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Notes On The New Chilean Law On International Arbitration

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Commentary

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[Editor's Note: Dyalá Jiménez Figueres is the Director for Latin America of ICC's Dispute Resolution Services. She is based in Santiago, Chile. Her views do not represent the views of ICC. Angie Armer Ríos is a U.S. Attorney at Alvarez, Hinzpeter, Jana & Valle in Santiago, Chile. A member of the New York and District of Columbia bars, Ms. Armer Rios practices international arbitration and transnational litigation, including investor-state disputes. Comments can be sent, and questions could be asked, by email a djz@iccwbo.org and aarmer@ahjv.cl. This article (in its Spanish version) was originally published in Revista Chilena de Derecho Privado Fernando Fueyo Laneri, Universidad Diego Portales. English translation of the law in ***Section B****. Document #05-050722-106X. Copyright 2005 by the authors.]*

With 52 bilateral investment treaties (BITs) signed to date, as well as free trade agreements with United States, Canada, Mexico, and South Korea,[1] Chile stands out as a country open to foreign investment. In this environment of economic liberalization, one can expect parties to choose arbitration as the dispute resolution tool in their commercial and investment arrangements. Indeed, these very BITs and free trade agreements contain provisions that contemplate arbitration as the means to resolve disputes between State parties and between foreign investors and States.[2]

This article does not specifically address arbitration arising out of these BITs or free trade agreements, but rather arbitration in general between parties arising from commercial arrangements. Before the new law on international arbitration was passed, Chile ratified important international instruments regarding international commercial arbitration, such as the New York Convention[3] and the Panama Convention.[4] However, these agreements do not provide a complete framework for the regulation of international commercial arbitration in Chile. The Model Law on International Commercial Arbitration of 1985 ("the Model Law") by the United Nations Commission for International Trade Law (UNCITRAL) offers such a framework. The Model Law has been imported wholesale into a large number of legislations,[5] and Chile joined the group when its Congress approved Law 19.971 on International Commercial Arbitration (hereinafter, "Arbitration Law" or "new Law"), on September 10, 2004.[6]

Before the Chilean Congress passed the new Law, Chilean law contained no specific provisions addressing international commercial arbitration. It was assumed that the mandatory provisions dealing with domestic arbitration, contained for the most part in the Código Orgánico de Tribunales (the code for the organization of courts, hereinafter "COT") of 1943 and the Code of Civil Procedure (hereinafter "CCP") of 1902, governed international arbitrations as well. Therefore, international commercial arbitration cases with an arbitral seat in Chile have been rare at least under the aegis of international arbitral institutions.[7]

With the enactment of the new Law, Chile has joined the jurisdictions that recognize the international minimum standards in international commercial arbitration,[8] thereby providing users with legal certainty and contributing to the legal harmony in the region.[9]

This article does not attempt to analyze each provision of the new Law.[10] Rather, its purpose is to (a) describe the scope of application of the new Law, (b) explain its characteristics, and (c) identify certain legal and practical issues that can arise in the application thereof.

A. Scope Of Application

The scope of application of the new Law is not as broad as it is in other jurisdictions in Latin America. Indeed, notwithstanding the fact that the Model Law was conceived for international arbitration, some countries have adopted the law to govern domestic arbitration ("unitary systems").[11] The Chilean Congress chose not to adopt a unitary approach to international arbitration, but rather it adopted the new Law for international arbitration, thereby creating a dualistic system.[12] The new Law applies to cases related to international commercial disputes in which the place of arbitration is located within the Chilean territory, with some important exceptions addressed below.[13] As regards the definition of "international," the new Law follows the original wording of the Model Law.[14] As to the definition of "commercial," Article 2(g) of the new Law adopts the broad definition of the Model Law.

Notwithstanding this broad provision, Article 1(5) of the new Law states that it "*shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law*." To which disputes does this article refer?[15] In this regard, at least two situations that arise in a commercial context in which the new Law will not be applied can be identified: certain contracts with the State and matters related to consumer protection.

Although the Chilean President has stated that international contracts for the public sector may include arbitration clauses under the new Law,[16] in strict rigor Chilean law actually limits the use of arbitral clauses in certain contracts with the State.[17] Limitations include foreign investment contracts that are governed by Law Decree No. 600,[18] oil operation contracts and contracts with the Chilean Commission of Nuclear Energy,[19] and contracts "*regarding concessions of public works and state owned assets.*"[20] For these cases, and as long as the conduct of the State constitutes a violation of a BIT, foreign private companies may recur to ICSID (International Center for the Settlement of Investment Disputes) arbitration or any other mechanism foreseen in the relevant BIT.

In addition parties' autonomy is limited regarding possible infractions of the consumer protection law.[21] According to said law, "consumers" are those "*natural or legal persons who by virtue of any legal onerous act acquire, use, or enjoy goods or services, as the end user*."[22] The law does not define "end user," but one can assume that it does not include persons who acquire goods or services to make, produce, import, construct, distribute or sell goods or services to third parties.

B. Characteristics Of The Law On International Commercial Arbitration

The new Law has three prominent characteristics: (1) the preeminence of parties' autonomy; (2) respect for due process; and (3) limited judicial intervention.

B.1. The Preeminence Of Parties' Autonomy

The modern concept of arbitration relies upon the ability of the parties to freely agree upon the details of the arbitration, with the exception of limited compulsory provisions.[23] This principle, in its broadest sense, is reflected in several elements of the new Law, among which the following stand out:

a) The broad definition of arbitration agreement, with no formal conditions with which the parties may not be familiar.[24] Indeed, the Chilean law requires only that the arbitration agreement be in writing.

b) The freedom to constitute the arbitral tribunal, including the possibility to determine the number of arbitrators,[25] the procedure for appointing them,[26] and their nationality.[27] Unless the parties have agreed otherwise, and if there are to be three arbitrators, each party has the right to designate a co-arbitrator.[28] In addition, there are no legal requirements to be an arbitrator, such as the requirement to be a lawyer.[29]

c) The parties are free to determine the rules of procedure for the arbitration and, in the absence of any such agreement, the arbitral tribunal will determine the procedure.[30] In practice, this will allow for procedural techniques from other systems to be imported into the arbitra-

tion taking place in Chile. For example, parties may agree that they will each will appoint their own expert(s), or that the cross-examination of witnesses will be allowed, or even that limited discovery will take place. These techniques are increasingly common in the international arena.[31] Also, unless otherwise agreed, the new Law provides for oral hearings.[32]

d) The parties have freedom to indicate the choice of law applicable to the substance of the dispute.[33] The pertinent provision establishes that, unless otherwise agreed, the arbitral tribunal "*shall apply the law determined by the conflict of laws rules which it considers applicable*."[34] It is noteworthy that other arbitration laws, such as the Spanish and Peruvian laws, give arbitrators the power to determine the rules of law directly, without having to apply any rules of conflict of law.[35] In any event, the arbitrators' power is always limited by their obligation to decide the dispute "*in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*"[36]

e) The language of the arbitration may be any language or languages chosen by the parties. If no agreement is reached in this regard, it is for the arbitral tribunal to determine it or them.

f) Finally, parties may request that the arbitral tribunal record any settlement that ends the dispute "*in the form of an arbitral award on agreed terms.*"[37]

Thus, the new Law contains several provisions that are only applicable in the absence of an agreement between the parties. If the parties have agreed to submit their dispute to the rules of an institution, those rules will apply as part of their agreement, that is, by reference.[38] However, if the parties have agreed to have an *ad hoc* arbitration, the pertinent provisions of the new Law will govern all matters upon which the parties have not agreed.

Finally, the new Law provides that the arbitral tribunal will decide ex aequo et bono only if the parties have expressly authorized it to do so.[39] This reflects international practice, in which most cases are decided on the basis of law and not "in equity."[40] In Chile, however, the trend has been rather the contrary because arbitrators most often are given the power to decide *ex aequo et bono*.[41]

B.2. Respect For Due Process

All of the provisions mentioned in this subsection are obligatory, and the parties cannot agree otherwise. In this way, the law guarantees a minimum standard of due process, without affecting the two characteristics most often sought in arbitration, flexibility and efficiency.

Article 18 contains the main obligation of treating the parties equally: "[t]*he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*." This rule is repeated in the provisions related to the proceedings. In that sense, Article 23 provides that there shall be a claim and a defense.[42] Article 24(2) instructs the arbitral tribunal to give sufficient advance notice of any hearing and meeting of the arbitral tribunal for the purpose of reviewing evidence. Paragraph 3 of that same provision states that all parties must have equal access to the evidence. According to Article 26(2), it is also compulsory that all parties hear the experts appointed by the parties or the arbitral tribunal. It is noteworthy that the new Law does not impose time limits for any procedural act.

The new Law underscores the importance of impartiality even before the constitution of the arbitral tribunal, with the obligation of prospective arbitrators to "*disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence*."[43] This duty continues throughout the entire proceeding.[44] The new Law also provides for a challenge in the event a party alleges a lack of impartiality or of independence of the arbitrator.[45] However, a party may challenge an arbitrator that it itself appointed "*only for reasons of which* [it] *becomes aware after the appointment has been made*."[46]

On the other hand, with respect to violations of due process, the parties have recourse to two motions under the new Law. They are a motion to annul the award and a motion objecting to the enforcement of the award. The award may be annulled if the party proves that it "*was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present* [its] *case*."[47] Also, a court may refuse

to recognize or grant enforcement of an award if one of the parties proves that it "*was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present* [its] *case.*"[48] The two articles that contain these provisions are almost identical and reflect the provisions contained in Article V of the New York Convention. Such a correspondence is logical, given that it was United Nations commissions that first elaborated the New York Convention and later the Model Law in order to provide the international community with a harmonic arbitration system.[49]

Finally, there is an increasing phenomenon in international arbitration practice that must be addressed, albeit summarily: multiparty arbitrations.[50] In proceedings with multiple parties, respect for due process includes equality in the constitution of the arbitral tribunal,[51] special care in the notification of non-participating parties and regarding the decisions on costs of the arbitration, among other issues. Although the new Law does not include provisions for arbitrations with multiple parties,[52] sensible interpretations of the new Law should allow for due process for all parties.

B.3. Limited Judicial Intervention

The expression of such a limitation is found in Article 5, which states: "*In matters governed by this Law, no court shall intervene except where so provided in this Law.*" Concerns regarding additional forms of judicial intervention that are not enumerated in the new Law will be addressed in section C.3 below. The new Law allows for the following limited judicial interventions:

i. Cases in which a party to a valid arbitral agreement request the court to refer the case to arbitration;

ii. Cases regarding the appointment of arbitrators, when there is no agreement between the parties as to the process or when the process agreed to by them is not respected[53];

iii. Challenge of arbitrators, when there is no agreement between the parties as to the process or when the process agreed by them is not complied with [54];

iv. Cases in which an arbitrator terminates its functions, when there is no agreement between the parties as to the causes for termination[55];

v. Cases in which one of the parties objects to the jurisdiction of the arbitral tribunal alleging that it has exceeded the scope of its authority and the arbitral tribunal determines that it has jurisdiction[56];

vi. Cases in which the arbitral tribunal or one of the parties requests "*from a competent court of Chile assistance in taking evidence*"[57];

vii. Cases in which one of the parties requests the annulment of the award.[58] It is in this provision that the Chilean legislature modified the Model Law and required the competent court to prioritize requests for annulment of awards on the docket.[59]; and

viii. Cases in which the enforcement of the award is sought.[60]

The functions described in points ii. to v. above shall be carried out by the President of the Court of Appeals of the place where the arbitration takes place, while the annulments of awards are decided by the respective Court of Appeals.[61]

When a Court of Appeals hears a case of annulment under the new Law, the decision to annul the award shall only be based on one of the following six causes.[62]

According to Article 34(a) of the new Law, annulment is only available when the affected party proves any of the following circumstances:

i. incapacity of a party or the invalidity of the arbitral agreement under the applicable law;

ii. violation of due process;

iii. decision of the arbitral tribunal that exceeds the scope of its mandate (with the possibility of a partial annulment);

iv. disregard for the agreement of the parties regarding the constitution of the arbitral tribunal or the rules governing the proceedings, unless said agreement contravenes the new Law.

Or when the Court itself finds that:

i. according to Chilean law, the subject matter of the dispute is not arbitrable[63]; or

ii. the award is contrary to the Chilean public policy.[64]

According to the new Law, a party may request a court to order interim measures of protection before the constitution of the arbitral tribunal, or even during the proceedings.[65] This power, together with the possibility of requesting a guarantee, is also given to the arbitral tribunal, in Article 17 of the new Law.

Thus, save for a few exceptions, the parties or the arbitral tribunal will make the final decision regarding the arbitral proceedings. Indeed, the arbitral tribunal determines its jurisdiction when it is argued that the agreement to arbitrate is invalid or absent, decides on the language and other procedural rules in the absence of an agreement between the parties, and even may order interim measures.

C. Legal And Practical Issues That May Arise In The Application Of The New Law

There are at least four important issues that may arise in the application of the new Law: (1) confidentiality of the proceedings, (2) nationality of the parties' counsel, (3) supremacy of the Supreme Court, and (4) enforcement of decisions that affect assets located in Chile. Given that the new Law contains neither transitory provisions nor provisions to conform existing legislation with the new Law, it is therefore difficult to predict if Chilean judges will apply it in the desired manner. In other words, an application of the new Law that will best fulfill the purpose of guaranteeing compliance with the minimum international standards such as respecting the parties' will, guaranteeing due process and minimizing judicial intervention strictly to necessary circumstances.

C.1. Confidentiality Of The Proceedings

There is a practical matter that is not included in the new Law: confidentiality of the proceedings. Neither the Model Law nor the rules of some of the most renowned international arbitration institutions[66] contain obligations for parties or arbitrators to keep the proceedings confidential.[67] However, it is not rare to find the obligation of limiting hearings only to parties to the dispute,[68] as well as the obligation for the institutions' personnel to keep matters confidential.[69]

Confidentiality, traditionally considered an advantage of arbitration over judicial proceedings, is therefore not absolute, and it might be more precise to speak of "privacy" than confidentiality.[70] According to the Concise Oxford Dictionary, one of the definitions of "privacy" is "*freedom from intrusion or public attention*." This concept is in sharp contrast with the publicity of court proceedings. For this reason, if the parties to an arbitration in Chile wish to keep proceedings (and documents) confidential to a larger extent than that foreseen in the respective institutional rules — if such rules apply —, it is advisable that they provide for this in the arbitral agreement or in a different document.[71] Notwithstanding the parties' faculty to agree on confidentiality, any imperative obligation to disclose will always prevail.[72]

C.2. Nationality Of Parties' Counsel

There is some concern regarding a provision in the COT according to which "[o]*nly Chilean nationals can exercise the legal profession. This provision shall not affect international treaties in force.*"[73] The Supreme Court decided that this provision was constitutional in 1998.[74] Furthermore, Law 18.120 requires representation by counsel of any person before "*any court of the Republic, be it ordinary, arbitral or special.*"[75] Said Law contains an exception for the so-called "arbitrations in equity," in which case only the first submission of a party must be done through counsel.[76]

For this reason, it is necessary to question the proceeding and ultimately any award in an international arbitration in Chile in which the parties' counsel are foreign nationals. That is, in order to annul it, could the Appellate Court decide that the provision in the COT is public policy, in the sense described in Article 34(2)(b)(ii) of the new Law? On the other hand, would it be possible that foreign counsel acting in Chile to be accused of violations of professional ethical rules or of unauthorized exercise of the legal profession?[77]

These concerns were raised in the Senate and, even though no conclusion was reached, it is noteworthy that the Minister of Justice stated that "*the COT governs in this case; a foreign lawyer could not litigate in Chile, unless the necessary legal reforms are passed in*

the future."[78] Since there is no explicit repeal of the provision of the COT for the cases of international arbitration, a future reform might take into consideration the spirit of said provision and the spirit of the new Law.[79]

Because one of the objectives of the new Law is to turn Chile into a center for international arbitrations, the possibility of annulment because of a lack of Chilean counsel in these cases could defeat the purpose. Therefore, until the subject is further examined, parties to an arbitration in Chile should include Chilean counsel in their representation as a matter of caution.

C.3. The Relationship Between The New Law And The Constitution, And The Supremacy Of The Supreme Court

An analysis of constitutional law as applied to arbitration falls outside of the scope of the present article. However, it is important to mention that, in principle, there could be at least three remedies against the arbitral proceedings or the award in Chile, in addition to the annulment foreseen in Article 34 of the new Law. These include: an action requesting disciplinary action ("*recurso de queja*"),[80] a request for a declaration of the law as inapplicable because it is unconstitutional ("*recurso de inaplicabidad por inconstitucionalidad*"),[81] and an injunction requesting the protection of certain constitutional rights ("*recurso de protección*").[82] The Constitutional Court's decision, that forms part of the legislative history, clearly establishes that these remedies must be applied also in international commercial arbitration cases.[83] It is unlikely that the Constitutional Court will decide in the future that these remedies can be waived.[84]

Nonetheless, the President's Message establishes that "*the proposed text must be interpreted in a way that benefits the existence of international commercial arbitration in its broadest sense, in order to support international trade*."[85] In addition, national courts are called to "[. . .] *intrude the least possible in order to ensure the success of the law*."[86]

C.4. Enforcement Of Decisions That Affect Assets Located In Chile

Another issue that might present a challenge for the development of international commercial arbitration in Chile is related to the enforcement of awards[87] and decisions that affect assets located in Chile. The new Law includes the issue of enforcement of awards in Articles 35 and 36, issues previously addressed in the New York Convention and Panama Convention.

What would occur if a creditor seeks to enforce a foreign award[88] against a Chilean debtor by pursuing its assets in Chile? Or what would be the outcome of enforcing a decision that grants interim measures that affect assets located in Chile? Could it be argued that Article 16 of the Civil Code[89] is public policy under Article 36(1)(b)(ii) of the new Law and Article V(2)(b) of the New York Convention? If so, what would be the scope of said determination?

Court decisions have not given a definite answer to these questions. In one case, the Supreme Court denied *exequatur,* among other reasons, because the request was:

> *"*[. . .] *against national jurisdiction, as it refers to assets located in national territory, which according to Article 16 of the Civil Code, are governed by Chilean law, that is under the jurisdiction of this country's courts; therefore, to grant exequatur would violate a rule of public policy. . . ."* (Emphasis added).[90]

On the other hand, in a more recent decision,[91] the Supreme Court opined that Article 16 of the Civil Code refers to substantive law rather than the procedural aspects of enforcing judgments. Further, the legislative history of the new Law, in its commentary of Article 17 (regarding interim measures), establishes that the power of an arbitral tribunal to order these measures is congruent with "[. . .] *the international dimension of disputes and with the globalized world, which makes it possible to transfer assets across borders to frustrate the result of the measure*."[92] Finally, it is worth mentioning that there are several cases of successful enforcement of foreign awards with no mention of Article 16 of the Civil Code in Chile.

D. Conclusion

When the new Law was introduced, the Chilean President indicated that it had three purposes, the fulfillment of which are examined below.[93]

One of the objectives is to provide a dispute resolution mechanism to small and medium sized businesses. As

of the enactment of the new Law, these businesses will be able to include arbitration clauses in their contracts with foreign companies with the certainty that the law governing the clause is both modern and in accordance with international standards. In this sense, the new Law offers small and medium enterprises the possibility to solve their disputes by an appropriate system in their own country, without having to expend resources in trips or other expenses common in arbitration in Europe or the United States, for example.

The President also expressed a desire to develop Chile as a regional or international arbitration center. The way in which judges interpret the new Law and existing legislation will determine whether this goal will be met. Other elements, such as travel expenses, the extent to which other countries in the region develop international commercial arbitration institutions and partnerships, and how much preparation is invested by Chilean counsel and arbitrators, among others, will also influence the development of Chile as a regional or international center for arbitration.[94]

The third objective of the new Law seeks to provide legal certainty to international transactions. This objective was practically achieved by the sole enactment of a law that is almost identical to the Model Law, as contracting parties who familiar with international arbitration and prefer it for their commercial transactions know exactly what to expect from the international arbitration regime in Chile, at least from a strictly legal perspective.

The enactment of the new Law is celebrated with optimism and with the hope that in its application, Chilean counsel, arbitrators, and judges will satisfy their wish that their country will become an example of commercial openness in its broadest sense. By enacting the new Law, Chile's image as a country friendly to international trade is nearly completed. Arbitration follows trade, and with a system such as the one offered by the new Law, investors in Chile will be sure that the rules of the game are modern.

Endnotes

1. See Foreign Investment Committee, IED in Chile, Rules and Procedures, in www.foreigninvestment.cl.

2. See, e.g., Agreement for the Reciprocal Promotion and Protection of Investment between the Republic of Chile and the Government of the Republic of Peru, Articles 8 and 9; Free Trade Agreement between Chile and the United States of America, Articles 10 and 22. Chile also ratified the Convention for the Settlement of Investment Disputes between States and Nationals of other States, of 1965 ("Washington Convention").

3. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 1958, ratified by Chile on September 4, 1975. Chile also signed the Interamerican Convention regarding Extraterritorial Effects of Foreign Decisions and Arbitral Awards, of 1979 ("Montevideo Convention") but did not ratify it.

4. Interamerican Convention on International Commercial Arbitration, of 1975 ("Panama Convention"); ratified by Chile on August 4, 1976.

5. Forty-six countries have adopted the Model Law, plus some states of the United States of America. For an updated list, see *www.uncitral.org*.

6. Published on September 29, 2004.

7. For example, the ICC International Court of Arbitration reports only two cases with seat in Chile from 1999 to 2004.

8. Of the most relevant economies in the region, Argentina is the only one that has not modernized its legislation on international commercial arbitration.

9. See Explanatory Note of the UNCITRAL Secretariat on the Model Law ("*The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws . . .*") Nonetheless, it is important to analyze each law to identify the modifications — and their scope — they have made to the Model Law. Para a comparative study, see Cristián Conejero R., "El Impacto de la Ley de la CNUDMI sobre arbitraje comercial internacional en América Latina: un análisis comparativo," Revista de la Corte Española de Arbitraje (2004), at 255.

10. For another analysis of the new Law, see Cristián Conejero R., "The New Chilean Arbitration Law

and the Influence of the Model Law," 22 Journal of International Arbitration 2 (2005), at 149.

11. For example, Mexico, Venezuela, and Uruguay have a unitary system of regulation of arbitration. Brazil also has unitary regulation, but its law is not modeled strictly after the Model Law. Spain also adopted the law for international as well as domestic arbitration. In Spanish Law 60/2003, some provisions are of application only for international cases. For details, see Fernando Mantilla Serrano, "The New Spanish Arbitration Act," 21 Journal of International Arbitration 4 (2004), at 368.

12. Colombia and Peru also chose to estabalish a unitary system of arbitration regulation.

13. Article 1(2) states: "[t]*he provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in Chilean territory*." Articles 8, 9, 35 and 36 must be applied by Chilean judges even if the place of arbitration is outside of Chile. Articles 8, 35 and 36 refer to obligations contained in the New York Convention, while Article 9 refers to the courts' assistance for the enforcement of interim measures.

14. See Article 1(3) of the new Law, which establishes that arbitrations are international in the following situations, among others: parties with places of business in different states, obligations in the commercial relationship outside of the State or States where parties have businesses, etc. The legislative history of the new Law indicates that "a dispute that does not effectively include a foreign element of some relevance or that violates public policy, such as the rules regarding consumer protection, cannot be declared international." See Report of the Committee on External Relations, Congressional Matters, and Latin American Integration on the bill (Boletín No. 3252-10) of August 26, 2003 (hereinafter "Lower Chamber Report"), section VI, commentary to Article 1(3). All translations in this Article are free translations except for the translations of the new Law which are based upon the English version of the UNCITRAL Model Law.

15. Regarding domestic disputes, there are subject matters for which arbitration is compulsory, such as division of assets and disputes among shareholders of a corporation. See Article 227 of the COT. On the other hand, there are matters that cannot be submitted to arbitration, such as child support and criminal cases. See Articles 229 and 230 of the COT. Also individual labor disputes, according to decision of the Supreme Court of October 18, 1993, "Nelson Figueroa Escobar."

16. The President's Message refers to Law Decree 2.349 of 1978 regarding International Contracts of the Public Sector.

17. In contrast, the faculty of the State and State entities to agree to arbitration is not questioned in jurisdictions such as Spain or Costa Rica. See Article 2 of Spanish Law 60/2003 and Article 18 of the Costa Rican Law on Alternative Dispute Resolution and the Promotion of Social Peace.

18. Law Decree 600 establishes a voluntary mechanism under foreign investment contracts whereby investors are guaranteed fiscal stability, capital repatriation after one year, and other privileges. Foreign investment contracts usually are domiciled in Santiago and are subject to the jurisdiction of the courts in Santiago.

19. See Jaqueline Rencoret Méndez and Alfredo Hess Buchroithner, Análisis pormenorizado del DL 2349 de 28 de Octubre de 1978 (thesis for law degree), edited in Santiago, Chile (1985) at 60-61. The laws mentioned therein are D.L. 1.809 and D.L. 1.557.

20. See Article 7 of D.L. 2.349. Nevertheless, the Law on the Concession of Public Works, which was enacted later, foresees a system whereby a Conciliation Commission is established or, in the absence of an agreement, an Arbitration Commission is appointed, for "[d]*isputes or claims that arise regarding the interpretation or application of the concession contract or its enforcement.*" See Article 36 of the Law on Concessions of Public Works, Supreme Decree 900 (this Supreme Decree is a text that has condensed, harmonized and systematized the Law on Concessions of Public Works). Whether the new Law will apply to these Arbitration Commissions when the investor is foreign is something that remains to be seen. There is also a prohibition to arbitrate mining

concessions. See decision of the Supreme Court of June 21, 1990 "Soc. Legal Minera La Unión de Tarapacá."

21. The Consumer Protection Law is Law No. 19.496.

22. See Article 1 of Law 19.496.

23. See, eg, Horacio A. Grigera Naón, "La función del arbitraje comercial internacional," DeCITA, No. 2, Ed. Zavalía (2004). From a conceptual standpoint, the preeminence of this principle is supported by the school that argues that the nature of arbitration is contractual. For analyses on the nature of arbitration, see e.g., Francisco González de Cossío, ARBITRAJE, Ed. Porrúa (2004), at 12; Thomas Clay, L'ARBITRE, Ed. Dalloz (2001), 33-37; Pierre Lalive, "Les règles de conflit des lois appliquées au fond du litige par l'arbitre international siégeant en Suisse," Revue de l'arbitrage, N°3 (1976), at 157.

24. See Article 7 of the new Law.

25. See Article 10(2) of the new Law that states that if there is no determination as to the number of arbitrators the number will be three. In the Spanish and Mexican laws, the number is one. See Article 12 of the Spanish Law 60/2003 and Article 1426 of the Mexican Commercial Code. For domestic arbitrations in Chile, the number may be "two or more," which does not reflect the modern practice of always having an odd number of arbitrators (including the sole arbitrator). See Articles 231 and 237 of the COT and 630 and 641 of the CCP. Although the Model Law does not establish that there must be an odd number of arbitrators explicitly, it does state that decisions are to be taken by a majority. See Article 29 of the new Law.

26. See Article 11(2) of the new Law ("*The parties are free to agree on a procedure of appointing the arbitrator or arbitrators* [. . .]").

27. See Article 11(1) of the new Law ("*No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*"). See also, Article 2 of the Panama Convention. It is worth noting the controversy surrounding an international ICC unpublished case between Chilean and European parties before the enactment of the new Law. The place of arbitration was Santiago and the law applicable to the substance of the dispute was Chilean. The chairperson of the arbitral tribunal was not a Chilean national, and he was challenged for this cause before the ICC Court (which rejected the challenge), invoking Article 526, section C2 of the COT, which provides that a lawyer in Chile must have Chilean nationality. Later, the debtor requested the annulment of the award invoking the same argument. Because the parties reached a settlement, the final outcome of the legal challenges remains unknown.

28. In domestic arbitration, all parties must in principle agree on the appointment of all arbitrators, which precludes the parties' liberty to choose a co-arbitrator. See Article 232 of the COT.

29. The Supreme Court made reference to this issue in its Communication No. 1306 dated July 9, 2003 as a possible problem for arbitrations "at law", but the discussion in Congress concluded with the point that the will of the parties should prevail. Report of the Lower Chamber, section VI, commentary to Article 11.

30. See Articles 19, 20, 24(1), 28(1) and 33 of the new Law. Article 20 allows parties to choose the place of arbitration, but it is noted that Article 1(2) limits its scope to cases with a place of arbitration in Chile (except Articles 8, 9, 35 and 36, as already mentioned).

31. Evidence of this is the creation of the IBA Rules on the Taking of Evidence in International Commercial Arbitration. See *www.ibanet.org*.

32. See Article 24(1) of the new Law.

33. See Article 28(1) ("*The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*")

34. See Article 28(2) of the new Law. In Chile, see the Code of Private International Law ("Código de

Derecho Internacional Privado"); see also, Articles 12-21, 950 and 951 of the Civil Code, among others.

35. The direct method, or "voie directe," is a concept adopted by the Swiss jurist and arbitrator Pierre Lalive to refer to the ability of arbitrators to apply substantive rules that they deem appropriate, without the need to apply rules of conflict of laws. See Pierre Lalive, "Les règles de conflit des lois appliquées au fond du litige par l'arbitre international siégeant en Suisse," Revue de l'arbitrage, N°3 (1976) 156-185. See also Article 34 of Spanish Law 60/2003 and Article 117 of the Peruvian law. In Mexico, Article 1445 of the Code of Commerce states, in the relevant part, that arbitrators shall take into account the "*characteristics and connections of the case*" to determine the law applicable to the substance.

36. See Article 28(4) of the new Law.

37. See Article 30 of the new Law. This is also permitted in institutional arbitrations. See, e.g., Article 26 of the ICC Rules of Arbitration (hereinafter, "the ICC rules").

38. In other words, the provisions that give preeminence to the agreement of the parties will be replaced by the respective provisions of the institutional rules in question. See Article 2(e) of the new Law.

39. See Article 28(3) of the new Law.

40. Although there are no statistics to confirm this information, it is rare to see arbitration clauses in international agreements that give arbitrators the power to decide ex aequo et bono. See Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 3d.Ed., Oceana Publications (2000), at 351, citing Eric Loquin "L'amiable composition en droit comparé et internacional" (1980), who observed that in 35 cases in which such powers were given to the arbitrators, most of them dealt with long-term cases. See also, Francisco González de Cossío, Arbitraje, Ed. Porrúa (2004), at 264.

41. The statistics of the Arbitration and Mediation Center of the Chamber of Commerce of Santiago ("CAM Santiago") show that between 1992 and 2005, 75% of the cases contained clauses that granted those powers to the arbitrators.

42. The exception is a party in default, in Article 25(b) (when "*the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations*.") and Article 25(c) (when "*any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before*.").

43. See Article 1 de of the IBA Guidelines on Conflicts of Interest in International Arbitration, in *www.ibanet.org*.

44. See Article 12(1) of the new Law.

45. See Article 12(2) of the new Law. An arbitrator may also be challenged if it does not have the qualifications agreed by the parties.

46. See Article 12(2) of the new Law.

47. See Article 34(2)(a)(ii) of the new Law.

48. See Article 36(1)(a)(ii) of the new Law. It is worth mentioning that even while there is a party in default in the terms of Article 25(b) and (c), arbitrators must be attentive to notify said party of all procedural acts.

49. Notwithstanding this, and due to the nature of the Model Law, causes for annulment under Article 34 may vary among the countries in the region. For a description of the differences, see Cristián Conejero Roos, Revista Española de Arbitraje, at 279 and 280.

50. This type of arbitration reaches approximately 30% of ICC cases, for example.

51. For a study of this issue, see Bernard Hanotiau, "Complex, Multicontract, Multiparty Arbitrations," 14 Arbitration International 4 (1998), at 369. A case before the French *Cour de Cassation* gave rise to the discussion on equality of the par-

ties in the appointment of arbitrators: Siemens AG and BKMI Industriean Lagen GmbH v. Dutco Construction Co., 1 Ch. Civ., January 7, 1992 (the "Dutco case").

52. Spanish Law 60/2003 has a special provision for the constitution of the arbitral tribunal in multiparty cases. See Article 15(2) of Spanish Law 60/2003.

53. See Article 11(3) and (4) of the new law.

54. See Article 13(1) and (3) of the new Law.

55. See Article 14(1) of the new Law.

56. See Article 16(3) of the new Law. Article 16(1) contains the principle of "*kompetenz-kompetenz,*" whereby the power of the arbitral tribunal to decide on its own jurisdiction is recognized.

57. See Article 27 of the new Law. The taking of evidence could include witness declarations and inspections, for example. This applies even if the arbitration has its seat outside of Chile.

58. See Article 34 of the new Law.

59. See Article 34(5) of the new Law. The new Law does not provide a deadline for the making of the award; nor does the Model Law. Since there are no repealing provisions in the new Law, the question remains as to whether the deadline for international ad hoc arbitrations will be the one provided in Article 235 of the COT; that is, two years from the acceptance of the arbitrator of its mandate (unless otherwise agreed by the parties).

60. See Article 35 of the new Law.

61. See Article 6 of the new Law. For matters included in points ii. to v., the court will not intervene in institutional arbitrations in which there are relevant provisions. The question has been raised regarding the possible violation of the principle of impartiality and independence in cases in which the President of the Court of Appeals ratifies the jurisdiction of an arbitral tribunal under Article 16(2) of the new Law and then the same Court of Appeals decides on an annulment procedure of the award resulting from the same arbitration, under Article 34(2)(a)(iii) of the new Law. See Matthew Weininger and Ruth Byrne, "New Chilean Arbitration Law," Herbert Smith Arbitration Briefing, March 2005. See Title XIX of the CCP for provisions regarding enforcement of arbitral awards.

62. See Article 34 of the new Law. In Chile, no additional bases for annulment were added to the ones contained in the Model Law, which gives certainty to parties. There are other jurisdictions that did so, such as Brazil and Costa Rica, in which an award may be annulled if it is not rendered within the time limit agreed by the parties. See Article 67(a) of the Costa Rican Law on Alternative Dispute Resolution and the Promotion of Social Peace. For details, see Cristián Conejero Roos, Revista Española de Arbitraje, at 280 and 281.

63. See section A of this article.

64. At times the concept of public policy is confused with arbitrability. See, for example, decision of the Supreme Court of October 18, 1993 Nelson Figueroa Escobar (". . . *individual labor disputes, such as the one at hand, cannot be submitted to arbitration, notwithstanding the will of the parties, because labor law provisions are public policy*.").

65. See Article 9 of the new Law.

66. The ICC rules and the Rules for International Commercial Arbitration of the AAA (hereinafter, "the AAA rules") do not contain confidentiality provisions that must be complied by the parties. The LCIA rules do include such a provision: "*Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority*." See Article 30(1) of the LCIA Arbitration Rules (hereinafter, "the LCIA rules").

67. Article 34 of the AAA rules imposes confidentiality upon the arbitrators. Article 24(2) of Spanish

Law 60/2003 imposes this duty upon the parties, the arbitrators, and the institutions, if applicable, regarding any information of which they become aware during the proceedings.

68. See, e.g., Article 21(3) of the ICC rules, Article 30(2) of the LCIA rules, and Article 34 of the AAA rules.

69. See, e.g., Article 6 of Appendix I of the ICC rules and Article 30(2) of the LCIA rules.

70. For a study on this matter, see Francisco González de Cossío, Arbitraje, Ed. Porrúa (2004), at 270.

71. In an ICC arbitration, it could be drafted in the Terms of Reference, in order to include the arbitrators.

72. For example, the duty that public companies have under some jurisdictions to make public the fact that they are submitting a dispute to arbitration. In Chile, see Article 10 of Law No. 18.045 of the Stock Exchange. In Chile, there is also the following obligation: "The matters decided by arbitrators shall be filed in the district or group of districts where the arbitration agreement was entered into, in the record of the officer who would have been in charge of its custody had the matter gone to courts." See Article 644 of the CCP. It is yet to be seen whether this obligation stands for international arbitrations.

73. See Article 526 of the COT. Article 520 of the COT provides that: "*Attorneys are persons who have been granted, by a competent authority, the power to defend the rights of litigants before the courts of justice*."

74. Decision of the Supreme Court, Pedro Carlos Torres, 543-98, August 28, 1998. In this case, an attorney of Argentine nationality revalidated his title of attorney by the Universidad de Chile, took the necessary exams to obtain his Chilean law degree, and did his practice. Nonetheless, the Supreme Court of Justice denied the application for a title of Attorney because he was not a Chilean national, as is required by Article 526 of the COT. The Supreme Court rejected the remedy of inapplicability on the basis of unconstitutionality.

75. See Articles 1 and 2 of Law 18.120.

76. See Article 2 of Law 18.120.

77. Article 9 of Law 18.120 states that it is parties, judicial functionaries, attorneys, and attorney unions or guilds who may denounce infractions. In some states of the United States, it is possible that an attorney lose his license based on unauthorized exercise of the profession if the Chilean Bar, for example, submits a claim before the respective US bar.

78. See discussion of the new Law in the Senate, June 15, 2003. Comments of Senators Coloma and Parra and of the Minister of Justice Luis Bates. On the other hand, when commenting Article 11(1) regarding the arbitrators' nationality, the following was stated: ". . . *in international commercial arbitration, it is the parties themselves who determine the qualifications of the arbitrators who will resolve the dispute. It was considered that if the parties decide that they should be lawyers or any other profession, their agreement should be respected*." See Report of the Lower Chamber, section IV, commentary to Article 17.

79. This spirit could be found in Article 19(3) of the Constitution that establishes that all persons have the right to a legal defense. This provision reflects what is inscribed in the Universal Declaration of Human Rights and protects the right to a legal defence. See Articles 8-11 of the Universal Declaration of Human Rights.

80. Article 79 of the Constitution of Chile provides that the Supreme Court has powers of direction, correction and economic supervision over all courts in Chile. The *recurso de queja* action is an expression of said powers, and it may be submitted against judges as well as arbitrators. See Article 545 of the COT. It is yet to be seen whether this action will be admitted against arbitral decisions or if it may proceed only against the decisions that the Courts of Appeal take regarding annulment of awards, or in none of the above (because it is considered to be included in Article 34 of the new Law).

81. Article 80 of the Constitution of Chile provides this remedy of inapplicability for specific cases only (ie, without "erga homnes" effects). This remedy is granted to a party who proves that the application of a specific law is unconstitutional in its case (it cannot be submitted if the case has been decided).

82. See Article 20 of the Constitution of Chile.

83. See Report of the Constitutional Court's of August 31, 2004, sixteenth and seventeenth whereas; report of the Lower Chamber, section VI, commentary to Article 5.

84. See Report Nº 895/131 of the Comisión Preventiva Central of January 20, 1994 ("*the arbitration clause cannot contain provisions that attempt against public policy rules, for example, that the* 'recurso de queja' *be waived*.").

85. President's Message, June 10, 2003, section V.

86. Report of the Lower Chamber, general debate. Citing Sergio Urrejola, President of the Bar.

87. Although it is not mentioned explicitly in the new Law, it is reasonable to sustain that the concept of "arbitral award" includes all types of awards and not only the final award. See, e.g., Article 2(iii) of the ICC rules, according to which "*'award' includes, inter alia, an interim, partial, or final award*." (Emphasis added). Article 29 of the new Law provides that decisions must be taken by a majority (unless otherwise agreed by the parties). In domestic arbitration in Chile, should the arbitrators not reach majority decision, the arbitral agreement is left with no effect. See Articles 238 of the COT and 631, 640 and 641 the CCP.

88. Even though the new Law does not indicate it, it is understood that these provisions apply to foreign awards. Article I of the New York Convention includes also "*arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought*." Therefore, it is possible to imagine that an award rendered in Chile can be enforced as a foreign award (for example, when it involves purely foreign issues).

89. Article 16 of the Civil Code states:

> "*Assets located in Chile are governed by the laws of Chile, even if they are owned by foreign nationals who do not reside in Chile.*
>
> *This provision shall not affect provisions contained in agreements validly entered into in a foreign country.*
>
> *However, the effects of agreements that are entered into in a foreign country but are to be performed in Chile shall be governed by the laws of Chile.*"

90. Supreme Court decision No. 1934-99, of November 17, 1999.

91. Supreme Court decision No. 868-2003, of November 30, 2004.

92. Report of the Lower Chamber, section VI, commentary to Article 17.

93. President's Message, section II.

94. For a study of Latin America as a place of arbitration, see Eduardo Silva Romero, "América Latina como sede de arbitrajes comerciales internacionales," 1 Revista de Arbitragem e Mediaçao 1 (2004), at 88. ■

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