Arbitration Guide
IBA Arbitration Committee

CHILE
April 2012

Andrés Jana*

Bofill Mir & Álvarez Jana
Av. Andrés Bello 2711, piso 8
Las Condes, Torre Costanera
7550611 Santiago
Chile
ajana@bmaj.cl

* The author thanks Johanna Klein Kranenberg, Constanza Onetto and Elina Meriminskaya for their collaboration in the drafting of this chapter.

Table of Contents

I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Chile ranks as one of the Latin American countries with the strongest traditions of arbitration. Arbitration is generally seen as the preferred method of commercial dispute resolution for a wide spectrum of entities ranging from sophisticated parties to small-business owners. Accordingly, arbitration clauses can be found not only in complex commercial instruments, but also in contracts such as for the sale or lease of residential or commercial properties.

Advantages: Arbitration can be completed in a more timely manner than court proceedings due to the mandatory time limit imposed on arbitrators (two years). Disputes can be adjudicated by legal experts in the field, with more procedural flexibility, and under conditions of confidentiality.

Disadvantages: The Chilean International Commercial Arbitration Law, Law No. 19.971 on International Commercial Arbitration (ICAL) came into force fairly recently, in 2004. As a result, the domestic courts are still adapting to the fact that this law now applies to international arbitrations instead of the domestic arbitration law as well as to their lessened involvement in international arbitrations. For instance, in a recent decision the Santiago Court of Appeals confirmed its competence to fully review an international arbitration clause in order to establish its validity under the ICAL.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

From the middle of the nineteenth century onwards, arbitration in Chile took place on an *ad hoc* basis. Starting in the early 1990's institutional arbitration has increasingly become a prevailing trend mostly due to the work of CAM Santiago Arbitration and Mediation Center (CAM Santiago).

In Chile, domestic arbitration prevails. Even in disputes that qualify as international arbitrations, parties until recently tended to apply domestic arbitration rules and practices. Since the enactment of ICAL, parties are getting more used to the practice of international arbitration and the use of international arbitration institutions and rules such as those of the International Chamber of Commerce (ICC).

Until 2004, the Chilean Code of Judicial Organization of 1943 (CJO) and Code of Civil Procedure of 1902 (CCP) applied to both domestic and international

arbitrations, imposing limitations on international arbitration, such as on the nationality and legal qualifications of the arbitrators. However, in September 2004, in order to better facilitate international arbitration in Chile, the Chilean legislature adopted ICAL which closely follows the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

By far the predominant arbitral institution in Chile is CAM Santiago, created in 1992. In 2006, an international arbitration centre was created as part of CAM. CAM presently administers arbitrations subject to both domestic and international arbitration law. CAM Santiago administers approximately 120 domestic arbitration cases a year, and the number of arbitrations has increased steadily over the past few years. CAM has its own set of rules for both domestic and international arbitration, namely, the Rules of Arbitration Procedure (the Domestic Arbitration Rules) and Rules of International Arbitration.

(iii) What types of disputes are typically arbitrated?

Commercial and civil disputes are commonly arbitrated in Chile, by a wide range of entities - from large corporations to small business owners. There are also certain disputes that are subject to mandatory arbitration such as disputes concerning the partition of goods and liquidation of a marriage in community of property, disputes between shareholders of a corporation (subject to exceptions), and all disputes arising out of maritime commerce (Art. 1203 Commercial Code). The Labor Code also provides for the mandatory arbitration of disputes where no agreement is reached between the parties in a collective bargaining process and where employees do not have the right to initiate a strike, for example in the public utility sector or other service suppliers whose interruption to services creates a serious risk to public health, the economy or national security (Art. 384 Labor Code).

(iv) How long do arbitral proceedings usually last in your country?

Arbitrators are under a general obligation to complete their task as expeditiously as possible (Art. 236 CJO). Unless the parties have determined otherwise, arbitrators in a domestic arbitration must issue their decision within two years after acceptance of their appointment as arbitrator (Art. 235 CJO). The ICAL sets no time limits and therefore the time limits of international arbitrations are normally subject to the arbitration rules governing the dispute.

The CAM Domestic Arbitration Rules state that the arbitrators must issue their decision within six months from constitution of the tribunal, extendable by another six months (Art. 33). The CAM Rules of International Arbitration also set a time limit of six months, starting on the day of the answering of the statement of

the claim or the answer to the counterclaim, if any (Art. 31). This period can be extended once.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

In domestic arbitrations any natural person who is of legal age may be appointed as an arbitrator in equity (*ex aequo et bono*), as long as he or she can freely dispose of his or her assets and is able to read and write (Art. 225 CJO). Only attorneys can be appointed as arbitrators in law (Art. 225 CJO), which places a limit on foreign lawyers acting as arbitrators because to act as an attorney in Chile a lawyer must have completed their entire legal studies in Chile.

The ICAL specifically establishes that nationality shall not be a barrier for the naming of an arbitrator (Art. 11(1) ICAL). Some commentators have taken the view that the requirement of being a lawyer has also been removed with that provision, even in cases where the applicable law is Chilean and the arbitration is "in law".[1] The matter has not yet been discussed in the courts.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Domestic arbitration law

Chile does not have a specific law on domestic arbitration, however, Articles 222 to 243 of the Code of Judicial Organization (CJO) and Articles 628 to 644 of the Code of Civil Procedure (CCP) contain certain provisions dedicated specifically to arbitration. There are 3 types of arbitration in Chile: (i) *de jure or "in law"* arbitration, which is governed both, in procedure and substance, by Chilean law; (ii) arbitration in equity, called *ex aequo et bono* arbitration, in which the arbitral tribunal must decide in accordance with its own best judgment and equity, both in procedural matters and on the merits; and (iii) arbitration in which the arbitral tribunal must decide on the merits in accordance with Chilean substantive law but may apply procedure as an arbitrator *ex aequo et bono* ("mixed arbitration"). In *de jure* and mixed arbitrations the same recourse that exists against judicial decisions is available against the arbitral award.

[1] Cf. SATELER, R., "*Historia de la Ley 19971 sobre Arbitraje Comercial Internacional*" in *Estudios de Arbitraje* (2006) p. 389. ROMERO Y DÍAZ, El arbitraje interno y comercial internacional, LexisNexis 1st ed (2007) pp. 46-47.

International arbitration law

In September 2004, the Chilean legislature adopted the ICAL which follows the Model Law. A 2006 decision by the Santiago Court of Appeals held that the ICAL is applicable to all international commercial disputes arising after its entry into force, irrespective of the date on which the relevant arbitration clause was signed.[2]

(ii) Is there is a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

In Chile, international and domestic arbitrations are governed by different legal provisions. International arbitration is governed by the ICAL, which is a self-standing law almost identical to the UNCITRAL Model Law. Domestic arbitration is governed by certain provisions of the CJO and CCP and by default, by ordinary rules of civil procedure. There are several differences between domestic and international arbitration law, for example with respect to the recourses against the award. In international arbitration correction and interpretation of the award (Art. 33 ICAL) and annulment (Art. 34 ICAL) are the only recourses available whereas in domestic arbitration, parties have more means of recourse available and even in *de jure* or mixed arbitrations may appeal an arbitration award before the ordinary civil courts. Other main differences relate to the system of challenges of arbitrators (Art. 13 ICAL), the power of arbitrators to conduct the procedure, the appointment of the arbitrators (Art. 11 ICAL) and the competence of the arbitral tribunal to rule on its jurisdiction (Art. 16 ICAL), among others.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Chile is a Contracting State to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington or ICSID Convention) which it ratified in 1991. Chile signed and ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1975 and is also a signatory to the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention) which was ratified by Chile in 1976.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

[2] *D'Arcy Masius Benton & Bowles Inc. Chile v. Otero, Miguel*, Santiago Court of Appeals, 25 May 2006, Rol no. 865-2006. See also *Toro A. Raúl v. Jorquiera M. Carlos,* Santiago Court of Appeals, 3 May 2006, Rol no. 88-2006.

In *de jure* arbitration, which is governed both in the process and substance by Chilean law, the substantive law applied is the Chilean law and the same recourse that exists against judicial decisions is applicable to arbitral awards.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Chilean domestic arbitration law recognises two types of agreements: (i) an arbitration clause included in a contract without the designation of an arbitrator; and (ii) an agreement to submit an existing or future dispute to arbitration where the arbitrator is designated (submission agreement).

Article 234 of the CJO establishes that the submission agreement must be in writing and must contain certain specific information, including:

1. the names of the parties to the dispute;

2. the name of the appointed arbitrator;

3. the dispute submitted to arbitration; and

4. the powers granted to the arbitrator, as well as the place and the time period in which he or she shall perform his or her function.

Failing the provision of any of the information as stated in points (1) to (3) above, the appointment of the arbitrator shall have no effect.

On the other hand, Chilean legal practice and doctrine have established that an arbitration clause is a consensual contract that commits the parties to submit any future or existing dispute related to a specified subject matter, to arbitration instead of the local courts. Thus, an arbitration clause need not specify the names of arbitrators nor fulfill any other formal requirement. Even so, it may be advisable to identify the arbitrator in the arbitration clause, since the Supreme Court has not always respected the difference between an arbitration agreement and an arbitration clause.

With respect to international arbitration, according to Article 7(1) of the ICAL, an arbitration agreement may be in the form of a clause in a contract or a separate

agreement. Article 7(2) of the ICAL establishes that the agreement must be *"…contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another"*.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an award will not be enforced?

Agreements to arbitrate will usually be upheld. In domestic arbitration, a party against whom a complaint is brought outside of arbitral jurisdiction may file a motion to dismiss for lack of jurisdiction based on the existence of an arbitration agreement (Art. 303 CCP). Arbitration agreements, like any other contract, must comply with certain general requirements of validity and enforcement, such as the existence of consent, legal capacity of the contracting parties and that the subject matter is valid and in compliance with public policy. In addition, Chilean law excludes certain matters from the submission to arbitration (see response to question IV (i) below).

Prior to the entry into force of the ICAL, the Supreme Court confirmed a lower court's decision to uphold an arbitration clause that provided for ICC arbitration in London and to deny the jurisdiction of the Chilean courts, in a situation where a party to the contract attempted to sue in a Chilean court.[3] The validity of arbitration agreements to submit a dispute that has connections to both the Chilean and a foreign jurisdiction, to an arbitral tribunal with seat outside of Chile, has been confirmed by the Supreme Court.[4]

Pursuant to Article 8 of the ICAL, a court seized of a dispute that is the subject of an arbitration agreement must, upon the motion of either party (presented no later than when submitting its first statement on the substance), declare that it lacks jurisdiction to hear the dispute unless it determines that the arbitration agreement is invalid, inoperative, or incapable of being performed. The Santiago Court of Appeals has recently determined that such determination requires a full review of the validity of the arbitration agreement.[5]

---

3 *British Car S.A. con Rover Exports Ltda.*, Supreme Court, 13 September 2004, Rol no 1166-98.

4 *Marlex Ltda. v. European Industrial Engineering*, Supreme Court, 28 July 2008, Rol no. 2026/2007; *Orient International Shanghai Garments Import. & Export*, Santiago Court of Appeals, 16 April 2001 Rol no. 6266/2000.

5 *Fastpack S.A. v. Bureau Veritas Chile S.A.*, Santiago Court of Appeals, 10 May 2011, Rol no. 2592-2010.

(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are not generally used in Chile. In some cases, prior negotiation between the parties is agreed as a requirement before arbitration can be commenced. In the arbitration proceedings, the absence of such prior negotiation has been argued by the parties to render the arbitral tribunal incompetent, however tribunals have generally considered that while it may constitute a breach of contract it does not affect the jurisdiction of the arbitral tribunal.

(iv) What are the requirements for a valid multi-party arbitration agreement?

There are no provisions in domestic or international arbitration law for multiparty arbitrations. The general requirements for the validity of an arbitration agreement apply. Parties may choose to incorporate the same arbitration clause in various related contracts, or appoint the same arbitrator for related disputes.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Even though there is no specific provision in either the domestic or the international arbitration law with respect to this matter, court decisions have enforced an agreement with a unilateral right to arbitrate. In *Provimin Ltda. V. Danfoss Nessie Water Hydraulics*, a local court declared itself incompetent and referred the dispute to arbitration even though the arbitration clause granted the right to initiate arbitration to one of the parties only. In this case, the dispute resolution clause provided for the jurisdiction of U.S. courts and at the same time a unilateral right to arbitrate to the North American party. The claim had been presented by the other party before the Chilean court.[6]

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

There are no specific rules in Chilean domestic or international arbitration law on the effects of the assignment of an agreement that contains an arbitration clause to a third party. In Chile, following contract law rules, arbitration agreements bind only its signatories. However, an arbitration clause in a contract that has been assigned to third parties by virtue of the law, for example, by subrogation in the

[6] *Provimin Ltda v. Danfoss Nessie Water Hydraulics*, 21th Civil Court of Santiago, Rol no.16361-2006, 2 November 2007.

case of insurance companies or by succession in the case of heirs, will be binding on those third parties. In cases of consensual assignment, where there is no explicit provision in Chilean law, it would be advisable for parties to include a provision whereby the arbitration clause is also transferred.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

With respect to domestic arbitration in Chile, criminal matters cannot be submitted to arbitration, as well as matters regarding alimony for minors, partition of goods between husband and wife, disputes between principle and agent, matters that affect the civil status of persons, public estate matters, assets belonging to foundations, matters regarding liability of judges or public officials (Arts. 229 and 230 CJO), and certain labor matters (Art. 5 Labor Code) with the exception that the Labor Code allows for arbitrations related to the collective bargaining process in the form established by the Labor Code.[7]

As regards to international arbitration, the legislative history of ICAL indicates that matters related to public policy such as labour, family or consumer rights cannot be subject to international arbitration.

In addition, Chilean courts might also be reluctant to enforce an arbitration clause with respect to self-executing instruments such as securities, cheques or promissory notes, and may refuse to enforce an arbitration clause relating to environmental issues, the registration of intellectual property rights, anti-trust or competition law related issues because such matters are considered to be a part of Chilean public order. Arbitrability has generally been considered as a matter of jurisdiction of the arbitral tribunal and has procedurally been treated accordingly.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Domestic Arbitration

[7] See *Nelson Figueroa Escobar*, Supreme Court, 18 October 1993, Rol no. 7574, CAM Santiago (2005) pp. 90-95. Also, see Arts. 355-368 Labor Code.

Parties to arbitration agreements who are sued in the ordinary civil court system have the right to ask the court to refer the case to arbitration without need for further procedure. This is done through the submission of an objection to jurisdiction (*declinatoria de jurisdicción*). However, it is understood that parties to an arbitration agreement may waive their right to bring their case to arbitration. Therefore, except in case of mandatory arbitration, whenever a claimant party to an arbitration agreement decides to bring its claim before the Chilean court system, it is up to the defendant to object to the jurisdiction of the Chilean court and request referral to the competent arbitral tribunal. If the defendant does not do so before, or together with, its response on the merits, it will run the risk of being considered to have waived its right to arbitration (Arts. 111, 112 and 303 CCP). An objection to jurisdiction may also be raised as an *inhbitoria de jurisdicción*[8] when the respondent feels that the court does not have jurisdiction. The respondent can submit a request to the court or tribunal to cease the proceeding and forward the files to the court or tribunal that the respondent deems competent and if this new court or tribunal so accepts, the new court or tribunal will hear the case (Art. 102 CCP).[9]

International Arbitration

Under the ICAL (as consistent with Article II of the 1958 New York Convention) and upon request of either party, courts are obliged to refer parties to arbitration in a dispute that is subject to an international arbitration agreement, unless the agreement is null and void, inoperative or incapable of being performed (Art. 8 ICAL).

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

In domestic arbitration there is no provision that explicitly confirms this principle, although it is recognised by courts[10] and arbitral decisions. Parties to arbitration agreements in Chile usually include a clause that explicitly allows the arbitrators to rule on their own jurisdiction, and when they choose the CAM Santiago Domestic Arbitration Rules they do so by reference. Regarding court intervention, in arbitrations *de jure*, courts will intervene if the award is appealed. All recourses available for court decisions are also available for awards granted in *de jure*

8 The *inhibitoria de jurisdicción* is a motion filed before the tribunal to affirm its jurisdiction and to request the tribunal before which the dispute is being discussed, to remit the files.

9 Even though the *inhibitoria* was established to resolve conflicts of competence between ordinary civil courts, it may be invoked before arbitral tribunals as well.

10 See, e.g., *Carter Holt Harvey v. Inversiones Socoroma*, Santiago Court of Appeals, 25 July 1995, CAM Santiago (2005) pp. 74-76.

arbitrations unless the parties waive the appeal or agree on a second instance arbitral tribunal.

Article 16 of the ICAL recognises the principle of *competence-competence.* The tribunal may decide on its own jurisdiction and objections to jurisdiction shall be raised not later than the submission of the statement of defense. Following the UNCITRAL Model Law, ICAL provides for very few cases of court intervention. Article 16(3) provides for court intervention where a party appeals a partial award on jurisdiction.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Domestic arbitration

In domestic arbitration, it used to be common practice in Chile to name one arbitrator in the arbitration clause itself (usually a lawyer) or refer the appointment to an ordinary civil court if no agreement between the parties could be reached or if the appointed arbitrator was unavailable.[11] In the case of multi-member tribunals, which are very unusual in Chile, unless parties otherwise agree, both parties must agree on the nomination of all of the arbitrators. Whether the parties wish to appoint a single or multi-member tribunal, if no agreement can be reached on the name(s) of the arbitrator(s), an ordinary civil court will appoint a single arbitrator by default (Art. 232 CJO). Since there is no formal procedure or roster of arbitrators, the appointment is at the court's discretion.

Under the CAM Domestic Arbitration Rules, the parties may agree on the arbitrators themselves or confer a special power of attorney upon the Santiago Chamber of Commerce to appoint the arbitrator(s) from its roster of listed arbitrators (Art. 8). In recent years, parties have started to delegate the appointment of the arbitrator(s) to CAM by means of a limited power of attorney, the appointment of one arbitrator still remaining the rule.

International arbitration

In international arbitration with a sole arbitrator, where parties have not agreed on an appointment procedure and cannot reach an agreement on the arbitrator, the appointment will be made by the President of the Court of Appeals where the arbitration is conducted. In the case of a 3 member tribunal, each party will name

[11] Specific appointment rules are established in Art. 10 *Decreto Ley* 1.557 of 30 September 1976, which states that, in contracts with the Chilean Commission of Nuclear Energy containing an arbitration clause, the Comptroller General of the Republic (*Contralor General de la República)* shall appoint the arbitrator(s) in case of disagreement between the parties.

a co-arbitrator and the co-arbitrators together will nominate the President. Where the co-arbitrators cannot reach an agreement, or where one of the parties fails to name a co-arbitrator, any party may request the President of the Court of Appeals to make the necessary appointment (Art. 11(3) ICAL). The President shall make the appointment with due regard to *"any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties"* (Art. 11(5) ICAL). There is no appeal available against the appointment of an arbitrator by the President of the Court of Appeals.

Under the CAM Rules of International Arbitration, if parties cannot agree on the number of arbitrators, only one arbitrator shall be appointed, unless CAM determines that a three member tribunal is necessary, in which case each party will name a co-arbitrator and the third arbitrator will be appointed by CAM. CAM shall also appoint the co-arbitrator on behalf of any of the parties that fail to do so (Art. 8).

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

In international arbitration the ICAL specifically requires a potential arbitrator, before his or her confirmation and throughout the arbitral proceeding to *"disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence"* (Art. 12(1)). Articles 11, 13 and 14 of the ICAL allow for the intervention of local courts in the appointment of arbitrators, the decision on challenges against them and decisions to remove an arbitrator. The CAM Rules of International Arbitration require that a candidate arbitrator sign a written declaration confirming his or her independence and impartiality in the specific case.

No equivalent duty to disclose exists under domestic arbitration law; arbitrators must merely swear to fulfill their task with due diligence (*debida fidelidad*) and in the shortest possible time (Art. 236 CJO).

The rules for challenging judges established in Articles 113-128 CCP and Articles 194-205 CJO also apply to arbitrators, as can be derived from Article 243 CJO. There are two kinds of challenges of arbitrators: *implicancias* and *recusaciones*. Both imply a conflict of interest, but *implicancias* are more serious in nature. In both cases, the grounds for challenge are related to the existence of a family or other personal relationship between the arbitrator and one of the parties; the

arbitrator having an interest in the matter under dispute; or the arbitrator making public statements on the subject matter of the pending arbitration.

CAM Santiago does not specifically define conflicts of interest for arbitrators under its rules of arbitration and has not yet issued a code of ethics for arbitrators.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

In domestic arbitration, judges, notaries public, and parties themselves are expressly prohibited from acting as arbitrators. This rule is also likely to apply to international arbitration as a matter of public policy. Depending on the type of arbitration, there are other limitations on persons to act as arbitrators, for example, only attorneys may be appointed as arbitrators *de jure*.

As to international arbitration, the ICAL does not contain any requirements for arbitrators, other than they act impartially and are independent from the parties, something that is indirectly recognised in Article 12 on challenges. In addition, Article 11(1) of the ICAL specifically establishes that nationality shall not be an obstacle to the appointment of an arbitrator, unless otherwise agreed by the parties. In general, the rule is that the parties' agreement governs, and parties may include qualifications in their agreements.

With respect to the ethical duties of arbitrators, under domestic arbitration law, arbitrators must swear to fulfill their task with due diligence (*debida fidelidad*) and in the shortest possible time (Art. 236 CJO).[12] With respect to international arbitration, Article 18 of the ICAL states that arbitrators have the obligation to treat the parties equally and as mentioned above must disclose any circumstances that may give rise to impartiality.

As well as the written declaration of impartiality required by the CAM Rules of International Arbitration, Article 14 of these rules establishes the possibility of the removal of the arbitrator from his or her functions following the parties' agreement. The parties may also wish to include a reference to the IBA Rules of Ethics for International Arbitrators.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

[12] Arbitrators that have not been sworn in accordance with Article 236 CJO are manifestly not competent. See *Pesquera Iquique Guanare SA v. Eliseo Rivera Fajardo*, Concepción Court of Appeals, 7 April 1994, Rol no. 11-1994, Legal Publishing no. 22102.

With respect to the rules or codes of conduct concerning conflicts of interest for arbitrators please see the response to question V (ii).

The IBA Guidelines on Conflicts of Interest in International Arbitration are not yet commonly used in Chile. Nevertheless, they are however commonly used in international arbitrations with seat in Santiago, Chile, under the auspices of international institutions such as the ICC.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

With respect to domestic arbitration, under the rules of civil procedure contained in the CCP, judges have the power to issue the following interim measures (*medidas precautorias*): (i) preservation of the goods that are the subject of the dispute; (ii) the appointment of one or more curators; (iii) the attachment of specified goods; and (iv) prohibition regarding any acts or agreements related to specified goods (Art. 290 CCP). Courts may also issue other unspecified measures if they are necessary to ensure the effective outcome of the dispute. In this latter case the court may ask the requesting party to provide a guarantee to cover any possible damage caused thereby (Art. 298 CCP).

Under Chilean law, it is not disputed that arbitrators may issue the same interim measures as courts. Thus, they can order attachments, the execution of bank guarantees and the freezing of assets, among others. However, measures that require enforcement or the enforcement of decisions that affect third parties to the arbitration require the assistance of the ordinary civil courts (Art. 635 CCP). It is also commonly understood that arbitrators have the power to grant ex-parte interim measures (Art. 302(2) CCP). Again, the enforcement of such measures or the enforcement of decisions affecting third parties would require the assistance of the courts.

The international commercial arbitration law allows parties to request interim measures from the arbitral tribunal as well as from the domestic courts (Art. 9 ICAL). The Chilean ICAL is based on the Model Law but without the 2006 amendments that regulate, in more detail, interim measures and preliminary orders. Under Article 17 ICAL, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. In this regard, it is possible for the arbitrator to order the issuance of a

bank guarantee or attachments. The arbitrator may also require the relevant party to provide appropriate security.[13] Domestic courts have provided assistance to international arbitrations with seat outside Chile.

The ICAL does not determine whether the interim measure shall be issued in the form of an award or not. Following domestic common practice, interim measures are generally not issued in the form of an award but as a procedural order within the arbitration.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

In domestic arbitrations, the courts may grant provisional relief when requested, even before the constitution of the arbitral tribunal.[14] After the constitution of the arbitral tribunal, the interested party must request the continuation of the relief that has been granted by the courts, since the arbitral tribunal will be the only competent body to issue new measures.

In international arbitration, in accordance with Article 9 of the ICAL, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such measure.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

In domestic arbitration, courts may grant evidentiary assistance at the request of the arbitral tribunal mostly by summoning or questioning witnesses who refuse to appear voluntarily or by ordering third parties to exhibit documentary evidence, among other possible measures (Arts. 633 and 634 of the CCP).

In international arbitration, in accordance with Article 27 of the ICAL, the arbitral tribunal or the party with the approval of the arbitral tribunal, may request assistance from a competent court in the taking of evidence. In accordance with the provisions in Article 1.2 of the ICAL, assistance of the national courts is possible only if the seat of arbitration is in the Chilean territory.

---

13 See VÁSQUEZ, M, *Arbitraje en Chile: análisis crítico de su normativa y jurisprudencia*, Legal Publishing, 1st edn. (2009) , pp. 244-248.

14 *Compañía de Teléfonos de Chile v. Chilesat SA*, Supreme Court, 6 January 1997, CAM Santiago (2005), pp. 178-180.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

Chilean legislation does not provide for the disclosure of documents or discovery as it is understood in proceedings in the United States and certain other common law jurisdictions. Nevertheless, there are some rules on the production of documents in civil procedure that are applicable to domestic arbitration. For instance, upon the request of a party, tribunals can order the production of documents that are in the possession of one of the parties or third parties. These documents must have a direct relation to the dispute and cannot be secret or confidential.[15] The costs of the production of the documents must be borne by the requesting party. Any person who is ordered to produce documentation but refuses to do so may be sanctioned with fines (Arts. 349 in relation with Arts. 274 and 277 CCP). If one of the parties refuses to produce the requested documents, it will no longer be able to submit the documentation during the procedure. The production of documents may also be requested before the initiation of the main dispute and may be decided by means of a preliminary order (*medida prejudicial*, Art. 273 CCP). Arbitrators under Chilean law are allowed to issue orders for production of documents; however, they cannot take any enforcement measures without resorting to the courts.

Art. 273 CCP could be considered applicable in an international arbitration. Other procedural rules of discovery do not apply to international arbitrations. In accordance with Art. 19 of ICAL, unless otherwise agreed between the parties, the Tribunal may conduct the proceedings in the manner it considers appropriate, including the production of evidence. There is an increased tendency to apply IBA Rules on Evidence in this matter.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

See answer to VII (i).

(iii) Are there special rules for handling electronically stored information?

Electronic documents can be submitted as evidence in domestic and international arbitration in Chile. Like all documents, they can be public or private. All public

[15] Chilean law does not contain a general provision on confidential documents. However, there are a few examples of confidential documents considered to be so by the law. Thus, according to the Chilean Commercial Code, accounting books are confidential and they can only be partially exhibited (see Arts. 42 and 43 ComC). In addition, the General Bank Act establishes "banking secrecy" with regard to banking accounts (Art. 154 General Banking Act).

electronic documents are authenticated by a registered service provider, in accordance with Art. 2 of Law 19.799[16] and have the same probative value as any other public documents. Private electronic documents that have been authenticated by a registered service provider will have the same value as a public document but for their date, which must be accredited separately by the service provider. Private documents subscribed by simple electronic signature only, will have the same value as a regular private document.

If the other party objects to the document, the court may order additional proof of its authenticity, at the cost of the objecting party. In practice, parties take into consideration the elevated cost of further authentication of large amounts of electronic documents and have not yet taken full advantage of this relatively new provision.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Neither the domestic nor the international arbitration laws specifically address the confidentiality of arbitral proceedings.

CAM Santiago's Rules of International Arbitration (Art. 33) provide that arbitral awards issued under its rules shall be confidential unless the parties otherwise agree. CAM Santiago's Domestic Arbitration Rules do not address the matter.

However, CAM Santiago may publish awards while protecting the confidentiality of the identity of the parties.

Any arbitration that is challenged in or appealed to a Chilean court will become a matter of public record, in accordance with Article 9 CJO, which provides that every act of the courts is public, except when otherwise provided by law. In addition, parties must take into consideration that under Chilean law, the arbitration file including the award shall in principle be deposited in the appropriate judicial archives (Art. 644 CCP). However, this requirement has never been actively enforced nor is generally complied with by arbitrators.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

[16] Law 19.977 on Electronic Documents, Electronic Signature and Authentication Services, of 12 April 2002.

Chilean arbitration provisions do not confer specific powers to the arbitral tribunal to protect trade secrets and confidential information. Please see the answer to question VIII (i).

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No. As a general matter the only rule with respect to privilege contained in Chilean law is with regards to the non appearance of lawyers as witnesses in a proceeding (Article 360 CCP). Indeed, Article 247 of the Penal Code establishes sanctions applicable to those professionals requiring a degree who reveal the secrets that were entrusted to them.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

The IBA Rules on the Taking of Evidence in International Arbitration are commonly invoked in the context of international arbitration with seat in Chile. They are also increasingly invoked by the parties and adopted by the arbitral tribunals in international arbitrations under the CAM Rules of International Arbitration.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

In domestic arbitrations the proceedings are largely based on written submissions rather than hearings. The main hearings relate to the intent of conciliation between the parties before the tribunal and also with respect to evidence. However, the formalities of these hearings will depend on the type of arbitration (*de jure*, mixed or *ex aequo et bono).*

In international arbitration Article 19 of the ICAL states that failing the agreement of the parties on the procedure to be followed by the arbitral tribunal, the tribunal has the discretion to conduct the arbitration in such manner as it considers appropriate, under the terms of the ICAL. With respect to hearings each party must have an equal opportunity to present its case. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

With respect to international arbitration, the ICAL contains no specific provisions on witness testimony and as such, the IBA Rules on the Taking of Evidence in International Commercial Arbitration may be useful. In practice, parties present written witness statements followed by oral examination at the hearing.

In relation to domestic arbitration, the rules on the examination and challenge of witnesses in the CCP are applicable to arbitrators *de jure*. After the presentation of the submissions, the court will list the issues of fact to be proved by the parties (*puntos de prueba*), who will then have five days to submit a list of witnesses for each factual issue (Art. 320 CCP).

Witnesses are heard at an oral hearing, where they are sworn in and are examined by the parties in the presence of an administrative secretary or the judge. Witnesses must swear to tell the truth prior to their deposition (Art. 363 CCP).

Any questions by the parties must be asked through the arbitrator, although in practice, the administrative secretary often poses the questions to the witnesses. Questions must be related to the specific evidentiary issues for which each witness was presented. After the party who presented the witness has asked its questions, there is an opportunity to cross-examine and redirect the witness, again through the mediation of the arbitrator or the administrative secretary.

Arbitrators in mixed arbitration ("mixed arbitrators") and arbitrators *ex aequo et bono* are not bound by these formal rules, and parties are free to agree on other procedures for the examination of witnesses. They tend to follow the structure of taking oral testimony at a hearing, although increasingly the presentation of written testimony followed by oral cross-examination is practiced. Arbitrators *ex aequo et bono* and mixed arbitrators have also repeatedly declared that they will evaluate the independence of witnesses in accordance with their own best judgment and equity, and not in accordance with the rules of the CCP.[17] Mixed arbitrators and arbitrators *ex aequo et bono* increasingly take an active role in questioning witnesses directly.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

[17] See *C.N de Chile v. Compañía de Seguros G. S.A y otros*, award by *ex aequo et bono* arbitrator Mr. Juan Achurra Larraín, 17 November 1994, Rol no. 1-1992, Sentencias Arbitrales, vol. I 1994-1998, pp.21-36 at p. 22. See also, Award by *ex aequo et bono* arbitrator Mr. Eduardo Novoa Aldunate, 30 June 2003, Rol no. 342, IV Sentencias Arbitrales, (2003-2006) pp. 80-93, at p. 81.

There are no specific rules. Nevertheless civil procedural rules which are mandatory in the case of *de jure* arbitrations and also commonly applied in mixed and *ex aequo et bono* arbitrations, establish that parties cannot present as witnesses: (i) minors under 14 years of age, save for exceptional cases; (ii) persons with injunction for insanity; (iii) persons who cannot reason by virtue of their state of mind while declaring (for example, are under the influence of alcohol); (iv) deaf or mute-deaf persons who cannot be understood with clarity; (v) persons involved in the case who have bribed others; (vi) vagabonds with no known occupation; (vii) persons who are unworthy to be heard according to the tribunal by virtue of a criminal conviction; and (viii) persons whose occupation is to give testimony (Art. 357 CCP). In addition, Article 328 of the CCP lists the persons who, by their close relationship to the parties, cannot testify if the counterparty convinces the tribunal that they are not impartial. Nevertheless the other party can request a forced testimony (*confesión*), which is governed by article 385 *et seq* of the CCP, by the other party or its legal representatives.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

Parties and their legal representatives cannot be witnesses. See answer to question IX (iv).

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Under the ICAL, parties may present their own expert witnesses as part of their statement of claim or defense, or later during the proceedings (Art. 23 ICAL).

In domestic arbitration, party-appointed experts are not specifically regulated in the CCP although in practice, parties' present expert reports. Because a written expert report is a private document without probative value in Chile, the party who presents the report will also call the expert as a witness, to ratify or confirm the content of the report, so as to give it evidentiary value.

There is no specific requirement of independence or impartiality for party appointed experts, and the same restrictions that are applicable to witnesses will apply. Most relevantly in this regard, the expert may not be an employee of the party that presents him or her, may not have an economic interest in the outcome of the case nor bear any hostility (animadversion) against the other party.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the

expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

In domestic arbitration, and in accordance with the general rules of civil procedure, the arbitral tribunal may appoint an expert upon the request of a party. The tribunal may also call for experts on its own initiative (Art. 412 CCP). In the case of the appointment of an expert by the arbitral tribunal, parties will be given the opportunity to agree on the number of experts, their technical background, the questions that will be put before them, and their identity. If parties cannot reach an agreement, the tribunal will decide from a list of experts of the Court of Appeals where the arbitration is conducted (Arts. 416-416 bis of the CCP). In this case, it cannot appoint the first two candidates put forward by each party (Art. 414 CCP).

The expert opinion must be issued in writing. In case of multiple experts who disagree, the tribunal may appoint a new expert in accordance with the rules already explained above. The tribunal will assess the expert opinions as it deems appropriate.

Article 26 of the ICAL establishes that the tribunal may appoint experts and may order parties to provide the experts with access to documents and to the site in question. It also indicates that, unless otherwise agreed by the parties, experts should be heard during the hearing and be questioned by the parties.

(viii) Is witness conferencing (`hot-tubbing´) used? If so, how is it typically handled?

Witness conferencing is not commonly used in arbitrations in Chile.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

The use of arbitral secretaries by the tribunal is common practice in domestic and international arbitrations.

As a particularity of Chilean law, Article 632 of the CPP requires that in domestic arbitrations which are *de jure*, any procedural act in arbitral proceedings must be conducted in the presence of a certifying authority *(ministro de fe)* appointed by the arbitrator, notwithstanding legal impediments or challenges which the parties may raise. Mixed arbitrators and arbitrators *ex aequo et bono* have discretion on this matter.

Article 13 of the CAM Santiago Rules of Arbitration establishes that any procedural act shall be authorised by a certifying authority *(ministro de fe)* appointed by the tribunal or by the Secretary of the Centre if the tribunal fails to do so.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

In domestic arbitrations, *de jure* and mixed arbitrators must render the award in accordance with the ordinary rules of civil procedure and failure to do so may be grounds for annulment. Article 170 of the CCP establishes that awards must contain a precise identification of the parties, a brief summary of the parties' claims and arguments, the reasons for the decision, and an enunciation of the laws relied upon. Awards by arbitrators *ex aequo et bono* must also contain an identification of the parties, a brief summary of their claims and arguments, and the reasons of wisdom and equity that support the decision of the award (Art. 640 CCP).

In accordance with Article 31 of the ICAL, international arbitral awards must be reasoned unless the parties agree otherwise or the award is an award on agreed terms. The award must also include the date and the place of arbitration, where the award will be deemed rendered (ie the seat) and the signature of the arbitrators. Although the law does not explicitly mention it, awards must contain decisions only on the claims brought by the parties lest they be annulled or *ultra or extra petita* in accordance with Article 34(2)(iii) of the ICAL.

Chilean law does not consider any specific limitations on the type of relief arbitrators can grant.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Chilean law does not recognise punitive or exemplary damages. Arbitrators may order compensatory damages including loss of profits and moral damages. A monetary award by an arbitrator can include interest.

If the contract foresees an interest rate, this rate should apply. However, if the agreed rate goes beyond the legal interest by more than 50%, the arbitrator will apply legal interest plus 50%, which is the maximum allowed. If the parties did not agree on an interest rate, current interest (that is, the average of the interest

applied by banks and financial institutions, fixed by the Banks and Financial Institutions Superintendent) shall apply.[18]

(iii) Are interim or partial awards enforceable?

Domestic arbitration rules do not specifically address interim or partial awards. The general practice of domestic arbitrators is to render only final awards, with the exception of a decision to reject objections to the jurisdiction or competence of the arbitral tribunal.

The ICAL only includes references to final awards but by giving power to arbitrators to decide on provisional measures, it also empowers arbitrators to render interim awards.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

In domestic arbitration there is no rule that limits the ability of arbitrators to issue dissenting opinions. In *de jure* arbitration, a member of an arbitral tribunal may issue a dissenting opinion, in accordance with the ordinary rules of procedure governing decisions of the Court of Appeals (Art. 237 CJO). These rules explicitly establish that judgments and decisions must name the members of the court who voted in favor as well as those who dissented from the majority opinion. The dissent must take the form of a reasoned vote (Art. 89 CJO).

The ICAL does not contain any explicit rule on this matter, being the general understanding that there is no limitation in the ability of arbitrators to issue dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are not specifically regulated by law in Chile for domestic arbitration. In *de jure* arbitration, if a settlement agreement is reached between the parties and signed by the arbitrator and the parties, it is deemed to be a final judgment, with every legal effect, in accordance with Article 267 of the CCP. The same applies for mixed or *ex aequo et bono* arbitrations. Article 35 of the CAM Santiago Domestic Arbitration Rules establishes the possibility of an award on agreed terms, for mixed or equity arbitrations governed by those Rules.

[18] In *Gold Nutrition v. Garden House*, Supreme Court, 15 September 2008, Rol no. 6615-2007 the defendant argued that the compound interest was contrary to the Chilean public order. However the Court did not accepted such argument and granted the exequatur.

In domestic arbitrations, the arbitrator's obligation to fulfill his task comes to a premature end only if: (i) the parties agree to submit their dispute to ordinary courts or to other arbitrators; (ii) if the arbitrators have suffered maltreatment or have been insulted by any of the parties; (iii) if illness makes normal fulfillment of the arbitrator's task impossible; or (iv) if for any reason the arbitrator must be absent from the place where the arbitration takes place (Art. 240 CJO). This is not the case where parties have signed an arbitration clause (*cláusula compromisoria*) that does not appoint a specific arbitrator, but commits the parties to the agreement to submit future disputes to arbitration. Parties may at all times agree to terminate the arbitration by revoking the mandate of the arbitrator (Art. 241 CJO).

Article 30 of the ICAL admits awards by consent, whereby parties request the tribunal to issue an award on their own agreed terms. The award need not state the reasons upon which it is based but must be in writing, signed by the arbitrators, and state the date and seat of arbitration (Art. 31 ICAL). The arbitrators may refuse the request, for instance if they find the agreement objectionable or misleading towards third parties. The award will have the same effects as an award on the merits.

ICAL recognises that proceedings will also terminate with the issuance by the tribunal of an order for termination if: (i) the c1aimant withdraws its c1aim; (ii) the parties agree to termination; or (iii) if the tribunal concludes that continuation is unnecessary or impossible (Art. 32 ICAL).

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Correcting an award

In domestic arbitration, parties may request the tribunal to clarify or correct the award (Art. 182 CCP), although no term is given for doing so. The tribunal may also correct parts of the award on its own initiative, within five days after receipt of the award (Art. 184 CCP).

In international arbitration, either party may request the tribunal to correct arithmetic, clerical, typographical, or other similar errors, within 30 days after receipt of the award. The tribunal will have 30 days from the request to do so. The tribunal may also correct such errors on its own initiative (Art. 33 ICAL), also within 30 days. The same applies under the CAM Santiago Rules of International Arbitration.

Interpreting an award

Domestic arbitration provisions do not include the possibility of interpretation of the award.

According to Article 33(1)(b) of the ICAL, "*if so agreed by the parties*", a party may request the interpretation of a part of the award. The tribunal will provide the interpretation if it considers the request justified, and the interpretation will become part of the award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

There is no rule under Chilean law that defines the costs of arbitration, either in international or domestic arbitration. Nevertheless the general rule of cost of litigation contained in the CCP which is applicable to *de jure* arbitrations and often used as a reference by domestic arbitrators is that the party that is defeated on all claims must bear the costs, unless it had plausible cause for litigation (Art. 144 CCP). In practice, however, courts and arbitral tribunals do not always follow the rules of article 144 of CCP. The CAM Santiago Rules of Arbitration do not contain references to the allocation of costs.

The ICAL contains no rules on the allocation of costs. The allocation of costs is a matter that will usually be decided by the tribunal in such manner as it considers appropriate.

If the parties choose institutional rules that include provisions regarding costs, these will apply. Article 36 of the CAM Santiago Rules of International Arbitration establishes that the arbitration costs include: (i) the arbitrators' fees and expenses; (ii) the tribunal-appointed expert's fees and expenses; (iii) the fees and expenses of the witnesses approved by the tribunal; (iv) other reasonable costs incurred and claimed by the winning party; and (v) the administrative expenses of CAM Santiago. The tribunal must determine the amount and which party will bear the costs in the final award. The general rule is that the losing party pays the costs, unless the tribunal decides to pro-rata the costs amongst the parties, taking into account the circumstances of the case (Art. 37). In this context, arbitrators typically take into account whether a party was only partially defeated in the arbitration.

(ii) What are the elements of costs that are typically awarded?

According to the general rules of civil procedure, costs include: (i) the arbitrators' fees and expenses; (ii) the administrative expenses of the arbitration institution (if

applicable); (iii) the costs of court officials whose services were required in the course of arbitration where applicable[19]; and (iv) the tribunal-appointed expert fees and expenses (Art. 139 CCP). Arbitrators in practice apply this rule. Article 36 of the CAM Santiago Rules of International Arbitration limits legal expenses to those reasonably incurred and claimed by the winning party.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Domestic arbitration law does not set rules for the assessment and determination of fees of *ad hoc* arbitrators. In practice, the arbitrator presents his or her fee proposal to the parties, taking into account the amount claimed and the complexity of the case. In the majority of cases, parties accept this proposal. However, in case of disagreement there is no rule under Chilean law that grants the power to arbitrators to fix their own fees unilaterally. For this reason, the majority of academic scholars and case law have found that, if no agreement has been reached, the arbitrators must sue the uncooperative party or parties in the ordinary civil courts and ask the court to determine their fees. This solution is however, impractical. Moreover the general understanding is that arbitrators are deemed to be judges and therefore they are obliged to proceed with the arbitration even in the case of no payment being made by one or both parties. Should the other party continue to refuse to pay its share of the arbitrator's fees, the arbitrator may initiate a judicial special collection procedure (*juicio sobre pago de ciertos honorarios*, Art. 697 CCP) which also applies to international *ad hoc* arbitrators.

In the case of institutional arbitration, CAM Santiago, like most arbitration institutions, publishes on its website a table indicating the minimum and maximum percentages that an arbitral tribunal may request as its fee, depending on the amount in dispute. The percentages are regressive, meaning they decrease as the amount in dispute increases. Within the margins set by the arbitration institution, the tribunal will set its fees taking into account the amount in dispute. If the amount cannot be determined, the arbitrator will fix the fees at his or her discretion. In the case of disagreement between any of the parties and the arbitrator on this matter, parties may recur to the Council of CAM to decide the matter.

[19] In *de jure* arbitrations and "mixed" or equity arbitrations where the parties agreed to use those services.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

In their final award, the arbitrators must determine how to allocate costs between the parties in accordance with the parties' agreement, the rules of an institution if applicable, and the rules of the CCP (Arts. 138-147 CCP). The general rule is that the party that is defeated on all points in a civil litigation must bear all costs, unless it had a plausible cause for litigation (Art. 144 CCP). See response to question XI (i).

The ICAL contains no rules on the allocation of costs. The allocation of costs is a matter that must be referred to the rules as agreed by the parties, and failing such agreement will be decided by the arbitrator in such manner as he or she considers appropriate.

Article 37.2 of the CAM Santiago Rules of International Arbitration establishes that the arbitral tribunal shall decide which party must pay the expenses and costs or whether costs should be pro-rated between the parties, taking into account the circumstances of the case.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

The arbitral tribunal's decision on costs is subject to the general rules applicable to challenges of arbitration awards as explained in the next section.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

In domestic arbitration, awards rendered in Chile may be challenged both with respect to the merits and the formal correctness of the arbitration proceedings. Which recourse is available depends on the kind of arbitration chosen by the parties, whether *de jure*, *ex aequo et bono* or mixed arbitration. Arbitral awards rendered by arbitrators *de jure* and mixed arbitrators are open to the same challenges as judgments issued by ordinary courts. These are:

1. appeal;

2. setting aside on certain specified grounds (*casación en la forma*);

3. correction and interpretation of the award, submitted to the same tribunal that issued the award;

4. *recurso de hecho* (an action submitted directly before the Court of Appeals if the arbitral tribunal denies the appeal (Arts. 203-206 CCP));

5. *recurso de revision* (an action submitted before the Supreme Court to annul a final award that was based on forged documents, false testimony, corruption, coercion, or any other fraudulent means **or**, which ignored another decision that had become *res judicata* (Arts. 810-816 CCP)); and

6. *recurso de queja* (an action submitted to the Court of Appeals to correct serious breaches of duty or abuses made in the rendering of an award).

Moreover, the decision of the Court of Appeals or the second-instance arbitral tribunal "in law" that reviewed the arbitral award by the arbitrator "in law" in appeal, can be set aside on specified grounds (*casación en la forma*) as well as for errors in the application of the law (*casación en el fondo*) by the Supreme Court (Art. 98(2) CJO, Art. 767 CCP).

Only limited recourse is available against arbitral awards issued by an arbitrator *ex aequo et bono* due to the nature of the awards, which are rendered in accordance with the arbitrator's best judgment and equity. The available actions are: (i) setting aside on certain limited grounds (*casación en la forma*); and (ii) *recurso de queja.*

In domestic arbitration, even when parties have waived all recourse against the award in *de jure* arbitrations, in mixed arbitrations and in arbitrations *ex aequo et bono*, there is still the possibility to set aside the award if it is found that the arbitrator has acted without jurisdiction or if the award was rendered *ultra petita* by means of the *recurso de casación en la forma*. Also it is generally accepted that the *recurso de queja* cannot be waived (see response to question XII (ii)).

In international arbitrations covered by the ICAL, there are two means of recourse: (i) correction and interpretation of the award (Art. 33 ICAL); and (ii) setting aside on limited grounds (Art. 34 ICAL). The Supreme Court recently confirmed that indeed no other recourse is available.[20] The grounds for annulment are established in Article 34 and must be proved by the party seeking annulment. If the party proves one of the following, the award may be set aside by the

[20] *Agriservices v. Árbitro Alejandro Romero*, Santiago Court of Appeals, 23 July 2010, Rol no. 2363-2010.

respective Court of Appeals: (i) the parties to the arbitration agreement were under some incapacity or the arbitration agreement is invalid; (ii) the party seeking annulment was not notified of the constitution of the arbitral tribunal or was not able to present its case; (iii) the award deals with matters not submitted to arbitration or goes beyond the matters submitted; or (iv) the constitution of the arbitral tribunal or the procedure was not carried out in accordance with the agreement of the parties or, failing such agreement, with the law of the seat of the arbitration. In addition, if the judge finds that the award violates Chilean public order or that it deals with matters that may not be subject to arbitration in accordance with Chilean law, the judges may set aside the award on their own initiative. In the only annulment procedure completed to date, the Santiago Court of Appeals rejected the request for annulment and emphasised its limited character as an extraordinary recourse.[21]

In domestic arbitration, a request for the setting aside of the award must be presented within 15 days following notification of the award. Only if the means of recourse is a *casación en la forma* and filed against a first instance award, is the time limit the same as that established for the presentation of appeal, that is ten days after the notification of a formal decision and five days after the notification of an interlocutory award (Arts. 770(2), 189 CCP). A party wishing to appeal an award and also request its setting aside on one of the grounds of *casación en la forma,* must file both recourses jointly (Art. 770(2) CCP). A party wishing to request both *casación en la forma* and *casación en el fondo,* must also present both recourses joint1y and in the same brief (Art. 770(1) CCP). Annulment on one of the grounds of *casación en la forma* can only be requested after all other available recourses have been exhausted.

Under the ICAL, a request for setting aside must be presented within three months of receipt of the award, or if a request had been made under the correction and interpretation recourse, from the date on which that request had been disposed of by the arbitral tribunal. These time limits apply to every ground for annulment, inc1uding public policy (Art. 34(3) ICAL).

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

In domestic *de jure* or mixed arbitration, if parties are of legal age and are legally capable of disposing of their assets, they may waive their right to appeal (Art. 239 CJO). However, it is generally accepted that the *recurso de queja* cannot be waived, as it is based on the superior courts', and in particular the Supreme

[21] *Publicis Groupe Holdings B.V. v. Árbitro Manuel José Vial Vial*, Santiago Court of Appeals, 4 August 2009, Rol no. 9134-2007.

Court's, corrective and disciplinary power over lower judges, as established in Art. 82 of the Constitution.

This is not applicable to international arbitrations as there is no right to challenge an award.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

With respect to domestic arbitration, parties to a *de jure* or mixed arbitration may appeal the award before the ordinary civil courts, unless they waive their right to do so or agree to submit an appeal to a second-instance arbitral tribunal (Art. 238 CJO). If the award is issued by an *ex aequo et bono* arbitrator the parties may only submit an appeal to a second-instance tribunal if they have explicitly reserved their right to appeal in the arbitration agreement and appointed the second-instance tribunal (Arts. 239 of CJO and 642 of CCP).

When parties do not waive their right to appeal, domestic awards by *de jure* or mixed arbitrators can be revised on the merits. The party must submit the motion to the Court of Appeals of the judicial district where the arbitration took place within 10 days from notification of the final award. No appeal to ordinary civil courts is available against domestic awards *ex aequo et bono*. Appeal implies a full review of the facts and substantive law and may even include the production of new evidence.

There is no appeal in international arbitration in Chile.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

In principle, courts may not remand an award to an arbitral tribunal. With respect to domestic arbitrations, if the Supreme Court sets aside a decision as a result of an error in the application of the law (*casación en el fondo*), the Court itself will render a new decision (Art. 785 CCP). If the decision has been annulled on the grounds of *ultra petita* (Art. 768(4) CCP); if it has failed to meet the requirements related to the form of the award (Art. 768(5) CCP); if there is another decision that is already *res judicata* (Art. 768(6) CCP) or if there are contradictory decisions (Art. 768(7) CCP), the Court may proceed and render a new decision itself (Art. 786 CCP).

With respect to international arbitrations, the Court of Appeals setting aside the award cannot render a new award, and the vacated award is no longer enforceable in Chile.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Arbitral awards are considered to be judicial decisions just like decisions issued by ordinary civil courts[22] so final domestic and international awards rendered in Chile can be directly enforced and do not require any leave for enforcement or *exequatur* by a Chilean court. Domestic arbitral awards may be enforced by the arbitrator as long as the time period of his or her appointment has not yet expired.[23] Where use of public force is required or the enforcement affects third parties, the interested party must request intervention by an ordinary civil court in accordance with the rules of civil procedure (Arts. 635 and 643 CCP). To enforce an award that contains a payment obligation, the amount must be determined in the award (Art. 438 CCP).

Under Chilean law, there are two different procedures to enforce a decision by a court or tribunal. The first procedure is the *procedimiento incidental*, which must be initiated before the same court that rendered the decision within one year of the award being issued. The second procedure to collect or enforce the decision (*procedimiento ejecutivo*) can be filed before any ordinary civil court. Both procedures establish limited grounds for opposition, such as previous payment, settlement, compensation, incompetence of the tribunal, claimant's incapacity, *lis pendens* and *res judicata* (Art. 234 and 464 CCP).

For international awards, Articles 35 and 36 of the ICAL govern the matter of recognition and enforcement, "*irrespective of the country where [they were] made*". In principle, this would mean that enforcement provisions apply to awards rendered both inside and outside of Chile in international arbitration cases covered by the ICAL. There is no case law that confirms this and these provisions have been applied to the recognition of foreign arbitral awards but not to their enforcement.

In Chile, a foreign award can only be enforced with leave from the Supreme Court (Art. 247 CCP), called the *exequatur*. The party seeking enforcement will submit a request for an *exequatur* procedure before the Supreme Court which will give

[22] AYLWIN (2005) p. 490.

[23] Cf. *Pérez Feliú, Renato*, Supreme Court, 19 June 1984, Rol no. 5343, CAM (2005) pp. 192-193. The time period is two years in accordance with Art. 235 CJO.

notice to the other party, who will have 15-18 days to present its comments (Arts. 248, 258, and 259 CCP) and will thereafter invite the *Fiscal Judicial*, an official court officer, to present its opinion. The party seeking enforcement must present the authenticated original or a certified copy of both the award and the arbitration agreement to the Supreme Court. If the Supreme Court deems it necessary, it may call for a hearing and open the matter for evidence (Art. 250 CCP), after which it will deliberate and render a decision. An *exequatur* proceeding takes approximately two years, while an enforcement proceeding may take one year or less.

Grounds for refusing recognition and enforcement

Although arbitral awards issued in Chile are *ipso jure* enforceable, the enforcing judge will verify that the three following circumstances exist: (i) the arbitrator was competent to issue the award; (ii) the award is final; and (iii) the award is not contrary to public policy.[24] Parties have three years to request enforcement of the award (Art. 442 CCP) and the judge may declare this statute of limitation on his or her own initiative. An award will be denied recognition for the same reasons included in the New York Convention, which also forms part of the local rules related to international commercial arbitration.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

If an *exequatur* is obtained, a procedure before a lower court is necessary to enforce the foreign award. Under Chilean law, enforcement actions have a statute of limitation of three years, which should start from the date the *exequatur* is granted. See answer to question XIII (i).

(iii) Are conservatory measures available pending enforcement of the award?

There is no specific rule in this regard and there are no reported cases.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

In decisions following the entry into force of the ICAL, the Supreme Court has consistently affirmed the limited scope of review in cases of *exequatur*, in accordance with Article 36 of the ICAL and Article V of the New York

[24] AYLWIN (2005), p. 411.

Convention.[25] The Supreme Court has granted *exequatur* of a French award even though a request of annulment was still pending before the courts of the seat of arbitration.[26] However, recently the Supreme Court has denied *exequatur* of an award set aside by the courts at the place of arbitration in Argentina.[27]

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

See response to question XIII (i).

XIV. Sovereign Immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

Article 2 of Decree Law No. 2349 of 13 October 1978 authorises the State of Chile and its agencies, institutions or companies, to waive immunity from execution in contracts with the public sector. In the case of agencies, institutions and companies with legal personality distinct from the State, the waiver will affect only the domain property of the contracting entity. For public entities to waive the immunity from execution, they need the authorisation of the President of the Republic. In any event, this authorisation may be granted for a term exceeding one year, but may be renewed (Art. 4). The Decree also provides for a kind of reciprocity clause applicable to foreign states and their agencies, institutions and companies. According to its Article 9, all of them may in Chile invoke immunity from jurisdiction and execution, as appropriate, in the same terms for the State of Chile or its agencies, institutions and businesses.

In general, Chilean court decisions have consistently been respectful of foreign states' sovereign immunity, and have rejected any legal action presented against their diplomatic missions.[28]

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

---

[25] *Mauro Stubrin v. Soc. Inversiones Morice S.A.*, Supreme Court, 11 January 2007, Rol no. 6600-2005; *Gold Nutrition v. Garden House*, Supreme Court, 15 September 2008, Rol no. 6615-2007; *Comverse Inc. v. American Telecommunication Inc. Chile S.A.*, Supreme Court, 8 September 2009, Rol no. 3225-2008; *Stemcor UK Limited con Compañía Comercial Metalúrgica Ltda*, Supreme Court, 21 June 2010, Rol no. 1724-2010. .

[26] *Kreditanstalt Für Wiederaufbau v. Inversiones Errázuriz*, Supreme Court, 15 December 2009, Rol no. 5228-2008.

[27] *EDF Internacional Soc. Energética Francesa S.A. v. Endesa Latinoamericana S.A.*, Supreme Court, 8 September 2011, Rol no. 4390-2010.

[28] *Díaz Alfaro, Fabián v. Embajada de la India*, Supreme Court, 14 September 2009, Rol no. 3493-2010; *Vicuña Poblete, María v. Estado Helénico*, Supreme Court, 10 December 2002, Rol no. 1675-2002.

In Chile, there are no special rules for the enforcement of an award against a state.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Chile has been a Contracting State to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States since October 1991 and has signed over 40 Bilateral Investment Treaties (BITs) and 6 Free Trade Agreements containing investment chapters.[29]

(ii) Has your country entered into bilateral investment treaties with other countries?

Yes, Chile does not have an official model BIT, however, the majority of the BITs that have been ratified correspond to the traditional category of BITs concluded during the 1990s.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

For domestic arbitrations the most consulted treatise is Aylwin A., Patricio: *Juicio arbitral*, *Editorial Jurídica de Chile* by Picand A. Eduardo 5th ed. (2005).

A recent publication is Vásquez Palma, María Fernanda, *Arbitraje en Chile, Análisis crítico de su normativa y jurisprudencia*, Ed. Legal Publishing (2009)

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

There are no major arbitration educational events that are held periodically in Chile. However international arbitral institutions have held conferences regarding

[29] At the time of writing, BITs with the following countries were in force: Argentina, Australia, Austria, Belgium and Luxemburg, Bolivia, China, Corea, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Italy, Malaysia, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Ukraine, United Kingdom, Uruguay and Venezuela. In addition, BITs with the following countries had been signed but not yet ratified or entry into force: Brazil, Colombia, Dominican Republic, Egypt, Hungary, Indonesia, Lebanon, The Netherlands, New Zealand, South Africa, Tunisia, Turkey and Vietnam.

arbitration matters. In addition, CAM Santiago organises numerous educational events and conferences to promote arbitration and mediation in Chile.[30]

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

As was explained in section I, there is a long tradition of arbitration in Chile and in general arbitral proceedings are preferred to general court proceedings for complex matters.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

It is common practice for arbitrators in Chile to conduct conciliation proceedings during the course of the arbitration. Therefore there is a strong tradition of conciliation as part of arbitration proceedings. Other ADR methods such as mediation are not commonly used in Chile.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

There have been recent initiatives to modernise the domestic arbitration law but no formal bill has been presented to Congress. In addition, since ICAL is fairly recent (2004), courts are starting to receive annulment requests which have required their intervention in international arbitration cases and thus they have started to recognise the generally accepted principles of international arbitration.

[30] See http://www.camsantiago.cl/actividades.htm.