

# **The New Chilean Arbitration Law: Will Chile Become a New International Arbitration Venue?**

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## I. Introduction

### 1. The Notion of a Modern Arbitration Law and Its Distinctive Characteristics: The UNCITRAL Model Law on International Commercial Arbitration

The recent "success" of international commercial arbitration practice in the field of international law has already become a trend worth analyzing. As the globalization of the economy had naturally led to the multiplication of free trade agreements, bilateral investment treaties and foreign investment protection, the disputes arising from these new trade relationships have called for new settlement mechanisms.

However, the solution established in international commercial arbitration soon faced the obstacles presented by inconsistencies between the various national legislations on this issue.

Aware of the need for appropriate legislation, in 1966 the United Nations General Assembly created the United Nations Commission on International Trade Law (UNCITRAL). This Commission has adopted many important arbitration instruments,<sup>1</sup> but certainly, the most important objective achieved after two decades of Commission sessions was the adoption of the UNCITRAL Model Law on International Commercial Arbitration in June 1985.

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<sup>1</sup> For instance the "UNCITRAL Arbitration Rules" in 1976.

This Model Law<sup>2</sup> was approved with the recommendation that “all nations give consideration to the international commercial arbitration Model Law in view of the desire to standardize arbitration procedural laws and the specific needs of international commercial arbitration practice.”<sup>3</sup>

Therefore, this Model Law is merely a document that is submitted to the consideration of the different Member States with the ultimate goal of incorporating it into their respective domestic legislation. It aims at improving and harmonizing domestic laws on arbitration, providing them with a general framework to follow while facilitating cross-border and/or international business transactions.

The UNCITRAL Model Law consists of eight Chapters (and thirty-six articles) that spell out the essential elements of an arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduction of the arbitral proceedings, and the enforcement of the tribunal’s award.

As defined in Chapter One (arts 1 to 6), an arbitration is considered to be “commercial” if it covers matters arising from commercial relationships of any nature, whether contractual or not.<sup>4</sup> Examples of relationships of a commercial nature are the transactions for the supply or exchange of goods and services, distribution agreements, construction of works, commercial representation, and joint ventures.

In addition, the Model Law states that an arbitration is international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States.”<sup>5</sup> Beside this hypothesis, an arbitration is also considered to be international when it meets the requirements of article 1.3 (b): when the place of arbitration or execution of the contract, or the subject of the dispute, is in a state other than where the parties have their regular places of business, or when the parties have expressly agreed that the object of the dispute is related to more than one country.

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<sup>2</sup> Available under <[www.uncitral.org](http://www.uncitral.org)>.

<sup>3</sup> G. Biggs, “Arbitraje Comercial Internacional. Una Tarea Pendiente”, *Revista del Colegio de Abogados de Chile* 30 (2004), 8 et seq.

<sup>4</sup> This notion follows the modern trends in international commercial arbitration, where the aim is to broaden the matters included in the scope of definition of “commercial”. P. Fouchard/ E. Gaillard/ B. Goldman, *Traité de l'arbitrage commercial international*, 1996, 38-47.

<sup>5</sup> UNCITRAL Model Law, article 1.3 (a), available under <[www.uncitral.org](http://www.uncitral.org)>.

Chapter Two of the Model Law (arts 7 to 9) deals with definitions concerning the scope and form that must be given to an arbitration agreement of an international nature; it establishes the limits to the exception of arbitration agreements and foresees the possibility of any party filing for interim protective measures before a domestic court.

Chapter Three (arts 10 to 15) regulates the composition of the arbitral tribunal: on this matter, the principle consists in giving the parties the freedom to define the number of arbitrators and the procedure to appoint them. In the event that the parties do not reach an agreement on this issue, additional regulations are provided. In like manner, it deals with court procedures for appointing arbitrators as well as causes and procedures for challenging them.

Chapter Four (arts 16 and 17) deals with issues related to the competence of the arbitral tribunal to determine its own jurisdiction (usually known as the *kompetenz-kompetenz* principle): thereby ensuring the autonomy of the arbitration agreement in relation to other contract provisions. Therefore, the nullity of the latter would not lead to the nullity of the former.

Chapter Five (arts 18 to 27) establishes ancillary regulations in the event that the parties to an arbitration fail to reach an agreement. Although the guiding principle is that parties shall be free to establish their own arbitration procedures regarding the place of arbitration, the language to be used, the procedures to submit claims and to defend against them, the nature of the hearings and the rules for submitting evidence, the effects of a party's default and its consequences upon the arbitration, among others, are regulations stipulated clearly and in extensive detail.

Chapter Six (arts 28 to 33), provides rules on the nature of arbitral procedures and their preparation, arbitral awards and their contents, among other special provisions.

Chapter Seven (arts 34 and 35) defines the terms concerning the review of the arbitral award. Its annulment before the domestic courts is the course of action to be followed by a party pursuing such aim. In short, this Chapter establishes the grounds for setting aside such award and the requirements, formalities and periods of time for such submission.

Finally, Chapter Eight (article 36) deals with the recognition and enforcement of the arbitral award.

As explained above, the UNCITRAL Model Law deals with harmony and coherence in the establishment of arbitration as an interna-

tional commercial practice. Consequently, many countries have already introduced its provisions into their domestic legislation, in some cases making a clear distinction between their domestic arbitration rules and those applicable to international arbitration proceedings, and in others covering both the domestic and international arbitration proceedings.

## 2. How Do We Define an “International Arbitration Venue”?

A “venue” is usually defined as “a) the place or country where the alleged events from which a legal action arises take place; or b) the place from which a jury is drawn and in which trial is held”.<sup>6</sup>

Therefore, it seems important to note that a distinction should be made in relation to the notion of venue and seat for international arbitration: basically – and in the sense given in this paper –, it is a general understanding that a country eventually becomes a venue only after having been chosen as a place of arbitration on several occasions.

On these grounds, the parties to an international arbitration proceeding seeking a suitable venue have a difficult decision to make, since many elements must be considered in choosing a country as an international arbitration venue. Briefly, we can list the following:

### a. Supportive Legal Environment

No legal obstacle must exist which would jeopardize the conduct of the arbitration and equally importantly, the successful party must be able to obtain legal enforcement in the country where the other party has assets.

Therefore, the ideal situation is for the place (country) where an international commercial arbitration is to take place, to at least have incorporated in its own legislation the following laws:

- The UNCITRAL Model Law of 1985 (in its entire form or with minor amendments): the adoption of the UNCITRAL Model Law ensures that parties seeking to arbitrate their disputes would do so within a familiar legal framework, one which has been enacted to date in nearly 40 countries.<sup>7</sup>

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<sup>6</sup> From The Merriam-Webster Dictionary of the English Language.

<sup>7</sup> Concerning references about this law and its most important provisions please see the first part of this Chapter.

- The New York Convention, 1958:<sup>8</sup> it is essential that once an award is issued, the successful party is able to enforce it in the country in which the losing party has assets.
- The Panama Convention, 1975:<sup>9</sup> This text aims at the same objectives as the New York Convention. This particular Convention, however, is regional in nature; it meets the need of international business to guarantee the enforcement of arbitration agreements and arbitral awards concerning international commercial transactions by the local domestic courts.<sup>10</sup>

There are two somewhat contrasting aspects of the interrelationship between courts and arbitration. Firstly, it is highly undesirable for there to be an excessive level of interference by the courts in the arbitral process. In international arbitration, it is highly unlikely for the parties to choose a country as a venue if its laws permit the courts to interfere with the arbitration or with the award. At the same time, however, court assistance in support of the arbitration is desirable. There may be circumstances where one of the parties may need to resort to the courts to assist the arbitral process; for instance, injunctions against further moves or precautionary measures to protect assets or the *status quo* or to preserve evidence. In those circumstances, it is crucial that a party to an arbitration has ready access to the local courts, and that it can be fa-

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<sup>8</sup> The above Convention was adopted in New York on 10 June 1958. It refers to the recognition and enforcement of awards made in the territory of a state other than the state where such recognition is sought. Article III of the Convention provides that: "Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon", see under <<http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>>.

<sup>9</sup> The Inter-American Convention on International Commercial Arbitration, 1975 (also known as the Panama Convention) entered into force on 16 June 1976. It was enacted at the end of the First Specialized Inter-American Conference on International Private Law sponsored by the Organization of American States (OAS), see under <<http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>>.

<sup>10</sup> Two other major conventions on international arbitration are the Geneva Protocol on Arbitration Clauses of 1923 (the Geneva Protocol) and the Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention). The reason why they are not analyzed in this paper is because neither the Geneva Protocol nor the Geneva Convention had significant practical effects (i.e., none of the Latin American countries ratified the Geneva Convention and Brazil was the only one that ratified the Geneva Protocol).

cilitated by an early hearing. In conclusion, it is of vital importance that domestic commercial courts appreciate the independence and significance of arbitral proceedings and that they are rigorous in enforcing arbitral awards and agreements.

Finally, it is important for the place (country) of arbitration to be in good standing and deserve the respect of the international business community. To that effect, conditions of neutrality, along with political and economic stability are desirable.

#### **b. Respected and Well-Prepared Legal Professionals**

It is important to have internationally renowned arbitrators who are knowledgeable on commercial matters and have proven experience in international cases. Further skilled practitioners are necessary. The state to be a place of arbitration must contain a certain number of law firms and renowned international arbitration specialists. Finally representation through foreign lawyers: the parties before an arbitral tribunal need to be allowed to be represented by the qualified legal practitioners of their choice from any other jurisdiction.

#### **c. Resources and Facilities**

The parties to an international commercial arbitration value that the place chosen is equipped with institutions and facilities of high standard to support the arbitration process and to ensure that it runs efficiently. These resources include, for example, office headquarters providing such essential services as hearing rooms, translation services, etc. In most cases, such structure is provided by 1) International Organizations (such as the International Chamber of Commerce)<sup>11</sup>, 2) National Chambers of Commerce, or 3) independent Arbitration Centers.

### **3. Reasons for Comparing the Chilean and the Spanish Cases**

Although at a first glance the reason for comparing these two countries may not appear so obvious, it is essentially quite simple. Chile and

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<sup>11</sup> The International Chamber of Commerce (hereinafter, ICC) was established in 1919 with the aim of promoting worldwide trade and investment, See under <[www.iccwbo.org](http://www.iccwbo.org)>.

Spain have many points in common in this regard: perhaps the most noticeable one is that they share a common cultural heritage, social origins and language. And thus, like other Latin American legal systems, Chile has inherited many laws and legal provisions from Spain. Besides this fact, in the field of economics and trade, they share many similarities in the trend of their commercial policies and growth. Despite their different geographical location and state of development, both of them exhibit an active and increasing participation in the fields of international trade. Moreover, they soon became aware of the importance of international arbitration as a convenient mechanism to settle disputes arising from trade relations and foreign investments. And finally, in line with the observation made above, both Chile and Spain have recently adopted the UNCITRAL Model Law: Spain in December of 2003 and Chile in September of 2004.<sup>12</sup>

Their respective and prompt legislative ratification of the UNCITRAL Model Law on International Commercial Arbitration, added a number of factors to the competitive advantages of these countries, establishing them as suitable international arbitration venues and positioning them along similar development paths.

## II. International Commercial Arbitration in Chile

### 1. Background

#### a. The Legal Framework before the New International Commercial Arbitration Law (Law 19.971)<sup>13</sup>

During the last decades, Chile has traveled a tortuous path to approve adequate commercial arbitration legislation. This situation is explained by the fact that as of the date of enactment of Law 19.971, Chile did not have specific regulations in the field of international commercial arbitration: the regulations in effect at the time governed, on the one hand, national arbitration procedures and, on the other, certain regulations

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<sup>12</sup> Although these laws will be analyzed in detail in further chapters, see under <[www.bcn.cl](http://www.bcn.cl)> (Chilean arbitration Law) and <<http://www.boe.es/boe/dias/2003-12-26/pdfs/A46097-46109.pdf#search='ley%2060/2003>> (Spanish arbitration Law).

<sup>13</sup> See under <[www.bcn.cl](http://www.bcn.cl)>.

that were taken from International Treaties and applied to specific hypothesis in this field. A summary of them is given below:

*Domestic Legislation Regulations:*

The Organic Judiciary Code [Código Orgánico de Tribunales (COT)] and the Code of Civil Procedure [Código de Procedimiento Civil (CPC)]<sup>14</sup>

Chile's arbitral legislation dates back to 1875 and it was later subsumed into the Code of Civil Procedure, in its arts 628 to 644.

As stated by Blackaby and Spinillo,<sup>15</sup> Chile's 1995 draft arbitration law (whose detailed analysis will be undertaken in the following Chapter) was based primarily on such regulations. These regulations, which in principle were meant to govern international commercial arbitration procedures, actually governed arbitral proceedings among nationals and those in which foreign parties subjected themselves to arbitration in Chile. On the other hand, the CPC contains, in arts 242 to 251, regulations applicable to the enforcement of foreign arbitral proceedings. It should be noted, however, that such regulations have a narrow field of application since they govern exclusively those cases where the New York Convention or the Panama Convention do not apply.

*Decree 2349/78*<sup>16</sup>

This Decree allows Chilean state and public sector companies, when bound by the provisions of an international contract of a patrimonial nature, to include among their clauses one that would grant jurisdiction to foreign courts, whether arbitral or ordinary.

*The Code of Commerce*<sup>17</sup>

This Code includes a number of provisions related to international arbitration; such as, for example, those referred to the termination and asset distribution of commercial companies.

*Decree Law 600 of 1974*<sup>18</sup>

This Decree governs foreign investments in Chile and its provisions apply to conflicts between Chile and foreign investors.

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<sup>14</sup> Ibid.

<sup>15</sup> See N. Blackaby/A. Spinillo, *Algunas reflexiones sobre el proyecto de ley de arbitraje de Chile de 1995*, 1988, 1-4.

<sup>16</sup> Available under <www.bcn.cl>.

<sup>17</sup> Available under <www.bcn.cl>.

<sup>18</sup> Ibid.

This text establishes that disputes emerging from contracts executed between of Chile and foreign investors and governed by Decree Law 600, may not be settled by arbitral courts, whether domestic or foreign.

Since this text refers only to foreign investment hypotheses, and since it specifically does not consider arbitration, its provisions do not fall under the aegis of the topic under study here. Additionally, because of Chile's ratification of the ICSID (International Center for the Settlement of Investment Disputes) Convention,<sup>19</sup> nowadays a foreign investor facing a dispute with Chile is entitled to resort to the ICSID Convention pursuant to its own rules and regulations, provided it is eligible under bilateral investment treaties or other mechanisms that consider arbitration to settle disputes.<sup>20</sup>

#### **b. International Treaty Regulations<sup>21</sup>**

*The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*<sup>22</sup>

In September 1975, Chile ratified this Convention – without reservations – thus enacting the most widely adopted agreement regarding the international enforcement of arbitration agreements and ensuing arbitral awards.

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<sup>19</sup> Available under <[www.worldbank.org/icsid/](http://www.worldbank.org/icsid/)>

<sup>20</sup> G. Biggs, "The process toward International Commercial Arbitration in Chile", in: *Papers of the International Commercial Arbitration Conference AmCham Chile, July 1998*, American Arbitration Association, Chile, 1998, 118.

<sup>21</sup> We will not include among the above-mentioned regulatory bodies, the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention, 1965, which established the International Center for the Settlement of Investment Disputes and entered into force in Chile in 1991), because it lies beyond the strict concept of international commercial arbitration, governing exclusively the relationship between foreign investors and Chile, in this instance as the investment recipient.

<sup>22</sup> For further comments on this Convention, cf. under I.

*The Inter-American Convention on International Commercial Arbitration (Panama Convention)*<sup>23</sup>

Chile signed this Convention in 1976 which – as mentioned above – deals with the enforcement of foreign arbitral awards and other important provisions concerning the nationality of arbitrators.

*MERCOSUR's Agreement on International Commercial Arbitration and the Agreement on International Commercial Arbitration between MERCOSUR, Bolivia and Chile*<sup>24</sup>

The Agreement on International Commercial Arbitration between MERCOSUR Member Countries and the Republic of Bolivia and the Republic of Chile, attempted to install a uniform and broadly applicable system of dispute settlement. Both agreements are substantially identical, except that in the second one non-member countries such as Bolivia and Chile are parties to the Agreement. These instruments govern arbitration agreements (arts 4 to 8) and proceedings (arts 11 to 25), including arbitral awards and appeals (arts 20 to 22) and the applicable law to the dispute (arts 9 and 10). Significantly, neither of these agreements provide rules concerning the recognition and enforcement of awards. Article 23 provides that in enforcing awards, the rules to follow will be those of the Panama Convention, the Las Leñas Protocol,<sup>25</sup> and the 1979 Montevideo Inter-American Convention on Extraterritorial Applicability of Court and Arbitral Awards<sup>26</sup>, all of them signed by MERCOSUR's four member countries.<sup>27</sup>

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<sup>23</sup> Ibid.

<sup>24</sup> MERCOSUR's Agreement on International Commercial Arbitration was executed at the XIVth Common Market's Meeting held in Buenos Aires and Ushuaia in July 1998. These regulations were integrated to associate countries (Bolivia and Chile) via MERCOSUR's Council Decision No 4/98, 1998, see under <<http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/Dec398.htm>>.

<sup>25</sup> Available under <<http://www.parlamento.gub.uy/htmlstat/pl/protocolos/prot16971.htm>>.

<sup>26</sup> Available under <[http://www.oas.org/dil/CIDIPV\\_home.htm](http://www.oas.org/dil/CIDIPV_home.htm)>.

<sup>27</sup> A. Perugini Zanetti, "Arbitraje comercial Internacional en el MERCOSUR", in: Max-Planck-Institut für ausländisches und internationales Privatrecht/ Fundación de Cultura Universitaria (eds), *Avances del Derecho Internacional Privado en América Latina. Liber Amicorum – Jürgen Samtleben*, 2002, 633 et seq. (637).

*Free Trade Agreements (FTA) signed by Chile*<sup>28</sup>

Each of the free trade agreements signed by Chile includes special arbitration mechanisms in order to settle disputes arising between the signatory parties.

**c. Previous Legislative Attempts**

On 16 April 1985, a Senate Commission approved a draft bill on international commercial arbitration aimed primarily at correcting existing deficiencies in the positive legislation on this subject matter.<sup>29</sup>

Nevertheless, this bill was never passed and, consequently, it never became law. In short, the main reasons why such avenue was frustrated were the following: first, certain regulations were introduced that placed restrictions on the autonomy of the will of the parties. This topic was not treated satisfactorily in this bill, which extended an insignificant autonomy to the parties in arbitral procedures including arbitrators bound by legal principles (“*árbitros en derecho*”), and an autonomy reduced to its minimum expression in those cases managed by mixed arbitrators and by arbitrators in equity (“*árbitros arbitradores*”).<sup>30</sup> The inevitable consequence of this provision was that arbitrations became mechanisms with few advantages to parties seeking an out-of-court settlement of their disputes and a broader freedom and field of action. Second, the bill was not governed by the principle of autonomy of arbitral agreements. Therefore, if the contract in which such arbitration clause is ultimately inserted was to be invalidated, it would fatally impact the outcome of the latter. Closely linked to this topic is the jurisdiction principle (*kompetenz-kompetenz* principle), which consists in the power of arbitrators to decide about the existence, breadth and

<sup>28</sup> To date, Chile has signed Free Trade Agreements (FTA) with the following countries or block of countries: Canada, United States, Mexico, Korea, Central America & the Caribbean, and with EFTA Member States. The country also signed an Economic Association with the European Union.

<sup>29</sup> Another draft bill was presented some years later, in 1992, by the Executive; nevertheless, its only aim was to regulate – with further details – the domestic arbitral proceedings. See under <<http://sil.congreso.cl/pags/index.html>>.

<sup>30</sup> The referred draft bill intended to create three types of arbitrators: (i) Arbitrators bound by legal principles; (ii) Mixed arbitrators; and (iii) Arbitrators not bound by legal principles but solely by their discretion (arbitrators in equity or so-called *amiables compositeurs*). These categories are also common to the UNCITRAL Model Law (cf. under <[www.uncitral.org](http://www.uncitral.org)>).

scope of their own jurisdiction; a topic that was not explicitly addressed in this draft bill.

Another unfortunate decision was the incorporation of forced arbitration procedures: this institution entailed the parties' obligation to submit to arbitration certain previously described subject matters.<sup>31</sup> Such a mechanism runs counter to the very essence of arbitration, which must be voluntary and consensual. Finally, the draft bill did not clearly establish the legal remedies that were available against arbitral awards. And, what is even more awkward, it established as a matter of principle that awards could be challenged in the same manner as judicial decisions. Such approach clashes head on with the prevailing principle in comparative law: i.e., that awards may be appealed on limited grounds. This is the guiding spirit of the UNCITRAL Model Law, which admits motions to invalidate awards only in specific circumstances; in our opinion, it is the wisest approach.

As may be inferred from this overview, Chile did not have a harmonious and adequately structured body of regulations in order to meet the legal requirements of modern international commercial arbitration proceedings until 2004. As properly stated by Mr. Ricardo Lagos Escobar, President of Chile, in his message to submit the draft bill on International Commercial Arbitration to congressional debate: "International commercial arbitration proceedings are not specifically regulated in our legal system (...) considering that domestic regulations were conceived for domestic arbitration proceedings, they are inadequate for international cases; thus, it is possible to conclude that there is a legal void in Chile's legislation that is necessary to fill in terms of international commercial arbitration."<sup>32</sup>

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<sup>31</sup> Article 230 of the draft-bill established which issues were compulsory to arbitration proceedings: among them, services, bank operations, buying and selling.

<sup>32</sup> Message issued by the President of the Republic when launching a draft bill on International Commercial Arbitration, (Bulletin No.3252-10). Documents accounted for the "Chilean Law on Arbitration, Law 19.971, 26 August 2004. Congreso Nacional, Historia de la Ley. Compilación de Textos Oficiales del Debate Parlamentario", Chile, 2004.

## 2. Noteworthy Provisions of Law 19.971

The following will include a review of those articles deemed most significant and specific under the regulations of law 19.971. Prior to this analysis, it is worth noting that the regulation referred to establishes a special and autonomous legal system for international commercial arbitration proceedings that operates in perfect harmony and coherence with the projected regulations applicable to domestic commercial arbitration proceedings as well as with the treaties currently in force.

### a. Arbitrability

This expression defines the suitability of a subject to be submitted to arbitration.<sup>33</sup> It encompasses those features and requirements that must be present in a dispute in order to be governed by this law.<sup>34</sup>

First, it is important to highlight that the law has clearly defined the breadth and scope of the two features that are intrinsic to this type of arbitration: i.e. its commercial nature and international dimension.

The commerciality requirement – among other definitions and rules of interpretation – is explained in article 2 of the law, which states:

“Article 2 – Definitions and Rules of Interpretation

For the purposes of this law:

g) The term “commercial” must be understood in a broad sense in order to cover all issues related to this type of relationships, whether contractual or not. Subsumed under the latter, for example, any commercial operation to supply or exchange goods or services, distribution agreement, representation or commercial agency, transfer of credits for collection, leasing of equipment with option to buy, construction of works, consulting, engineering, license concessions, investments, finance, banking, insurance, development agreements or concessions, corporate associations and other forms of industrial or commercial cooperation, transport of merchandise or passengers by air, sea, railroad or surface.”

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<sup>33</sup> J. Poudret/ S. Besson, *Droit comparé de l'arbitrage international*, Editions Juridiques Associés, 2002, 298-300.

<sup>34</sup> Although the aim of arbitration laws is to embrace most subject matter, all nations treat some categories of claims as incapable of resolution by arbitration. See G. Born, *International Commercial Arbitration*, 2001, 245.

The notion of what is indeed commercial, finds in this law a much broader field than that conceded to the *acts of commerce* by Chile's Code of Commerce.<sup>35</sup> Additionally, it matches the scope that the UNCITRAL Model Law gives to commercial practice and usage. On the other hand, the "international" nature of the arbitration is regulated under its various hypotheses in article 1.3, which states:

"Article 1 – Scope of Application

3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

In this manner, the law lists the different elements that can give a certain situation an international character. Beyond this – and as stated in the message of Chile's President prior to the congressional debate – "the recognition of the will of the parties has its limits in as much as one could not declare as international a controversy lacking relevant foreign elements or violating the public order (...)."

Finally, it must also be noted that this law introduces another principle deeply ingrained in Chilean Positive law: the principle of territoriality. To this effect, the provisions of this Law shall apply exclusively if the place of arbitration is in Chilean territory.

#### **b. Autonomy of the Arbitration Agreement. The Principle of *Kompetenz-Kompetenz***

As mentioned above, these two principles, although different and independent from each other, are very much related and they have been given particular relevance in the arbitration rules. The principle of

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<sup>35</sup> Chile's Code of Commerce, article 3, see under <www.bcn.cl>.

autonomy responds negatively to the question as to whether or not the eventual nullity of the main contract implies the nullity of the arbitration agreement. It has been extensively debated whether the arbitration agreement is actually independent from the contract. The crucial point is determining whether the arbitration agreement is valid, and thus submitting to arbitration is possible even when the main contract is null. The modern position favors that the arbitration agreement be independent and autonomous from the rest of the contract. This position implies that such agreement is in itself a different contract, at least for the purpose of the subject of nullity. In this manner, one would have to consider whether the contract is valid according to its specific rules and whether the arbitration agreement is also valid according to its specific rules. Among the reasons advanced by those postulating that autonomy means that the eventual nullity of the main contract is extended to the arbitration agreement, mention is made of the fact that it would unduly restrict the manifestation of the will, aimed at submitting any future litigation before an arbitrator. Moreover, the cause of the arbitration agreement is different from that of the main contract. The autonomy of the will of the parties, stated in the arbitration agreement, plays a significant role in modern systems: it is in both the UNCITRAL Model Law and in Law 19.971.

Article 7 of Law 19.971 states as follows:

“Article 7 – Definition and Form of Arbitration Agreement

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

Insofar as the jurisdiction of the arbitrators is concerned, it must be noted that this question arises at the time of determining who has the right to decide on the competence of an arbitral tribunal when confronted with the objection of one of the parties. In this respect, there are two positions: the traditional one, that holds that the decision as to whether an arbitral tribunal is competent to resolve a conflict is incumbent upon the ordinary courts of justice, and the modern one, that holds that the arbitral tribunal itself is entitled to resolve any objection regarding its own jurisdiction.

This approach has been introduced in Law 19.971 in article 16:

“Article 16 – Competence of Arbitral Tribunal to Rule on its Jurisdiction

1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

### **c. Composition of the Arbitral Tribunal**

The law has followed the international practice on this point: the agreement of the parties prevails, and, if there is no explicit agreement of the parties or should there be a disagreement regarding their opinion, the number of arbitrators shall be three.

“Article 10 – Number of Arbitrators

1) The parties are free to determine the number of arbitrators.

2) Failing such determination, the number of arbitrators shall be three.”

### **d. Exceptional Intervention of Chile’s Ordinary Courts of Justice**

This principle is established under article 5 of Law 19.971:

“Article 5 – Extent of Court Intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.”

This regulation limits the intervention of Chilean courts in matters submitted to the international arbitration law to the minimum. Those cases where such intervention is accepted are:

- Appointing an arbitrator in the absence of an agreement of the parties.
- Challenging and removing an arbitrator.
- Decision of the arbitral tribunal declaring it to be incompetent.
- Application for setting aside the arbitral award.

Limiting the field of action to the Chilean courts of justice generated a debate in the draft bill’s legislative proceedings. Determining the in-

tervention of domestic courts of justice in arbitration proceedings is a topic of international as well as national concern.<sup>36</sup>

#### **e. Review of the Arbitral Award**

Following the spirit of the UNCITRAL Model Law, article 34 of Law 19.971 permits the application for setting aside as the only legal remedy against an arbitral award.

“Article 34 – Application for Setting Aside as Exclusive Recourse against Arbitral Award

1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.”

The Chilean Appeal Courts (“Cortes de Apelaciones”) are designated to have competence in such cases. The grounds for setting aside an award are limited and described in detail in article 34 of the law. Among other provisions, some of these grounds are: the lack of proper notice to a party or a party’s inability to present its case, that the award refers to questions not submitted to arbitrator decision or not capable of settlement by arbitration, etc. This article, analyzed together with article 5, was the point of departure for several doctrinal discussions relating to the intervention of the Chilean Judicial Courts in arbitral proceedings, especially concerning the possibility of presenting other legal remedies against the awards apart from the action for setting aside.<sup>37</sup>

### **III. International Commercial Arbitration in Ibero America**

#### **1. Legislation on International Commercial Arbitration in Some Latin American Jurisdictions: Mexico, Brazil, Argentina and Uruguay**

To analyze the position of certain Latin American countries with respect to international commercial arbitration might be somewhat com-

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<sup>36</sup> This topic was submitted by Mr. Miguel Otero Lathrop on the occasion of the Seminar on the new International Commercial Arbitration Law held in Valparaíso, Chile, in November 2004.

<sup>37</sup> Further explanations on this topic will be developed later on.

plex if, previously, one does not consider certain landmarks that have set an identifiable pattern for the entire region.<sup>38</sup>

“The lack of an arbitration culture”<sup>39</sup> was the most commonly identifiable feature only a few decades ago. The refusal to accept arbitration as a means to solve disputes was grounded in the so-called Calvo Doctrine based on national sovereignty principles, postulating the equality among national and foreign citizens and among territorial jurisdictions. Basically, such doctrine argued that sovereign states were entitled to remain free from any form of interference from other states. It is further argued that foreigners enjoyed the same rights as national citizens, and in case of lawsuits or claims, they were under the obligation to exhaust all legal remedies before domestic courts without resorting to the diplomatic protection of their respective countries of origin.<sup>40</sup>

The Calvo Doctrine inspired and permeated the attitude of Latin American countries<sup>41</sup> in another manifestation of this spirit in which they persistently and collectively rejected the international arbitration mechanism proposed by the World Bank in 1964.<sup>42</sup> A second feature of the region has been that the commercial policies followed by Latin

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<sup>38</sup> C. Frutos-Peterson, *L'émergence de l'arbitrage commercial international en Amérique Latine: L'efficacité de son droit*, 2003, 15-40.

<sup>39</sup> Id., *International Commercial Arbitration in Latin America: As healthy as it could be?* Available under <[www.texasadr.org](http://www.texasadr.org)>.

<sup>40</sup> Carlos Calvo's ideas (Argentina, 1822-1906) materialized, on the one hand, in the “Calvo Clause”, which postulated that agreements with foreign citizens should include a provision whereby foreign nationals accept to submit their cases to the territorial jurisdiction in place, thereby waiving diplomatic protection from their respective governments; and, on the other hand, it materialized into the so-called “Calvo Doctrine”, which is nothing but the institutional recognition of such principle. For further comments on this theory see F. Tamburini, “Historia y destino de la “Doctrina Calvo”: ¿Actualidad u obsolescencia del pensamiento de Carlos Calvo?”, *Revista de Estudios Histórico-Jurídicos* 24 (2002), 81 et seq.

<sup>41</sup> In addition, the Ninth Pan-American Conference (Bogotá 1948) established the Calvo Doctrine in the regional sphere with the Chart of the Organization of American States, whose article 14 states: “The jurisdiction of the States applies within the limits of the national territory and is equally exercised over all its inhabitants, whether national or foreign.” The same Conference approved the Bogotá Pact, whose article 7 follows the same line. Likewise, it shows up in several Latin American constitutions, among them the Argentinean Constitution (article 116); and, in the international sphere, also within the United Nations.

<sup>42</sup> Tamburini, see note 40.

American countries did not favor international commercial arbitration: the so-called “import substitution” policy – applied by many countries of the region during the decade of the 1960’s – favored primarily domestic market growth, propelled by strong state support. Within this context – devoid of incentives to foreign investments or international commercial agreements – an international arbitration mechanism was clearly not a favored mechanism.

Years later, however, the recognized obsolescence of the Calvo Doctrine and the increasing liberalization of the markets launched Latin American countries into a quick transition from a system that scarcely knew anything about international arbitration to another where it is not only well accepted but also strongly promoted.<sup>43</sup>

#### Mexico

Although nowadays it enjoys the privilege of being the most widely sought after arbitration seat in Latin America, Mexico’s history in this respect does not go back very far. In 1993 this country adopted the UNCITRAL Model Law and, since then – whether by mutual agreement between parties or as instructed by the Court of Arbitration of the ICC – it has been the seat for over 35 international arbitration proceedings.

Arbitrations in Mexico are governed by article 1051 of the Code of Commerce,<sup>44</sup> which provides that the applicable commercial procedure may be freely and mutually agreed between the parties – albeit with the restrictions spelled out in the Code. In this respect, it also establishes that the latter may be either a conventional proceeding before domestic courts or an arbitral proceeding, in which case the provisions of Title Four (arts 1415 to 1463) apply. These regulations were refurbished in 1993 as a result of the adoption of the UNCITRAL Model Law.<sup>45</sup>

Mexico adopted this law almost to the letter: only certain modifica-

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<sup>43</sup> J. Kleinheisterkamp, “Conflict of Treaties on International Arbitration in the Southern Cone”, in: *Avances del Derecho Internacional Privado en América Latina*, see note 27, 668.

<sup>44</sup> <<http://www.inacipe.gob.mx/htm/Prontuario/Volumen1/Codigos/CodigoComercio/LibroQuinto/TituloCuarto/EjecuLaudos.html>>.

<sup>45</sup> N. Blackaby/ D. Lindsey/ A. Spinillo, *International Arbitration in Latin America*, 2002, 155 et seq.

tions were introduced; among the most important of which are the following:

- 1) Mexico adopted a monist system upon providing that its arbitration regulations were meant to govern both domestic and international arbitrations.
- 2) It is provided that in the event that the parties do not specify the number of arbitrators, it shall be one, and not three as suggested by the UNCITRAL Model Law.
- 3) With respect to the substantive legislation applicable to the litigation, should the parties fail to reach an agreement on this subject matter, the arbitrators shall be empowered to apply that which they deem most adequate to the circumstances of the case. Here also it departs from the Model Law, since the latter provides that in such a case the regulations governing the conflict of law shall apply.
- 4) In relation to the legal remedies eligible to challenge the award, the Mexican Law deprives local courts of jurisdiction to review arbitral awards. Should any such remedy be filed before them, they must directly declare themselves incompetent.

#### Brazil

Being an economic and commercial power – not only at the regional but also at the world level – Brazil did not have adequate arbitration regulations until the decade of the 1990's. However, as a consequence of its strong commercial opening, followed by the ratification of the Panama Convention and, years afterwards, the New York Convention, Brazil set itself on the path to commercial arbitration. On 23 September 1996, the Brazilian Government issued this country's very first Arbitration Act, Law No. 9307,<sup>46</sup> inspired by the UNCITRAL Model Law, the Spanish arbitration act of 1988 and the Panama and New York Conventions.

This law introduces several modifications to the Model Law, most notably, that Law preserves the distinction between an arbitral clause in a contract and what is known as an "arbitral compromise".<sup>47</sup> The objec-

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<sup>46</sup> Available under <[www.planalto.gov.br/ccivil\\_03/Leis/L9307.htm](http://www.planalto.gov.br/ccivil_03/Leis/L9307.htm)>. Also, see Kleinheisterkamp, see note 43.

<sup>47</sup> In some Latin American legislations the distinction between the "compromiso arbitral" and the "clausula compromisorio" still prevails, a trend largely criticized by the modern arbitration doctrine. In fact, many countries had modified this concept by introducing a unique notion: the arbitral

tive of the “arbitral compromise” is to give a more precise definition of the terms included in the arbitral clause, which is more general. To that extent, article 7 of Law 9307 requires a formal submission to national courts in order to validate certain arbitral proceedings (for instance, if the parties do not reach an agreement in relation to the scope of the arbitral compromise, a national court must decide on this matter).<sup>48</sup>

Among other relevant differences, we find:<sup>49</sup>

a) The Brazilian Act applies to both domestic and international disputes; thus, international arbitrations are not defined and their elements are not analyzed.

b) Arbitral Tribunals must be comprised of an odd number of arbitrators.

Also, – and in line with the Model Law – the principles of impartiality and independence of the arbitrator are expressly considered.

c) Besides the rule of fair and equal treatment of both parties (article 18 Model Law), the Brazilian Act adds a reference to the principles of impartiality and freedom of decision of the arbitrators, as well as total observance of the adversary principle (*principios do contraditório*) throughout the proceedings.

d) In relation to the time limit to file a challenge, the Act refers to “the first opportunity for the party to manifest itself”. Since it does not establish the 15-day time limit suggested by the Model Law, this provision is somewhat controversial.

e) If the challenge is denied by the arbitral tribunal, while the Model Law provides for recourse to the court within thirty days, the Act orders that it be left for an eventual setting aside action.

f) The Act also differs from the Model Law with respect to the place (seat) of arbitration: such a place must be indicated by the parties upon submission, prior to the formal constitution of the arbitral tribunal. If the parties have not so indicated, the place of arbitration shall be determined by the court in the proceedings.

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agreement (“acuerdo arbitral” or “pacto arbitral”). Frutos-Peterson, see note 38, 275.

<sup>48</sup> This was much criticized: a national judge cannot replace the parties will nor take decisions over matters subject to arbitration. Frutos-Peterson, see note 38, 277.

<sup>49</sup> Blackaby/ Lindsey/ Spinillo, see note 45, 61-88.

- g) Under the Act, arbitration commences when all the members of the arbitral tribunal accept their mission.
- h) The parties are free to choose the law applicable to the merits, provided this choice is not in violation of good morals and public order. Parties may also agree on the application of general principles of law, international rules or trade usages. If expressly authorized by the parties, arbitrators may act as *amiable compositeurs*.
- i) The Act allows a dissenting arbitrator to attach a dissenting opinion to the award. If a majority cannot be formed, the President of the arbitral tribunal shall cast the deciding vote. Furthermore, the award must be reasoned (even an award on agreed terms). Other formal requirements include a description of the facts, the decision, and an indication of the time limit granted for the execution of the award by the party or parties, as the case might be.
- j) The Act allows correcting the award, as well as an additional award or an interpretation of the award, but it sets shorter time limits for the application than those set by the Model Law. The correction, additional award, or interpretation must be applied for within five days of receiving the award, and the arbitral tribunal is allowed ten days to process the application.
- k) With respect to challenges against the award, the Brazilian Act provides fewer grounds for setting aside than the Model Law. The main grounds are: nullity of the submission, incapacity of an arbitrator, non-observance of the formal requirements for the award, and the award being *extra petita* or *infra petita*.
- l) Finally, the Act contains a Chapter on the enforcement of foreign awards, thus putting an end to the old “double homologation” system which was extremely troublesome.<sup>50</sup> Now the enforcement of domestic and international awards is dealt with in separate Chapters. Moreover, the grounds for refusal of enforcement of a foreign award are limited by article 38 of the Act and are similar to those suggested in article 36 of the Model Law.

#### Argentina

A marked trend has been observed in Argentina toward the acceptance of arbitrations in the last two decades; there is an increasing ac-

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<sup>50</sup> The previous Arbitration Law required a “double exequatur”: Foreign arbitral awards ought to be confirmed, in the first place, by the courts of the country of origin; and, in the second place, by the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*).

ceptance to include arbitration clauses in international contracts, particularly in those executed by private companies. Toward the end of the 1990's, the official ICC statistics showed Mexico and Argentina leading the share of arbitral proceedings filed under the aegis of that institution.<sup>51</sup> Noteworthy among them is the renowned activity carried out by the Arbitral Tribunal of the Buenos Aires Stock Exchange,<sup>52</sup> an experience that has been emulated by other similar provincial entities.<sup>53</sup>

However, this incipient development of arbitration proceedings both domestic and international has, unfortunately, not gone hand-in-hand with a modern legislation adapted to today's commercial arbitration needs.

Nowadays, the regulations in effect are those of the Code of Civil Procedure (CPC), which also governs federal commercial affairs. The CPC establishes a procedure that in principle appears in favor of arbitration, but in practice has many shortcomings as a consequence of its numerous modifications.<sup>54</sup> In April 2001 – following the “failure” of five earlier draft bills<sup>55</sup> – a new federal arbitration bill was drafted – but not yet passed – based on the UNCITRAL Model Law and on modifications introduced into it by doctrine, jurisprudence and the arbitration practice of the last years.<sup>56</sup> One peculiar feature of the Argentinean Law consists in its attempt to improve the Spanish version used in the UNCITRAL Model Law, taking its terminology from its original English version. On the other hand, this law establishes an identical treatment

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<sup>51</sup> Blackaby/ Lindsey/ Spinillo, see note 45, 22.

<sup>52</sup> The Tribunal acts like an arbitrator bound by legal principles or an *amiable compositeur*, pursuant to the modality chosen by the parties; in the absence of any such provisions, such arbitrator must act and decide as *amiable compositeur* (Regulations, art. 2). See M. Noodt Taquela, “Avances del proyecto de ley argentina de arbitraje respecto de la ley modelo UNCITRAL”, in: *Avances del Derecho Internacional Privado en América Latina. Liber Amicorum – Jürgen Samtleben*, see note 27, 719 et seq. Also <[www.bcba.sba.com.ar/](http://www.bcba.sba.com.ar/)>.

<sup>53</sup> R. Berizonce, “El Arbitraje Institucional en Iberoamerica”, in: *Estudios en homenaje al Profesor Enrique Vescovi*, Fundación de Cultura Universitaria, 2000, 102.

<sup>54</sup> An example of the foregoing is the non-unanimity (among scholars and jurisprudence) in what concerns the mandatory nature of the arbitration clause. Frutos-Peterson, see note 38.

<sup>55</sup> The last drafts to adopt the UNCITRAL Model Law may be checked by visiting <[www.senado.gov.ar](http://www.senado.gov.ar)>.

<sup>56</sup> Noodt Taquela, see note 52, 719-721.

for domestic as well as international arbitrations: although on this point it follows the Model Law, it is a feature to be noted because it had not been considered in the previous drafts of the bill. With respect to the elements that internationalize arbitrations (article 1.3),<sup>57</sup> a variant is introduced: the Argentinean law expands the concept of international arbitration given by the Model Law, incorporating two new elements: on the one hand, it maintains the concept of “facilities of the parties in different States”, but adding the notion of “domicile of the parties in different States.” On the other hand, it also includes the concept of “controlling foreign companies”, with the assumption that the parties may own facilities and domiciles in Argentina although – one or both – may be controlled by persons domiciled abroad. The other special feature of the draft bill relates to the federal structure of the Republic of Argentina: although the Argentinean Law governs both domestic as well as international arbitrations without any difference in treatment, it must be clarified that if the arbitration is international the law applies nationwide; but, if domestic, it applies only to federal disputes and to those incumbent upon a Buenos Aires judge, in the absence of an arbitration agreement (article 1b and 1c). With respect to the matters subject to arbitration (arbitrational), the law is not limited to the field of commerce, but also encompasses civil matters, including corporations and inheritance (article 9).

In a different realm, the Argentinean law also concerns itself with another ambit not regulated by the Model Law, which has to do with third party interventions; their acceptance – which is not positively and exclusively regulated in order not to place limitations – shall remain subject to the discretion of the arbitrator (arts 6 and 7). Article 11 establishes another novelty in arbitral matters; namely, the acceptance of multiple party arbitrations. With respect to legislation applicable to the merits of the litigation, the Argentinean law also offers a variant regarding the Model Law: although both acknowledge the autonomy of the will of the parties in this field, if the parties fail to reach an agreement, the arbitrator will not resort to the conflict laws of international private law, rather it grants the parties the right to choose the legislation which they deem appropriate (article 28.2).<sup>58</sup>

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<sup>57</sup> See under <<http://www.saij.jus.gov.ar>>.

<sup>58</sup> The Argentinean draft bill follows on this point the provisions of art. 17 of the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce.

Finally, the draft provides in relation to the means available to challenge arbitral awards, as a requirement for the subsequent appeal for declaration of nullity, that the party considering that there is a flaw that might cause the nullity of the award, is responsible for submitting it to the tribunal via a “request for clarification” (arts 33 and 34).

### Uruguay

In line with the assessment of Claudia Frutos-Peterson,<sup>59</sup> we can say that Uruguay – along with Argentina, Costa Rica and El Salvador – joins the group of Latin American states that have introduced legislative modifications of importance in the last years. The General Procedural Code (Código General del Proceso – CGP, Law 15.982 of 1988)<sup>60</sup> regulates arbitrations, recognizing as fully legal the awards issued by those “arbitration chambers” to which the parties may decide to subject themselves. The foregoing has facilitated the possibility of opting in favor of one of the permanent arbitral tribunals established by the arbitration chambers, which, in turn, facilitate the selection of particularly specialized judges and, generally, at an acceptable cost. Domestic arbitrations are regulated by the CGP in arts 472 to 507. In turn, international arbitrations are regulated by the New York Convention and the Panama Convention. The enforcement of international arbitration awards is governed by the regulations established by the CGP in arts 502, 537 et seq.<sup>61</sup> Finally, Uruguay also subscribed – although its ratification is pending – the Inter-American Convention of International Private Law (Convención Interamericana de Derecho Internacional Privado – CIDIP V)<sup>62</sup> regarding international contracts.

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<sup>59</sup> Frutos-Peterson, see note 38, 239.

<sup>60</sup> <[www.parlamento.gub.uy](http://www.parlamento.gub.uy)>.

<sup>61</sup> In Commercial Law, there were cases of forced commercial arbitration that were subsequently derogated. Thus, for example, article 511 and 512 of the Code of Commerce regulated corporate matters among partners throughout the existence of the company, its liquidation or partition; article 633 regulated the interpretation of the letters of credit and the obligations stemming there from; article 601 regulated the topics arising from commercial leasing contracts.

<sup>62</sup> The Fifth Specialized Inter-American Conference on International Private Law (CIDIP V), held in the city of Mexico in 1994, adopted the following international instruments: the Inter-American Convention on Law Applicable to International Contracts and the Inter-American Convention on the Traffic of Minors <[http://www.oas.org/dil/esp/CIDIPV\\_convencioncontratosinternacionales\\_home.htm](http://www.oas.org/dil/esp/CIDIPV_convencioncontratosinternacionales_home.htm)>.

Part of the *jus privatista* doctrine considers that the progress to be achieved, in terms of international arbitration in Uruguay, is substantial to the recognition of the autonomy of the will of the parties regarding the choice of law and procedure.<sup>63</sup> With the sole exception of a few scholars, the Uruguayan doctrine denies specifically the possibility of choice regarding the applicable law in international arbitrations; their understanding is, rather, that the Appendix of the Civil Code is applicable to that effect, thereby eliminating the will of the parties in this matter. The same problem emerges with respect to the possibility of autonomy of the will of the parties in terms of their choice of the law governing international legal relationships. The fact that Uruguay ratified the Panama and New York Conventions reflects the validity – at the domestic level – of an international arbitration agreement.

At any rate, the existence of opposing jurisprudence criteria, as well as the diversity of doctrinal opinions has caused a kind of legal insecurity that has not contributed to the development of institutions of an arbitral nature, all of which require a high degree of certainty and foreseeability of legal solutions. Uruguay's ratification of the CIDIP V would put an end to the prevailing climate of uncertainty and become an incentive to the development of international arbitration in this country. Based on the foregoing and mainly because of the international prestige enjoyed by Uruguayan jurists and institutions, it would be highly desirable for the country to adopt a more specific arbitration system.

## 2. The New Spanish International Commercial Arbitration Law

Although Spain's deep reform of its arbitration system in 1988<sup>64</sup> had suggested a bright future – particularly because of its reform of the old system in force from 1953 – the fact is that this law was rapidly overcome by the needs and requirements of international markets that opened up with Spain's full entry into the European Union and the

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<sup>63</sup> M. Jiménez De Aréchaga, *Algunos comentarios sobre la resolución alternativa de conflictos en el derecho comercial moderno: mediación y arbitraje*, La Justicia Uruguaya, Vol. 111, 1995, 169-175.

<sup>64</sup> Law 36/1988 of December 5, 1988, available at <[www.hcivil.udg.es/normacivil/estatal/contract/Larbr.html](http://www.hcivil.udg.es/normacivil/estatal/contract/Larbr.html)>.

economic growth accompanying it.<sup>65</sup> Thus, at the request of the Spanish government, the General Codification Committee<sup>66</sup> was appointed to prepare a draft bill to restructure the arbitration system: it was submitted in February 2003 and approved by both congressional chambers on 18 November 2003. It was enacted a month later (on 23 December 2003), becoming effective on 26 March 2004.<sup>67</sup>

This law is largely inspired by the UNCITRAL Model Law. However, as opposed to the Mexican case, it was not incorporated into Spain's legislation in an identical and literal manner; instead, it raised "significant modifications that take into account not only the criticisms the Model law has received over the years but also the most recent work that UNCITRAL has done on arbitration, as well as advances in jurisprudence, both domestic and foreign."<sup>68</sup> We cannot fail to mention that two domestic laws have also served as a guide for this new Spanish law; these are the Swiss law – in its provisions regarding a) the arbitrability and b) the *in favorem validitatis* principle – and the French law, regarding the criteria adopted in order to define the international nature of arbitrations.<sup>69</sup> Among the most noteworthy provisions of this law, are the following:

*International Arbitration*

This concept is precisely defined by the Spanish legislation following, in the main, the criteria applied by article 1.3 of the UNCITRAL Model Law. But, it adds a complementary criterion: the notion of "interests of international trade." This precision – taken from the French law, as mentioned earlier – broadens the scope of those arbitrations that cannot be considered international by virtue of the requirements posed by article 3.1 of the new law and that cannot be considered domestic in the strict sense of the word, since they are linked to interests of international trade.

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<sup>65</sup> See F. Mantilla-Serrano, "La nouvelle loi espagnole du 23 décembre 2003 sur l'arbitrage", *Revue de L'Arbitrage* 2 (2004), 226 et seq.

<sup>66</sup> The following jurists comprised the Commission: Evelio Verdura y Tuells, Manuel Olivencia Ruiz, Ignacio Díez-Picazo and Fernando Mantilla-Serrano.

<sup>67</sup> Available at <[www.boe.es/boe/dias/2003-12-26/pdfs/A46097-46109.pdf](http://www.boe.es/boe/dias/2003-12-26/pdfs/A46097-46109.pdf)>.

<sup>68</sup> F. Mantilla-Serrano, *The New Spanish Arbitration Act*, 2004, 368.

<sup>69</sup> J. Poudret, "L'originalité du Droit français de l'arbitrage au regard du Droit comparé", *Revue Internationale Du Droit Comparé* 1 (2004), 133 et seq.

“Article 3 – International Arbitration

1. An arbitration is international when any of the following circumstances are met:

- a) When, at the time the arbitration agreement is made, the parties have their legal residence in different countries;
- b) When the place of arbitration as determined in the arbitration agreement or pursuant to it, the place of performance of a substantial part of the legal obligations from which the disputes arises, or the place where the dispute has its closest ties, is situated outside of the country where the parties have their legal residence;
- c) When the legal relationship from which the dispute arises affects the interest of international trade.

2. For the purposes of the above, if any of the parties has more than one legal residence, the legal residence is that which has the closest connection to the arbitration agreement; and if a party does not have a legal residence, its habitual residence shall apply.”

*Arbitrability*

With respect to those topics amenable to international arbitration, the new Spanish law also adopts the general criterion established in article 2.1; i.e. arbitral matters are all those that can be freely disposed of by law<sup>70</sup>; but, once again, adding two complementary criteria:

- a) Neither the states nor state entities are entitled to invoke the privileges of domestic laws in order to avoid the obligations assumed by virtue of the arbitration agreement (article 2.2).<sup>71</sup>

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<sup>70</sup> “Matters capable of free disposition are not exactly defined in Spanish Law, and it is not clear how the Courts will interpret «free disposition» in this context. If it is narrowly interpreted, then it might exclude disputes arising from economic rights subject to mandatory rules, such as unfair competition, intellectual property ... and agency disputes”, D. Cairns/ A. Lopez-Ortiz, “Spain’s new arbitration Act”, *International Arbitration Law Review*, 2004. For further explanations on this matter, see J. Chillón Medina/ J. Merino Merchán, *Tratado de Arbitraje Privado Interno e Internacional*, 1991, 169-180.

<sup>71</sup> Article 2 Law 60/2003 states: “Article 2. Subject matter of Arbitration. 1. All disputes relating to matters within the free disposition of the parties according to law are capable of arbitration. 2. Where the arbitration is international and one of the parties is a State or a company, organisation or enterprise controlled by a State, that party shall not be able to invoke the pre-

b) A controversy may be subjected to arbitration if it meets one of the requirements mentioned in article 9.6, which covers nearly all cases, thus making practically all topics arbitrable.

#### *Arbitration Agreement*

The *in favorem validitatis* principle finds its fullest expression in this law. The new law is more flexible regarding the form and content of the arbitration agreement than the Model Law. Thus, for example, the requirement that this agreement be in writing refers not only to the classic manner of writing, but also to other means that carry a subsequent record of the same (for example, via electronic or optical means of support).<sup>72</sup>

#### *Arbitration according to the Principles of Law or Equity*

The old law established the difference between an arbitration bound by legal principles – issuing decisions according to the law – and an arbitration in equity – issuing decisions *ex aequo et bono* – which are the remains of old legal traditions adopted not only by Spain but also by most Latin American countries. The new law encompasses all of these concepts and hands them over to the arbitrator as one of the powers available at the time of issuing the decision.

The silence of the parties shall be interpreted as the parties' withholding empowerment from the arbitrator to issue decisions.

#### *Arbitrators*

The number of arbitrators must always be an odd number. As opposed to what is established in the Model Law, in the event of silence of the parties, the arbitrator shall be only one (and not three). It is also important to note the provision of article 15 regarding the procedure to follow in order to appoint arbitrators in cases of multiple parties. Regarding the jurisdiction of arbitrators, their actions are governed by the

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rogatives of its own law in order to avoid the obligations arising from the arbitration agreement.”

<sup>72</sup> Article 9 Law 60/2003:

“Article 9: Form and content of the arbitration agreement. 1. The arbitration agreement, which may be in the form of a clause in the contract or in the form of a separate agreement, shall express the will of the parties to submit to arbitration all or some disputes which have arisen, which may arise between them in respect of a determined legal relationship, whether contractual or not contractual (...) 3. The arbitration agreement shall be verifiable in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, fax or any other means of telecommunications that provides a record of the agreement.”

principle of *kompetenz-kompetenz* (article 22.1),<sup>73</sup> thereby leaving no room for doubt that arbitrators shall be entitled to decide all – and not just a few – of the exceptions submitted to challenge their jurisdiction. Another provision of interest is article 23.1, which grants arbitrators the authority to adopt interim measures, “regardless of the form they may take”.

#### *Testamentary Executions*

This is recognized in article 10 and obligates the inheritors or beneficiaries to subject any litigation resulting from the inheritance to arbitration. Since these cases are very uncommon, their inclusion is mostly for historical reasons.

#### *The Arbitral Award*

One of the most interesting features of this law is that it establishes a time limit for the preparation of the award. Article 37.2<sup>74</sup> fixes this time limit at six months counted from the date of submission of the statement of defense or the expiry of the deadline for its submission. The new law does not require – as opposed to its predecessors – to formally register the award with a Notary Public as a requirement for the presumption of authenticity; this act becomes optional. Another feature has to do with the challenge to the award: the term “appeal” is not employed here; rather, it is called an “action for setting aside.” Last, in relation to the enforcement of the award one finds one of the most innovative aspects of this Law. Article 45.1 grants the award its maximum effectiveness, establishing its immediate enforcement, even if an action for setting aside was initiated. Therefore, this action shall not result in

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<sup>73</sup> Article 22.1 states: “Article 22: Competence of the Arbitrators to rule on their own Jurisdiction. 1. The arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any other objection the acceptance of which would prevent the arbitrators from entering into the merits of the dispute. For this purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail by itself the invalidity of the arbitration agreement”.

<sup>74</sup> “Article 37. Time, Form, Contents and Notification of the Award – 2. Unless otherwise agreed by the parties, the arbitrators ought to decide the dispute within six months from the date of the submission of the statement of defence referred to in Article 29 or from the expiry of the period to submit it. Unless otherwise agreed by the parties, this period of time may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision”.

the award being suspended; thus, should it be filed, it will not impede the execution of the award. The aim here is to discourage challenges filed solely with a view to prolonging the procedures, although this suspension may be explicitly applied for by the losing party – if deemed convenient.

#### **IV. Comparative Analysis of the Arbitration Systems in Effect in Chile and Spain and their Future Perspectives**

*The Goal sought: Arbitration to become an effective Means to solve International Commercial Disputes*

It appears evident that the paramount objective – both of the promoters of the new arbitration laws and of those who instrumented their launching – is to have modern legislation systems which introduce arbitration as the preferred mechanism to solve conflicts arising from commercial transactions. Within this context, adopting a law based on UNCITRAL's Model Law is almost a necessity: the latter has been solidly established in the practice of contemporary international arbitration as a modern law that considers all aspects of arbitration and is applicable to various systems of law, while its acceptance and recognition is universal. Ultimately, this was the path followed by both the Spanish as well as the Chilean legislators.

*Awareness of the Need to Adapt the Legislation to the Changing Needs of International Trade*

Both Spain and Chile became immersed in the last few years, in a process of commercial openness and liberalization of their economies: Spain given its privileged position within the European Union, and Chile because of its solid and stable economic development, partly owing to its entry into multiple free trade agreements. A common feature among these two countries is that prior to passing their respective laws, both of them were limited by “archaic” laws in terms of commercial arbitration. Chile's regulations on this matter had been promulgated over one century ago. Spain, on the other hand, notwithstanding the fact that it had a relatively newer law (1988), did not specifically include international arbitration proceedings and instead it included several provisions linked to old commercial usage. For example, the requirement of having awards formally registered by a Notary Public for validating them – all of which rendered the system inappropriate to deal with the new trade

practices, particularly when foreign actors intervened in the process. In this context, in sharp contrast with the above-mentioned economic development, the need to modify the legislation became more evident and acute in these two countries.

*Monist and Dualist Laws*

From what has been stated in the previous Chapters, it should be clear that the option favored by the Chilean legislation was to adopt a dual system: thus, international commercial arbitration proceedings are nowadays governed in this country by the provisions of its new law 19.971, while domestic arbitrations on the other hand, continue to be governed by the specific regulations in effect (COT and CPC). One part of the doctrine<sup>75</sup> has been inclined in favor of this type of arbitration regulation, since it entails special advantages given the particular connotations of international arbitration proceedings, all of which make it advisable to have an organic body of specific norms. Nevertheless, such vision has its detractors. Based on these doctrinal positions, as well as on the previous experience acquired in the field of arbitration, Spain opted in favor of a monist system.<sup>76</sup> Thus, the Preamble of law 60/2003 states:<sup>77</sup> “(...) In the context of what has been denominated the alternative between dualism (where international arbitration is governed completely or in large part by different rules than domestic arbitration) and monism (where, save for a few exceptions, the same rules apply equally to domestic and international arbitrations) this Law follows the monist system. The rules that require a different system for international arbitration than for domestic arbitration are few and clearly justifiable. Despite the awareness that international arbitration responds many times to different demands, this Law starts from the premise – ratified by the current tendency in this field – that a good regulation for international arbitration must be a good regulation for domestic arbitration as well, and vice versa. The Model Law, as a product of UNCITRAL, is conceived specifically for international commercial arbitration; but its inspiration and solutions are perfectly valid, in the large majority of the cases, for domestic arbitration. In this aspect, the Law follows the example of other recent legislation from abroad that has deemed the

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<sup>75</sup> Among them, Roque Caivano. See R. Caivano, *Arbitraje*, 2001, 59.

<sup>76</sup> In this respect, it should be noted that the monist conception is becoming more recognized and proliferating in an increasing majority of countries.

<sup>77</sup> F. Mantilla-Serrano, *Introductory Note to Spain's law 60/2003 of December 23, 2003 on arbitration*, 2004, 485.

Model Law to be appropriate not only for international commercial arbitration but also for arbitration in general (...).”

Therefore, we consider the Spanish law to be monist, since by definition it establishes one single system for domestic and international arbitration.

“Article 1 – Scope of Application

1. This Law shall apply to all arbitration proceedings, whether domestic or international, with their place of arbitration within Spanish territory, but nothing in this law shall be taken to affect the provisions of any treaties to which Spain is a party or any laws containing especial provisions on arbitration.”

It should be noted that – as stated in the statement of motives of the law – this is perfectly consistent with the fact that certain norms exist in Spain’s new arbitration law that are solely meant for international arbitrations: the specificity of the subject matter therein regulated justifies the need to have such special provisions.<sup>78</sup> A clear example of this may be found in article 3, of the Spanish law.<sup>79</sup>

Contrariwise – although this is less usual – one may also find certain provisions that are solely applicable to domestic arbitrations, such as for example the rule requiring that arbitrators be practicing attorneys.<sup>80</sup>

Adopting a monist system – although it might entail a more difficult implementation process – carries along with it, in our understanding, the coverage of a system that in the long term will be more beneficial than the dualist system. This because, on the one hand, it enjoys the unquestionable benefit of making arbitral procedures uniform (thereby simplifying and making the process more familiar to its participants), and, on the other, because of a practical verification: the field of international arbitration has had a more noteworthy evolution and modernization than domestic arbitration, as a result of which, the latter will ultimately benefit from more flexible and recent norms.

*Laws of General Application*

It may be considered that a law is of “general application” when it applies to all procedures – in this case, arbitrations – without a special

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<sup>78</sup> Mantilla-Serrano, see note 77, 481

<sup>79</sup> See III. 2 of this paper.

<sup>80</sup> Article 15.1 Law 60/2003: Appointment of arbitrators. 1. In domestic arbitrations that are not to be decided *ex aequo et bono*, pursuant to article 34, arbitrators will be required to be practicing attorneys, save an express agreement by the parties to the contrary”.

system, or, even if having one, such law will apply in a supplementary manner.

The new Spanish Arbitration Act is meant to govern all the arbitral proceedings occurring in Spain. Therefore, its general scope is meant to harmonize all the provisions that exist in other Spanish laws.

There is only one exception to this rule: the “labor arbitration”. This type of arbitration is compulsory and follows its own specific rules.<sup>81</sup>

The Chilean law is also of general application, since it must be applied to all arbitration procedures that meet the commercial and international criteria established in it, with the above-mentioned limitation (non-inclusion of domestic arbitrations).

#### *Specific and Autonomous Laws*

The general principle that guides the provisions of both the Chilean as well as the Spanish law consists in assisting commercial arbitration proceedings with specific and autonomous regulations.

Their specificity is given by the special and concrete regulation that both countries dedicate to arbitral procedures. As a corollary of the foregoing – in line with our previous analysis – we can say that the Chilean law enjoys a greater degree of specialization than that of Spain, since it regulates international commercial arbitrations exclusively.

Secondly, their autonomy is ensured by the independence of this regulatory body from others: its effective application does not depend on other norms and neither does it need other norms for the interpretation of its terms.

In any case, as it often happens in the practice of law in general – which benefits precisely from the interaction between its different norms – this autonomy must not be understood as being absolute: arbitral laws will eventually need to resort – for example – to Civil Code norms applicable to contracts, or even to certain provisions of the Code of Commerce on the subject. Once again, we understand that given the interrelationship between the Spanish law and the rest of its legal system, this autonomy is perhaps more evident in the Chilean law.

#### *The establishment of the “in favorem validitatis” principle*

This principle, which inspires both the Chilean as well as the Spanish laws, seeks as a general rule to defend the validity of the arbitration

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<sup>81</sup> Labor arbitration intends to settle disputes between unions and employers, and is established in decree-law 2/1995. Mantilla-Serrano, see note 68; and Chillón Medina and Merino Merchán, see note 70, 202-215.

agreement when confronted with any circumstance that may originate more than one interpretation.

The foregoing is not only applicable to the arbitration agreement itself, but it also extends to any other agreement between the parties, to the arbitration procedure as a whole, and to the arbitral award.

The acceptance of this principle reflects the general concern that is perceived in the field of international law on contracts, governed in broader terms by the “*favor contractus*” principle, by virtue of which – given the self-sufficient nature of the latter contracts – they become the “law for the parties.”

Thus, the “*in favorem validitatis*” principle may be observed in two different stages: (i) in the spirit of the law (and, consequently, in that of the legislators); and, more importantly, (ii) from the viewpoint of the arbitrator when deciding the controversy: as opposed to a domestic judge, who is under an obligation to apply certain specific norms, international arbitrators have a greater margin for discretion at their disposal, all of which may lead them to opt in favor of one solution over another in order to give priority to the will of the parties.

## V. Chile’s Past Achievements and Future Challenges as a Center of International Arbitration

This Chapter intends to weigh the pros and cons of, on the one hand, the improvements already introduced into Chile’s arbitration system and, on the other, to visualize aspects – whether regulated or not – that might be substantially improved upon in the future.

It is unquestionable that Chile meets several of the eligibility requirements for a state to become an international arbitration center, as mentioned in Chapter I of this paper.<sup>82</sup>

In the first place, it enjoys the advantages of being a nation undergoing an economic boom and a revitalization of its economy. The various free trade agreements (FTA) and bilateral investment agreements (BITs) signed by Chile constitute a reflection of the strength acquired by the Chilean economy as a whole.

In the second place, it is important to highlight the benefit of a modern and recently approved Law 19.971 on international commercial ar-

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<sup>82</sup> See under I. of this paper.

bitration. Without such a regulatory body, this economic prosperity, propelled by, among other factors, the commercial agreements described above, would appear incomplete. As stated by Gonzalo Biggs,<sup>83</sup> this law is a perfect complement to Chile's commercial and economic policies.

Moreover, Chile's ratification of the New York and Panama Conventions goes hand-in-hand with this law, rounding up this overall panorama.

In the third place, Chile enjoys a good degree of international prestige: the solid image of its public institutions and the confidence that they generate in the international community, because of their transparency and low level of corruption, rank Chile number twenty among the 146 countries analyzed worldwide, and number one in Latin America.<sup>84</sup> Clearly, this fact is particularly related to the existing perception of the judiciary (and justice in general) and the other public institutions linked to arbitral processes.

Likewise, having outstanding arbitrators and jurists constitutes another of Chile's major strengths: currently, there is a quite broad list of professional arbitrators with experience in both domestic and international commercial arbitration. This phenomenon is also apparent regarding lawyers and other professionals akin to commercial affairs who have lately shown increasing interest in specializing in this subject matter.

Regarding the question of arbitrators, it must be noted that one of Chile's significant advantages is that – like other Latin American countries – arbitrators are professionals traditionally trained in the study and practice of the law. This situation, although it may appear obvious at first, in fact is not: in other cultures, such as the Common Law tradition, for example, the belief prevails that the capacity of professional arbitrators must not necessarily be bestowed upon juridically trained persons.<sup>85</sup>

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<sup>83</sup> Biggs, see note 3, 8.

<sup>84</sup> Chile was given 7.4 points (ranking 20 in the list) in the 2004 annual report prepared by Transparency International, a non-governmental organization that monitors and combats corruption. See under <[www.transparency.org](http://www.transparency.org)> and <[www.chiletransparente.cl](http://www.chiletransparente.cl)>.

<sup>85</sup> However, it should be noted that a certain sector of the doctrine sees a disadvantage in this excessive presence of jurists in the field of arbitration in Hispanic countries: "... arbitration in our countries is open to the allegation that it is excessively formal. It is even said that arbitration in Hispanic

Further, Chile is equipped with institutions and facilities of high standards in order to support the arbitration process. The continuous development of its means of transportation and the modernization path assumed by Chile in this sense, no longer hide the country on the extremities of the world, but rather, places it as one of the region's main interconnecting air (airports) and land (highways) center's. Today's strong telecommunications development also places Chile at the vanguard of the other countries of the region.

Equally noteworthy are Chile's advantages in terms of arbitration costs; this is a subject matter of considerable significance to all actors in general, since Santiago is a city with a relatively low cost of living; but, it becomes particularly important to small and medium-size Chilean companies which, in arbitrations submitted prior to the approval of Law 19.971, had to have deep pockets in order to finance the expenses implied by arbitration procedures since they had to be carried out abroad.

As with any new law, the system introduced by Law 19.971 also has its "weak spots". The first obstacle – and challenge – faced by Chile today is that the new law is indeed so recent that no arbitration cases have yet been submitted to its jurisdiction. Consequently, as of today, Chile lacks jurisprudence in international commercial arbitration cases. Since the only "cure" to this circumstance is the passage of time – as international cases begin to be progressively submitted to its local jurisdiction – the country's primary role at this time should be to elicit the confidence of commercial actors thereby motivating them to partake of this procedure.

Another key aspect would be to establish in which ambit, or under the aegis of which institutions, arbitrations should – or should not – be carried out. Currently, there are at least two institutions in Chile that perform commercial arbitrations: the Santiago Chamber of Commerce (CCS)<sup>86</sup> and the Chilean American Chamber of Commerce (Am-

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countries is nothing other than pseudo-judicial proceedings." B. Cremades, "New Challenges and Demands for International Arbitration in Latin America", Papers of the International Commercial Arbitration Conference AmCham Chile, see note 20, 156. With respect to this judicialization of arbitrations, Juan Colombo Campbell, following Patricio Aylwin ("*El Juicio arbitral*") states that: "(...) arbitrators are judges who, as such, are empowered by jurisdiction and not merely private conventions." J. Colombo Campbell, *La competencia*, 1959, 140.

<sup>86</sup> <[www.camsantiago.com](http://www.camsantiago.com)>.

Cham).<sup>87</sup> Although the resort to a National Chamber of Commerce to support arbitrations has been criticized by some scholars,<sup>88</sup> both the Santiago Chamber of Commerce and the Chilean American Chamber of Commerce appear to have come a long way in terms of gaining exposure to domestic arbitration proceedings.<sup>89</sup>

All this augurs an encouraging future for the development of international commercial arbitration proceedings brought under them.

Regarding the development of arbitral proceedings as such, one aspect has generated debate ever since the congressional debate of Law 19.971 and until after its promulgation; namely, the role to be played by foreign lawyers in arbitral proceedings to be carried out in Chile.

Here, we must distinguish between two different hypotheses. With respect to the participation of foreign lawyers as arbitrators, in principle, there should be no problem since the law (in addition to the general principles that guide the arbitration rules) has already ruled in this respect, as expressly mentioned in the President's message upon submitting the draft bill for congressional debate and approval.<sup>90</sup>

Additionally, the Law establishes in its articles the primacy of the will of the parties in order to appoint the arbitrator. This is provided in article 11. 1 of Law 19.971.

“Article 11 Appointment of Arbitrators

Unless otherwise agreed by the parties, the nationality of a person shall not obstruct that person's performance as arbitrator”.

Nevertheless, the debate hovers around the performance of defense lawyers having a nationality other than the Chilean one.

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<sup>87</sup> <[www.amchamchile.cl](http://www.amchamchile.cl)>.

<sup>88</sup> See Frutos-Peterson, see note 38, 214-217; and M. Wilkey, “Multinational Arbitration: Mitigating the Clash of Legal Cultures”, in: Papers of the International Commercial Arbitration Conference AmCham, see note 20, 138.

<sup>89</sup> For instance, statistics show that the Mediation and Arbitration Center of the Santiago Chamber of Commerce has received some 500 cases over the years since the date of its inception, exhibiting a continuous increase to this date. See under <[www.camsantiago.com](http://www.camsantiago.com)>.

<sup>90</sup> See II. 2. of this paper. From the text of the presidential message, it may be inferred that the draft bill constitutes a closed regulatory body meant to govern both the substance as well as the form of arbitrations with international elements.

The COT,<sup>91</sup> in its article 526, states the requirement that lawyers, in order to practice their profession within the Chilean territory, must be nationals of this country.

“Article 526: Only Chileans may exercise the legal profession. The foregoing shall be understood without prejudice of the provisions of international treaties currently in effect.”

This controversy was not explicitly settled by Law 19.971, all of which has allowed room for various interpretations.

Although many scholars – as well as congresspersons who debated the law – favor the provisions contained under article 11 of Law 19.971, unequivocally establishing the spirit of the law regarding arbitrators and, consequently, its prevalence over the COT provisions, the fact is that the subject matter remains wide open to debate. And, it is equally true that the lack of certainty on this topic makes it possible that in the future one of the parties to arbitration, for example, may file for the annulment of its counterpart’s actions based on the alleged lack of legitimacy of the defense lawyer.

Although this is a controversial topic, a single precedent of this type would suffice for the country to have a “black spot” in its jurisprudence history that might, in turn, dissuade potentially interested parties against choosing this arbitration seat.<sup>92</sup>

This is no minor issue and, given the repercussions and contradictory versions that it has generated, we believe that it deserves to be clarified. To this effect, a legislative clarification would be best.

Another topic of an essentially practical nature regards the use – within arbitration proceedings – of a language other than Spanish; i.e. English.

The ability to carry out an entire arbitration procedure in English is an indispensable tool to compete successfully in this global world. And, on this point, Chile still has a long way to go. On the one hand, this is a very important matter that ought to be taken into consideration by the Arbitration Centers (as seats of arbitration proceedings) when implementing their resources and facilities. On the other hand, although this country has many professionals and arbitrators that are fluent in English, this situation is not evenly applicable around the country – neither at the academic level nor at the practical commercial level. Therefore, since the number of people who have an adequate command of the

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<sup>91</sup> *Código Orgánico de Tribunales*, see under <www.bcn.cl>.

<sup>92</sup> In fact, this already happened in one case presented a few years ago.

English language remains insufficient – albeit not too difficult to solve – this is a question worth considering within the overall implementation of arbitral proceedings.

Also directly connected with the implementation of these new proceedings, a further aspect needs to be mentioned: it should be noted that although the judges called upon to intervene in arbitration proceedings come from superior hierarchical echelons (judges of the Courts of Appeal), they are ill-equipped in the specialized field of international law, since such topics lie beyond their own field of jurisdiction.<sup>93</sup>

On this point, a task to be carried out in the future by those institutions called upon to support arbitral proceedings, such as the Chilean Supreme Court, on the one hand, and the Chilean Judicial Academy and the Institute of Judicial Studies, on the other, should be to provide specialized training courses and updating opportunities on this subject.<sup>94</sup>

Finally, one last point that still generates uncertainty with respect to the development of international commercial arbitrations in Chile has to do with the eventual attitude of Chilean courts when called upon to intervene in arbitration proceedings.<sup>95</sup>

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<sup>93</sup> Wilkey, see note 88, 136-147.

<sup>94</sup> Article 79 of Chile's Constitution, states as follows: "Article 79. The Supreme Court is empowered with the directional, correctional and economic superintendence of all the courts of law of the nation. The exceptions to this norm are the Constitutional Tribunal, the Electoral Tribunal, the regional electoral tribunals, and military tribunals in times of war ..." Also, article 506 of the COT states as follows: "Article 506. The management of the human, financial, technological and material resources allocated toward the operation of the Supreme Court, the Courts of Appeal and the Courts of First Instance, of Minors and of Labour shall be exercised by the Supreme Court through an entity called Judicial Branch Management Corporation (Corporación Administrativa del Poder Judicial). The Judicial Branch Management Corporation shall be responsible for: 4 *Organizing courses and conferences aimed at educating and training judicial employees...*" (emphasis added).

<sup>95</sup> In sum, Chile's courts of law are required to partake of Law 19.971 in: A) appointing and challenging the arbitrators (article 11 3) and 4), and article 13 3); B) all matters referred to the processing of evidence, as a form of aiding the arbitral tribunal, and; C) annulling arbitration awards.

Article 5 of Law 19.971, as stated earlier, provides as a general rule:

“Article 5 Extent of Court Intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.”

The practice in this field – given the courts’ exposure to domestic arbitration cases – is that Chilean judges have been extremely respectful of the independence of arbitral proceedings and, consequently, they have limited their actions in them to the minimum.

Nevertheless, during the parliamentary debate sessions of Law 19.971, the question related to the recourses that could be presented against the arbitral award. At this stage, the Senate Commission pointed out the Chilean Supreme Court of Justice observations in relation to the fact that article 34 of the law was not sufficiently precise about determining which recourses were admissible. Specifically, the controversy was presented in relation to all those recourses regulated in the Chilean Constitution, as the appeal for inapplicability based on unconstitutionality of the law (“*recurso de inaplicabilidad por inconstitucionalidad de la ley*”). Although consensus was finally reached regarding the acceptance of those legal recourses, the discussion concerning the legal remedy of complaint (“*recurso de queja*”) remained inconclusive.<sup>96</sup> The core of the discussion was if arts 5 and 34 of the Law were taking away part of the Chilean Supreme Court of Justice’s correctional, disciplinary and economic jurisdiction to decide over the arbitrators. Concerning this matter, the Chilean Constitutional Tribunal, in a report submitted to the Senate,<sup>97</sup> decided on the constitutionality of the Chilean draft bill on international commercial arbitration, including its arts 5 and 34.<sup>98</sup> This decision was based on the fact that the above mentioned provisions have no effect on either the attributions given to the Supreme

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<sup>96</sup> Patricio Aylwin states (...) “Arbitrators, in their capacity as judges, are subject to correctional, disciplinary and economic jurisdiction of the Supreme Court of Justice. (Chilean Politic Constitution article 84) (...) By virtue of this circumstance, Chile’s jurisprudence has unanimously acknowledged the appropriateness of remedies of complaint (“*recurso de queja*”) filed against them, which may be exercised in spite of any waiver in order to seek punishment for faults or abuses eventually committed by arbitrators while exercising their duties and to obtain a prompt remedy for the evils motivating such complaints (COT, arts 540 and 541)”. See P. Aylwin, *El juicio arbitral*, Fallos del Mes, 1982, 511-512.

<sup>97</sup> Oficio Nr. 2117 del Tribunal Constitucional.

<sup>98</sup> Decision of the Chilean Constitutional Tribunal, 25 August 2004.

Court of Justice by the Chilean Constitution, nor on the judicial actions that the latter enables in favor of those who may be affected in their fundamental rights even though the international commercial arbitration law applies.

The remedy of complaint stems from article 79 of the Constitution of Chile,<sup>99</sup> which states: “The Supreme Court has the directive, correctional, and economic superintendence of all the courts of justice of the nation ...”.<sup>100</sup>

The remedy of complaint is governed by arts 545,<sup>101</sup> 548 and 549 of the COT. It may be defined as that recourse exercised before the hierarchically superior court and against the inferior judge or judges who

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<sup>99</sup> See note 94.

<sup>100</sup> When referring the “correctional” superintendence, the constituent alluded precisely to the disciplinary powers in virtue of which a remedy of complaint is processed (enabling the Supreme Court to amend or correct whatever is wrong or defective, such as repressing or censuring the party incurring in it).

<sup>101</sup> The article states the following: article 545. – The sole objective of the remedy of complaint is to correct gross negligence or serious abuses committed upon issuing jurisdictional resolutions. It is appropriate only when such gross negligence or abuse is committed in an interlocutory judgment putting an end to a lawsuit or making its continuation or finalization impossible, and that it is not eligible for any remedy whatsoever, ordinary or extraordinary, notwithstanding the authority of the Supreme Court powers to act on its own initiative pursuant to its disciplinary powers. The exceptions are appeal able final judgments issued by arbitrating arbitrators, in which case the remedy of complaint is indeed appropriate, in addition to the appeal for annulment on grounds of breach of a procedural right. The decision honoring a remedy of complaint shall contain the precise considerations demonstrating the negligence or abuse, as well as the manifest error or omissions that constitute them and that exist in the resolution motivating the recourse, and shall determine the measures toward remedying such negligence or abuse. Under no circumstance whatsoever shall it be permissible to modify, amend or invalidate judicial resolutions regarding which the Law contemplates ordinary or extraordinary judicial remedies, unless it is a remedy of complaint filed against an appeal able final judgment issued by an arbitrating arbitrator. Should a superior court of justice, upon exercising its disciplinary authority, invalidate a judicial resolution, it must apply the disciplinary measures that it deems appropriate. In that case, the courtroom shall make arrangements to inform the full court about the background information in order to apply the pertinent disciplinary measures, given the nature of the negligence or abuse, which may not be inferior to a private warning.

would have issued – in a case tried by them – a resolution tainted by gross negligence or abuse, requesting the judge or judges to promptly remedy the evil motivating the complaint by means of an amendment, revocation or invalidation of such resolution. Any appropriate disciplinary sanctions would still be applied.

In order for a remedy of complaint to be appropriate, the procedural law requires:

- 1) That in issuing a judicial resolution, the judge or judges would have incurred gross negligence or abuse;
- 2) That such gross negligence or abuse would have been committed in issuing a certain specific kinds of judicial resolutions indicated by the law (final or interlocutory judgments, provided that they put an end to the lawsuit or make its continuation impossible); and
- 3) That the judgment making appropriate a remedy of complaint according to its juridical nature is not eligible for any legal recourse.

Considering the aforementioned, it is doubtful whether the remedy of complaint is appropriate against those arbitrators that are governed by Law 19.971.<sup>102</sup> The foregoing, not only because such law is inspired by the need to generate an international arbitration procedure that is sufficiently simple, quick and effective (lacking in stalling delays to which an international commercial dispute cannot be exposed), but rather, because upon analyzing Chile's legal system, more than sufficient reasons arose to deny its appropriateness.

Nevertheless, as was mentioned before, two arguments can be outlined in relation to whether the remedy of complaint is appropriate or not:

a) Appropriateness of the Remedy of Complaint within the Arbitral Procedure governed by Law 19.971:

A position favorable to the appropriateness of the remedy of complaint could be inferred from an erroneous interpretation of the reports issued by the Constitutional Tribunal as well as by the Supreme Court during the legislative debate. In such reports, both organs stated the need to “salvage” the authority granted by the Constitution to the Supreme Court (particularly under article 79). Thus,

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<sup>102</sup> The use of the expression “against the arbitrators” is consequence of the fact that the remedy of complaint is not filed against a resolution, but against the judge or judges who issued a resolution incurring gross negligence or abuse, so that if such fault or abuse is accredited it be modified, amended or left without effect in order to promptly end the evil.

it could be argued that the Supreme Court shall always retain the directive, *correctional* and economic superintendence of the courts of justice of the nation, including the international arbitral tribunals of the law under study. Moreover, it may be pointed out that precisely because it was deemed necessary to include an explicit reference to it within the articles of Law 19.971, such constitutionally consecrated superintendence is always applicable, and international commercial arbitrations should not be an exception.

Finally, it may be held that Law 19.971 establishes that an award may be challenged when it is deemed “contrary to Chilean public order.” In this respect, Prof. Patricio Aylwin Azócar<sup>103</sup> indicates that the fact that the parties waive certain legal recourses in the “*arbitration clause*”, does not mean that this waiver “empowers the arbitrator to violate public order provisions, whether in the hearing of the case – for example, by disavowing the right to defense – or in the verdict – for example, by judging against the provisions of a public order norm” – (and Prof. Aylwin continues) “... we believe that in our legal system, hypotheses such as those referred to above, represent gross negligence or abuses susceptible of being corrected by way of the remedy of complaint, which – as we shall see – is by its very nature unrenounceable. Consequently, even if the parties had waived all legal recourses against the arbitrator, the arbitrator’s violation of public order norms shall be always susceptible to challenge via a remedy of complaint (...).”<sup>104</sup>

b) Inappropriateness of the Remedy of Complaint within the Arbitral Procedure governed by Law 19.971:

As mentioned before, it seems clear that both the spirit as well as the intention of those who promoted this law, was to make this arbitral procedure as expeditious, clear and effective as possible. Consequently, it is reasonable to assume that, if Chile aspires to provide the globe with a procedural tool that is truly effective in the mechanism for solving commercial disputes, it would be preferable that the remedy of complaint was not considered.

In effect:

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<sup>103</sup> Aylwin, see note 96, 291 et seq.

<sup>104</sup> It is important to highlight that the preceding statement was written by Prof. Aylwin not only prior to Law 19.971, but also in reference to those arbitral tribunals governed by the COT and not – as will be explained herein below – to the international arbitral tribunals of Law 19.971.

1) The arbitrators of an *international* arbitration procedure are not included within the concept of “special tribunals” of article 5 of the COT<sup>105</sup> since they are not omitted from the jurisdiction of ordinary courts on any subject matter, but rather, they decide on subject matters heretofore not regulated by Chile’s positive law. In this manner, international commercial arbitrations, although entailing a jurisdictional activity, would not be left to nor remain dependent upon the national jurisdiction system, except in those matters in which the law specifically bestows authority upon some courts of the Republic (as is the case of the action for the setting aside Law 19.971, but not the remedy of complaint). Thus, upon the silence of the law, it would not be lawful to presume or bestow any authority upon the Supreme Court nor upon any other superior court with respect to these conflict resolution mechanisms.

As stated during the parliamentary debate, what the draft bill (nowadays Law 19.971) intended was “... that the intervention of Chilean courts be as limited as possible, which does not mean that they be left without jurisdiction; but rather, that they should intervene only when called upon to do so, and in all other matters, to let the autonomy of the will of the parties operate.” This is a way of saying that the courts would be called upon to participate only “by exception.”

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<sup>105</sup> Article 5: “The courts mentioned in this article shall hear all judicial matters filed within the territory of the Republic of Chile whatever their nature or the capacity of the persons intervening in them, notwithstanding the exceptions established by the Constitution and the Laws.

The ordinary courts of justice of the Judicial Branch are: the Supreme Court, the Courts of Appeal, Court Presidents and Ministers, the oral courts on criminal matters, the first instance courts and the guarantee courts. The special courts of the Judicial Branch are: Minor Courts of First Instance, Labour Courts of First Instance, and Military Courts in times of peace, which shall be governed – insofar as their organization and powers are concerned – by the statutory legal provisions contained in law 16.618, in the Labor Code, and in the Military Justice Code and its complementary laws, respectively, whereas the provisions of this Code shall be applicable to them only inasmuch as the referred legal bodies expressly remit to it. All other special courts shall be governed by the laws that establish and regulate them, without prejudice of remaining subject to the general provisions of this Code. Judges and arbitrators shall be governed by Title IX of this Code.”

2) Additionally, one must consider that there are literal reasons that deny the appropriateness of the remedy of complaint. In effect, the latter remedy is appropriate against resolutions that – among other characteristics – are not subject to recourses of any kind – and, since arbitral awards can indeed be set aside, the remedy of complaint would be inappropriate.

In any case, the fact that arbitral awards cannot be challenged via a remedy of complaint should not trigger apprehension or fear, since – as it was held by the procedural expert, Prof. Cristian Maturana, in his intervention in the Senate Commission that studied the draft bill – the present Law provides sufficient protection to the national legal system and to our sovereignty “because it establishes respect of the respective public order” (Chile’s public order). Consequently, he stated “... from the point of view of procedural law, the primary principle is to make this draft bill consistent with the UNCITRAL model”, adding that “the experience of those countries that have excessively modified such model law has been quite negative, since it has had no effect at all”.

## **VI. Conclusions**

Since about two decades ago, international commercial arbitration has been gathering momentum worldwide. For historical reasons, this growth has been most pronounced in Latin America. In this region, as in the rest of the world, arbitrations have become the natural place for encounters, conciliations and agreements derived from commercial practice.

Circumstances appear to have demonstrated that it is important not only to promote arbitral justice, but also, to take sides in favor of it. On the one hand, arbitrations entail improving the quality of service of the judicial system, by helping the parties to elucidate more complex controversies, contributing a greater degree of specialization and, by offering more technically-equipped locations on the respective subject matters. On the other hand, it becomes indispensable by conferring upon those who take part in trade and international exchange activities, clear, efficient and safe conditions in order to resolve the disputes that inevitably arise from them.

Mindful of this reality, several countries – among them, Spain and Chile – have opted in favor of following the path towards establishing a system that would provide effective, well-respected and trustworthy

arbitral proceedings, choosing to modernize their domestic arbitration legislations on the basis of the UNCITRAL Model Law.

Spain chose to emulate the spirit of the Model Law, but not limit itself to following its articles in a strict manner; instead, it introduced certain modifications that its earlier commercial practice had already consolidated as being useful and necessary. Thus, following a rapid legislative debate, Law 60/2003 became effective implementing an expeditious and efficient arbitral procedure that governs both domestic as well as international arbitrations. This legislation includes several innovative features, among which must be noted the acceptance of multiple parties, maximum periods to conclude arbitration proceedings and the right to have awards enforced immediately after their issuance (even if an action to set it aside should be pending), among others.

Chile, on the other hand, decided to follow the UNCITRAL Model Law more closely. Its new Law 19.971 filled the legal void in international commercial arbitration and harmonized its new regulations with the provisions contained in the New York and the Panama Conventions. In this manner, it has been able to regulate international arbitral procedures in a clear and concise way; all of which will surely bring about increased development possibilities in the field of international arbitration.

If Chile aspires – as we believe it does – to become an effective international arbitration venue in the not too distant future, it must further develop its own strengths: i.e. sustained economic growth, a solid image among the other countries of the region, the confidence generated by the transparency of its institutions, etc. While all of these factors will be very much taken into account by the parties upon choosing Chile as their seat of international arbitration, ultimately, however, they are merely part of the context surrounding arbitration procedures. The legal cover provided by the arbitration system, albeit in need of some improvement, is soundly rooted in the UNCITRAL Model Law.

From now on, the work to be carried out in Chile by those institutions entrusted to house arbitral proceedings will become very relevant. However, the trust placed in the new system and in the expertise to be acquired on the topic of domestic arbitration places/seats, permit, in principle, a promising outlook.

Notwithstanding the foregoing, it is advisable to exercise a certain degree of moderation in order to avoid generating excessively high expectations that might not be fulfilled. It should be taken into account that Chile will compete with several other states – such as Mexico, for

example – that already enjoy a long-standing and well-consolidated experience as international arbitration centers. Because of this, it is advisable to approach this challenge slowly but surely. First, Chile's initial steps should be focused, for instance, in developing international commercial arbitration proceedings that connect small and medium enterprises (SMEs) of this country seeking for settlement of their commercial disputes. And, in a second stage, Chile should take advantage of its leading position in the Latin American region, and by nurturing this, aim at a first stage of regional consolidation. In that sense Chile is likely to enjoy a good start in benefiting from its MERCOSUR membership condition in order to capture that important market. Nobody denies that the arbitral procedure installed by this regional group has not managed to operate as expected; a reason why Chile may become a valid alternative to be seriously considered.

To sum up, Chile must take heed of its unquestionable advantages and improve its shortcomings. One way of doing this would be to launch and set in motion as soon as possible its new mechanism to solve commercial conflicts through arbitration.

Unfortunately, little time has yet elapsed since the enactment of Chile's new arbitration law and its incorporation into the country's juridical system. Consequently, it is not yet possible to undertake a detailed study of its repercussions in the country's commercial practice.

In spite of the foregoing, this system – as well as that of Spain, with similar features and chronology – admits a theoretical examination of the provisions contained in the letter of the law and a projection of some of the consequences envisaged. The purpose of this paper, therefore, has been to attempt to explain and develop such eventual consequences.

