consequences of an award having been set aside in subsequent proceedings.

or enforcement judgment. Therefore no preclusive effect should be given to the foreign court's determination, which is based on protection of local interests."

⁷⁵ Similarly, Maxi Scherer (n 84) 627, states that: "refusing recognition to a foreign set aside judgment for violation of public policy because a court finds that the arbitration agreement was invalid although the forum would have found it valid, comes dangerously close to an impermissible review of the merits of that judgment. (...) Moreover, the notion of public policy is too vague to provide sufficient guidance as to when a set aside award may, or may not, be enforced in other jurisdictions."

⁷⁶ In this sense, Petr Dobiáš, 'The Recognition and Enforcement of Arbitral Awards Set Aside in the Country of Origin', in Alexander J. Bělohávek & Naděžda Rozehnalová (eds.), *Czech (& Central European) Yearbook of Arbitration* (Lex Lata 2019) 19, states that: "If the arbitral award was annulled for the reason of being contrary to public policy, it would be possible to find another country on which public policy is not based on the same moral values. In the event of a breach of the right to a fair trial, if, for example, a party did not have the opportunity to attend a hearing before the arbitral tribunal, it would not be possible to enforce such an arbitral award anywhere, because the principle of a fair trial is internationally recognized."

Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including the ICC and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

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Books related to the topics discussed in the Bulletin may be sent for review to the Editor in Chief (**Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland**).