CHILE

Law & Practice

Contributed by Grupo Vial Serrano Abogados

CONTENTS

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Grupo Vial Serrano Abogados' dispute resolution department offers expertise in international and domestic arbitration and domestic litigation including commercial, civil, investment, tax and antitrust disputes. Notably, the tax expertise has increased since the merger of Grupo Vial Abogados with tax boutique Serrano & Weinstein. The team has particular experience representing clients in commercial litigation and international and domestic arbitration particularly under the rules of the International Chamber of Commerce (ICC).

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1. General

1.1 Prevalence of Arbitration

In September 2004, Chile promulgated and published Law 19.971 on International Commercial Arbitration (LACI), which is based on the Model Law.

Prior to the publication of the LACI, international disputes were covered by internal regulations that were inadequate for disputes of this nature, conceived specifically for domestic arbitrations, thus generating a degree of uncertainty in the international sphere.

The legislature corrected this situation by adopting legislation consistent with the Model Law of the United Nations Commission on International Trade Law (UNCITRAL).

In the eleven years since its promulgation, the LACI has become a vehicle permitting Chile to open up as a seat of international arbitration based on a suitable legal framework which includes the Conventions of New York and Panama.

There is consensus that the legal framework that regulates international arbitration in Chile has been suitable, which to a large extent has been achieved by the recognition given by the courts of international arbitration, as for example hearing nullity recourses against arbitration awards, and by being aware of exequatur proceedings, as on the occasion when the president of the respective court of appeal had to intervene in accordance with the LACI. It has also been supported and recognised when it has had to have knowledge of and judge actions and recourse brought outside the LACI and which belonged to domestic arbitration and litigation.

The evolution of jurisprudence evolution in pursuit of international arbitration and its own regulatory

framework is even more evident when considering that in compliance with international arbitration sentences, the Supreme Court has gradually, but increasingly so, departed from domestic legislation and for this purpose has directly applied the regulations contained in the LACI, thus recognising their supremacy.

Regarding the international arbitration of investments, Chile has been a signatory of the ICSID Convention since 1991.

1.2 Trends

Since the promulgation of the LACI and the development of jurisprudence in international arbitration in Chile, we can say that both the legislature and the judiciary have developed an adequate relationship with international arbitration, thus meeting one of the principal objectives we had at the time of promulgating the LACI, ie to make Chile a centre for international arbitration.

The courts, especially the Supreme Court and the Santiago Appeals Court, have in the international area tried, analysed and duly accepted the concepts of proceeding and substantive public order, of due process, the competence-competence principle, the principle of independence of arbitrational agreement, the principle of minimum intervention, the principle of autonomy of will, etc.

However, except for interventions of the Supreme Court, the development of jurisprudence is mainly focused on the Santiago Appeals Court, as it is this court which has jurisdiction for hearing recourses and demands arising from arbitrations seated in Santiago. It is therefore uncertain what the response of the other appeals courts will be when they have to hear these matters, which will only be clarified over time.

1.3 Key Industries

Whilst international arbitrations in Chile are handled confidentially by arbitrators and the parties, experience shows that the industries of energy and construction are currently quite active in this respect.

1.4 Arbitral Institutions

The principal institutions used in Chile for international arbitration are the International Court of Arbitration of the International Chamber of Commerce, and the Arbitration and Mediation Centre of the Santiago Chamber of Commerce.

2. Governing Law

2.1 International Legislation

International arbitration in Chile is governed by Law 19.971 on International Commercial Arbitration which was promulgated and published in 2004, and which corresponds to the adoption of the Model Law of the UNCITRAL of 1985. However, the subsequent modifications of the Model Law have not been incorporated, an amendment that could be recommendable given the development of international arbitration.

2.2 Changes to National Law

Congress has since 2012 been considering a substantial reform of the Civil Proceedings Code which currently regulates litigation and domestic arbitration, in order to establish a completely new code. However, the project of the new code does not include a body that regulates domestic arbitration, the regulation of which, according to Chile's president, has been left for a special law.

Although a draft bill exists for a domestic arbitration law, Congress is not currently discussing this.

3. The Arbitration Agreement

3.1 Enforceability

In order for the arbitration agreement to be enforceable under Chilean law, it is only necessary for this to be a written agreement between the parties in which they agree to submit one or more current or future disputes arising between them with respect to a certain legal relationship, whether or not it is contractual.

Whether or not the agreement is in writing does not mean that it should necessarily be in one document, although legislation is lax in this respect.

In fact, a written agreement is understood to be (i) in a document signed by the parties, (ii) in an exchange of letters, telex, telegrams or other means of telecommunication, or (iii) in an exchange of written demands and responses in which one of the parties alleges the existence of an arbitration agreement and

the other party does not deny this. Also considered to be valid is an arbitration agreement which arises from a reference made in a contract or other document that contains an arbitration clause. However, in order for such a reference to be valid, it is necessary for the contract to be in writing and to refer expressly to the other document, implying the referred arbitration clause in that reference.

It is important to point out that the arbitration agreement can take the form of an independent document or the form of an arbitration clause that is part of some other contract.

3.2 Approach of National Courts

Both the Supreme Court and the Santiago Appeals Court have, since the promulgation of the LACI, been shown to be favourable to the enforceability of international arbitration agreements.

3.3 Validity of Arbitral Clause

The principle of separability is fully accepted in Chilean legislation, jurisprudence and doctrine.

The LACI expressly states that arbitration clauses forming part of a contract are to be considered as an agreement independent of the other stipulations of the contract.

Moreover, if the arbitration tribunal decides that the contract is null, this does not have the effect ipso jure of nullifying the arbitration clause.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator

There are no limitations in this respect. In accordance with the LACI, the parties are free to determine the number of arbitrators who should hear the dispute, who may even be foreigners. In the absence of agreement, the arbitrators are to be three in number.

Regarding the procedure for appointing arbitrators, the parties are free to adopt that which they consider appropriate. In the absence of agreement, the number of arbitrators to be appointed should be defined, as follows.

If the arbitration tribunal consists of three arbitrators, each party is to elect one and the third is to be elected by the arbitrators appointed by the parties. If one of the parties does not appoint the corresponding arbitrator or if the first two arbitrators appointed do not agree on the appointment of the third, within a period of 30 days from the requirement to appoint an arbitrator by a party, in the first case, and from their appointment, in the second, that appointment, at the request of either party, should be made by the president of the court of appeals of the place where the arbitration is to be held.

If the arbitration tribunal is one person and the parties do not reach agreement on the name of the arbitrator, that appointment, at the request of either party, is also to be made by the president of the court of appeals of the place where the arbitration is to be held.

If the procedure for the appointment of arbitrators agreed by the parties fails, either of the parties may ask the president of the respective court of appeals to take the necessary measures. This right is established specifically for the case in which one of the parties does not act in accordance with that agreed by the parties for that purpose, for the case in which the parties or the arbitrators do not reach agreement in accordance with the procedure agreed by the parties, and for the case where a third party, eg an institution, does not perform the function that the parties have entrusted to it in the agreed arbitrator appointment procedure.

It should be pointed out that no appeal is permitted against the decisions taken by the president of the respective court of appeals with respect to these matters.

4.2 Challenging or Removing an Arbitrator

The LACI establishes that an arbitrator may be challenged if there are justified doubts about their impartiality or independence, or if they do not possess the characteristics or meet the conditions that the parties have agreed are required. However, the party which named or participated in the appointment of the arbitrator in question may only challenge them on issues that have become known since their appointment.

Any person who has been appointed as an arbitrator, once the possibility has been communicated to

them, should inform the parties of all circumstances which may generate doubts about their impartiality or independence. The arbitrator should follow the same procedure if they become aware of any such circumstances during the course of the arbitration proceedings, and inform the parties immediately.

To proceed with the removal of the arbitrator, the procedure agreed by the parties should be followed. In the absence of agreement, the interested party is to submit a report to the arbitration tribunal that is hearing the dispute, explaining the reasons for requesting the removal, which is to be resolved by that tribunal. However, its resolution will not be necessary in the event that the arbitrator resigns their appointment or the counterparty accepts the removal.

The period for presenting a request for removal is 15 days from becoming aware of the constitution of the arbitration tribunal or becoming aware that the arbitrator being removed is involved in some cause or circumstance to be challenged.

If the requested challenge does not succeed, the president of the respective court of appeal is to address the matter, at the prior request of the interested party, which they should submit within 30 days from the notification of the resolution denying the challenge.

If the arbitrator challenged ceases to perform their functions, a replacement should be appointed in the same manner in which the arbitrator to be replaced was initially appointed.

Arbitrators may also cease to perform their functions upon their resignation or by agreement between the parties, when they are prevented de jure or de facto from exercising their functions, or when for any other reason they cannot perform their functions within a reasonable period of time. If there is no agreement in this respect, the interested party may request the president of the respective court of appeals to pronounce; this decision may not be appealed against.

In this case, the appointment of the replacement arbitrator is to be made in the same way as in the previous case.

Regarding the capacity of the courts to intervene in the arbitrator appointment process, it is necessary to bear in mind that the parties are free to adopt whichever arbitrator appointment procedure they consider suitable. In the absence of agreement, the number of arbitrators to be appointed should be specified, as described below.

If the arbitration tribunal consists of three arbitrators, each party is to elect one and the third is to be elected by the arbitrators appointed by the parties. If one of the parties does not appoint the corresponding arbitrator or if the arbitrators appointed do not agree on the appointment of the third arbitrator, within a period of 30 days from the requirement to appoint an arbitrator by the other party, in the first case, and from their appointment, in the second, that appointment, at the request of either party, is to be made by the president of the court of appeal of the place where the arbitration is to be held.

If the arbitration tribunal is one person and the parties do not reach agreement on the name of the arbitrator, that appointment, at the request of either party, is also to be made by the president of the court of appeal of the place where the arbitration is to be held.

If the procedure for appointment of arbitrators agreed by the parties fails, either of the parties may ask the president of the respective court of appeals to take the necessary measures. This right is established specifically for the case in which one of the parties does not act in accordance with that agreed by the parties for that purpose, for the case in which the parties or the arbitrators do not reach agreement in accordance with the procedure agreed by the parties, and for the case where a third party, eg an institution, does not perform the function that the parties have entrusted to it in the agreed arbitrator appointment procedure.

It should be pointed out that no appeal is permitted against the decisions taken by the president of the respective court of appeal with respect to these matters.

4.3 Independence, Impartiality and Conflicts of Interest

In accordance with the LACI, in matters of independence, impartiality and/or disclosure of potential conflicts of interest, the standard of disclosure required of arbitrators is any circumstance that may

generate doubts about their impartiality or independence.

Any person who has been appointed as an arbitrator, once that possibility is communicated to them, is to inform the parties of all circumstances that might generate doubts about their impartiality or independence. The arbitrators should follow the same procedure if they become aware of any such circumstances during the course of the arbitration, and must inform the parties immediately.

However, the parties may only challenge an arbitrator when there are justified doubts about their impartiality and independence, as is also the case where the arbitrator does not have the qualifications demanded by the parties for taking up the position.

Regarding arbitrations handled by the Arbitration and Mediation Centre of the Santiago Chamber of Commerce, in accordance with its International Arbitration Regulations, arbitrators should be permanently independent of and impartial to the parties. Candidates for the role of arbitrator should declare in writing any circumstance that may give rise to justified doubts about their independence and impartiality. In addition, in the same way as that ordered by the LACI, arbitrators should inform the parties without delay of any circumstances that arise later and which might affect such requirements.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

The Organic Code of Tribunals states that the following matters cannot be submitted to arbitration:

- Matters relating to alimony;
- Matters relating to the right to request separation of assets between married couples;
- Criminal cases;
- Cases under Law 18.287;
- Cases arising between a legal representative and their principal.
- Cases in which the judicial prosecutor should be heard. The same code states that judicial prosecutors should be heard when the laws expressly order the audience or intervention of the Prosecutor Office, as in the following cases:
  - In disputes of competence, whether due to the matter litigated or with respect to tribunals that exercise jurisdiction of a different nature;
  - In disputes regarding the civil liability of judges or public employees, with respect to their ministerial acts;
  - In disputes relating to the civil status of any individual;
  - In disputes affecting the assets of public corporations or foundations, whether because of the nature of the business or because it appears in the process of interest of such institutions, and provided their hearing corresponds in the first instance to the sitting judge of the respective court of appeal.

5.2 Challenges to Jurisidiction

In Chile the competence-competence principle is fully accepted by legislation, jurisprudence and doctrine.

The LACI expressly establishes that the arbitration tribunal is authorised to decide on its competence.

Moreover, the LACI authorises the arbitration tribunal to hear and resolve the issues that are related to the existence and validity of the respective arbitration agreement.

Such issues may be heard and decided by the arbitration tribunal as a prior matter to or together with the merits.

If the arbitration tribunal decides the issue of incompetence as a prior matter and declares itself competent to hear the disputes arising between the parties, either of the parties may request the intervention of the president of the respective court of appeal to resolve the jurisdictional issue. The term for such a request is 30 days from the notification of the decision of the arbitration tribunal and the interposition is not to suspend the proceedings of the arbitration.

If the tribunal decides the referred issue in a merit award, the interested party may oppose the award through the interposition of a request of nullity before the respective court of appeal, for which it will have a period of three months from receipt of the award.

5.3 Timing of Challenge

In accordance with the LACI, the arbitration tribunal is authorised to hear and decide issues of incompetence, even when these are related to the existence and/or validity of the arbitration agreement.

The party wishing to challenge the competence of the tribunal should oppose the corresponding issue no later than the moment of responding to the demand. If the issue is related to an extra-limitation of the mandate by the arbitrator, it should be opposed as soon as the interested party becomes aware of the facts. These terms are, notwithstanding the power of the tribunal to hear those issues, presented extemporaneously, when the interested party has duly justified the delay.

Regarding the hearing and decision of the issue of incompetence, this can take place immediately, as a prior question, or on the occasion of a basic award on the matter.

If the arbitration tribunal decides the issue of incompetence as a prior matter and declares itself competent to hear the disputes arising between the parties, either of the parties may request the intervention of the president of the respective court of appeals to resolve the jurisdictional issue. The term for such a request is 30 days from the notification of the decision of the arbitration tribunal and the interposition is not to suspend the proceedings of the arbitration.

If the tribunal decides the referred issue in a merit award, the interested party may oppose the award through the interposition of a request of nullity to the respective court of appeal, for which they will have a period of three months from receipt of the award.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility

Although the LACI does not expressly establish it, from the jurisprudence of the president of the Santiago Court of Appeal it is clear that every time that it has heard and decided issues of competence, based on the fact that the arbitration tribunal has declared itself competent as a prior matter, it has heard the matter in depth, analysing the facts and the law.

5.5 Breach of Arbitration Agreement

If one of the parties brings to the country's courts an action relating to a dispute that is submitted to an arbitration agreement, the court should hear and decide the dispute unless either of the parties requests that the matter be sent to arbitration, no later than the point at which the interested party submits the first document. If this is not requested, competence will be extended to the ordinary court to hear the matter.

However, whilst the decision of the action in the ordinary court remains pending, the parties may equally initiate or continue arbitration actions, even resolving the respective arbitration award.

5.6 Right of Tribunal to Assume Jurisdiction

The general rule is set out in the Organic Code of Tribunals, which expressly prohibits the obligation of any person to submit to the decision of arbitral tribunal. The exception occurs in cases of forced arbitration, expressly provided for by the legislature and which are the following:

- The liquidation of marital society or of a collective society or in civil partnership, and that of communities;
- The partition of assets;
- Issues arising from the presentation of the account of the manager or liquidator of commercial companies and other litigation regarding accounts;
- Differences arising between shareholders in a corporation, or partners in a partnership or between associates in a participation account, when no method has been established for resolving the differences.

In other cases as determined in laws.

However, in exceptional cases, jurisprudence has extended an arbitration agreement to third parties who did not participate in the signing of the respective contract, eg in the case of a dispute under a contract that, apart from containing an arbitration clause, contained a stipulation in favour of a third party. The dispute was between one of the signatories to the contract and the third party who was to benefit.

In this case, after the arbitrator declared themself competent to hear the dispute as a prior matter, the

president of the Santiago Appeals Court, in accordance with the LACI, heard and decided the question of competence, considering *"(…) that the acceptance or non-acceptance of the stipulation by the eventual third party and naturally produce several and various legal effects in relation with one or some or with all the parties that participated in the signing of the contract. And could also originate "some conflict, difficulties or dispute" between the parties in relation to such third party, and then it could be said that the acceptance or lack of acceptance of the stipulation is a legal act that has emerged or taken place "due to or on the occasion" of the "existence, validity effectiveness, interpretation, nullity, compliance or non-compliance with the contract", or of another varied event or circumstance, as such hypotheses do not constitute, as has been seen, a "restrictive enumeration". In this way, and although "Servicios Financieros Altis S.A." did not sign the contract, it is a person reached by the effects of the contract, remaining therefore under the jurisdiction of the arbitrator the matter brought (…)"* [Sentence of 30 December 2011 of the President of the Santiago Appeals Court, case named *"Servicios Financieros Altis S.A. v Grupo Casa Saba S.A.B. de C.V."*. Role No1886-2011.]

6. Preliminary and Interim Relief

6.1 Types of Relief

In accordance with the LACI, during the arbitration proceedings, either of the parties may request from the arbitrator a provisional measure, without any limitation but always in respect to the object of the proceedings.

In relation to the referred object, therefore, the arbitrator is empowered to order the provisional measures considered necessary, and also to require the parties to grant an appropriate guarantee in connection with the measures ordered.

However, the parties may agree that the arbitrator does not have these powers.

6.2 Role of Courts

As a general rule, and in accordance with the LACI, it is not incompatible with the arbitration agreement nor with the arbitration award that either of the parties, prior to the start of the arbitration proceedings or during the proceedings, may make a request to the ordinary courts for provisional measures, which may be conceded by them.

6.3 Security for Costs

Whilst there is no legal provision that specifically permits the ordinary courts and/or arbitration tribunals to require security in respect of the payment of the costs of arbitration to either of the parties, in accordance with the general rules, either of the parties may request, either to the ordinary courts or to the arbitration tribunal, precautionary measures to ensure the results of the arbitration.

Specifically with regard to the costs of the arbitration itself, such as the fees of the arbitrators, experts, etc there is no legal provision that expressly permits them. However, the LACI, in dealing with provisional precautionary measures requested to the arbitrator, expressly permits the arbitrator to require from either of the parties suitable security with respect to such measures.

7. Procedure

7.1 Governing Rules

In accordance with the LACI, the parties are completely free to agree the procedure to be adopted in the respective arbitration proceedings. If the parties do not agree any procedure, the arbitration tribunal is to conduct the arbitration as it considers appropriate, including everything related to admissibility, pertinence and valuation of the evidence the parties choose to submit. However, in both cases the parties and the arbitration tribunal should subject the procedure to the provisions of the LACI.

All those involved should never lose sight of the fact that the basis of the arbitration procedure in Chile is equal treatment of the parties, ensuring that both have a full opportunity to use their rights.

Therefore, unless agreed to the contrary by the parties, the LACI establishes:

a) That arbitration actions are to begin on a date in the future after the requirement from the interested party to submit certain disputes to arbitration has been received.
b) That the submission contains the facts on which it is based, the points disputed and its object,

which should be answered by the party of whom it is demanded, both parties being able to produce the documents on which it is based. This is to take place within the period of time agreed by the parties or otherwise the period of time determined by the arbitration tribunal. Both the demand and the response may be modified and/or extended during the substantiation of the arbitration unless the tribunal considers that it inadmissible due to delay.

c) That the arbitration tribunal is to decide whether a hearing should be set for the receipt of evidence, and for the parties to make oral allegations, or whether the proceedings are to be based only on documents and other evidence provided by the parties.

d) That the arbitration tribunal should respond to the counterparty with respect to all the declarations, documents and other information that one of the other parties submits, and should make available to the parties the expert reports and evidence documents submitted for consideration by the tribunal.

7.2 Procedural Steps

The only proceedings requirement that cannot be avoided by agreement of the parties is the due summoning of both parties with respect to the decisions and actions of the tribunal.

For example, in accordance with the LACI both parties should be given due notice of the audiences to take place, as well as meetings of the arbitration tribunal to examine merchandise and other assets or documents.

7.3 Legal Representatives

As Article 527 of the Organic Code of Tribunals establishes that *"Oral defences in any tribunal in Chile may only be made before a lawyer prepared for exercising the profession (…)"* and that in the same sense, Article 1 of Law 18.120 states that *"The first presentation of each party or interested party in contentious or non-contentious matters before any tribunal in Chile, whether ordinary, arbitration or special, should be sponsored by a lawyer prepared for the exercise of the profession. (…)",* there has been discussion about whether foreign lawyers may appear in international arbitrations on behalf of the parties. However, that doubt was resolved favourably in 2014 by the Santiago Appeals Court. There is today jurisprudence that enables foreign lawyers to appear directly in international arbitrations seated in Chile.

The Santiago Appeals Court considered that *"(…) With respect to the second reason for nullity that questions the action of foreign lawyers in representation of the defendant, that they are not able to litigate in Chile, it should be borne in mind that the alleged defect it would bring would be to affect the defendant itself, which has made no complaint and on which they validated their action. The rule invoked by petitioner is fully applicable for litigation brought before Chilean tribunals, which is not the character of the arbitration tribunal, to which should added that the dispute was with respect to the contract signed and only due to the lack in its own terms does the substantive Chilean law come into effect and while this was known by the judicial representatives, nothing prevents their actions. It should be added that in any case the petitioner accepted the action of such representative during the whole proceedings without making any complaint in that respect, for which reason it is not appropriate to now pretend the nullity of the sentence for this matter which, as has been said, had in no way prejudiced it. (…)"* [Sentence of 10 April 2014 of the Santiago Appeals Court, case named *"Constructora Emex Limitada vs Organización Europea para la Investigación Astronómica en el Hemisferio Sur"*. Role No.9211-2012.]

8. Evidence

8.1 Collection and Submission of Evidence

Regarding the submission of evidence, unless there is an agreement to the contrary by the parties in accordance with the LACI, the arbitration tribunal is called to decide whether to arrange audiences for the submission of evidence, as well as for the parties to make their oral allegations, or if the proceedings will be substantiated only on documents and other evidence submitted by the parties.

Regarding the methods of evidence that the parties may bring to accredit the facts alleged, the general rule is that all methods of evidence are acceptable that are normally accepted in litigation in civil law countries, such as documents, witnesses, expert opinion, personal inspections by the tribunal, confessions, etc.

Due to cultural reasons, the use of discovery as a means of evidence is unusual, tending to limit it to specific internal legislation, which corresponds more to a specific disclosure, on the basis of the exhibition of certain previously identified documents.

The use of witness statements and cross-examination in the area of international arbitration is generally accepted, without there being objections to it. However, more common is the verbal declaration of witnesses before the arbitration tribunal, granting the parties the right to question and cross-examine them.

In any case, it is increasingly frequent to see that in international arbitrations, the evidence parameters are agreed and are used as established in the rules of the IBA on the Practice of Evidence in International Arbitration.

8.2 Rules of Evidence

The submission of evidence in international arbitrations seated in Chile is regulated by the LACI, which states that unless there is agreement to the contrary by the parties, the arbitration tribunal has to decide whether to arrange audiences for submission of evidence, and for the parties to make their oral allegations, or if the sentence will be substantiated solely on the documents and other evidence submitted by the parties.

Despite the broad freedom that the parties and the arbitration tribunal enjoy for regulating the evidence stage, this is limited by the equal treatment that should be given to the parties, who should have every opportunity to make use of their rights.

In addition, such autonomy is conditioned to the due and timely movement of the parties with respect to the audiences that are to take place, as well as the meetings that the arbitration tribunal holds to examine merchandise or other assets or documents.

It should be pointed out that, whilst it is a power in accordance with the LACI, the parties usually submit the documental evidence supporting their allegations or at least make reference to such documents and other evidence they have, when submitting their written demands and responses.

8.3 Powers of Compulsion

Despite the fact that under Chilean legislation arbitrators are effectively judges with public authority, by exercising an analogous jurisdiction to that of the ordinary courts, according to the law and the jurisprudence of the Supreme Court, arbitrators lack the power to ensure compliance with their decisions. So if anyone disrupts the production of documents or a witness does not agree to appear voluntarily, the arbitrator may request the assistance of the ordinary courts in order to apply the compulsive measures or necessary judicial order, in order to ensure compliance with that decided by the arbitration tribunal, in accordance with the provisions of the Civil Proceedings Code.

In addition, this time in accordance with the LACI, the arbitration tribunal, as well as the parties with the approval of the tribunal, may require the assistance of the competent ordinary courts of Chile for the practice of evidence, which should be subject to the rules on means of evidence that are applicable.

It should lastly be pointed out that the arbitration tribunal does not require the assistance of the ordinary courts of justice for the application of proceedings sanctions, such as for example the impossibility of presenting later a document that was in the possession of the party who should have submitted it and refused to do so at the request for exhibition of documents presented by the counterparty, thus disobeying the arbitration tribunal.

9. Confidentiality

Arbitrations are not confidential in Chile unless otherwise agreed by the parties or if the arbitration institution so orders. There is no rule in this respect. However, arbitrations are usually conducted in a reserved way without third parties having access to the file.

Notwithstanding, this reserve will necessarily be lost when the intervention or assistance of either the respective court of appeal has been requested (eg as a result of a request for nullity), or of its president (eg when their intervention is requested to resolve a jurisdictional issue, when the arbitration tribunal faces an exception of competence, and has been declared competent as prior matter) or of the ordinary courts

of justice (eg when their assistance is requested for the practice of evidence); since in these cases the files will be public and any person may have access to them, whether physically or through the web portal of the Judiciary.

10. The Award

10.1 Legal Requirements

The decisions contained in arbitration awards made by the arbitration tribunals must be adopted, unless the parties agree otherwise, by a majority of the votes of its members.

Such decisions should be contained in a written award which is motivated, unless the parties have agreed another form, signed by the arbitrators, indicating the date of its pronouncement and the place of the arbitration.

If one or more members of the arbitration tribunal did not sign the award, the signatures of a majority of the arbitrators are to be sufficient, and a note should be attached, giving the reasons why the remaining member(s) of the panel did not sign.

In the event that during the substantiation of the arbitration the parties reach a settlement, whether total or partial, they may ask the arbitration tribunal, provided it does not oppose the request, to record the terms of the settlement in the form of an arbitration award, leaving a note to this effect in that arbitration award. However, in this case the arbitration award shall not contain motivations. In this case, the award is to have the same nature and effects of an arbitration award that contains the decision of the tribunal on the merits of the dispute.

The arbitration award should be notified to the parties by means of the delivery to each party of a copy of the award duly signed by the arbitration tribunal, in the explained terms.

However, at the request of the tribunal and within a term of 30 days from the notification of the award, the award may be corrected with respect to mistakes of calculation, copying or typing or any other similar error.

In addition, at the request within the same 30 days and provided the parties have so agreed, either of them may request the arbitration tribunal to interpret a point or a concrete part of the award. Such interpretation, if considered appropriate, should be issued within the term of 30 days and is to be understood to form an integral part of the award.

Finally, unless agreed otherwise and in the same way as in the previous case, either of the parties may request that an additional award be pronounced with respect to the claims submitted for the consideration of the tribunal, but omitted in the award, for which it shall have a period of 60 days.

The deadline for the arbitration tribunal to correct and interpret the award, and to issue an additional award, may be extended by it if considered necessary.

10.2 Types of Remedies

Whilst the LACI does not directly deal with the types of remedies with which the arbitration tribunal may support its decision, and although this matter has not been considered from this point of view by jurisprudence, it is believed that, for the LACI and the criterion of the Chilean tribunals, the limits are established precisely in the merit law which is applied for resolving disputes arising between the parties.

Thus, if the merits of the dispute between the parties have to be decided in accordance with Chilean rules, the remedies available to the tribunal will also be limited by Chilean laws, which do not consider the granting of punitive damages.

If the merits of the dispute between the parties are be decided in accordance with foreign rules, the remedies available to the tribunal will be limited by those rules. If they consider the award of damages that are not payable under Chilean legislation or if the arbitration tribunal concedes remedies which, for example, are against the internal Chilean public order, this will not be an impediment to the recognition and execution of the award as it will correspond to a basic decision that, when the award is being presented and revised, the request of exequatur is not to be revised. This is because the Supreme Court will only confirm that the arbitration and especially the award meet the minimum standards of legality.

10.3 Recovering Interest and Legal Costs

Regarding the recovery of costs which the parties have incurred due to the arbitration, the domestic custom is that each party assumes their own costs, unless one of the parties has been completely defeated. In such a case, the arbitration tribunal will assess the costs at its discretion, which will probably be lower than the costs effectively incurred by the parties.

However, this situation is currently changing incipiently to adjust to international standards.

11. Review of an Award

11.1 Grounds for Appeal

International arbitration awards cannot be appealed against; they may only be opposed by a petition for nullity which should be presented to the respective court of appeals within three months of the receipt of the award and may be based on any of the reasons established by the LACI for such a purpose.

As is to be expected from the quality of the signatories to the conventions of New York and Panama of which Chile is one, the causes on which the petition of nullity can be based are very similar to the reasons that these conventions establish for denying the enforceability of a foreign award. The causes are the following:

a) When the petitioner proves the existence of any of the following circumstances:
   i) That one of the parties to the arbitration agreement was affected by some disability, or that the agreement is not valid under the law to which the parties have submitted, or if nothing has been agreed with respect to Chilean law.
   ii) That a party has not been duly notified of the appointment of an arbitrator or of arbitration actions or has not been able for any other reason to make use of their rights.
   iii) That the award refers to a dispute not provided for in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement. However, in the event that the matters of an award which has been submitted to arbitration can be separated from those that have not, only the latter may be the object of the petition of nullity.
   iv) That the composition of the arbitration tribunal or the arbitration proceedings are not in accordance with the agreement of the parties, unless the agreement of the parties is in conflict with some provision of the LACI which places an obligation on the parties. In the absence of agreement by the parties, in cases where the composition of the tribunal or the proceedings do not accord with the rules of the LACI.

b) When the respective court of appeal sees:
   i) That the object of the dispute is not susceptible to being submitted to arbitration in accordance with Chilean legislation.
   ii) That the arbitration award is against public order in Chile.

Notwithstanding the fact that the grounds on which to base the petition of nullity are clearly limited by the LACI, in order to understand clearly what should be understood to be public order in Chile, it is necessary to go to the jurisprudence of the Santiago Appeals Court as the LACI has not defined it.

The relevance of trying to define what should be understood as public order in Chile for the purposes of international arbitration, together with the invocation of infringement of due process, is that it is the reason or cause on which most petitions of nullity are based. For this reason, in order to give greater security to international arbitration, the concept should be limited to the maximum possible. The effect of this has been that for jurisprudence in Chile, in matters of international arbitration, the concept of public order in Chile has evolved into the concept of international public order.

In the first international arbitration subject to a petition of nullity from one of the parties, the Santiago Appeals Court considered that *"(…) Referring to the second cause, of Article 34 N° 2 (b) ii, of having violated the Chilean public order by permitting that the legal dispute be decided with infringement of the guarantees of due process, since the evidence cannot be objected to, indicates that this should be applied in a restrictive way, limiting itself only to the infringement of basic and fundamental rules of the Chilean state;*

this is in order to avoid the limit of enforceability of international awards in Chile through the simple invocation of local public order, for which reason such cause should also be rejected (…)" [Sentence of 4 August 2007 of the Santiago Appeals Court, case named *"Publicis Groupe Holdings BV and Publicis Groupe Investments with Arbitrator Manuel José Vial Vial"*, Role No 134-2007.]

This restrictive interpretation was the first approach of our courts in interpreting the Chilean public order in the area of international arbitration, as a reference to international public order. Later this interpretation, apart from being ratified, was made precise by the Santiago Appeals Court, on the occasion of another petition of nullity, in which it considered that *"(…) The establishment (…) of a cause of nullity based on Chilean public order makes reference to what in classical private international law is called international public order. The application of the notion of international public order in place of public order covered by internal law, provokes the annulment of arbitration awards for that concept is circumscribed to extremely serious violations of the fundamental principles and rules of law in Chile. These serious infringements can be of proceedings or substantive order.*

At the proceedings level, the relevant public order to these purposes comprises principles as fundamental as the conditions of due process, equal treatment of the parties, the existence of a contradictory procedure, the impartiality of the arbitration tribunal and the prohibition of fraud or corruption of some of its members. At the substantive level, it includes principles like the prohibition on abuse of rights, protection of political, social and economic rights essential for the state and respect for the obligations assumed by this with other states and international organisms. (…)" [Sentence of 9 September 2013 of the Santiago Appeals Court, case named *"Vergara Varas, Pedro v Costa Ramírez, Vasco."* Role No1971-2012.]

The petition for nullity of an arbitration award may therefore be based only on an infringement of Chilean public order, when the violation has been of such magnitude that it has damaged the most basic moral and justice principles on which Chilean law is based.

11.2 Excluding/Expanding the Scope of Appeal

In accordance with the Principle of Minimum Intervention, the only recourse that the LACI concedes to the parties of an international arbitration to contest an award is the petition of nullity, which necessarily should be based on any of the causes established, which are of a restrictive nature, in order to facilitate the enforcement of the award. The parties are not authorised to exclude any cause or to include additional clauses.

It should be noted that the jurisprudence of our courts has established that the recourses available under the domestic proceedings law against domestic arbitration awards and/or litigation in general (eg the appeal) are not justified in cases of international arbitration.

11.3 Standard of Judicial Review

Jurisprudence has established that the petition for nullity is not a recourse as such against the arbitration award but an independent action, clearly limited in its scope, whose sole objective is to correct possible errors or excesses incurred by the arbitration tribunal, but always circumscribed to the restrictive causes established in the LACI.

The respective court of appeal, therefore, is not in a position to hear the basis of the dispute submitted to the arbitration tribunal, and only has competence to consider the facts and decide whether the content of the award has incurred any of the infringements considered in the referred causes.

The Appeals Court has considered that *"(…) as already stated, in the compared law, we do not find in this case before a second instance and less before a recourse of annulment as of no other recourse whose object is to revise the conformity to the facts, the law and justice of the award, but we are in the presence of an autonomous process of impugnation in which the tribunal has a specific and restrictive competence, in which it should only be limited to resolving and leaving without effect what constitutes an excess or a mistake of the award, in the light of the only restrictive motives that legitimate the interposition of this action of nullity in the terms of Law 19.971.*

The award once notified therefore is definitive, unappealable and obligatory for the parties. The matter judged at arbitration is thus assured, making it impossible to be appealable according to the applicable arbitration legislation. (…)" [Sentence of 9 September 2013 of the Santiago Appeals Court, case named *"Vergara Varas, Pedro v Costa Ramírez, Vasco."* Role No1971-2012.

12. Enforcement of an Award

12.1 New York Convention

Chile is a signatory to the following international conventions relating to international arbitration:

a) Bustamante Code, called 'Code of Private International Law', ratified in 1933.
b) Convention of New York, called 'Convention on the Recognition and Enforceability of Sentences', ratified in 1975. It should be noted that in the exercise of its right of reserve, Chile declared that this convention will only apply to arbitration awards dictated in the territory of another signatory state.
c) Convention of Panama called 'Inter American Convention on International Trade Arbitration', ratified in 1976.
d) ICSID Convention, called 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States', ratified in 1991.
e) Bilateral and multilateral treaties with different countries.

Letters d) and e) above relate only to international arbitration in investments.

12.2 Enforcement Procedure

The enforcement of international arbitration awards called exequatur is generally regulated by the LACI and also the Convention of New York.

The LACI provides that all arbitration awards, regardless of the country where pronounced, are considered as binding.

For enforcement, the interested party should submit a request to that effect to the Supreme Court. The request should be accompanied by the authenticated original of the arbitration award it is intended to enforce plus the original of the respective arbitration agreement, or at least a certified copy of such documents. If any of them is not written in the Spanish language, it should also be accompanied by a duly certified translation.

The specific procedure applicable is regulated in the Civil Proceedings Code, which orders that the request should be communicated to the party against which the enforcement is sought, which may explain what is considered convenient within the term for answering demands (the minimum term is 15 business days including Saturdays).

Whether or not the counterparty has presented its response, and following a report by the judicial prosecutor, the court shall resolve on whether the award should be enforced or not. If considered necessary, the court may open a term for evidence of eight business days.

Given that Chile is a signatory to the conventions of New York and Panama, the reasons for which the court might reject the recognition and enforcement of the arbitration award established in the LACI are very similar to those that these conventions establish for denying the enforcement of a foreign arbitration. The restrictive grounds are the following:

a) At the request of the defendant party, when there is evidence of any of the following circumstances:
    i) That one of the parties to the arbitration agreement was affected by some disability, or that the agreement is not valid under the law to which the parties have submitted, or if nothing had been agreed on the matter under the law of the country in which the award has been pronounced.
    ii) That the appointment of an arbitrator or the actions of the arbitrator have not been duly notified or that a party has been unable to enforce their rights for any other reason.
    iii) That the award refers to a dispute not provided for in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement. However, in the case that aspects of the award submitted to arbitration can be separated from those

that have not, the former may be recognised and enforced.

iv) That the composition of the arbitration tribunal or the arbitration proceedings is not as agreed by the parties. In the absence of agreement between the parties, if the composition of the tribunal or the proceedings is not in accordance with the law of the country in which the arbitration took place.

v) That the arbitration award is not yet obligatory for the parties, or has been annulled or suspended by a tribunal of the country where the award has been pronounced, in accordance with its law.

b) When the court sees:

i) That the object of the dispute is not susceptible to being submitted to arbitration, in accordance with Chilean legislation.

ii) That the arbitration award is contrary to Chilean public order.

Note that in a) v) above, the court that hears the exequatur may delay its decision and, at the request of the party that requested the recognition and enforcement of the award, may require the counterparty to grant appropriate security.

12.3 Approach of the Courts

Regarding the recognition and enforcement of arbitration awards, the jurisprudence of the Supreme Court shows the favourable disposition of that court regarding compliance with awards.

This court has constantly rejected any involvement in the basis of the question disputed, considering that the analysis of the merits is not within its competence and that it should be required to assess only that they conform to the legal requirements.

The court has considered that *"(…) these proceedings do not constitute an instance so it is not possible to promote or resolve within it matters appropriate to the facts and law relating to the cause on which the foreign sentence was pronounced, nor may allegations be resolved that may constitute exceptions that should be opposed in the corresponding enforcement and before the tribunal that hears them. (…)"* [Sentence of 15 September 2008 of the Supreme Court, case named *"Gold Nutrition Industria e Comercio Ltda."*. Role No 6615-2007.]

In the same vein, it later considered that *"(…) the Supreme Court (…) after face the respective contradictory proceedings* [by which the request of exequatur is communicated to the party against which it is requested, in order to present its responses]*, proceeds to revise the legal requirements without entering into the merits of the respective dispute, grants authorisation or favourable pronouncement to the foreign sentence that resolves it, in order to grant it the enforceable force that it lacks and recognise the same effects as sentences given by national judges, which will permit compliance through the proceedings and before the competent tribunal.(…)"* [Sentence of 8 September 2009 of the Supreme Court, case named *"Comverse Inc"*. Role No 225-2008.]

Regarding the infringement of Chilean public order as a reason for rejecting the recognition and enforcement of an arbitration award, it is firstly necessary to see the jurisprudence of the Santiago Appeals Court in order to determine what should be understood by this term.

Public order is the reason or cause on which most petitions of nullity are based. For this reason, in order to give greater security to international arbitration, the concept should be given the widest possible definition. The effect of this has been that for jurisprudence in Chile, in matters of international arbitration, the concept of public order in Chile has evolved into the concept of international public order.

In the first international arbitration subject to a petition of nullity from one of the parties, the Santiago Appeals Court considered that *"(…) Referring to the second cause, of Article 34 N° 2 (b) ii, of having violated the Chilean public order by permitting that the legal dispute be decided with infringement of the guarantees of due process, since the evidence cannot be objected to, indicates that this should be applied in a restrictive way, limiting itself only to the infringement of basic and fundamental rules of the Chilean state; this in order to avoid the limit of enforceability of international awards in Chile through the simple invocation of local public order, for which reason such cause should also be rejected (…)"* [Sentence of 4 August 2007 of the Santiago Appeals Court, case named

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"Publicis Groupe Holdings B.V. and Publicis Groupe Investments with Arbitrator Manuel José Vial Vial", Role No 9134-2007.]

This restrictive interpretation was the first approach of Chilean courts in interpreting the Chilean public order in the area of international arbitration as a reference to international public order. Subsequently, this interpretation, apart from being ratified, was made more precise by the Santiago Appeals Court, on the occasion of another petition of nullity, in which it considered that *"(…) The establishment (…) of a cause of nullity based on Chilean public order makes reference to what in classical private international law is called international public order. The application of the notion of international public order in place of public order covered by internal law, provokes the annulment of arbitration awards for that concept is circumscribed to extremely serious violations of the fundamental principles and rules of law in Chile. These serious infringements can be of proceedings or substantive order.*

At the proceedings level, the relevant public order for these purposes comprises principles as fundamental as the conditions of due process, equal treatment of the parties, the existence of a contradictory procedure, the impartiality of the arbitration tribunal and the prohibition of fraud or corruption of some of its members. At the substantive level, it includes principles like the prohibition on abuse of rights, protection of political, social and economic rights essential for the state and respect for the obligations assumed by this with other states and international organisms. (…)" [Sentence of 9 September 2013 of the Santiago Appeals Court, case named *"Vergara Varas, Pedro v Costa Ramírez, Vasco."* Role No 1971-2012.]

With respect to the jurisprudence of the Supreme Court regarding what should be understood by Chilean public order in the area of grounds for denying the recognition and enforcement of a foreign award, it can be stated that it supports the interpretation of the Santiago Appeals Court as, in hearing and deciding requests for exequatur, it has systematically rejected the defence based on the decision harming Chilean public order, when the alleged infringements are related to merit matters, which may possibly harm internal public order, in place of infringements of international public order, in the terms explained.

In order, therefore, to obstruct the recognition and enforcement of an international award, it should be understood that there exists an infringement of Chilean public order where that infringement is of such magnitude that it has harmed the most basic moral and justice principles on which Chilean law is based.

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