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Chile

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A. Legislation and rules

A.1 Legislation

Arbitration in Chile continues to be primarily governed by the Organic Code of Courts, the Code of Civil Procedure and Act No. 19,971 on International Commercial Arbitration (the “ICA Law”), which is mostly a replica of the UNCITRAL Model Law.

Chile is also a signatory to the New York Convention, the Inter-American Convention for Letters Rogatory, the Panama Convention and the ICSID Convention. Additionally, most of the free trade agreements and bilateral investment treaties (BITs) that Chile has entered into provide for specific arbitration mechanisms to settle disputes arising from their application.

No recent legal changes have been introduced nor proposed for arbitration.

Chile has a longstanding tradition in arbitration. Case law demonstrates the strong and sound support of Chilean courts for due autonomy and independence of arbitration tribunals. This judicial support, alongside the well-recognized quality of arbitrators and

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national arbitral institutions, good infrastructure, and low rates of corruption has positioned Chile as a reliable seat for arbitration in Latin America.

A.2 Institutions, rules and infrastructure

There are two main arbitration institutions in Chile: the Arbitration and Mediation Centre of the Santiago Chamber of Commerce (CAM) and the National Centre of Arbitration of Chile (CNA). Other minor arbitration institutions are located throughout the country.

A.2.1 CAM

The CAM is a non-profit institution founded in 1992 by the Chamber of Commerce of Santiago with the support of the Bar Association of Chile. Throughout its 25 years of service, the CAM has handled around 3,100 arbitrations. During the first semester of 2017, 158 new cases were filed before the Centre.

The CAM has its own procedural rules both for international and domestic disputes, unless both parties agree to establish different rules. The CAM has also recently developed a dispute boards service, an alternative system of early resolution of disputes, under which a panel of independent experts helps the parties resolve their disputes through informal assistance. The CAM has also developed E-CAM, an online system that makes procedural tracing easier.

The CAM headquarters are located in the city center of Santiago,⁴ and its facilities are new, modern and comfortable.

A.2.2 CNA

The CNA was created in 2007 by independent professionals to constitute an alternative to institutional arbitration in Chile. The CNA Santiago handles arbitration and mediation for solving domestic

⁴ CAM Santiago is located in Monjitas 392, Floor 11, borough of Santiago, city of Santiago de Chile. Its website is: www.camsantiago.cl.



disputes and, since its creation, it has handled more than 100 cases. The CNA is located in the financial district of Santiago.⁵

A.2.3 Regional institutions of arbitration

There are also other regional arbitration institutions, such as the Centre for Arbitration and Mediation of the Region of Valparaíso, located in the port of Valparaíso,⁶ while Biobío Arbitration and Mediation Centre is located in the city of Concepción,⁷ and the Centre of Conciliation and Arbitration has its venue in the southern city of Puerto Montt.⁸

B. Cases

In accordance with the general provisions of the UNCITRAL Model Law, the Chilean ICA Law made clear that the only resource available to challenge an arbitral award is a request for annulment (*recurso de nulidad*), which must be submitted before a court of appeal. In this regard, the Chilean superior courts (Supreme Court and Courts of Appeal) have consistently (i) rejected actions other than the request for annulment of arbitral rulings; and (ii) ruled against all requests for annulment of international commercial arbitral awards in the last 10 years. As a matter of fact, to this date, Chilean superior courts have never granted an annulment of an arbitral award based on the ICA Law. Therefore, the criterion held by the Supreme Court to challenge an arbitral award is still narrow and restrictive, thus protecting the value of the arbitral award.

⁵ CNA is located in Apoquindo 3600, Floor 5, borough of Las Condes, city of Santiago de Chile. Its website is www.cna.cl.

⁶ Its address is Plaza Justicia, Floor 1, city of Valparaíso. Its website is www.abogados-valparaiso.cl.

⁷ Its address is Caupolicán 567, Office 201, city of Concepción. Its website is www.cpcc.cl/centro-de-arbitraje-y-mediacion/

⁸ Its address is O'Higgins 144, city of Puerto Montt. Its website is www.colegioabogados.info/centro-conciliacin-y-arbitrajes.

Some of the most significant rulings of Chilean superior courts in regard to international commercial arbitration are as follows:

B.1 *Huber/Coderch Mitjans Jorge - Sociedad Río Bonito S.A. - Sociedad Queltehue S.A.*⁹

The company Rio Bonito S.A. appeared before the Court of Appeal of Santiago to request the annulment of an arbitral award. The Court of Appeal found that the arbitral award was duly pronounced, since all legal requirements were met. Therefore, the request was denied by the court.

Subsequently, Rio Bonito presented a complaint against the judges of the Fifth Chamber of the Court of Appeal of Santiago, arguing that these judges had exerted their functions in a “wrongful or abusive” manner.

The Supreme Court declared that in conformity with the ICA Law, the action for annulment is the only legal remedy available to challenge an arbitral award. Therefore, the Supreme Court found the complaint to be inadmissible, because it meant asking the Supreme Court to determine a matter that had already been met and resolved by an arbitral court.

On the other hand, the Supreme Court noted that Article 63 of the Organic Code of Courts established that a court of appeal is the only court capable of delivering a decision in cases of extraordinary resources directed against arbitrators and their sentences.

The Supreme Court declared the request filed by Rio Bonito to be inadmissible.

⁹ Court of Appeal of Santiago, Docket No. 1739-2015; Supreme Court, Docket No. 30967-2015.



B.2 *Ingeniería Proyersa Ltda. v. Arbitrator Mr. Figueroa*¹⁰

In 2016, Ingeniería Proyersa Ltda. filed a request for the annulment of an international commercial arbitration award before the Court of Appeal of Santiago. It was alleged that the arbitral award was contrary to due process, since the award was made in violation of the Chilean rules of civil procedure. Therefore, this award was argued by Proyersa to be contrary to the Chilean public order (*Orden Público*).

The Court of Appeal of Santiago stated that rules of civil procedure were not part of the legal provisions of the Chilean public order. Furthermore, the court defined “public order” as a set of basic norms of justice and morality of the legal system, including the principles of minimal judicial intervention, exceptionality in the revision of the award and restrictive interpretation of the causes for annulment. Therefore, the court dismissed the annulment request.

Proyersa submitted a complaint to the Supreme Court about the judges of the Court of Santiago on the grounds of “wrongful or abusive” exertion of their jurisdictional power. Once again, the Supreme Court stated that according to the ICA Law, the only mechanism suitable to challenge an international commercial arbitral award was a request for annulment. Therefore, the Supreme Court found the complaint inadmissible.

B.3 *D’Arcy Masius Benton & Bowles Inc. v. Arbitrator Mr. Jorquiera*¹¹

In 2005, the president of the CAM named an arbitrator and established the ICA Law as the applicable rules for an arbitral proceeding arising from an arbitral clause from 1996. Nevertheless, one of the parties, D’Arcy Masius Benton & Bowles Inc., stated that the ICA Law was not applicable as the relevant contract was signed many years ago, before the entry into force of this legal framework. D’Arcy filed a

¹⁰ Court of Appeal of Santiago, Docket No. 2685-2016; Supreme Court, Docket No. 62114-2016.

¹¹ Court of Appeal of Santiago, Docket No. 865-2006.

request for reconsideration (*recurso de reposición*) before the arbitrator, jointly with an appeal. The arbitrator dismissed the request for reconsideration and did not allow D’Arcy to lodge an appeal with the Court of Santiago. In particular, the arbitrator found that, according to the ICA Law, the only mechanism available to parties that enabled local courts to intervene in the arbitration was the request for annulment.

D’Arcy submitted a request for reconsideration of the appeal refusal before the Court of Santiago. However, the court found that the ICA Law was fully suitable to govern the arbitration.

Given that the Act of Retroactive Effect of Law of 1861 established that the laws concerning judgments prevail once they come into force, and they do not affect the contract but the procedural rules of the arbitration, the court found that the arbitrator was entitled to determine the ICA Law as the law applicable to the arbitral proceedings. Therefore, the Court of Santiago dismissed the request for annulment.

B.4 *Publicis Groupe Holdings B.V. v. Arbitrator Mr. Vial*¹²

Publicis Groupe Holdings B.V. challenged an arbitral award by filing a request for annulment before the Court of Appeal of Santiago. Publicis alleged that the award was issued in contravention of the Chilean public order, in both substantive and procedural aspects. In particular, Publicis held that both the existence and the determination of damages in the arbitral award were not based on legally rendered evidence, instead consisting of mere speculations that lacked of any supporting antecedent. Besides, Publicis alleged that the lack of legally rendered evidence was mandatorily regulated by the Code of Civil Procedure.

However, the Court found that no breach was made in the arbitral ruling, given that all evidence in the arbitration procedure was rendered according to the rules of procedure that governed such

¹² Court of Appeal of Santiago, Docket No. 9134-2007.



arbitration procedure. Therefore, the Court dismissed the request for annulment.

B.5 *Administradora Río Claro S.A. v. Arbitrator Mr. Jana*¹³

In April 2017, the Court of Appeals of Santiago dismissed a complaint filed by Administradora Río Claro against the arbitrator Mr. Andrés Jana. Among other issues, Río Claro argued that the arbitrator gave value to depositions made by dependents of the counterparty, and that allowed the counterparty to submit allegations after the discussion phase of the arbitration was closed.

As expected, the Court of Santiago dismissed the complaint on the basis that pursuant to the ICA Law, the only available mechanism to challenge an arbitral award is the request for annulment. Therefore, the Supreme Court found the complaint to be inadmissible — thus consolidating a longstanding precedent on this matter.

C. Funding in international arbitration

C.1 Arbitration funding in a wide sense

Given that the ICA Law does not include provisions covering the situation of arbitral funding, the regulation of this issue will depend on the specific arbitral rules chosen by the parties.

As for the costs involved, the CAM's Rules for International Arbitration provide that the expenses of the arbitration include: (i) a fee for the arbitral tribunal, traveling or other expenses incurred by the arbitral tribunal; (ii) an administrative fee charged by the CAM; (iii) the fees and expenses of an expert appointed by the arbitral tribunal; (iv) the fees and expenses of the witnesses approved by the arbitral tribunal; (v) other expenses determined by the arbitral tribunal that were reasonably incurred by the winning party and claimed in the arbitration procedure; and (vi) or other charges made by the CAM for administrative or other services provided to the arbitral tribunal or to

¹³ Court of Appeal of Santiago, Docket No. 3390-2017.

the parties in relation to the arbitration procedure.¹⁴ Arbitral fees ((i) above) will depend on three factors: the amount in dispute, the nature of the arbitration, and the number of arbitrators; while the administrative fee ((ii) above) will depend solely on the amount in dispute.¹⁵

In the final judgment, the arbitrator shall determine the party who has to bear the costs of the process, always condemning the party that has been fully defeated without having a plausible reason for litigating. However, the CAM may request each party to make deposits in advance, once the arbitral tribunal has been established.¹⁶ Also, the CAM may occasionally request the parties to make additional deposits.¹⁷

Failure to make such payments may enable the CAM to order the suspension or even the conclusion of the arbitral procedure.¹⁸

This situation is similar in local arbitration, where the CAM Rules established that failure to make payments in the manner agreed by the parties will entitle the CAM to order the suspension of the arbitral procedure. If parties do not fulfil the payment obligation within two years of the beginning of the arbitration, the arbitration will expire and no refund is due.

If a party refuses to pay for the costs and expenses (including the arbitral fees), the CAM may pursue the compulsory payment of fees before the ordinary civil courts.¹⁹

¹⁴ CAM's Rules for International Arbitration, Article 36.

¹⁵ Fees for International Arbitration can be calculated at this address: www.camsantiago.cl/tarifas/internacional.html.

¹⁶ CAM's Rules for International Arbitration, Article 39, No. 1.

¹⁷ CAM's Rules for International Arbitration, Article 39, No. 2.

¹⁸ CAM's Rules for International Arbitration, Article 39, No. 3.

¹⁹ As for the arbitral fees, relevant provisions are Articles 143 and 697 of the Code of Civil Procedure.



C.2 Third-party funding

Though not prohibited either by law²⁰ or by the regulations of the Chilean Bar Association, third-party funding remains as an unexplored experience in Chile to date. To the best of our knowledge, there are no ventures operating in Chile providing third-party funding services. Nevertheless, as Professor Elina Mereminskaya points out, a Peruvian company in the market of third-party funding is currently developing an expansion plan that may include Chile.²¹

²⁰ No provision forbids a third-party funding model. Additionally, the Civil Code expressly authorizes the transfer of litigious rights and the sale of such rights (Articles 1911 and 1912).

²¹ Mereminskaya, Elina (2016): *Financiamiento de Litigios a Través de Terceros y su Aterrizaje en Chile*. Informativo CAM Santiago, N° 3.