BUILDING A REGIONAL ARBITRATION CENTER: CHILE'S 2004 INTERNATIONAL COMMERCIAL ARBITRATION LAW

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I. INTRODUCTION

In September 2004, Chile adopted the 1985 Model Law on International Commercial Arbitration created by the United Nations Commission on International Trade Law ("UNCITRAL")[1] by enacting Law 19,971 ("Arbitration Law")[2] with several changes. By adopting the Model Law, Chile boldly reformed its arbitration laws and detached international arbitration from its previous arbitration statutes and procedure.[3] This law positions Chile to be a regional, Latin American center for international commercial arbitration.[4]

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[1] United Nations Commission on International Trade Law [hereinafter UNCITRAL] 1985 Model Law on International Commercial Arbitration, [hereinafter UNCITRAL Model Law], *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf. Several provisions of the model law were based on the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* UNCITRAL Model Law, Appendix, Explanatory Note by UNCITRAL Secretariat art. 17. The goal of the UNICTRAL Model Law was to harmonize arbitral procedure laws on international commercial arbitration to a single uniform law. UNCITRAL Model Law, App., Explanatory Note by UNCITRAL Secretariat, art. 1. The UNCITRAL Model Law is regarded as the global standard for arbitration regulation. JAN KLEINHEISTERKAMP, INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA 2 (Oceana Publications 2005).

[2] Ley 19,971, "Ley de Arbitraje Comercial Internacional" [Law of International Commercial Arbitration], Sep. 10, 2004 (Chile) [hereinafter Arbitration Law], available at http://www.minjusticia.cl/leyes/19971.pdf.

[3] Mensaje [Message] No. 15-349 ("Proyecto de Ley sobre Arbitraje Comercial Internacional" [Project of the Law about International Commercial Arbitration]), registered as Boletín [Bulletin] 3252-10, Jun. 2, 2003 (Chile) [hereinafter Legislative History], *available at* http://sil.congreso.cl. However, domestic arbitration and certain areas of law are still subject to the prior arbitration laws. Arbitration Law, *supra* note 2, arts. 34(2)(b)(i)–(ii), 36(1)(b)(i)–(ii). Furthermore, some domestic laws are still relevant to international commercial arbitration. *See*

Arbitration runs deep in the legal traditions of Chile, with laws on arbitration first passed in 1875.[5] As a result, Chilean legal practitioners generally trust arbitrators and arbitration as an institution.[6] They have a good opinion of the Arbitration Law, believing it was necessary to give Chile a comparative advantage in international commercial arbitration.[7] The Arbitration Law modernized Chile's legal system and created a safer legal environment for international commercial arbitration.[8] A draft of the regulations implementing the Arbitra-

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CÓDIGO ORGÁNICO DE TRIBUNALES [Court Code] [hereinafter CÓD. TRIB.] arts. 222-243, *available at* http://www.bcn.cl/publicadores/pub_leyes_mas_soli/admin/listado_codigos_nuevo.php. For example, arbitrators are classified as judges, and as judges, arbitrators can be subject to criminal liability for misconduct such as bribery. CÓD. TRIB. arts. 222, 324. For a discussion of prior arbitration laws, *see* CARLOS EUGENIO JORQUIERA & KARIN HELMLINGER, INTERNATIONAL ARBITRATION IN LATIN AMERICA 90-91 (Nigel Blackaby, David M. Lindsey, and Alessandro Spinillo eds., Kluwer Law International 2002); Law No. 7421, Jun. 15, 1943 (Chile) (consolidating previous laws relating to arbitration) (published as regulations in CÓD. TRIB. arts. 222-243); CÓDIGO DE PROCEDIMIENTO CIVIL [Civil Procedure Code] [hereinafter CÓD. CIV.] arts. 242 to 251.

[4] Juan Eduardo Figueroa Valdés, *La Nueva Ley Chilena Sobre Arbitraje Comercial Internacional* [*The New Chilean Law on International Commercial Arbitration*], 3 INTER-AMERICAN BAR ASS'N L. REV. ____ (2005), available at http://www.iaba.org/Law Review_Vol 3/LawReview_3_JEFigueroa.htm; Jaime Arellano Quintana, *Resolución Alternativa de Conflictos: De una Cultura del Conflicto a una Cultura del Acuerdo* [Alternative Conflict Resolution: From a Culture of Conflict to a Culture of Agreement], 7 BOLETÍN JURÍDICO DEL MINISTERIO DE JUSTICIA 8, 9 (2005), *available at* http://www.minjusticia.cl/documentos/boletin7.pdf; Interview with Boris Kozolchyk, Professor of Law, University of Arizona Rogers Collage of Law and Director, National Law Center for Inter-American Free Trade, by email (Apr. 5, 2006); Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

[5] Gonzalo Biggs, *Breakthrough for International Commercial Arbitration in Chile*, 59 DISP. RESOL. J. 65 (2004).

[6] Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006); KLEINHEISTERKAMP, *supra* note 1, at 466.

[7] Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

[8] KLEINHEISTERKAMP, *supra* note 1, at 459.

tion Law should be released by the end of 2006.[9] This note is a general guide for those doing business in Chile or contemplating using Chile as an arbitration site. It analyzes the Arbitration Law and details potential problems with the law, and suggests points to consider in drafting an arbitration agreement for arbitration conducted in Chile.[10]

Section II gives a brief background on international arbitration. Section III details the international treaties that apply to Chile. Section IV examines several arbitration institutions that provide ready-made rules for arbitration, including a new International Arbitration Center in Chile. Section V covers general arbitration issues in Chile. Section VI follows the arbitration procedure in Chile from the filing of the complaint to enforcing the award. Section VII discusses the challenges the new law faces and Section VIII gives recommendations to consider when drafting an arbitration agreement. The final section concludes with some suggestions on the next steps that Chile can take to build a regional arbitration center.

II. BACKGROUND

A patchwork of international treaties and domestic laws covers a contract between two parties who are not of the same country. Arbitration is a private legal system to resolve

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[9] Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

[10] This note does not address investment dispute resolution between private parties and states. For articles on investment dispute resolution between private parties and states, see David B. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement*, 19 AM. U. INT'L. L. REV. 679 (2004), and a comment by Scott R. Jablonski, *¡Si, Po! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States-Chile Free Trade Agreement*, 35 U. MIAMI INTER-AM. L. REV. 627 (2004). Neither does this note analyze the Chile-U.S. Free Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

Rather, this note updates and extends a previous article by JORQUIERA ET AL., *supra* note 3, at 88–110, analyzing the text of the Arbitration Law and the issues to be considered by parties considering international commercial arbitration in Chile.

disputes, overlaid upon existing national and international treaties and laws.[11] Arbitration allows a third party or organization to decide a dispute between two parties according to their respective system of private law and procedure, thus designing a "tailor-made court" for their specific problems.[12] International arbitration adds different cultures and languages to the arbitration equation, which often results in greater possibility for misunderstanding and miscommunication.[13] Thus, a trade professional who is intimately familiar with trade usage and custom can better arbitrate a dispute over the quality of the goods as the objective third party, instead of a judge who must try to learn them quickly.[14]

While arbitration is usually more efficient and inexpensive compared to the traditional court system, complex procedures and expanding discovery has eroded the price and time advantage of arbitration.[15] To receive the benefits of arbitration, an arbitration agreement's terms must be precise.[16] Because standard rules do not accommodate smaller or simpler

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[11] CÓD. CIV. art. 1545, *available at* http://www.diarioficial.cl/actualidad/relacion/alegisla/ccmodifi/a00146.htm (stating that every contract is "a law unto the contracting parties"); KLEINHEISTERKAMP, *supra* note 1, at 51-52.

[12] KLEINHEISTERKAMP, *supra* note 1, at 53; *see* Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221, 223 (1998).

[13] *See generally* Andrew Sagartz, Note & Comment, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675, 705–709 (1998) (recommending the use of mediators or arbitrators that are very familiar with the cultures and customs of all the parties to the dispute); Lara M. Pair, *Cross--Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?,* 9 INT'L L. STUD. ASS'N. J. INT'L & COMP. L. 57 (2002).

[14] KLEINHEISTERKAMP, *supra* note 1, at 162.

[15] *See e.g.*, Eva Müller, Assistant Sec'y Gen. of the Arbitration Inst. of the Stockholm Chamber of Commerce, Commercial Alternative Dispute Resolution (ADR) in the XXI Century: The Road Ahead For Latin America And The Caribbean: ADR Vis-à-vis Small and Medium-Sized Enterprises, address at the 2000 Inter-American Bank Multilateral Investment Fund Conference, Washington, D.C. (Oct. 26-27, 2000) (transcript available at http://www.iadb.org/mif/V2/spanish/speeches/muller.html).

[16] Dillenz, *supra* note 12, at 223 (suggesting "if an arbitration clause is not drafted carefully, then it should not be included in the contract").

disputes well, the cost and length of standard arbitration is inappropriate to such disputes.[17] On the other hand, focusing too much on procedure for a dispute over a small amount of money conducted according to procedures developed for complicated matters would result in an unnecessarily lengthy arbitration with costs similar to court litigation.[18] If a provision only meets the needs of one party, disagreement is likely to occur.[19] Accordingly, standard language may prevent disagreement.[20] In sum, when considering an arbitration agreement, remember the agreement should "resolve disputes, not create them."[21]

III. INTERNATIONAL TREATIES

Chile has ratified several treaties dealing with arbitration, including the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards in New York City [hereinafter the New York Convention],[22] the 1975 Inter-American Convention on International Commercial Arbitration in Panama City, Panama, [hereinafter the Panama Convention],[23]

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[17] *See* Müller, *supra* note 15, at 14; LUCY F. REED, INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 583 (Practising Law Institute 2002).

[18] Müller, *supra* note 15.

[19] *Id.*

[20] *Id.*

[21] American Arbitration Association, *Drafting Dispute Resolution Clauses – A Practical Guide* [hereinafter "AAA Practical Guide"] (2004), Conclusion, *available at* http://www.adr.org/sp.asp?id=24243 (last visited Feb. 18, 2006).

[22] Decreto-Ley [Decree-Law] 1095, Jul. 14, 1975, published Jul. 31, 1975, ratified Sep. 4, 1975, and entered into force on Dec. 12, 1975 (Chile), *available at* http://www.bcn.cl/imag/tratados/tratado_mp567.pdf. Chile was the first country in South America to ratify the New York Convention. KLEINHEISTERKAMP, *supra* note 1, at 19.

[23] Decreto-Ley [Decree-Law] 1376, Mar. 18, 1976, published Apr. 8, 1976, ratified May 17, 1976, entered into force on Jun. 16, 1976 (Chile), *available at* http://www.bcn.cl/imag/tratados/tratado_dani459.pdf; Inter-American Convention on International Commercial Arbitration art. 10 (stating that the convention enters into force "on the thirtieth day following the date of deposit" of the ratification); ratification information at http://www.oas.org/juridico/english/Sigs/b-35.html; KLEINHEISTERKAMP, *supra* note 1, at 23.

as well as several other bilateral treaties.[24] The New York Convention dramatically reformed enforcement of arbitral awards from foreign countries for the signatory countries; for the first time, a foreign arbitral award from another signatory to the New York Convention had to be treated autonomously from the parties' nationality, underlying substantive law, or the award's arbitration site.[25] However, while the New York Convention forbade countries from giving domestic awards different treatment from foreign awards, it did not "declare how much better [the countries] must treat foreign awards.[26]

The Panama Convention, complementing the New York Convention, also applies to international arbitration agreements between its signatories.[27] The Panama Convention contains a powerful provision stating that if the arbitration agreement does not stipulate the rules of procedure, the Inter-American Commercial Arbitration Commission rules of procedure apply to the arbitration.[28] Upon ratification, the 1998 International Arbitration

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[24] Dirección General de Relaciones Económicas Internacionales de Chile [General Directorate for International Economic Affairs], http://www.direcon.cl/ (listing Chile's most recent trade treaties).

[25] KLEINHEISTERKAMP, *supra* note 1, at 18–19. Chilean courts ignored the New York Convention in favor of Chilean law in some cases prior to the Arbitration Law. *Id.* at 19. With the passage of the Arbitration Law, this problem should be eliminated or at least restrict challenges to foreign arbitral awards to the grounds listed in the law. *Id.*

[26] Leonard V. Quigley, *Accession to the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1066 (1961).

[27] KLEINHEISTERKAMP, *supra* note 1, at 24. Article 7(1) of the New York Convention provides that it does not "deprive any interested party of any right he may have to available himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Kleinheisterkamp notes that the ratification of the Panama Convention "largely eliminated most substantive arguments against accepting the [New York Convention]" and "offer[ed] a local solution for local problems." KLEINHEISTERKAMP, *supra* note 1, at 27.

[28] Inter-American Convention on International Commercial Arbitration art. 3, *available at* http://www.oas.org/juridico/english/treaties/b-35.htm. The Inter-American Commercial Arbitration Commission Rules are modeled after the UNCITRAL Arbitration Rules of 1976. *See also* KLEINHEISTERKAMP, *supra* note 1, at 29 (arguing that this article will only apply if the parties subject to the Panama Convention choose a place of arbitration in a country that is a party to the Panama Convention.

Agreement between Chile and the Mercado Común del Cono Sur,[29] an association between Argentina, Brazil, Paraguay, and Uruguay, will apply to arbitrations between parties of countries that are parties to the convention.[30] In addition, the bilateral free trade agreement between the United States and Chile specifically requires the countries to "encourage and facilitate" arbitration for settling "international commercial disputes between private parties."[31]

IV. INSTITUTIONS

Laws provide the frame for an international commercial arbitration center, but arbitration institutions implement the details. The choice to use an arbitration institution turns on cost; the parties can design the arbitration rules and procedures during negotiation and select their own arbitrators, or they can agree in the contract to pay the arbitration institution and use its rules and procedures.[32] If parties choose ad-hoc arbitration, they should carefully plan the arbitration procedure before a dispute arises, because seemingly insignificant procedural rules can profoundly impact the arbitration.[33] While ad-hoc arbitration offers potential savings by avoiding the administrative costs, the savings are not always realized when parties fail to cooperate and use procedural disputes as proxy, requiring court

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[29] MERCOSUR, http://www.mercosur.org.uy/.

[30] JORQUIERA ET AL., *supra* note 3, at 93–94; KLEINHEISTERKAMP, *supra* note 1, at 39–43.

[31] U.S.-Chile Free Trade Agreement, art. 22.21, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. The agreement took effect on January. 1, 2004 after a December 30, 2003 Presidential Proclamation, *available at* http://www.whitehouse.gov/news/releases/2003/12/20031230-2.html. The agreement showed immediate fruits, with first quarter 2004 exports to rising 24 percent over total U.S. exports to Chile in the first quarter of 2003. By comparison, overall U.S. exports to the world increased by 13 percent in the first quarter of 2004. The U.S.–Chile Free Trade Agreement: An Early Record of Success, http://www.ustr.gov/.

[32] KLEINHEISTERKAMP, *supra* note 1, at 183.

[33] KLEINHEISTERKAMP, *supra* note 1, at 462; REED, supra note 17, at 583. JOHN FELLAS, INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 573 (Practising Law Institute 2005), has several model arbitration clause, including one for ad-hoc arbitration. *See also* UNCITRAL Notes on Organizing Arbitral Proceedings (1996), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html (detailing issues to discuss when organizing arbitration proceedings).

intervention to referee.[34] Institutional arbitration has the advantages of reliable procedural rules, experienced staff, and respected arbitrators – but the same advantages can result in delays due to the bureaucracy of the institution.[35] Choose carefully between ad-hoc or institutional arbitration, for once the choice of arbitration is made, it is very difficult to get both parties to switch later and lose bargained-for advantages.[36]

In July 2006, the two most prominent arbitration institutions in Chile, the Santiago Chamber of Commerce Center for Arbitration and Mediation [hereinafter CAM],[37] and the Chilean-American Chamber of Commerce Center for Arbitration [hereinafter AMCHAM],[38] joined together to form a new International Arbitration Center.[39] Other alternatives include the International Chamber of Commerce International Court of Arbitration [hereinafter ICC],[40] the London Court of International Arbitration [hereinafter LCIA],[41] the American Arbitration Association International Centre for Dispute Resolu-

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[34] REED, *supra* note 17, at 583; *see* William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 54 (1996) (stating that if the institution does not perform the administrative functions, the arbitrator must spend time doing them).

[35] *Id.*

[36] Dillenz, *supra* note 12, at 223–224.

[37] The Santiago Chamber of Commerce [hereinafter CAM], http://www.camsantiago.cl/.

[38] The Chilean-American Chamber of Commerce [hereinafter AMCHAM], http://www.amchamchile.cl/.

[39] AMCHAM, AMCHAM se integra a Nuevo Centro de Arbitraje Internacional de la Cámara de Comercio de Santiago [AMCHAM Joins the New International Arbitration Center of the Santiago Chamber of Commerce], http://www.amchamchile.cl/node/1130.

[40] The International Chamber of Commerce [hereinafter ICC], http://www.ICCwbo.org/. For the ICC Rules of Arbitration [hereinafter ICC Rules], see http://www.ICCwbo.org/court/english/arbitration/rules.asp (effective Jan. 1, 1998, cost scales effective Jul. 1, 2003).

[41] The London Court of International Arbitration [hereinafter LCIA], http://www.LCIA-arbitration.com/. The LCIA Rules of Arbitration [hereinafter LCIA Rules] are available at http://www.LCIA.org/ARB_folder/arb_english_main.htm.

tion [hereinafter AAA],[42] and the Stockholm Chamber of Commerce Arbitration Institute [hereinafter Stockholm].[43]

A. International Arbitration Center in Chile

AMCHAM, established in 1918, seeks to promote free trade and investment between the United States and Chile.[44] In 1998, its Arbitration Center was established in collaboration with the AAA, primarily to assist in commerce between parties from the United States and Chile.[45] CAM, founded in 1992, was the first local arbitration institution in Chile,[46] and has an excellent reputation in the Chilean business community.[47] CAM associates with ICC and the Inter-American Commercial Arbitration Commission, and bases its rules and procedures upon UNCITRAL arbitration rules.[48] AMCHAM and CAM recently joined their expertise to form an International Arbitration Center, updating CAM's arbitration procedures to reflect the Arbitration Law.[49]

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[42] The American Arbitration Association [hereinafter AAA], http://www.adr.org/International. The AAA Rules of Arbitration [hereinafter AAA Rules] are available at http://www.adr.org/sp.asp?id=22090.

[43] The Stockholm Chamber of Commerce Arbitration Institute [hereinafter Stockholm], http://www.sccinstitute.com/uk/Home/. The Stockholm Rules of Arbitration [hereinafter Stockholm Rules] are available at http://www.sccinstitute.com/_upload/shared_files/regler/web_A4_vanliga_2004_eng.pdf.

[44] AMCHAM, Nuestra Historia [Our History], http://www.amchamchile.cl/01_quienes_somos/nuestra_historia/nuestra_historia.html (last visited Feb. 13, 2006).

[45] AMCHAM, Información General [General Information], http://www.amchamchile.cl/.

[46] The Santiago Chamber of Commerce Arbitration and Mediation Center [hereinafter CAM], Quienes Somos [Who We Are], http://www.camsantiago.com/ (last visited Feb. 18, 2006).

[47] Cruzat, Ortúzar & Mackenna Ltda., Baker & McKenzie, *Arbitration in Chile*, 3, http://www.camsantiago.com/html/articulos/articulos.htm (last visited Feb. 16, 2006).

[48] The Inter-American Commercial Arbitration Commission, http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp.

[49] AMCHAM, AMCHAM se integra a Nuevo Centro de Arbitraje Internacional de la Cámara de Comercio de Santiago [AMCHAM Joins the New International Arbitration Center of the Santiago Chamber of Commerce], http://www.amchamchile.cl/node/1130; Interview with

Parties can delegate the selection of arbitrators to CAM.[50] The arbitrators must have at least ten years of professional experience and no history of ethical sanctions.[51] CAM sets the arbitrator fees as a percentage of the dispute amount.[52] Its fees are moderate: a dispute of $100,000 U.S. would cost $11,437 U.S.; a dispute of $1,000,000 would cost $36,400 U.S.[53]

B. International Chamber of Commerce International Court of Arbitration

The ICC, established in 1919, has a reputation of issuing high quality awards that parties usually accept.[54] The ICC is an administrative body, only appointing the arbitrators.[55] The ICC is unique among arbitration organizations by requiring the tribunal to establish "Terms of Reference," setting out a timetable and deciding the rules of procedure and evidence before the arbitration begins.[56] Arbitrators are also required to submit the final award to the ICC International Court of Arbitration for review and possible modification.[57]

Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

The new CAM International Arbitration Rules are available at http://www.camsantiago.com/internacional/ [hereinafter CAM Rules].

[50] CAM Rules, art. 8; Marcelo Armas, *Overview of Arbitration in Chile*, 2000 INT'L LAW NEWS 6, *available at* http://www.internationallawoffice.com/ (free subscription required). Only in exceptional circumstances can CAM appoint arbitrators that are not on the list. *Id.*

[51] Armas, *supra* note 50.

[52] Armas, *supra* note 50.

[53] CAM, Calculador de Costos Internacionales [Calculador of Internacional Costs], http://www.camsantiago.com/internacional/Default.aspx?tabid=2467. For CAM's fee schedule, *see* CAM, Tarifas Arbitraje Comercial Internacional [International Commercial Arbitration Fees], http://www.camsantiago.com/internacional/default.aspx?tabid=2466.

[54] ICC, What is ICC, http://www.ICCwbo.org/id93/index.html (last visited Feb. 13, 2006); INTERNATIONAL ARBITRATION RULES: A COMPARATIVE GUIDE 2–3 (Bridget Wheeler, ed., LLP Professional Publishing 2000) [hereinafter INTERNATIONAL ARBITRATION RULES].

[55] REED, *supra* note 17, at 586.

[56] ICC Rules art. 18; *see* INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 37.

[57] ICC Rules art. 27 (stating that the International Court of Arbitration can modify the form of the award and give feedback to the arbitrator on substantive issues).

The ICC bases its arbitration fee as a percentage on the amount in dispute and requires a substantial portion of the fee as the advance, drawn down on an hourly rate.[58] Consequently, cash flow can be a problem using the ICC.[59] Unsurprisingly, the ICC is one of the most expensive arbitration organizations, requiring a $30,500 U.S. advance on costs for a dispute of $100,000 U.S. and an $113,925 U.S. advance for a dispute of $1,000,000 U.S.[60]

C. London Court of International Arbitration

One of the oldest arbitral institutions, the LCIA was founded in 1892[61] and has a good reputation of promptly dealing with appointment of tribunals.[62] Like the ICC, the LCIA appoints the tribunal and does not hear the dispute.[63] To initiate arbitration, the LCIA requires a modest setup fee with an hourly rate for the arbitrators.[64] The setup fee for any amount dispute would be £1,500 (about $2,858 U.S.) and a deposit in the proportion deemed appropriate by the LCIA.[65]

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[58] *Id.* at 115–18; ICC Rules, App. III arts. 2(1), 4.

[59] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 3.

[60] Calculated using calculator at http://www.ICCwbo.org/court/english/cost_calculator/cost_calculator.asp, with three arbitrators selected.

[61] LCIA, About the LCIA , http://www.LCIA.org/PRINT/LCIA_main_print.html (last visited Feb. 13, 2006).

[62] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 3.

[63] REED, *supra* note 17, at 586.

[64] LCIA, Schedule of Arbitration Fees and Costs, *available at* http://www.LCIA.org/ARB_folder/arb_english_main.htm (last visited Feb. 21, 2006); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 115, 119–22.

[65] LCIA, Schedule of Arbitration Fees and Costs, *available at* http://www.LCIA.org/ARB_folder/arb_english_main.htm (last visited Feb. 21, 2006).

D. American Arbitration Association International Dispute Resolution Centre

Established in 1926, the AAA has a reputation for speedy administration of arbitration.[66] Some parties might impute a bias to the AAA for parties from the United States, however, because of its history as an American arbitration institution.[67] The AAA offers a variant of its rules based upon the UNCITRAL arbitration rules[68] and specifically excludes punitive damages unless agreed otherwise by the parties.[69] The fee structure has a setup fee with an hourly rate for the arbitrators.[70] For example, the setup fee for a dispute of $100,000 U.S. would be $2,550 U.S., and the setup fee for a dispute of $1,000,000 U.S. would be $8,250 U.S.[71]

E. Stockholm Chamber of Commerce Arbitration Institute

Stockholm's Arbitration Institute was established in 1917 and is often used as a neutral venue for arbitrations in Europe.[72] Stockholm has a relatively small pool of local lawyers to act as arbitrators, and offers the option of using the Stockholm rules or a UNCITRAL variation, as well as rules for expedited arbitration.[73] Stockholm requires a setup fee with a

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[66] AAA, About Us, http://www.adr.org/About (last visited Feb. 13, 2006); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 3.

[67] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 3.

[68] AAA, Procedures for Cases under the UNCITRAL Arbitration Rules, http://www.adr.org/sp.asp?id=22091 (last visited Feb. 13, 2006).

[69] AAA Rules art. 28.5; INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 71.

[70] AAA Rules, Schedule of Costs and Fees; INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 115, 119–22.

[71] AAA Rules, Administrative Fees, at http://www.adr.org/sp.asp?id=22090.

[72] Stockholm, About the SCC Institute, http://www.sccinstitute.com/uk/About/. Over 80 percent of arbitrations involve non-Swedish parties. Müller, *supra* note 15.

[73] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 3; Stockholm, About the SCC Institute, http://www.sccinstitute.com/uk/About/ (last visited Feb. 13, 2006); Stockholm, Rules for Expedited Arbitrations, http://www.sccinstitute.com/uk/Rules/ (last visited Feb. 13, 2006); Müller, *supra* note 15. Müller suggests that the expedited rules may better suit small or medium amounts in dispute, but not if for complicated disputes. *Id.* Expedited disputes are usually decided by a sole arbitrator, with limits on procedure, and an award deadline. *Id.* Since the complexity of a dispute is not always known at the time of drafting, parties can plan by drafting

sliding scale for the arbitration fee.[74] For example, the advance on costs for a dispute of $100,000 U.S. would be about $12,716 U.S. and the advance on costs for a dispute of $1,000,000 U.S. would be about $44,681 U.S.[75]

V. ARBITRATION

A. Capacity to Contract

The Arbitration Law permits parties to decide what law will be applied to whether a party was capable of making a contract.[76] Under Chilean law, while directors and presidents of corporations can execute arbitration agreements without an explicit grant of authority, Chilean corporations must grant the power of agency to managers before they can enter into arbitration agreements on behalf of their corporation.[77] Accordingly, parties should

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a normal and an expedited set of rules, to be chosen by the party or parties when the request for arbitration is made. *Id.* Alternatively, the choice of procedure can also be determined in the contract by dictating triggering conditions, such as the amount in dispute. *Id.*

[74] Stockholm Rules, Regulations for Arbitration Costs, http://www.sccinstitute.com/uk/Rules/ (last visited Feb. 13, 2006); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 116, 124–26.

[75] Stockholm, Arbitration and Mediation Costs Calculator, http://www.sccinstitute.com/uk/Calculator/ (using the inputs of Stockholm rules, three arbitrators, €79,052 ($100,000 U.S. according to exchange rate on November 9, 2006) and €790,526 ($1,000,000 U.S. according to interbank exchange rate +1% on November 9, 2006).

[76] Arbitration Law, *supra* note 2, arts. 34(2)(a)(i), 36(1)(a)(i). In contrast, the capacity of the parties to contract under the New York Convention art. V(1)(a), and the Panama Convention art. 5(1)(a) is determined by "the law applicable to [the parties]," which could be interpreted to mean the laws of the site of the arbitration or the laws of where the arbitration is enforced. *See* the InterAmerican Convention on the Legal Regime of Powers of Attorney to be Used Abroad art. 5 (stating that "The effects and use of the power of attorney shall be governed by the law of the State in which it is to be used.") (Jan. 30, 1975), promulgated on Sep. 20, 1976, published on Oct. 11, 1976, *available at* http://www.oas.org/. *See* http://www.bcn.cl/ ; KLEINHEISTERKAMP, *supra* note 1, at 92–93.

[77] Law 18046 ("Ley de Sociedades Anónimas" [Law of Corporations]) art. 40 (Oct. 21, 1981) (authorizing directors the power to enter into contracts and to delegate this authority); CÓD. CIV. art. 8 (granting presidents of corporation the authority to litigate on behalf of the corporation); CÓD. CIV. arts. 550–552. The president of the corporation is considered to have the power to enter into arbitration agreements. *See* CÓD. CIV. arts. 8, 552.

consider verifying the ability of the other party's representative to bind it to the arbitration agreement.

B. Jurisdiction

The Arbitration Law retains some exceptions to the general rule that disputes can be submitted to arbitration; types of disputes declared non-arbitrable by Chilean law or contrary to public order are not subject to arbitration.[78] For example, child support,[79] division of marital property,[80] alimony,[81] individual labor disputes,[82] and criminal matters[83] cannot be resolved by arbitration.[84] On the other hand, many types of disputes are subject to mandatory arbitration.[85]

The Arbitration Law is subject to any treaty in force in Chile.[86] The place of arbitration determines the "nationality" of the award, affecting which challenges can be brought in a country's court.[87] Unless the arbitration specifies the place of arbitration, the arbitration organization[88] or the arbitral tribunal[89] decides it. For example, articles eight, nine, and 35

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[78] Arbitration Law, *supra* note 2, arts. 34(2)(b)(i)–(ii), 36(1)(b)(i)–(ii).

[79] CÓD. TRIB. art. 229.

[80] *Id.*

[81] *Id.*

[82] KLEINHEISTERKAMP, *supra* note 1, at 60 n.50 (citing two cases interpreting a law as excluding individual labor disputes from arbitration because the law is in the public interest ("de orden público)). Collective labor disputes, on the other hand, can be submitted to arbitration. KLEINHEISTERKAMP, *supra* note 1, at 60 n.52.

[83] CÓD. TRIB. art. 230.

[84] *See* JORQUIERA ET AL., *supra* note 3, at 95.

[85] *See* KLEINHEISTERKAMP, *supra* note 1, at 68–70, JORQUIERA ET AL., *supra* note 3, at 95.

[86] Arbitration Law, *supra* note 2, art. 1(1).

[87] KLEINHEISTERKAMP, *supra* note 1, at 281; Arbitration Law, *supra* note 2, art.1(2).

[88] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 40. The ICC, LCIA, and AAA, permit the parties to decide the place of arbitration.

[89] Arbitration Law, *supra* note 2, art. 20(1). If the place of arbitration is not in the contract, the arbitration tribunal will decide. *Id.*; CAM Rules art. 20(1); s*ee also* KLEINHEISTERKAMP, *supra*

apply regardless of where the arbitration was conducted.[90] Article eight instructs the courts to refer parties to arbitration if they are subject to an arbitration agreement, while article nine grants Chilean courts the power to grant interim measures during arbitration and articles 35 and 36 deal with the recognition and enforcement of awards. These articles are the exception; most provisions apply only if the place of arbitration is in Chile.[91] Accordingly, the arbitration agreement should dictate the country that will be the place of arbitration.

The Arbitration Law also applies to any "international commercial arbitration."[92] Arbitration is considered "international" if one of the following situations is met:

1. The parties had places of business in different States at the agreement's conclusion;[93]
2. The place of arbitration specified in the agreement is located outside a State where the parties' places of business are located;[94]
3. A substantial part of the commercial contract is or was performed in a State outside where the parties' places of business are located; [95]
4. The place with the closest relationship to the object of the dispute is located outside a State where the parties' places of business are located;[96] or
5. The parties expressly agreed that the arbitration agreement's subject matter is related to more than one State.[97]

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note 1, at 12. This could cause problems if the arbitration agreement is challenged in the Chilean Court of Appeals before the arbitration tribunal has selected the place of arbitration. *Id.* According to article 20(1), the courts will then decide the place of arbitration by considering the "circumstances of the case," including which location is more convenient for the parties.

[90] Arbitration Law, *supra* note 2, art. 1(2).

[91] Arbitration Law, *supra* note 2, art. 1(2).

[92] Arbitration Law, *supra* note 2, art. 1(1).

[93] Arbitration Law, *supra* note 2, art. 1(3)(a). If a party has more than one place of business, the place of business is the one with the closest relationship with the arbitration agreement. *Id.*, art. 1(4)(a). If a party does not have a place of business, his "habitual residence" is considered his place of business. *Id.*, art. 1(4)(b).

[94] Arbitration Law, *supra* note 2, art. 1(3)(b)(i).

[95] Arbitration Law, *supra* note 2, art. 1(3)(b)(ii).

[96] Arbitration Law, *supra* note 2, art. 1(3)(b)(ii).

The Arbitration Law instructs the Chilean Court of Appeals to interpret broadly whether an agreement is "commercial," even including situations where there is no explicit contract between the parties.[98] The broad mandate has its limits. For example, the Arbitration Law would not apply to contracts with purely domestic elements, or where the subject of the contract is excluded from arbitration by Chilean law, such some contract terms when one of the parties is a consumer.[99] It is also important to note that the parties can avoid potential issues by expressly stipulating that, "both parties agree that subject matter of the agreement is related to more than one State and is an international commercial matter."[100]

A Chilean court must refer any dispute that is subject to any arbitration agreement to arbitration if a party requests,[101] and the Court of Appeals can intervene in arbitration only according to the Arbitration Law's provisions.[102] The arbitral tribunal decides any challenges to its jurisdiction, or whether an arbitration agreement exists or is valid.[103] The challenge to jurisdiction or validity must be brought before or with the party's answer to the claim for arbitration.[104] The tribunal can treat the challenge as a preliminary question,

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[97] Arbitration Law, *supra* note 2, art. 1(3)(c).

[98] Arbitration Law, *supra* note 2, art. 2(g). Many categories are listed as examples, which include: trade transactions for the supply or exchange of goods or services; distribution agreements; commercial representation agreements; factoring agreements; leasing agreements; construction contracts; consulting agreements; engineering contracts; concession or license agreements; investment agreements; financing agreements; banking agreements; insurance agreements; exploitation or concession agreements; joint venture agreements; and shipping contracts; The draft proposal of the law explains that article 3 of the Commercial Code, which defines "commercial" more narrowly, does not apply to this law. Legislative History, *supra* note 3, at 8.

[99] Legislative History, *supra* note 3, at 9.

[100] Arbitration Law, *supra* note 2, art. 1(3)(c), 2(g).

[101] Arbitration Law, *supra* note 2, art. 8(1).

[102] Arbitration Law, *supra* note 2, art. 5.

[103] Arbitration Law, *supra* note 2, art. 16(1).

[104] Arbitration Law, *supra* note 2, art. 16(2). The parties can still choose an arbitrator without prejudicing this claim. The tribunal may allow an untimely objection if it finds the delay justified.

which can be appealed, or a challenge to the merits.[105] If the tribunal finds that the contract is not valid, it still has jurisdiction to rule on whether the arbitration clause or agreement is valid.[106] The arbitration clause is considered an independent agreement , apart from the contract.[107] If the tribunal decides, as a preliminary decision, that it has jurisdiction, a final appeal can be made to the President of the Court of Appeals.[108] The tribunal also has power to issue interim measures, including injunctions, to protect the object of the dispute.[109]

C. Formal Requirements

The Arbitration Law covers a broad range of relationships, informal relationships.[110] An "arbitration agreement" can be a clause or a separate contract, and must be in writing.[111] The agreement does not have to be in a separate communication and can be contained in another document or communication.[112] In addition, the writing does not have to be signed by both parties, but instead can be taken from an exchange of written communications.[113] The agreement can also be incorporated by reference in the contract to a written document containing an arbitration clause.[114] Lastly, an agreement contained in an electronic docu-

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[105] Arbitration Law, *supra* note 2, art. 16(3).

[106] Arbitration Law, *supra* note 2, art. 16(1).

[107] *Id.*

[108] Arbitration Law, *supra* note 2, art. 16(3). If the tribunal treats the decision as a challenge to the merits, it is final.

[109] The arbitration agreement can eliminate this authority. Arbitration Law, *supra* note 2, art. 17. The tribunal can only act on the request of a party. *Id.*. Security can be required if the measure is granted. *Id.*

[110] Arbitration Law, *supra* note 2, art. 7(1).

[111] Arbitration Law, *supra* note 2, art. 7(2).

[112] Arbitration Law, *supra* note 2, art. 7(2).

[113] *Id.*

[114] *Id.*

ment or signature is given the legal effect of a written document under Chilean law.[115] Thus, at least theoretically, an arbitration agreement could be concluded electronically.

D. Sources of Law

There are three basic varieties of arbitration: arbitration in law, arbitration in equity, and mixed arbitration, which blends both. Arbitrators in law follow procedures required by law selected by the parties and judge the merits of the disputes by the same law.[116] Arbitrators *ex aequo et bono* follow principles of equity and justice to rule on issues of procedure and merit and are not limited by the law or regulations.[117] Mixed arbitrators follow the procedures determined by the parties, not by the law, but issue decisions according to the law.[118] Under the default rules of the arbitration institutions, the arbitral tribunal decides the substantive law, or the law that will govern the dispute.[119] By default, the Arbitration Law specifies that the arbitration agreement's election of a country's substantive law will be

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[115] Law 19.799 ("Ley Sobre Documentos Electrónicos, Firma Electrónica y Servicios de Certificación de Dicha Firma" [Law Concerning Electronic Documents, Electronic Signatures, and Certifications Services of Electronic Signatures]) art. 3, Apr. 12, 2002 (Chile), *available at* http://www.bcn.cl/; Decree 181 ("Reglamento de la Ley Nº 19.799 Sobre Documentos Electrónicos, Firma Electrónica y la Certificación de Dicha Firma" [Regulation Concerning Electronic Documents, Electronic Signatures, and Certifications Services of Electronic Signatures]), August 17, 2002 (Chile), *available at* http://www.bcn.cl/; Figueroa Valdéz, *supra* note 4; *see also* Gretchen Robinson, *Chile: Electronic Documents, Signatures and Certification*, INTER-AMERICAN TRADE REP., Nov. 2002, at 9–13, *available at* http://natlaw.com/bulletin/2002/0211/trnov02.pdf.

[116] Cruzat, *supra* note 47, 1. In Chile, the procedural rules would come from the Arbitration Law. *See id.*

[117] *Id. Ex aequo et bono* is Latin for "according to what is equitable and good." BLACK'S LAW DICTIONARY, *ex aequo et bono*, (8th ed. 2004). Arbitrators with equitable powers have wide latitude to decide procedural issues unless the arbitration agreement limits this. KLEINHEISTERKAMP, *supra* note 1, at 462–463.

[118] *Id.*

[119] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 43–44; ICC Rules art. 17(1)–(2); LCIA Rules arts. 16.3, 22.3; AAA Rules art. 28.1–2; Stockholm Rules art. 24(1).

applied.[120] To prevent possible conflict between arbitration institutions and the Arbitration Law, parties should stipulate to the substantive law that will apply to the arbitration.[121]

The agreement can grant the tribunal the power to decide the issues under equitable principles.[122] Arbitration in equity allows arbitrators to ignore the law and judge according to rules of fairness and equity, providing a practical solution to complex legal issues such as choice of law.[123] Arbitrators in equity also use the contract terms and the applicable trade usages in their decision.[124] In drafting the arbitration agreement, to avoid or minimize later disputes, the parties should also define key trade and industry terms used in the contract.[125] Other arbitration rules can also be incorporated into the contract by including a reference to them.[126] The Arbitration Law only allows tribunals to decide by equity when the parties expressly decide to grant the tribunal equitable powers.[127] However, even when the arbitra-

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[120] Arbitration Law, *supra* note 2, art. 28(1). Any reference to the country's laws will be construed to refer to the country's substantive law, not its conflict of laws rules. *Id.* If no reference to substantive law is made, the tribunal will decide using the conflict of laws rules it considers applicable. *Id.*

[121] Arbitration Law, *supra* note 2, art. 28(4); CAM Rules art. 29(1).

[122]Arbitration Law, *supra* note 2, art. 28(3); CAM Rules art. 29(4).

[123] KLEINHEISTERKAMP, *supra* note 1, at 320. However, limiting equitable discretion is difficult. *See, e.g.,* Arbitration Law, *supra* note 2, art. 28(4) (requiring arbitral tribunal abide by terms of contract and trade usage in all cases).

[124] Arbitration Law, *supra* note 2, art. 28(4).

[125] *See* CAM Rules art. 29(5) ("the arbitral tribunal shall take into consideration the stipulations in the contract and the pertinent uses in commerce."); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 45. Under the ICC rules, the arbitral tribunal creates the terms of reference for use in the arbitration at the beginning of the proceedings.

[126] Arbitration Law, *supra* note 2, art. 2(e).

[127] Arbitration Law, *supra* note 2, art. 28(3); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 44; ICC Rules art. 17(3); LCIA Rules art. 22.4; AAA Rules art. 28.3; Stockholm Rules art. 24(3).

tion is by law, Chilean parties typically give arbitrators equitable powers to decide procedural issues.[128]

E. Selecting Arbitrators

"The arbitration is no better than the arbitrator" because arbitrators control procedure and justice.[129] The Arbitration Law provides that, by default, an arbitral tribunal shall consist of three arbitrators.[130] Chilean parties usually prefer using one arbitrator; considering it the most confidential and efficient arrangement, since one arbitrator can more quickly schedule meetings, conducts hearings, and make an award.[131] Under the CAM Rules, CAM selects the single arbitrator if the parties cannot agree who to appoint within 30 days of requesting arbitration.[132] Three arbitrators are typically used only for disputes involving more than one million dollars in order to justify the added cost.[133] Additionally, three

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[128] KLEINHEISTERKAMP, *supra* note 1, at 465–466 (noting that this allows greater flexibility and avoids potential delays of ordinary procedure).

[129] Müller, *supra* note 15.

[130] Arbitration Law, *supra* note 2, art. 10(1)–(2). Of course, the parties are free to choose a different number, but in Chilean tradition, usually only one arbitrator is chosen. KLEINHEISTERKAMP, *supra* note 1, at 162 n.18. The default rules of the arbitration organizations call for one arbitrator. CAM Rules, art. 8(2); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 15, 21; ICC Rules art. 8(2); LCIA Rules 5.4; AAA Rules art. 5; Stockholm Rules art. 16(1).

[131] KLEINHEISTERKAMP, *supra* note 1, at 466; REED, *supra* note 17, 576. Stockholm has expedited arbitration rules that use three main principles to quickly and effectively issue awards: (1) use a sole arbitrator; (2) use procedural limitations,; and (3) set a time limit to render the award. Müller, supra 15. The expedited rules place a limit of one written statement per party. Stockholm Rules for Expedited Arbitration, art. 16, http://www.sccinstitute.com/uk/Rules/ (last visited Feb. 18, 2006). Oral hearings are only held if a party requests it and the Arbitrator agrees to the request. *Id.* art. 21. The award must also be issued within three months of when the case is referred to the arbitrator. *Id.* art. 28.

[132] CAM Rules art. 8(4). Similarly, if a party declines to answer the request for arbitration, CAM will appoint the arbitrator. CAM Rules art. 6(4).

[133] REED, *supra* note 17, 577; Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006). Another author wryly notes that cost for three arbitrators may "actually exceed the contentious amount. Dillenz, *supra* note 12, 233–234.

arbitrators may be employed when the parties cannot agree on one arbitrator.[134] The potential problem of whether the Arbitration Law overrides current law and allows arbitrators who are not Chilean nationals to function as arbitrators at law is discussed below in section VII.

When three arbitrators are used, each party selects an arbitrator, and the two arbitrators select the third.[135] This selection method works poorly for contracts involving three or more parties because of possible conflicting interests.[136] In discussions, parties need to make clear what role the arbitrators will play: the neutral decisionmaker or the partisan advocate.[137] Conflicts occur when one party selects an arbitrator to act as an advocate, not as a fair and impartial decision maker, and the other party responds in kind.[138] This conflict can be prevented by requiring both parties to agree to appoint neutral and impartial arbitrators.[139] Even with this agreement, parties often use potential arbitrators' nationality as a proxy for how they will decide.[140]

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[134] REED, *supra* note 17, 576.

[135] Arbitration Law, *supra* note 2, art. 11(3)(a). Under the default CAM Rules, CAM appoints the third arbitrator. CAM Rules art. 8(5). CAM does not have to state the reason why it selected a particular arbitrator.

[136] Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A U.S. Perspective*, 1997 AMERICAN BAR ASSOCIATION CENTER FOR CONTINUING LEGAL EDUCATION NATIONAL INST. B-75, B-91; *see* George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective from North America*, 5 ANN. SURV. INT'L & COMP. L. 13, 16 (1999).

[137] Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INTL'L L. 53, 113–114 (2005).

[138] AAA, Practical Guide, *supra* note 21, at art. 5(A); REED, *supra* note 17, at 578. To prevent procedural disputes, arbitration agreement can grant the presiding arbitrator the sole authority over procedural issues. Arbitration Law, *supra* note 2, art. 29.

[139] AAA, Practical Guide, *supra* note 21, at art. 5(A).

[140] Rogers, *supra* note 137, at 73. Sometimes parties even interview candidates extensively to gauge their predisposition. *Id.* at 74. This could be solved by requiring joint interviews. *Id.* at 75.

If the parties are permitted to appoint partisan arbitrators, the agreement should explicitly state this.[141] If a party-appointed arbitrator is allowed to act as an advocate, parties should discuss whether *ex parte* discussions are allowed.[142] Parties can also adopt ethical rules, such as those proposed by the International Bar Association.[143] The ethical rules should guide prospective arbitrators by objective standards – subjective standards are often interpreted quite differently by prospective arbitrators.[144] Disclosure rules are especially important because non-disclosure is rarely sufficient grounds for setting aside an award or resisting its enforcement.[145]

A party can ask the President of the Court of Appeals to appoint the third arbitrator if the two arbitrators cannot agree or if the other party has not selected its arbitrator within 30 days after receiving the request to do so.[146] This is in direct conflict with the rules of some arbitration organizations, which specify that the arbitration organization shall select the

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[141] *Id.*

[142] Rogers, *supra* note 137, at 63–64.

[143] International Bar Association, *International Code of Ethics* (1988), *available at* http://www.ibanet.org/images/downloads/International_Code_of_Ethics.pdf (last visited Feb. 21, 2006); International Bar Association, *Ethics for International Arbitrators*, 26 I.L.M. 583, 584 (1987). Another alternative would be to require arbitrators to take an oath of impartiality AAA, Practical Guide, *supra* note 21, at art. 5(A).

[144] Rogers, *supra* note 137, at 72. For examples of disclosure rules for conflicts of interest, see the IBA Guidelines on Conflicts of Interest in International Arbitration (2004), available at http://www.ibanet.org/images/downloads/guidelines%20text.pdf (last visited Apr. 12, 2005), and the AAA Code of Ethics for Arbitrators in Commercial Disputes (2004), available at http://www.adr.org/sp.asp?id=21958.

[145] Rogers, *supra* note 137, at 72.

[146] Arbitration Law, *supra* note 2, art. 11(3)(a). One of the parties must request the intervention. If the agreement specifies only one arbitrator, the President of the Court of Appeals will choose the sole arbitrator if the parties cannot agree. Arbitration Law, *supra* note 2, art. 11(3)(b). Typically, the hearing takes place within five to seven days. KLEINHEISTERKAMP, *supra* note 1, at 179–180 n.139. The parties can also choose an arbitration organization to select in case of disagreement. Arbitration Law, *supra* note 2, art. 2(d); Panama Convention art. 2(1) (stating that the appointment of arbitrators "may be delegated to a third party, whether a natural or juridical person"); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 27. ICC Rules art. 10(2); LCIA Rules art. 8.1; Stockholm Rules art. 16(3).

arbitrator if the parties cannot agree.[147] The President's selection cannot be appealed.[148] However, the parties can create a different appointment procedure by agreement, so they may wish to clarify this point in the arbitration agreement.[149]

The potential arbitrator must reveal any conflicts of interest that would affect independent or impartial performance.[150] An arbitrator can be challenged only on "justified doubts"[151] or inability to perform.[152] To challenge an arbitrator, the party sends a written statement with the reasons for the challenge to the arbitral tribunal within fifteen days of becoming aware of the conflict of interest or receiving notice of the arbitral tribunal's composition.[153] The arbitral tribunal then decides the challenge.[154] The losing party must appeal within 30 days from the tribunal's decision.[155] During the appeal, the tribunal can continue the proceed-

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[147] CAM Rules art. 8(5); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 27; ICC Rules art. 10(2); LCIA Rules art. 8.1; Stockholm Rules art. 16(3).

[148] Arbitration Law, *supra* note 2, art. 11(5). The President of the Court of Appeals is to select an "independent and impartial" arbitrator and consider selecting an arbitrator with a nationality different from the parties when selecting the sole arbitrator or the third arbitrator. *Id.*

[149] Arbitration Law, *supra* note 2, art. 11(4)(c); Panama Convention art. 2(1); CAM Rules art. 1(3); *see* New York Convention art. V.(1)(d)

[150] Arbitration Law, *supra* note 2, art. 12(1); CAM Rules art. 11. CAM Rules permit parties to contact other parties' arbitration candidates to ask them about their "traits, availability, independence in respect of the parties and impartiality in relation to the dispute." CAM Rules art. 11(4).

[151] Arbitration Law, *supra* note 2, art. 12(2); CAM Rules art. 12(1)(a). The party that appointed the arbitrator can only challenge the arbitrator for reasons that the party became aware of after the appointment. *Id.*

[152] Arbitration Law, *supra* note 2, art. 14(1); CAM Rules art. 12(1)(b).

[153] Arbitration Law, *supra* note 2, art. 13(2); CAM Rules art. 13(1). Again, the parties can fashion their own procedure for challenging the selection of an arbitrator. Arbitration Law, *supra* note 2, art. 13(1).

[154] Arbitration Law, *supra* note 2, art. 13(2). CAM decides the recusal issue if CAM is the arbitration institution. CAM Rules art. 13.

[155] Arbitration Law, *supra* note 2, art. 13(2).

ings and make an award.[156] However, a decision from the Court of Appeals on the challenge is final.[157] If the arbitrator withdraws, a substitute will be selected in the same manner as other arbitrator.[158] Accordingly, parties should weigh the risk of delay and the additional expense in allowing the replacement arbitrator to become familiar with the case against proceeding without a substitute and the risk of a failed arbitration if the remaining arbitrators cannot agree.[159]

In choosing an arbitrator, evaluate the most important or divisive issues and choose an arbitrator with the experience or character best suited to address them.[160] For example, technical experts familiar with disputed technical issues can eliminate disputes over expert reports; arbitrators with a reputation of integrity may help persuade the unsuccessful party the award is fair.[161] Similarly, if the arbitrator is well qualified, the parties will more likely trust the arbitrator, and therefore are more likely to consider the hearing and the award to be fair and accept the award instead of seeking to delay or nullify it.[162] Consider stipulating that the sole or presiding arbitrator's nationality be different than that of any party to the contract if national bias could be an issue.[163] Also consider the backgrounds of the arbitra-

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[156] *Id.* Similarly, if one arbitrator is recused, then the other two arbitrators can continue. CAM Rules art. 14(3).

[157] *Id.*

[158] Arbitration Law, *supra* note 2, art. 15; CAM Rules art. 15. By withdrawing, the arbitrator is not imputed to accept the truth of the challenge. Arbitration Law, *supra* note 2, art. 14(2).

[159] Arbitration Law, *supra* note 2, art. 12 to 15. CAM Rules provide for this by allowing the tribunal to decide if hearings need to be repeated and presuming the prior resolutions by the tribunal to be valid. CAM Rules art. 15(2)–(3).

[160] KLEINHEISTERKAMP, *supra* note 1, at 162. Parties should specify that at least one of the arbitrators have experience arbitrating the primary issue at dispute. *See* AAA, Practical Guide, *supra* note 21, at art. 5(B). However, the expert's knowledge could imbalance deliberation. *Id.*

[161] KLEINHEISTERKAMP, *supra* note 1, at 162.

[162] *See* KLEINHEISTERKAMP, *supra* note 1, at 162–163.

[163] CAM Rules art. 9(1); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 15; Rogers, *supra* note 137, at 116. The Arbitration Law instructs the court to consider whether the sole or third arbitrator should be of a different nationality. Arbitration Law, *supra* note 2, art. 11(b)(5). While there is a general consensus that the Arbitration Law takes precedence over Judicial

tors, since their backgrounds often determine the scope of discovery.[164] For example, arbitrators from civil law jurisdictions such as Chile are accustomed to limited discovery and are less likely to enforce broad discovery requests, while arbitrators familiar with American or English litigation will expect broader discovery.[165]

F. Negotiating and Mediating

Since arbitration is often viewed as the equivalent of litigation for international disputes, negotiation and mediation are the true international alternatives to litigation.[166] Taking advantage of corporate dynamics, the arbitration agreement can establish a negotiation procedure to promote conflict settlement.[167] This is done by requiring two mid-level managers most responsible for negotiating the substantive terms of the contract to negoti-

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Code's requirement that only attorneys can be arbitrators at law, the question is unresolved. Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006); Figueroa Valdéz, *supra* note 4, at 14.

The rules of the arbitration organizations address this issue by defaulting to a sole or third arbitrator of a different nationality than that of the parties unless the parties agree otherwise. ICC Rules art. 9(5); LCIA Rules art. 6(1); AAA Rules art. 6.4; Stockholm Rules art. 16(8). An arbitrator of a different nationality will most likely be considered impartial. On the other hand, if the arbitrator does not have knowledge and experience with the locality, the hearing may take longer and be more costly.

[164] Grant Hanessian, *Discovery in International Arbitration*, 34 INTL. LAW NEWS, 1, 8–9.

[165] Hanessian, *supra* note 164 at 8–9.

[166] Harold I. Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. 323, 325 (1998). Mediation is structured negotiation who attempts to bring parties to a clear understanding of their position and expectations to help them to settle. *Id.* at 323. The mediator's decision is not binding; the parties can choose to reject a decision by a mediator. *Id.* at 325.

[167] Freyer, *supra* note 136, at B-78. Adding a requirement to negotiate in good faith is not advisable, as litigation over whether an effort was in "good faith" could delay arbitration. Abramson, *supra* note 166, at 326; Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV., at 644–45 (1995) (noting one U.S. case that held that mediation was a required condition to bring an arbitration claim because the contract required negotiation in "good faith").

ate.[168] If no agreement is reached, the dispute is elevated to their supervisors.[169] Thus, the embarrassment of a failed project motivates potential managers to compromise and if the dispute escalates, the companies have a new perspective and a second chance to settle.[170]

Parties may also wish to include a "cooling-off" provision that requires parties to seek mediation or wait before initiating binding arbitration.[171] For example, a provision could require parties to seek the advice of a neutral expert mutually selected or to try to settle the dispute within 14 days of a "cooling-off" request.[172] The mediator should be familiar with the customs and culture of both parties.[173] An accompanying statute of limitations may be advisable to prevent the use of the negotiation and mediation provisions to delay arbitration.[174] Also, disputes that may require an injunction or extraordinary relief should not include a waiting period before a party can file an arbitration request.[175] With binding arbitration to follow, parties are more likely to seriously participate in the mediation and follow any settlement.[176]

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[168] *Id.* at 77. The Institute for Conflict Prevention and Resolution (formerly the Center for Public Resources), which has promoted this multi-step approach to dispute resolution, gives a model clause requiring parties to negotiate between "executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract." CPR Model Dispute Resolution Clauses, *available at* http://www.cpradr.org/pdfs/ADRclauseswithInbox_Jul03.pdf (last visited Feb. 21, 2006).

[169] *Id.* at 77.

[170] *Id.* at 78 (citing the Center for Public Resources, *The Merits of the 'Multi-Step' ADR Contract Clause*, 4 ALTERNATIVES TO THE HIGH COST OF LITIG. 5 (1986)). This multi-step procedure appears to be more successful where an ongoing relationship is involved. *Id.*

[171] AAA, Practical Guide, *supra* note 21, at art. 5(F).

[172] *See id.*; Freyer, *supra* note 136, at B-79 (noting that technical issues are often difficult to settle because of differing views from the parties' own experts and that a neutral expert can provide an objective evaluation of the merits of the issue).

[173] Sagartz, Note & Comment, *supra* note 13; Burton, *supra* note 167, at 637, 639.

[174] AAA, Practical Guide, *supra* note 21, at art. 5(F).

[175] Freyer, *supra* note 136, at B-78.

[176] Abramson, *supra* note 166, at 326–327; Burton, *supra* note 167, at 643.

G. Commencing Arbitration

Under the Arbitration Law, arbitration commences on the day a party receives the request for arbitration from another party,[177] and terminates upon settlement,[178] issuance of a final award,[179] or withdrawal of the claim.[180] Written communications can be made by delivery to the person, the place of business, residence, or mailing address of the party;[181] and the day

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[177] Arbitration Law, *supra* note 2, art. 21. The parties can alter this by agreement. By the default rules of the arbitration organizations, arbitration begins when the arbitration organization receives the request. CAM Rules art. 5(1)–(2) (arbitration begins "upon delivery of the request for arbitration and payment of the advance required for such commencement"); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 5–6; ICC Rules art. 4(2); LCIA Rules art. 1.2; AAA Rules art. 2.2; Stockholm Rules art. 8. Since appointing the arbitration tribunal may take some time, if there is a short period of limitation to file arbitration, parties may wish to specifically identify the arbitrators to be used in the arbitration agreement along with a process for substitution. *See* KLEINHEISTERKAMP, *supra* note 1, at 292.

[178] Arbitration Law, *supra* note 2, arts. 30, 31(2)(b); CAM Rules art. 34(2)(b). If all parties request and the tribunal does not object to the request, the tribunal can record the settlement agreement as an award from the tribunal. Arbitration Law, *supra* note 2, art. 30.

[179] Arbitration Law, *supra* note 2, art. 32(1), (3); CAM Rules art. 34(1).

[180] Arbitration Law, *supra* note 2, art. 32(2)(a); CAM Rules art. 34(2)(a). However, the respondent can ask the tribunal to continue the proceedings. The tribunal may grant this if the respondent has a legitimate interest in obtaining a final resolution to the litigation. *Id.* The tribunal can also terminate the arbitration if it finds that continuing the proceedings would be unnecessary or impossible. Arbitration Law, *supra* note 2, art. 32(c).

[181] Arbitration Law, *supra* note 2, art. 3(1)(a); CAM Rules art. 2(2). If the current location is unknown, the last known location can be used. The delivery method must provide a record of the delivery attempt. Arbitration Law, *supra* note 2, art. 3(1)(a).

of delivery is the day of receipt.[182] However, this rule does not apply to communications made during the arbitration.[183]

VI. PROCEDURE

The arbitration will be conducted in the language or languages selected by the arbitration agreement.[184] If the agreement does not specify the language, the tribunal will determine what language or languages to apply to all writings, hearings, decisions, and awards.[185] Consequently, parties should stipulate to the language in the agreement to clarify any possible confusion.[186] Any evidence in an unadopted language must be accompanied by a translation.[187]

The arbitration agreement controls the arbitration procedure;[188] otherwise, the tribunal determines the appropriate procedure to apply, including admissibility, relevance, and weight of evidence.[189] The tribunal must treat each party equally and give each the full

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[182] Arbitration Law, *supra* note 2, art. 3(1)(b); *see* CAM Rules art. 2(4) (deeming communications to be received on the day of receipt or "the day when they should have been received, depending on the means of communication used."). The CAM Rules further clarify that all calendar days, including holidays count toward time periods unless the last day is an official holiday or non-business day – the time period is extended to the next business day. CAM Rules art. 2(5).

[183] Arbitration Law, *supra* note 2, art. 3(2).

[184] Arbitration Law, *supra* note 2, art. 22(1); CAM Rules art. 20. This is also reflected in the rules of most arbitration organizations. INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 42–43.

[185] Arbitration Law, *supra* note 2, art. 22(1); CAM Rules art. 20(2)–(3).

[186] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 42–43.

[187] Arbitration Law, *supra* note 2, art. 22(2); CAM Rules art. 20(3).

[188] Arbitration Law, *supra* note 2, art. 19(1).

[189] Arbitration Law, *supra* note 2, art. 19(2); CAM Rules art. 21(2)–(3) (the arbitration tribunal may decide procedure to "to avoid unnecessary delays and expenses and ensure efficient and fair means" to settle the dispute).

opportunity to present its case.[190] If the parties fail to decide the place of arbitration, the tribunal will select it by considering all of the circumstances.[191] When there is more than one arbitration, if the parties or all tribunal members agree, an arbitration agreement can grant the presiding arbitrator the power to decide questions of procedure.[192]

A. Complaint and Answer

The tribunal determines the deadline for stating a claim and answer it if the agreement is does not explicitly state it.[193] If the claim is not made on time, the arbitration will terminate.[194] The claim must include the claim, the issues, the facts supporting them, and the relief sought.[195] The answer must respond to the claim in a like manner.[196] If the answer omits part of elements required , the omission is considered an admission.[197] A late answer will be given the effect of accepting all of the claim's allegations, and the arbitration will continue.[198] The answer or claim can be accompanied by supporting evidence or refer to the evidence that will be presented.[199] Note that the Arbitration Law does not *require* pre-

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[190] Arbitration Law, *supra* note 2, art. 18. Accordingly, if one party has the opportunity to present in person, each party should receive the same opportunity.

[191] Arbitration Law, *supra* note 2, art. 20(1). The tribunal should consider factors such the locations of the parties, witnesses, experts, and evidence when deciding the place of arbitration. *Id.* art. 20(2).

[192] Arbitration Law, *supra* note 2, art. 29; CAM Rules art. 31(2); Stockholm Rules art. 20(2).

[193] Arbitration Law, *supra* note 2, art. 23(1); CAM Rules art. 22(2).

[194] Arbitration Law, *supra* note 2, art. 25(a).

[195] Arbitration Law, *supra* note 2, art. 23(1); CAM Rules arts. 5(3), 22(2).

[196] *Id.*

[197] Arbitration Law, *supra* note 2, art. 25(b); CAM Rules art. 27(1) ("When the claimant does not present his statement of claim within the purview of article 22 number 1 of these Rules or in the period set for such purpose by the arbitral tribunal without citing a justified reason, the arbitral tribunal may conclude the proceedings in relation to that claim.").

[198] Arbitration Law, *supra* note 2, art. 25(b). The ICC and the LCIA rules also allow the arbitration to proceed even if a party refuses to participate. INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 18; ICC Rules art. 6(3); LCIA Rules art. 15.8.

[199] Arbitration Law, *supra* note 2, art. 23(1); CAM Rules art. 22(4).

hearing exchange of information.[200] Parties may wish to alter this point, even if the standard discovery rules are not expanded.[201] Additionally, parties may amend their claim and answer during arbitration, unless the agreement forbids it or the tribunal finds the amendment unlawful because of the delay.[202]

B. Discovery

In general, discovery in international arbitration is more restrictive than the broad document discovery, prehearing oral depositions of witnesses, and written depositions provided by the United States court system.[203] Civil law countries like Chile do not usually provide for such liberal discovery in domestic arbitrations, but discovery orders are usually enforceable in international arbitration.[204] Even if discovery is expanded, foreign companies and their counsel are not bound by the same ethical code of the U.S. court system and are thus not likely to treat a discovery request in the same manner as a discovery request in litigation in U.S. courts.[205] Expanded discovery could be a benefit or a disadvantage, depending on which party is bringing the claim.[206] As a result, parties should consider possible disputes

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[200] *See* Arbitration Law, *supra* note 2, art. 23 (giving parties the option to attach supporting evidence).

[201] *See generally* Hanessian, *supra* note 164. Even the CAM Rules do not require it: "The arbitral tribunal may, if it deems appropriate, request that the parties provide a summary of the documents and evidence that they will present in support of the points in dispute on which their statements of claim or response are based." CAM Rules art. 24(2).

[202] Arbitration Law, *supra* note 2, art. 23(2).

[203] Hanessian, *supra* note 164, at 1, 8–9. However, international arbitrations often have informal "information sessions" prior to hearings in complex disputes. *Id.*

[204] *Id.* at 8. In civil law jurisdictions, extensive discovery is often seen as a "fishing expedition." Jose Luis Siqueiros, *Arbitration of Commercial Disputes in Mexico and the United States: A Panel Arbitration of Commercial Disputes in Mexico and the United States: a Panel Discussion*, 2 U.S.-MEX. L. J. 111, 119 (1994).

[205] *Id.* at 9.

[206] *Id.* at 9 (giving the example of a distribution agreement between a manufacturer and a distributor). Expanded discovery would be beneficial to the manufacturer in its claim for violation of the non-compete clause, but would be a disadvantage to the manufacturer if the distributor brings a defective product claim against it. *Id.*

and what evidence would be needed to arbitrate them. To prevent using discovery as a dilatory tactic, parties can include time limitations as to when all discovery should be completed or when arbitrators must decide discovery questions.[207]

Under the Arbitration Law, the tribunal conducts discovery in arbitration as it considers "appropriate" and may request assistance from the Chilean courts in obtaining evidence.[208] Discovery is therefore limited by the "competence" of the court and its rules of evidence.[209] The ability to enforce discovery orders in the local court is critical when a third party holds evidence.[210]

The rules of discovery differ slightly among arbitration organizations. The ICC, for example, is unique among arbitration organizations because it requires the arbitration tribunal and the parties to establish "Terms of Reference," which include a timetable for information exchange and the rules of procedure and evidence, to apply to the arbitration.[211] The CAM Rules only provide discovery if the tribunal requests it.[212] The ICC Rules give arbitrators the general power to "establish the facts of the case by all appropriate means."[213] The AAA and LCIA Rules are more specific than the ICC Rules, granting greater power to the arbitral tribunal to conduct discovery.[214] The AAA Rules give the arbitral tribunal power to "order parties to produce documents, exhibits, or other evidence that [the arbitral tribunal] deems

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[207] AAA, Practical Guide, *supra* note 21, art. 5(I).

[208] Arbitration Law, *supra* note 2, arts. 19(2), 27.

[209] Arbitration Law, *supra* note 2, art. 27.

[210] Hanessian, *supra* note 164, at 8.

[211] ICC Rules art. 18; *see* INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 37.

[212] "The arbitral tribunal may occasionally request that the parties furnish additional documents, appendices and evidence and may set the date or period of time for delivery thereof." CAM Rules 24(3). The "occasionally" seems to reflect a general attitude against expansive discovery.

[213] ICC Rules art. 20(1).

[214] *Compare* ICC Rules art. 20(1) (giving the tribunal the power to "establish the facts of the case by all appropriate means") *with* AAA Rules art. 19(3) (giving the arbitral tribunal power to "order parties to produce documents, exhibits, or other evidence [the arbitral tribunal] deems necessary or appropriate") and LCIA Rules art. 22(1)(d).

necessary or appropriate."[215] The LCIA Rules give the tribunal the power "to order any party to make any property, site, or thing under its control . . . available for inspection" and "to order any party to produce . . . any documents or classes of documents in their possession, custody or power which the arbitration tribunal determines to be relevant."[216] The Stockholm Rules allow the tribunal to determine the "manner of conducting the proceedings"[217] and instruct the tribunal to conduct the hearing in a "practical and expeditious manner,"[218] and the tribunal can appoint its own expert.[219]

The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") allow a tribunal to require pre-hearing exchange of documents, and allow party requests for "a narrow and specific requested category of documents that are reasonably believed to exist."[220] If a party refuses a request without a "satisfactory explanation" or objection, the IBA Rules permit the tribunal to draw an adverse inference.[221] This inference may be sufficient to ensure cooperation, as a party must decide whether producing the potentially harmful documents is worse than allowing the tribunal to draw the inference that the documents contain what the requesting party

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[215] AAA Rules art. 19(3).

[216] LCIA Rules arts. 22(1)(d), 22(1)(e) (giving the tribunal power "to order any party to make any property, site, or thing under its control . . . available for inspection"[216] and "to order any party to produce . . . any documents or classes of documents in their possession, custody or power which the arbitration tribunal determines to be relevant").

[217] Stockholm Rules art. 20(1).

[218] Stockholm Rules art. 20(3).

[219] Stockholm Rules art. 27(1). If a party requests, it can question the expert appointed. Stockholm Rules art. 27(2).

[220] IBA Rules on the Taking of Evidence in International Commercial Arbitration [hereinafter IBA Rules] art. 3(1), (3)(a)(ii) (pre-hearing exchange of documents), *available at* http://www.ibanet.org/images/downloads/IBA rules on the taking of Evidence.pdf (last visited Feb. 21, 2006).

[221] IBA Rules, *supra* at note 220, art. 9(4)–(5).

alleges.[222] If parties are considering expanded discovery, the IBA Rules can be adopted by reference.[223]

C. Arbitration Hearing

An oral hearing will be held to present evidence or for oral argument, unless the arbitration agreement specifies otherwise.[224] The CAM Rules default to no oral hearing unless the arbitral tribunal decides it is necessary.[225] Additionally, if the agreement fails to establish the extent and timing of the hearing, the tribunal does so instead.[226] The tribunal must notify the parties in advance of the hearing to allow the parties sufficient time to examine merchandise, property, or documents.[227] Any statement, document, or other information submitted by one party to the tribunal must also be given to the other party,[228] and any reports or documents that could be used by the arbitral tribunal in its decision must also be given to both parties.[229] If a party fails to appear at a hearing or does not present documentary evidence, the tribunal may continue the arbitration and determine the outcome of the case based on the evidence it has.[230]

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[222] Hanessian, *supra* note 164, 8–9.

[223] Arbitration Law, *supra* note 2, art. 2(e).

[224] Arbitration Law, *supra* note 2, art. 24(1); UNCITRAL Model Law, App., Explanatory Note by UNCITRAL Secretariat art. 28.

[225] CAM Rules art 25(1).

[226] Arbitration Law, *supra* note 2, art. 24(1). Note that article 24 deals with the general right of a party to an oral hearing, and does not address the procedure such as length of the hearing. UNCITRAL Model Law, App., Explanatory Note by UNCITRAL Secretariat art. 28.

[227] Arbitration Law, *supra* note 2, art. 24(2).

[228] Arbitration Law, *supra* note 2, art. 24(3); CAM Rules art. 24(4).

[229] Arbitration Law, *supra* note 2, art. 24(3); CAM Rules art. 24(4).

[230] Arbitration Law, *supra* note 2, art. 25(c). The ICC and the LCIA Rules also allow the arbitration to proceed even if a party refuses to participate. INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 18; ICC Rules art. 6(3); LCIA Rules art. 15.8. This places the party that ignores the arbitration in peril if it later seeks to have the award set aside. *See* UNCITRAL Model Law App., Explanatory Note by UNCITRAL Secretariat, art. 34; KLEINHEISTERKAMP, *supra* note 1, at 386.

Under default CAM Rules, witness testimony is written.[231] A party can petition the tribunal under CAM Rules to cross-examine the other party's witness.[232] If the tribunal allows it and the witness does not attend the hearing, the tribunal can disregard the testimony.[233]

The tribunal may appoint experts to report on material issues and require the parties to produce or give access to all the documents, merchandise, or other pertinent goods.[234] Upon a party request or on its own accord, the tribunal may conduct a hearing to provide the parties the opportunity to examine the opponent's expert and present additional expert testimony on disputed issues.[235] Only the AAA rules expressly forbid *ex parte* communications (communications where only one party is present) with the arbitrators.[236] Confidentiality of the proceedings is addressed in part by the arbitration organizations,[237] and hearings

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[231] CAM Rules art 26(1)–(2).

[232] CAM Rules art 26(3).

[233] *Id.*

[234] Arbitration Law, *supra* note 2, art. 26(1)(a)–(b); CAM Rules art. 28 (1). The parties can restrict or take away this power. Arbitration Law, *supra* note 2, art. 26(1).

[235] Arbitration Law, *supra* note 2, art. 26(2). CAM Rules seem to require a hearing of the expert, with an opportunity to question the expert and present other experts, if a party requests it. CAM Rules art. 28(6). Parties can eliminate this by agreement. *Id.*

[236] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 20; AAA Rules art. 7.2, 16(4). The ICC, LCIA, and the Stockholm Rules are silent on this issue. INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 20 This is important if one party chooses to not appear at the arbitration – a one-sided hearing could be held with only the party that filed for arbitration unless *ex parte* communications are forbidden.

[237] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 33, 54–55, 96–97; ICC Rules Appendix II; LCIA Rules art. 30; AAA Rules arts. 27.4, 34; Stockholm Rules art. 9. Article 30 of the LCIA rules and article 27.4 of the AAA rules presume confidentiality unless the agreement indicates otherwise. The AAA rules do not specify that the parties must keep the arbitration award confidential. AAA Rules art. 27.4 The Stockholm rules require the arbitration tribunal to maintain confidentiality. Stockholm Rules art. 9. The ICC rules maintain the documents shall be kept confidential by the ICC and the arbitral tribunal. ICC Appendix II.

are private.[238] If confidentiality is a concern, the parties should address this by negotiating confidentiality provisions broader than that of the arbitration organization's provisions.[239]

D. Arbitral Awards

Under Chilean law, arbitrators are expected to encourage the parties to settle.[240] If the parties choose to settle, the arbitral tribunal can record a settlement between the parties.[241] The arbitral tribunal must decide any award by a majority vote and state its reasons in writing.[242] One drawback of requiring a reasoned award is that it reduces finality by facilitating appeal.[243] While this may be desirable for complex or large awards, smaller amounts

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[238] CAM Rules art. 25(5) ("All oral hearings and meetings of the arbitral tribunal will be private, save written agreement otherwise of the parties."); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 57; ICC Rules art. 21(3); LCIA Rules art. 19.4; AAA Rules art. 20.4. The Stockholm rules do not explicitly address the privacy of the arbitration hearing. INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 57.

[239] Dillenz, *supra* note 12, at 244. Since the arbitration institutional rules do not always include the parties, a party could publicly disclose the award. *Id.* For example the CAM Rules state that

> "The award will be confidential unless disclosure thereof is required for a challenge procedure, fulfillment or enforcement of the award, or the law or any judicial authority requires disclosure thereof or the parties mutually agree to stipulate that it is not confidential. However, the CAM Santiago may publish the awards while protecting the confidentiality of the identity of the parties."

CAM Rules art. 33(8).

[240] *See* CÓD. CIV. art. 262. This suggestion cannot be used as the basis for a claim of partiality. COD. CIV. art. 263.

[241] Arbitration Law, *supra* note 2, art. 30(1); CAM Rules art. 32(1). Under CAM Rules, the settlement is considered an award.

[242] Arbitration Law, *supra* note 2, arts. 29 (stating that the majority of the arbitrators must vote for the award), 30(1)–(2) (requiring the arbitrators to give their reasons in writing); *see also* CAM Rules arts. 31(1), 31(3)–(4); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 33–35, 65; ICC Rules art. 25(2); LCIA Rules art. 26.1; and AAA Rules art. 27. The Stockholm Rules do not address this issue. INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 33–35, 65.

[243] AAA, Practical Guide, *supra* note 21, art. 5(P).

in dispute may benefit from the greater finality of an unreasoned award.[244] The tribunal must also sign the award.[245] Furthermore, the award must so be titled, and the date and place of the award, as established by the place of arbitration,[246] must be included.[247] The award will be considered to have been delivered, for the purposes of the Arbitration Law, in the place of arbitration.[248] A signed copy of the award must then be delivered to each party.[249]

The Arbitration Law notably removes international commercial arbitration from Chilean Law governing deadlines for domestic arbitration.[250] Accordingly, parties may wish to set a deadline in their agreement to prevent unnecessary delays.[251] CAM Rules impose a six-month deadline.[252] If such a deadline is used, arbitrators should be allowed to extend this deadline if one party agrees.[253]

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[244] *See id.* It is more difficult to appeal an award without reasons because the court has little to review.

[245] Arbitration Law, *supra* note 2, art. 31(1). If any arbitrator does not sign the award, it must state the reasons why. *Id.*

[246] Arbitration Law, *supra* note 2, art. 31(4); CAM Rules art. 33(5).

[247] Arbitration Law, *supra* note 2, arts. 30(2), 31(3).

[248] Arbitration Law, *supra* note 2, art. 31(4).

[249] *Id.*; CAM Rules art. 33(6) (requiring the tribunal to notify each party of "the text of the final award" but only if the arbitration costs have been paid). CAM Rules also default to not requiring more notification. CAM Rules art. 33(6).

[250] Chilean law governing domestic arbitration requires arbitrators to perform their duties within either two years or the time dictated by the agreement. CÓD. TRIB. art. 235. After the deadline, the arbitrators do not have any power unless the parties grant them again. KLEINHEISTERKAMP, *supra* note 1, at 358.

[251] AAA, Practical Guide, *supra* note 21, art. 5(K).

[252] CAM Rules art. 31(3).

[253] AAA, Practical Guide, *supra* note 21, art. 5(K). CAM Rules permit the arbitral tribunal to extend the deadline once without the agreement of the parties. CAM Rules art. 31(4).

Parties can limit the amount of the award by using a "baseball" arbitration provision.[254] In "baseball" arbitration, used in Major League Baseball salary arbitration, both parties give the arbitrator and the other party their last, best settlement offer.[255] The arbitrator must use one party or the other party's amount in the award.[256] This motivates the parties to make a reasonable offer in settlement negotiations, sometimes moving the parties close enough to settle without arbitration.[257]

Under the rules of most arbitration institutions, the arbitral tribunal can award legal fees and costs to the successful party.[258] Since the Arbitration Law is intentionally silent on this point, parties can grant this power to the arbitral tribunal.[259] CAM Rules allow the arbitration award to include simple or compounded interest until the award is fulfilled,[260] and in the currency the arbitral tribunal deems appropriate.[261] Only the AAA Rules specifically exclude punitive damages unless the parties agree otherwise.[262] Most institutional rules require an advance on costs before commencing arbitration[263] and allow the arbitral tribu-

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[254] AAA, Practical Guide, *supra* note 21, art. 5(M).

[255] *Id.*

[256] *Id.*

[257] *Id.* Possible language for this provision is "Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted." *Id.*

[258] CAM Rules art. 36; INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 73, 77–78; ICC Rules art. 31(3); LCIA Rules art. 28; AAA Rules art. 31(d); Stockholm Rules art. 41.

[259] *See* UNCITRAL Model Law App., Explanatory Note by UNCITRAL Secretariat art. 16 (specifically noting that the fixing of costs and fees is not regulated by the Model Law). This may not be advisable, though, since it may hinder contract negotiations. *See* Dillenz, *supra* note 12, at 241. Instead, parties should state that a party resisting enforcement should bear the cost of the other party. *Id.*

[260] CAM Rules art. 33(7).

[261] *Id.*

[262] INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 71; AAA Rules art. 28.5.

[263] CAM Rules art. 39 (also allowing CAM to pay the arbitration costs out of the deposit); INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 75–76; ICC Rules art. 30; LCIA Rules art. 24; AAA Rules art. 33; Stockholm Rules art. 14.

nal to apportion them in unequal shares.[264] However, the Arbitration Law is intentionally silent on whether tribunals have the power to apportion the costs.[265]

E. Appeal to Alter or Add to the Award

A party must appeal to the tribunal to alter or add to the award within 30 days following the issuance of the award and may appeal to the tribunal to correct any calculation, typographic, or similar error, as well as for an interpretation of part of the award.[266] If the tribunal decides the request is justified, it must correct the error or give the interpretation within 30 days.[267] Under CAM Rules, the other party must respond to the appeal within 15 days of receiving notice from the tribunal.[268] An appeal may also be made for an additional award for any claim made in the proceedings that was not included in the award.[269] If the tribunal deems it a justified request, it must make the additional award must within 60 days.[270] The new award may require additional costs under CAM Rules.[271] Any correction, interpretation, or additional award must conform to the requirements applicable to issuing the first award, such as including the date and place.[272]

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[264] CAM Rules art. 37; INTERNATIONAL ARBITRATION RULES, *supra* note 54, at 77–78; ICC Rules art. 31(3); LCIA Rules art. 28.2; AAA Rules art. 31; Stockholm Rules art. 39(1).

[265] *See* UNCITRAL Model Law, App., Explanatory Note by UNCITRAL Secretariat art. 16 (specifically mentioning that the fixing of costs and fees is not regulated by the Model Law).

[266] Arbitration Law, *supra* note 2, art. 33(1)(a); CAM Rules art. 35(1). The other party must be notified of the appeal. *Id.* The arbitration agreement must allow the part of the award to be interpreted and the appealing party must notify the other parties of the appeal. *Id.*, art. 33(1)(b). The CAM Rules permit the tribunal to correct any of the errors on its own iniative. CAM Rules art. 35(3).

[267] Arbitration Law, *supra* note 2, art. 33(1)(b). The tribunal can extend its deadline if it is necessary. *Id.* art. 33(4).

[268] CAM Rules art. 35(7).

[269] Arbitration Law, *supra* note 2, art. 33(3); CAM Rules art. 35(5).

[270] Arbitration Law, *supra* note 2, art. 33(3); CAM Rules art. 35(5). The tribunal can extend the deadline for making the additional award if necessary. Arbitration Law, *supra* note 2, art. 33(4).

[271] CAM Rules art. 38(2).

[272] Arbitration Law, *supra* note 2, art. 33(5).

F. Award Enforcement

Prior to the Arbitration Law, foreign awards were enforced by *exequatur*, a procedure to petition the Supreme Court of Chile for approval.[273] The Arbitration Law changes this, granting the Court of Appeals the power to enforce foreign arbitral awards.[274] The party seeking enforcement must present the Court of Appeals with either an original or a certified copy of both the arbitration agreement and the award.[275] If the award or agreement is not in Spanish, a certified translation is also required.[276] If the enforcement is appealed, the Court of Appeals can order the party resisting enforcement to provide security.[277] Although a performance bond or insurance may be expensive, parties should consider placing in the arbitration agreement a requirement that all parties purchase it when an arbitration claim is filed.[278] This avoids the possibility of a party with a foreign subsidiary waiting for an unfavorable decision, then closing the foreign subsidiary and forcing the successful party to seek costly enforcement of the judgment in another country.[279]

G. Appeal to Set Aside the Award or Refuse Enforcement

A party must appeal the award to a Court of Appeals within three months of receiving the award or from the date of the tribunal's decision on an appeal.[280] Appeals of arbitration awards receive preference on the Court of Appeals docket over other cases.[281] The arbitration can begin and finish while the court hears the claim against the arbitration agree-

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[273] Cruzat, *supra* note 47, at 2. *See generally* Katherine Birmingham Wilmore, et. al in *International Legal Developments in Review: 2001 Business Transactions & Disputes International Litigation VI. Enforcement of Foreign Judgments*, 36 INT'L LAW. 449 (2002).

[274] Arbitration Law, *supra* note 2, art. 35.

[275] Arbitration Law, *supra* note 2, art. 35(2).

[276] *Id.* A Chilean consulate can certify the translation. Cruzat, *supra* note 47, at 3.

[277] Arbitration Law, *supra* note 2, art. 36(2).

[278] KLEINHEISTERKAMP, *supra* note 1, at 431–432. A performance bond is a bond purchased that operates much like an escrow account for the amount in dispute. *See id.*

[279] *Id.*

[280] Arbitration Law, *supra* note 2, art. 34(3). Article six of the Arbitration Law specifies that the Court of Appeals hears the appeal.

[281] Arbitration Law, *supra* note 2, art. 34(5).

ment.[282] Alternatively, the court can suspend the appeal to allow the arbitral tribunal to finish the arbitration or address the claim.[283] The court can also grant a party's request for "preventative provisional measures."[284]

The appellate procedure for refusing recognition of the award is the same as that of requesting the award to be set aside, albeit some differences.[285] Most notably, an appeal resisting enforcement does not have a three-month deadline, allowing it to be made after the deadline.[286] An additional ground for appeal can be made on the ground that the award is not yet binding or has been suspended by a court of the country whose law was applied in the decision;[287] the Court of Appeals can suspend its decision on this appeal as well.[288]

The Arbitration Law, following the New York Convention, limits appeals to set aside the award or refuse enforcement on seven grounds:[289]

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[282] Arbitration Law, *supra* note 2, art. 8(2).

[283] Arbitration Law, *supra* note 2, art. 34(4).

[284] Arbitration Law, *supra* note 2, art. 9.

[285] *Compare* Arbitration Law, *supra* note 2, art. 34 *with* art. 36. Note that the Arbitration Law does not specifically preclude an appeal of the enforcement of the award under article 36 on the same grounds of an appeal under article 34, making it theoretically possible to appeal the award and then appeal the enforcement of the award. *See* KLEINHEISTERKAMP, *supra* note 1, 425–426. Since article one specifies that article 34 only applies to arbitrations conducted in Chile, this possibility does not apply to foreign awards. *Id.*

[286] Article 36 does not have the three month deadline of article 34. *Compare* Arbitration Law, *supra* note 2, art. 34(3) *with* art. 36.

[287] Arbitration Law, *supra* note 2, art. 36(1)(a)(v). This usually means there is no appeal on the merits currently pending. *See* KLEINHEISTERKAMP, *supra* note 1, at 450–453. Since the Arbitration Law does not allow an appeal on the merits of the award, this ground would only apply when a foreign court has set aside the award. *Id.*

[288] Arbitration Law, *supra* note 2, art. 36(2).

[289] Legislative History, *supra* note 3, art. 5(10). The legislative history of the Arbitration Law's model, the UNCITRAL Model Law, describes this limitation: "The issues relating to setting aside or annulment of arbitral awards are amongst the most difficult ones to be settled in the Model Law." PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 206 (London Sweet & Maxwell 2000) (quoting the First Secretariat

1. One of the parties was affected by some incapacity;[290]
2. The agreement is invalid under the substantive law selected;[291]
3. A party was not notified of the selection of an arbitrator or the arbitration hearing;[292]
4. The award is outside the scope of the agreement;[293]
5. The composition arbitral tribunal or the arbitration proceeding did not follow the arbitration agreement;[294]
6. The subject matter of the agreement is not susceptible to arbitration;[295] or
7. The award is contrary to public policy.[296]

Parties appealing on the grounds of lack capacity bears the burden of proving that a party was incapable of making a contract.[297] For example, if a party used fraud or misrepresentation to obtain the contract or agreement, it cannot base a claim against the arbitral award

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Note, *Possible Features of a Model Law*, ¶ 107, U.N. Doc. A/CN.9/207 (May 14, 1981)). The limitations balance the authority of arbitration and the authority of courts to intervene. *Id.* at 206.

[290] Arbitration Law, *supra* note 2, arts. 34(2)(a)(i), 36(1)(a)(i).

[291] *Id.*

[292] Arbitration Law, *supra* note 2, arts. 34(2)(a)(ii), 36(1)(a)(ii). The New York Convention added this exception to incorporate a basic concept of due process into the Convention. Quigley, *supra*, note 26 at 1067. The "proper notice" to include situations where the defendant was legally incapacitated. *Id.*

[293] Arbitration Law, *supra* note 2, arts. 34(2)(a)(iii), 36(1)(a)(iii).

[294] Arbitration Law, *supra* note 2, arts. 34(2)(a)(iv), 36(1)(a)(iv).

[295] Arbitration Law, *supra* note 2, arts. 1(5), 34(2)(b)(i), 36(1)(b)(i).

[296] Arbitration Law, *supra* note 2, arts. 34(2)(b)(ii), 36(1)(b)(ii).

[297] Arbitration Law, *supra* note 2, art. 34(2)(a); BINDER, *supra* note 289, at 211 (discussing the legislative history of the Model Law that the Arbitration Law is based on and noting that if the party "fails to sufficiently prove the existence of the ground, the court will confirm the award").

on its own incapacity.[298] If the party in question is Chilean, the Chilean rules of civil law should apply to claims of incapacity.[299]

The party claiming the arbitration tribunal incorrectly applied the substantive law in a proceeding or the arbitration has the burden of proof.[300] If the agreement did not specify the law to be applied, the agreement must be invalid under the law selected in the agreement or the country where the award was made.[301]

The party appealing on the ground of lack of notification has the burden of proving it.[302] The party must prove either that it was not given notice of the arbitrator's appointment or the arbitration proceedings, or that it was not able to present its case.[303]

If an issue arises regarding one of the parties going beyond the scope of the agreement, it is the responsibility of the appealing party to prove that the award was in fact beyond the scope of the agreement.[304] A decision is beyond the scope of an agreement when the dispute was not in the arbitration agreement's terms or in the scope of its terms.[305] The court may

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[298] CÓD. CIV. art. 1685.

[299] BINDER, *supra* note 289, at 211 (discussing the legislative history of the Model Law that the Arbitration Law is based on); s*ee* KLEINHEISTERKAMP, *supra* note 1, at 388 (arguing that the "general rules of civil law should be applicable with respect to the possibility of invoking capacity"); *see generally* CÓD. CIV. arts. 1681–1697 (relating to the validity of contract and rescission). An in-depth discussion of Chilean contract law is beyond the scope of this article.

[300] Arbitration Law, *supra* note 2, arts. 34(2)(a), 36(1)(a); BINDER, *supra* note 289, at 211 (discussing the legislative history of the Model Law that the Arbitration Law is based on and noting that if the party "fails to sufficiently prove the existence of the ground, the court will confirm the award").

[301] Arbitration Law, *supra* note 2, arts. 34(2)(a)(i), 36(1)(a)(i).

[302] Arbitration Law, *supra* note 2, arts. 34(2)(a), 36(1)(a).

[303] Arbitration Law, *supra* note 2, arts. 34(2)(a)(ii), 36(1)(a)(ii).

[304] Arbitration Law, *supra* note 2, arts. 34(2)(a), 36(1)(a); BINDER, *supra* note 289, at 211 (discussing the legislative history of the Model Law that the Arbitration Law is based on).

[305] Arbitration Law, *supra* note 2, arts. 34(2)(a)(iii), 36(1)(a)(iii).

choose to separate any part of the agreement and enforce the remainder of the arbitration agreement.[306]

A party claiming a violation of due process has the burden of proving such a violation.[307] Furthermore, when the composition or proceedings of the arbitral tribunal do not comply with the agreement or the Arbitration Law, a party can raise a procedural due process claim on appeal.[308] If the arbitration was conducted outside of Chile, the appellant must prove that the proceedings did not comply with the law of the country where the arbitration was conducted.[309]

On appeal, the party raising the challenge that the arbitration agreement issue is not capable of being arbitrated has the burden of proof.[310] The Arbitration Law retains existing Chilean law exclusions of certain areas of law from arbitration.[311] Chilean law currently expressly excludes the following disputes from arbitration: alimony and property settlement in a divorce; criminal matters; matters dealing with local police; attorney-client disputes; or any matter where the Public Prosecutor should be heard.[312] Employment disputes may also be non-arbitrable in Chile.[313]

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[306] *See* JORQUIERA ET AL., *supra* note 3, at 97 (stating that an arbitration agreement is autonomous and independently valid apart from the contract (citing Corte de Santiago, Revista, t. LXXVII, s. II, p. 64)).

[307] Arbitration Law, *supra* note 2, arts. 34(2)(a), 36(1)(a).

[308] Arbitration Law, *supra* note 2, arts. 34(2)(a)(iv), 36(1)(a)(iv); BINDER, *supra* note 289, at 211 (discussing the legislative history of the Model Law that the Arbitration Law is based on, and noting that this ground was seen as a "catch-all" for procedural errors).

[309] *Id.*

[310] Arbitration Law, *supra* note 2, arts. 34(2)(a), 36(1)(a); BINDER, *supra* note 289, at 211 (discussing the legislative history of the Model Law that the Arbitration Law is based on).

[311] Arbitration Law, *supra* note 2, arts. 1(5), 34(2)(b)(i), 36(1)(b)(i). The provisions do not prevent future exclusions.

[312] CÓD. TRIB. arts. 229–230.

[313] JORQUIERA ET AL., *supra* note 3, at 94–95 (asserting employment disputes are a non-arbitrable matter even though there is no express legislation); *contra* CONST. CHILE, ART. 19, § 16 ("*La ley señalará los casos en que la negociación colectiva deba someterse a arbitraje obligatorio.*" ["The

VII. POTENTIAL PROBLEMS

The Arbitration Law, and with it, the future of Chile as a regional arbitration center, faces three challenges. First, it is unclear whether the Arbitration Law overrides current law and allows arbitrators who are neither Chilean nationals nor attorneys to function as arbitrators at law.[314] Second, the Arbitration Law is silent on whether foreign counsel can represent parties at arbitration.[315] Third, and most important, the Arbitration Law may permit parties to use the extraordinary appeal of the *recurso de queja* to delay or annul an award.

A. Do arbitrators at law have to be both lawyers and Chilean nationals?

The Organic Code of the Judiciary requires arbitrators at law to be Chilean lawyers.[316] The Arbitration Law plainly changes this: "the nationality of a person will not be an obstacle to a person acting as an arbitrator."[317] But the Supreme Court cast doubt on this when it responded to the first proposed bill that later became the Arbitration Law: "With respect to Article 11 No.1, it seems convenient to request that the arbitration be lawyers if the arbitral tribunal is to act as *de iure* arbitrators."[318] Mauricio Zelada Pérez, a legislative counsel at Chile's Justice Ministry, argues that foreign attorneys can be arbitrators at law because they

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law will indicate the cases where collective bargaining must be submitted to mandatory arbitration"]).

[314] Arbitration Law, *supra* note 2, art. 11(1); Figueroa Valdés, *supra* note 4, at 14; Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006). Prior to the Arbitration Law, only a lawyer admitted to the Chilean bar could be an arbitrator at law and Chilean nationality is required to become a lawyer in Chile. JORQUIERA ET AL., *supra* note 3, at 99; KLEINHEISTERKAMP, *supra* note 1, at 166–167.

[315] David M. Lindsey & Ricardo Riesco, *The 2004 Chilean Arbitration Act on International Commercial Arbitration: Selecting Chile as Seat of Arbitration: A Real Option?*, INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 639 (Practising Law Institute 2006). This article discusses the Arbitration Law's three potential problems in greater detail.

[316] CÓD. TRIB. art. 225.

[317] Arbitration Law, *supra* note 2, art. 11(1).

[318] Lindsey & Riesco, *supra* note 315, at 639 n.5 (quoting Supreme Court Letter No. 1306 (July 9, 2003)).

are acting as arbitrators only, not attorneys.[319] Similarly, Attorney Juan Eduardo Figueroa Valdés, citing the history of the Arbitration Law, argues that the Arbitration Law overrides the current law because it does not require arbitrators deciding controversies by law to be attorneys.[320] Even though the plainness of the Arbitration Law should override the Supreme Court's preferences, the wisest course would be to appoint Chilean lawyers to be arbitrators.

B. Can foreign counsel represent parties at an arbitration hearing?

During the Senate discussion of the Arbitration Law, Senator Parra argued that a tribunal under the Arbitration Law is a Chilean tribunal and is thus subject to Chilean law, including Law 18,120[321] which requires that parties can only be represented before tribunal by a Chilean lawyer.[322] The Minister of Justice agreed:

> "The bill does not contain an explicit provision. Therefore, it is necessary to comply with the general rules as provided by Chilean law . . . [A] foreign lawyer cannot intervene in an arbitration conducted in Chile, regardless of future amendments to the [Arbitration Law]."[323]

Accordingly, it is unclear whether the Arbitration Law detached international arbitration from this requirement. If the courts decide that it does not, then Chile will be an exception to the general international rule that parties can choose counsel for arbitration from any country.[324]

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[319] Mauricio Zelada Pérez, *Proyecto de Ley de Arbitraje Comercial Internacional* [The International Commercial Arbitration Law Project], 6 BOLETÍN JURÍDICO DE MINISTERIO DE JUSTICIA DE CHILE 101, 105–107 (2004), *available at* http://www.minjusticia.cl/documentos/numero6.pdf.

[320] Figueroa Valdés, *supra* note 4.

[321] Ley 18,120, "Normas sobre Comparecencia en Juicio" [Rules over Appearing in Judgment], available at http://www.bcn.cl/.

[322] Lindsey & Riesco, *supra* note 315, at 639 n.5 (quoting the Senate, 351st Ordinary Legislative Period, 4th Session, 47–51 (June 15, 2004)).

[323] Lindsey & Riesco, *supra* note 315, at 639 n.5 (quoting the Senate, 351st Ordinary Legislative Period, 4th Session, 62 (June 15, 2004))..

[324] Lindsey & Riesco, *supra* note 315, at 639 n.5.

C. Can parties use the *recurso de queja* to delay or attack an award?

Before the Arbitration Law, parties could appeal an arbitration award by pursuing the *recurso de queja*, a disciplinary recourse of complaint, against the arbitrator.[325] In domestic arbitration, the *recurso de queja* is used to correct the mistakes or serious abuses committed in judicial decisions, and should only be used when there is no other ordinary or extraordinary recourse available.[326] The arbitrator's decision must have had substantial "fault or abuse" and be "manifestly unjustified and pernicious."[327] The disciplinary recourse must be brought within a short period of time, usually little more than 18 days where one party is from a foreign jurisdiction.[328] In domestic arbitration cases, the *recurso de queja* is rarely granted.[329] However, in some domestic arbitration cases, the Supreme Court hasmodified

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[325] KLEINHEISTERKAMP, *supra* note 1, at 376–380; JORQUIERA ET AL., *supra* note 3, at 107–09. For a discussion of the disciplinary recourse, see Julio Guzmán Jordán, *Arbitraje y Recurso de Queja* [Arbitration and Disciplinary Recourse], CÁMARA DE COMERCIO DE SANTIAGO, http://www.camsantiago.com/html/articulos/articulos.htm.

[326] CÓD. TRIB. art. 545 (the *recurso de queja* "is only available if the error or abuse has been committed in interlocutory judgments that put an end to the trial or make its continuation impossible, or in final judgments not subject to any kind of ordinary or extraordinary challenge, irrespective of the power of the Supreme Court to act ex officio in exercise of its disciplinary functions.") (translation by Lindsey & Riesco, supra note 319, at 648–49). Law 19.374, enacted on Feb. 18, 1995, added a paragraph to article 545 limiting the use of the recourse to situations where no other recourse was possible. Guzmán Jordán, *supra* note 325, at 1.

[327] KLEINHEISTERKAMP, *supra* note 1, at 378–379 (quoting CA Santiago (Aug. 5, 1997) 94 II-2 RDJ 94, 96 (1997)).

[328] CÓD. TRIB. art. 547–548; CÓD. CIV. art. 259.

[329] Lindsey & Riesco, *supra* note 315, at 651–52 (citing *In re Mónica Portales Coya*, CA Santiago, Aug. 5, 1997, Revista Chilena de Derecho y Jurisprudencia, Tomo XCIV, No. 2, Sección 2a; *Romero Olmedo, Eduardo y Otro con Arbitro Arbitrador Rojas Abud, Nayo*, CA Santiago, Dec. 1, 1999, *reported in* El Arbitraje en la Jurisprudencia, Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (2005), at 276; *Papeles Concepción Ltda. con Juez Arbitro Armando Alvarez*, CA Santiago, July 22, 2002, Revista Chilena de Derecho y Jurisprudencia, Tomo XCIX, No. 3, Sección 2a).

arbitration awards when the arbitral tribunal misapplied the law or did not properly consider the evidence.[330]

A significant question is whether the *recurso de queja* can be used against international arbitration awards after the Arbitration Law, or whether the law precludes it.[331] The answer depends on how the Supreme Court interprets the Arbitration Law's last public policy exception that disallows any award (or award enforcement) that is "contrary to the public order of Chile."[332] Prior to the Arbitration Law, the scope of "public order" for foreign judgments was the "laws of the Republic [of Chile]."[333] The legislative history of the Arbitration Law sheds little light on the meaning of "public order," only mentioning that the grounds for appeal in the Arbitration Law are "fundamentally the same ones established by article V of the New York Convention."[334] The legislative history for the Model Law that the Arbitration Law was based on adds that this ground "covered fundamental principles of law and justice. . . . in substantive as well as procedural respects."[335] Thus, according to the Model Law's legislative history, corruption, bribery, or fraud, for example, would "constitute a ground for setting aside."[336]

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[330] Lindsey & Riesco, *supra* note 315, at 652–53 (citing *In re Velasco Guzmán, Roberto,* Supreme Court, Sep. 13, 1983, Revista Chilena de Derecho y Jurisprudencia, Tomo LXXX, No. 3, Sección 1a; *Banco de Chile con Juez Arbitro*, Supreme Court, July 22, 1993, *reported in* El Arbitraje en la Jurisprudencia, supra, at 292; *In re Guillón Cuevas, Pedro y Otra, Supreme Court*, May 4, 1999, Revista Chilena de Derecho y Jurisprudencia, Tomo XCVI, No. 2, Sección 1a).

[331] Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006). This should be resolved when the regulations are issued and the Supreme Court has a chance to review them. Id.

[332] Arbitration Law, *supra* note 2, arts. 34(2)(b)(i), 36(1)(b)(ii).

[333] CÓD. CIV. art. 245(1a); KLEINHEISTERKAMP, *supra* note 1, at 453–457.

[334] Legislative History, *supra* note 3, art. 5(10). The Model Law, which the Arbitration Law was based on, consciously used the same grounds as the New York Convention. BINDER, *supra* note 289, 208–209. The New York Convention's exception "relegat[ed] the ultimate decision on the efficacy of the [New York] Convention to the good faith of the Contracting States."

[335] BINDER, *supra* note 289, 208–209 (quoting the U.N. Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law on the Work of Its 18th Session*, ¶ 297, U.N. Doc. A/40/17 (June 21, 1985)).

[336] *Id.*

Under the Chilean Constitution, the Supreme Court is responsible for supervising and disciplining judges.[337] Arbitrators are part of the judiciary under Chilean law[338] and are subject to discipline, civil liability,[339] and criminal liability.[340] On its face, the Arbitration Law seems to preclude the Supreme Court from using this power to interfere with international arbitration awards. Article (5) states that "In matters governed by this Law, no court shall intervene except where so provided in this Law." Article 34(1) of the Arbitration Law states that the limited appeal to have the award set aside is the only recourse. The explanatory note accompanying the Model Law states that one purpose of the Model Law is to limit the types of recourse to that of the Model Law.[341] During debate on the bill, witnesses stated in both the Senate and the Deputies' Commissions that the Arbitration Law would limit the procedures that could be used to attack an award.[342] The Chilean Constitutional Tribunal

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[337] CONST. CHILE art. 79 (judges are personally responsible for their misconduct); CONST. CHILE art. 82 ("The Supreme Court is vested with directional, correctional and economic supervisory powers over all Chilean courts."); CÓD. TRIB. arts. 540–541 (Supreme Court has the power to correct, discipline and fine judges).

[338] CÓD. TRIB. art. 5(4) (listing arbitrators as part of the judiciary along with the courts); CÓD. TRIB. art. 222 (arbitrators are "the judges appointed by the parties" or by Court authority to resolve legal disputes); JORQUIERA ET AL., *supra* note 3, at 98, 100–101; Figueroa Valdés, *supra* note 4, at 17; KLEINHEISTERKAMP, *supra* note 1, at 377.

[339] CÓD. TRIB. arts. 325–326.

[340] CÓD. TRIB. art. 324. Parties must wait six months after the end of arbitration before bringing any criminal claims against the arbitrator. JORQUIERA ET AL., *supra* note 3, at 100. One author argues that even if the claim is successful, the arbitration award will not be affected. *Id.,* at 100.

[341] UNCITRAL Model Law, App., Explanatory Note by UNCITRAL Secretariat arts. 40–41.

[342] "[I]nternational authors specialized in arbitration are in agreement that international commercial arbitration proceedings are not to be dealt with the traditional, conservative procedural mentality so fond of dilatory tactics through challenges, motions and other mechanisms aimed at causing delay to the benefit of one of the parties. This situation is largely avoided by the bill under discussion, which grants the parties very specific and limited recourses such as the one for setting aside the award and the other aimed at refusing enforcement." Arturo Alessandri, the Chairman of the Arbitration Center of the American-Chilean Chamber of Commerce, in the Chamber of Deputies, Commission of Foreign Affairs, Intercongressional Issues and Latin American Integration, Report No. 3252- 10 (August 26, 2003), at 6, *quoted in* Lindsey & Riesco, *supra* note 315, at 642–43.

found article 34 to be constitutional.[343] Thus, the Arbitration Law should thus limit this judicial review to awards contrary to public policy.[344] A private practitioner in Chile takes the position that since the recourse is an extraordinary remedy and the Arbitration Law is specific as to international commercial arbitration, the Arbitration Law should prevail over general law and prevent use of the recourse.[345]

On the other hand, the mandate from the Constitution to the Supreme Court to supervise all Chilean courts seems to give parties a Constitutional right to challenge a judge's actions.[346] Concerned about this conflict, the Chamber of Deputies, the lower house of the legislature, removed Article 5 of the Arbitration Law from the version it passed.[347] The Senate's version included Article 5, the Senate was of the view that the Arbitration Law did not restrict the Supreme Court's Constitutional authority to supervise the courts.[348] In the Senate's report, Raúl Bertelsen Repetto, a professor of law at the University of Chile, stated that,

> "[A]rticle 5, as proposed by the Executive Power, may well be approved in its original version as it is certainly not unconstitutional. Directional, correctional and economic supervisory powers are vested in the Supreme Court directly by the Constitution, which is not amended by [the Chilean Arbitration Act]... [A]s the *recurso de*

Similarly, in the Senate, another witness testified that that "[t]he court intervention mechanism provided for in the law is limited but effective. Amending the bill so as to grant Chilean courts further authority to intervene would thwart one of the most important characteristics of the Model Law which is to free arbitral tribunals from judicial control." Ricardo Sateler, Senate, Commission of Foreign Affairs, Report No. 3252-10 [hereinafter "Senate Commission Report"], at 19 (May 11, 2004), *quoted in* Lindsey & Riesco, *supra* note 315, at 643. Mr. Sateler is a private practitioner who helped draft the bill. Lindsey & Riesco, *supra* note 315, at 643.

[343] Arbitration Law, *supra* note 2, app. art. 3.

[344] Arbitration Law, *supra* note 2, art. 34(2)(b)(ii).

[345] Figueroa Valdés, *supra* note 4, at 20–21.

[346] CONST. CHILE art. 82 ("The Supreme Court is vested with directional, correctional and economic supervisory powers over all Chilean courts.").

[347] Lindsey & Riesco, *supra* note 315, at 646.

[348] Lindsey & Riesco, *supra* note 315, at 646–47. Mr. Bertelsen, a law professor at the University of Chile, is

> *queja* is not governed by [the Chilean Arbitration Act], Article 5 as proposed by the Executive Power does not modify the powers vested by the Constitution in the Supreme Court. Therefore, it is also unnecessary to explicitly provide that the powers of the Supreme Court remain unaltered in order for [Article 5 of the Chilean Arbitration Act] being constitutional."[349]

This statement has great weight because Prof. Bertelsen is currently a minister of Chile's Constitution Tribunal,[350] which has the authority under the Constitution to decide "the constitutionality of the laws that interpret a precept of the Constitution. . . ."[351]

The Constitutional Tribunal also reports on the constitutionality of proposed laws.[352] In its report on the Arbitration Law, the Tribunal reported that

> "Articles 5 and 34 . . . are constitutional in the understanding that they do not alter either the functions vested in the Supreme Court by the Constitution or the constitutional actions that may be brought by any person whose fundamental rights have been aggrieved by the application of [the Arbitration Law]."[353]

Thus, the Constitutional Tribunal approved the Arbitration Law, but reserved the right of the Supreme Court to supervise and discipline the judiciary. In an analogous argument, the *recurso de queja* may qualify as a public policy exception under the Arbitration Law because

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[349] Senate Commission Report, at 20, *quoted in* Lindsey & Riesco, *supra* note 315, at 646–47. Cristián Maturana Miquel, a law professor at the University of Chile, agreed with Prof. Bertelsen. Lindsey & Riesco, *supra* note 315, at 647, (citing Senate Commission Report, at 21). Prof. Maturana is currently an attorney member of the Constitutional Tribunal. Constitutional Tribunal of Chile, http://www.tribunalconstitucional.cl/site/integrantes/integrantes.html.

[350] Constitutional Tribunal of Chile, http://www.tribunalconstitucional.cl/site/integrantes/integrantes.html; *see also* http://es.wikipedia.org/wiki/Tribunal_Constitucional_de_Chile. At the time of the statement, Prof. Bertelsen was probably an attorney member of the Tribunal. Constitutional Tribunal of Chile, http://es.wikipedia.org/wiki/Tribunal_Constitucional_de_Chile.

[351] CONST. CHILE art. 93(1).

[352] CONST. CHILE art. 93(3).

[353] Constitutional Tribunal Report No. 420.08-004 (August 25, 2004), at 14. *available at* http://www.tribunalconstitucional.cl/site/sentencias/anos/2004.html. Translation by Lindsey & Riesco, *supra* note 315, at 647–48.

it stems from the constitutional power of the Supreme Court to supervise and discipline arbitrators as judges.[354]

When the Court of Appeals, following the Arbitration Law's procedure, confirms or vacates an award, the decision puts an end to the trial, making it possible for a party to claim that the *recurso de queja* applies because the final decision was a serious abuse by the Court of Appeal.[355] David M. Lindsey and Ricardo Riesco point out several problems if the Supreme Court allows parties to use the *recurso de queja* against arbitrators.[356] First, the *recurso de queja* has two excellent advantages for a losing party: the *recurso de queja* can stay recognition and enforcement,[357] and can postpone enforcement.[358] Second, the judges on the 17 Courts of Appeal in Chile do not all have the expertise to deal with sensitive international matters and will "certainly create contradictory case law."[359] Lindsey and Riesco recommend amending the Arbitration Law to give jurisdiction to the Supreme Court to review international arbitration awards, arguing that any delay will only last until the Supreme Court limits the grounds for review to the Arbitration Law's Article 34 categories.

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[354] *See* CONST. CHILE art. 79 (mandating that judges are personally responsible for their misconduct); CÓD. TRIB. arts. 540–541 (establishing that the Supreme Court has the power to correct, discipline, and fine judges); CÓD. TRIB. art. 222 (mandating that arbitrators are "the judges appointed by the parties" or by Court authority to resolve legal disputes); JORQUIERA ET AL., *supra* note 3, at 98, 100–101; Figueroa Valdés, *supra* note 4, at 17; KLEINHEISTERKAMP, *supra* note 1, at 377.

[355] Lindsey & Riesco, *supra* note 315, at 649–50.

[356] Lindsey & Riesco, *supra* note 315.

[357] CÓD. TRIB. art. 548 ("The aggrieved party may request an immediate *orden de no innovar* at any moment during the resolution of the recurso de queja.") (translation by Lindsey & Riesco, *supra* note 315, at 654). To grant an *orden de no innovar*, the party must show there will be irreparable harm unless the stay is granted. Lindsey & Riesco, *supra* note 315, at 654 (citing Soto Kloss, E., El Recurso de Protección, Editorial Jurídica de Chile, 1982).

[358] This is because the Supreme Court would decide the *recurso de queja* against the Court of Appeals after oral argument. Lindsey & Riesco, *supra* note 315, at 655. The parties could postpone the hearing and after the hearing, the Supreme Court does not have deadline to pass final judgment (which could take up to several months). *Id. See also* CÓD. CIV. art. 223 for the procedure of hearing the *recurso de queja*.

[359] Lindsey & Riesco, *supra* note 315, at 657–58.

As an interim possible solution, the arbitration agreement can specifically limit the *recurso de queja* to the limited grounds listed in the Arbitration Law.[360] Another practical solution that may reduce the risk of a *recurso de queja* is to appoint arbitrators with excellent reputations; the courts will be more likely to dismiss complaints against them.[361] The *recurso de queja* does not need to be abolished for international arbitration, but should be limited to overturning awards because of bribery, fraud, or similar actions which completely vitiate any confidence in the quality of the award. Otherwise, the Supreme Court should not allow the *recurso de queja* to attack the underlying merits of arbitration awards, else the Arbitration Law's limits will be circumvented, diminishing Chile's potential to be a regional arbitration center.

The *recurso de queja* thus remains a "source of surprise or at least some uncertainty."[362]

D. Mexico's *amparo* and international commercial arbitration.

In deciding how to react to the Arbitration Law, the Supreme Court should review the example of Mexico. In 1993, Mexico adopted the UNCITRAL Model Law on Arbitration into its Commercial Code.[363] Like the *recurso de queja* in Chile, there was some question of what would happen to the *amparo* writ in Mexico. The writ of *amparo* asks the Federal district court to enjoin or remedy a violation of the Mexican Constitution.[364] It has been described as a combination of the writ of habeas corpus and mandamus with the remedies

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[360] Prior to the Arbitration Law, one case upheld an arbitration agreement that waived the *recurso de queja*. KLEINHEISTERKAMP, *supra* note 1, at 380 n.87; *but see* KLEINHEISTERKAMP, *supra* note 1, at 380 n.88, 384 n.106 (citing cases where the court accepted the *recurso de queja* despite the waiver); Lindsey & Riesco, *supra* note 315, at 656; Guzmán Jordán, *supra* note 325, at 9 (citing a well-known treatise by Patricio Aylwin that the *recurso de queja* cannot be waived).

[361] KLEINHEISTERKAMP, *supra* note 1, at 377–378 (citing several interviews with experienced Chilean lawyers).

[362] KLEINHEISTERKAMP, *supra* note 1, at 377–378. See Lindsey & Riesco, *supra* note 315, at 647–48.

[363] Jose Luis Siqueiros, *Mexican Arbitration – The New Statute*, 30 TEX. INT'L L. J. 227, 230 (1995). In contrast to Chile, the new Mexican law also applied to domestic arbitration. *Id.* at 231.

[364] *Id.* at 241.

of injunction.[365] It also allows the courts to review the merits of lower court decisions.[366] *Amparo* protects the enumerated Constitutional rights of individuals and corporations from unconstitutional laws and arbitrary or illegal acts performed by public authorities.[367] A writ of *amparo* against an international arbitration award is based on Article 14 of the Constitution, which provides that:

> "No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act."[368]

Because Mexico is a civil law country, court decisions have limited binding force as precedent. However, if the Supreme Court affirms a holding five times without interruption, the holding binds lower state and federal courts as jurisprudencia.[369]

"*Amparo* is not frivolous, nor is it an easy remedy or injunction to obtain."[370] To succeed in a writ of *amparo*, a party needs to show a public act.[371] A public act is "the act of a public official taken within the scope of his authority."[372] Some scholars argue that because arbitrators act as judges, their acts are public acts.[373] Rejecting this reasoning, the Supreme Court has held that arbitrators appointed by private parties are not public actors and are not

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[365] Margarita Treviño Balli & David S. Coale, *Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?*, 30 TEX. INT'L L. J. 535, 552 (1995); *see also* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 98–105 (2003) (detailing the history of the writ of *amparo*).

[366] *Id.* at 552–53.

[367] *Id.* at 553. Over 90 percent of the Supreme Court's docket involved writs of amparo. *Id.*

[368] *Id.*

[369] Del Duca, supra note 365, at 101. At least eight members of the Supreme Court must uphold each of the five decisions. *Id.*

[370] Siqueiros, *supra* note 204 at 127. Prof. Siqueiros notes that if the party claiming the writ of *amparo* fails, it "will most likely be fined by the court." *Id.*

[371] *Id.*

[372] Balli & Coale, *supra* note 365, at 553.

[373] *Id.* at 554.

subject to the writ of *amparo*.[374] Thus, the writ of *amparo* would probably only succeed in for egregious violations of constitutional guarantees.[375]

VIII. DRAFTING RECOMMENDATIONS

The arbitration agreement should be included during negotiations over substantive terms;[376] a poorly-drafted arbitration clause can result in years of litigation over its meaning and effect.[377] Avoid several pitfalls with careful drafting by explicitly specifying whether arbitration is an exclusive remedy.[378] Do not use any shorthand or ambiguous terms and define any terms specific to the business or industry[379] and verify that the authority specified is willing to perform the appointing function.[380] Do not draft procedural rules that overlap or conflict in any way.[381] Lastly, if the arbitration agreement uses the model arbitration clause of an arbitration institution, do not modify it without verifying the change with the institution; if the institution refuses to accept the arbitration, court intervention may be required.[382] If the parties choose ad hoc arbitration, the arbitration agreement needs to include a broad catch-all clause to cover all possible "claims, disputes, and controversies" in

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[374] *Id.* These decisions did not address award recognition or enforcement. An international law expert on arbitration supports this view, pointing toward the Mexican Supreme Court's refusal to review arbitration awards after Mexico enacted the UNCITRAL rules. Interview with Boris Kozolchyk, Professor of Law, University of Arizona Rogers Collage of Law and Director, National Law Center for Inter-American Free Trade, by email (Apr. 5, 2006); *see also* JORGE ALBERTO SILVA SILVA, ARBITRAJE COMERCIAL INTERNACIONAL EN MÉXICO 203 (Oxford Univ. Press 2001) (stating that arbitrators are not authorities under the Amparo Law).

[375] *Id.*

[376] Freyer, *supra* note 136, at B-76.

[377] REED, *supra* note 17, at 561.

[378] *Id.* at 563, 591.

[379] *Id.* at 591.

[380] *Id.* at 591.

[381] *Id.* at 591.

[382] *Id.* at 591.

contract, in tort, and by statute, including any claims "arising out of or in connection with the contract."[383]

IX. CONCLUSION

The Arbitration Law makes arbitration in Chile is a very flexible alternative to litigation. With its shortcomings in mind, the Arbitration Law provides an excellent foundation on which to construct a good arbitration system that emphasizes a process that allows the business relationship to continue thriving. Chile is poised to become a regional center for international commercial arbitration.[384] While arbitration was used primarily with multinational companies or multimillion dollar claims, the framework of the Arbitration Law makes it possible for medium and small businesses to use arbitration.[385] To become a regional arbitration center, Chile must gain the trust of Latin American businesses.[386] To do so, Chile should target specific industries, adjust the application of the Arbitration Law to meet the industries' needs, and develop rules of the best arbitration practices for the industries with its arbitration institutions.[387]

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[383] *Id.*, at 564–65, 567; Dillenz, *supra* note 12, at 228. These two phrases should cover most, if not all, claims associated with the arbitration agreement. REED, *supra* note 17, at 564–65, 567.

[384] Figueroa Valdéz, *supra* note 4, at 5–6; Arellano Quintana, *supra* note 4, at 9; Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

[385] Figueroa Valdéz, *supra* note 4, at 5–6; Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

[386] Interview with Rodrigo Novoa, Research Assistant and Chile Liaison, National Law Center for Inter-American Free Trade, in Wash., D.C. (Mar. 2, 2006).

[387] Interview with Boris Kozolchyk, Professor of Law, University of Arizona Rogers Collage of Law and Director, National Law Center for Inter-American Free Trade, by email (Apr. 5, 2006).