SANTIAGO ARBITRATION AND MEDIATION CENTER (Santiago CAM)

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I. BASIC INFORMATION

A. History and Background of the Institution

Chile has taken a dualistic approach to the regulation of arbitration.[1] Chilean legislation applicable to international arbitration is based on the UNCITRAL Model Law for International Commercial Arbitration. Thus, it is very different from the legislation applicable to domestic arbitration, enclosed in the traditional and long predated Codes of Judicial Organization and of Civil Procedure.[2]

CAM Santiago arbitration rules reflect this dualism between international and domestic arbitration. The Center offers arbitration under two different sets of rules. There are Rules of Arbitration Procedure designed for national proceedings (hereafter, also *National Rules*) and the Rules for International Commercial Arbitration adopted for the international realm (hereafter, also

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[1] See WAR Chapter on Chile by Andrés Jana for more details.

[2] Code of Judicial Organization was originally adopted in 1943. Code of Civil Procedure was originally adopted in 1902.

International Rules). This Chapter focuses on the latter. However, CAM Santiago's rich experience in domestic arbitration is also used to explain the institutional backgrounds.

CAM Santiago's history offers an example of a careful and successful private norm and practice development within a rather strict legal context. Since the very beginnings of Chilean Independency, the legislation has recognized and even fostered arbitration.[3] Indeed, in several areas arbitration is not an alternative method for dispute resolution, but rather the only mechanism available. This concerns such every-day matters as inheritance, partnerships and company law, maritime commerce and insurance.[4]

At the same time, Chile has opted for a clear "jurisdictional" notion of arbitration. At least domestic arbitrators are considered Judges of the Republic.[5] As such, they are subject to the disciplinary oversight by the superior courts for faults or serious abuses in their awards.[6] Non-Chilean observers and commentators often perceive it as a kind of undue judicial interference contrary to the intrinsic nature of arbitration. However, the local practice does not see it as an obstacle. A study conducted by CAM Santiago in 2010, showed that 71.7% of the respondents perceived the disciplinary review of the awards as non-threatening to arbitration.[7] The case law also indicates that award annulments are extremely rare.[8]

Another feature of the traditional Chilean arbitral landscape worth highlighting was its clear preference for an *ad hoc* arbitration. This is in part because the law applicable to domestic arbitration does not contemplate the figure of arbitral institutions. Usually a name of a sole arbitrator was chosen the moment the parties entered into the contract. Because of the small scale of the Chilean society,

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[3] Rafael Eyzaguirre, *El arbitraje comercial en la legislación chilena y su regulación internacional*, Ed. Jurídica de Chile, Santiago, 1981, p. 24; Patricio Aylwin, *El juicio arbitral*, Ed. Jurídica, Santiago, 2005, pp. 84-117.

[4] See Article 227 of the Code of Judicial Organization.

[5] Article 222 of the Code of Judicial Organization: "Judges appointed by parties or by ordinary courts in their default, for dispute resolution, shall be called arbitrators".

[6] Article 545 of the Code of Judicial Organization on recourse of complain (*recurso de queja*).

[7] Study conducted jointly by CAM Santiago and University of Alberto Hurtado. Published by Javier Mujica and Nicolás Harambour, *Arbitraje comercial en Chile*, Universidad Alberto Hurtado, 2010.

[8] Elina Mereminskaya, "Jurisprudencia en materia de recurso de queja: años 2011-2012", *Informativo On Line CAM Santiago*, No. 11/2012.

there were only a handful of names that were easy to agree upon and tended to repeat a lot.

If the parties are unable to agree upon an arbitrator's name, first-instance ordinary courts have to be called for. The court appoints one person to act as arbitrator, and cannot choose either of the first two candidates nominated by each party.[9] The law does not provide other guidelines for the courts to take into account when making the appointment, which has sometimes led to questionable appointments.

In 1992, Chilean legal and business circles joined forces in order to expand options for efficient dispute resolution. The Santiago Arbitration and Mediation Center (CAM Santiago or Center) was established by the Santiago Chamber of Commerce (CCS) with the support of the Chilean Bar Association and the Chilean Confederation of Production and Commerce. The Center forms part of the CCS internal structure. Thus it does not have an independent legal personality. The CCS itself is established under the law governing trade associations and is registered with the Ministry of Economy. As part of the CCS, CAM Santiago is a non-profit institution.[10]

The Center is led by a Council of 12 members (Art. 5 of the Bylaws), which 10 members are designated by the CCS. The designations reflect sectors of economic activities the members of the Chamber are active in, such as construction, mining, banking, agriculture, etc. The 2 remaining members are designated by the Chilean Bar Association.

The Council approves CAM Santiago's fees and the roster of arbitrators and mediators (Art. 2.b, 5 and 11). All members of the Council can act as CAM Santiago arbitrators. However, they can only be designated by the parties (Art. 8). In order to nominate arbitrators or mediators for specific cases, the Council meets in committee that comprises a fraction of its members (Art. 13).

At the beginning, users tended to reproduce the *ad hoc* arbitration scheme, appointing arbitrators in the arbitration agreement while submitting their arbitrations to CAM Santiago rules and its administration. As the Center gained recognition, the users started to take advantage of one of the main services rendered by an arbitral institution, that is, designation of the arbitral tribunal. Nowadays, it can be safely presumed that 98% of arbitrations submitted to CAM Santiago entail an open authorization to the Center to appoint arbitrators from among the members of its roster.

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[9] Article 232 of the Code of Judicial Organization.

[10] http://www.camsantiago.com/en/quienes_somos.htm.

Because there was no legal recognition of an institutional arbitration, the Center's creators sought to highlight the contractual nature of the functions it would perform. The original version of the CAM Santiago Procedural Rules for Arbitration, which applied to national arbitrations, established the Center's authority to nominate arbitrators only when expressly authorized by the parties.[11] Mere reference to the Rules was not enough. Accordingly, the CAM Santiago domestic model clause urged the parties to include such an authorization by way of the following provision:

> The parties confer an irrevocable special power of attorney upon the Santiago Chamber of Commerce so that it may, at the written request of any of the parties, appoint an arbitrator [*ex aequo et bono* or at-law] from among the members of the arbitration corps of the Santiago Arbitration and Mediation Center.

The requirement that the Center be specifically granted power of attorney before it could exercise this power was finally abolished in the most recent version of the National Rules established in 2012. Pursuant to Article 11 of the current Rules, the arbitrators are appointed by CAM Santiago unless designated by the parties.[12]

In 1994, two years after its creation, the Center received 2 arbitrations. 20 years later, it receives over 200 cases per year. The Center has administered around 2,500 arbitrations. There is no doubt that its creation changed the Chilean arbitral landscape profoundly and today all relevant contracts usually include a CAM Santiago arbitration clause.

Since 2001, the Center has published its arbitral awards but has maintained complete anonymity of the involved parties' identities. The publication includes the arbitrators' names, allowing for public assessment of the quality of the awards. With that measure the Center lifted the obscure curtain that surrounded *ad hoc* arbitration

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[11] E.g. Article 8 of the National Rules applicable before 1 December 2012 stated: "The parties must decide on the appointment of the arbitration tribunal, unless they delegate this power to the Santiago Chamber of Commerce by means of a special and sufficient power of attorney."

[12] Notwithstanding this amendment, the CAM Santiago domestic model clause still includes the reference to the special power of attorney, but only as a tribute to the tradition.

and made arbitration more transparent and visible to the public.[13] Five printed volumes have been published over the years. The awards continue to be published electronically on the CAM Santiago webpage. They are searchable under arbitrators' names or according to an index of procedural and substantive matters.[14]

In 1998, the Center added mediation to its services. The mediators of CAM Santiago have been trained in negotiation and mediation techniques according to the Harvard University methodology.[15] In 2010, the mediator's fees and the administrative fees of CAM Santiago were changed to an hourly-rate basis, replacing the amount in dispute as the basis for fees calculation.[16] The amendment lowered the fees significantly and was adopted in order to promote the use of mediation. However, mediation has not yet acquired the level of popularity enjoyed by domestic arbitration. This is perhaps because commercial mediation is not legally recognized as binding or just because of its relative novelty to the Chilean legal culture. Until today, the Center has handled slightly over 100 mediations.

After the approval of the Law on International Commercial Arbitration N° 19.971 (hereafter, also *ICAL*) in 2004, the Center extended its services to the international area as well. In 2006, the Rules for International Commercial Arbitration entered into force. While the percentage of the cases involving foreign parties traditionally has reached 10% of the total caseload, there have been only a few arbitrations under International Rules. It appears that foreign parties, when advised by local lawyers, are perfectly willing to accept arbitration before a sole Chilean arbitrator under the rules created for domestic proceedings.

In 2013, CAM Santiago launched an on-line system for keeping an arbitration file whereto the parties upload their submissions and the arbitral tribunals upload their decisions, instantaneously notifying the parties.[17] However, if an award is challenged before ordinary courts, the original arbitration file must be submitted. Therefore for the time being a paper file is kept parallel to the electronic one.

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[13] Even though it is a legal obligation to deliver the arbitral file to the Judicial Archive, there is no way of enforcing it or to further resorting to those cases.

[14] http://www.camsantiago.cl/sentencias_arbitrales.htm.

[15] http://www.camsantiago.com/en/quienes_somos.htm.

[16] http://www.camsantiago.cl/en/tarifasm.htm.

[17] http://www.camsantiago.cl/eCAM.htm.

B. Model Clause

In order to agree upon CAM Santiago international arbitration, the Center recommends the parties to include the following arbitration clause in their contract:

> All disputes arising out of or in connection with this contract, shall be resolved by arbitration according to the Rules of International Commercial Arbitration of the Arbitration and Mediation Center of the Santiago Chamber of Commerce in effect at the time of its initiation.
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> It is further recommended to add:
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> a. The number of arbitrators will be _____ [one or three].
> b. The place of arbitration will be _____ [city and country].
> c. The language of arbitration will be _____.
> d. The law governing the agreement will be the substantive law of _____.

Article 1.2 of the Rules of International Commercial Arbitration entails an important reminder of the Center's dualistic reality. It establishes that the Rules apply:

> Whenever:
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> a. The parties have agreed in writing to submit a dispute that has arisen or may arise there between regarding a certain juridical, contractual or non-contractual relationship to arbitration under the Rules of International Arbitration of the CAM Santiago; and,
> b. The arbitration indicated in letter a. above is an international commercial arbitration;

This means the parties to the contract must have chosen the International Rules explicitly, and that the criterions for the application of Law N° 19.971 must be complied with.[18] In other

[18] See Elina Mereminskaya, *Arbitraje Comercial Internacional en Chile: Desafíos y desarrollo*, Thomson Reuters, Santiago, 2014, pp. 10-33, for more on the applicability of the ICAL.

words, the parties cannot "internationalize" a domestic arbitration. However, as mentioned above, arbitrations that qualify as international under the Law Nº 19.971, sometimes are "nationalized", when the parties agree upon the application of the CAM Santiago Rules of Arbitration Procedure.

The correct denomination of the arbitral rules chosen by the parties is an issue commonly highlighted for the purpose of avoiding confusing or "pathological" arbitral clauses. This is especially true for CAM Santiago arbitration due to a provision that establishes a default application of National Rules. Article 1 of the Rules of Arbitration Procedure provide:

> When the parties to an arbitration agreement included into a contract or any other document or exchange of documents, have agreed to submit one or more disputes to the Arbitration and Mediation Center of the Santiago Chamber of Commerce, although they use this denomination or another similar, such disputes will be resolved according to the current Rules of Arbitration Procedure and the CAM Santiago Bylaws.

This provision seeks to offer a solution for wrongly worded arbitral clauses that did not individualize the Center correctly. It also established the Rules of Arbitration Procedure as default rules at CAM Santiago unless a different set of rules has been chosen by the parties. Therefore, if opting for the CAM Santiago international arbitration, the correct identification of the Rules of International Commercial Arbitration is mandatory.

The National and International Rules envisage different types of arbitral procedure. But once arbitration has been initiated, the parties can easily modify the procedure and give their proceedings a more national or international "flavor".

But during the previous stage, e.g. the request for arbitration and the appointment of the arbitral tribunal, there is no other option as to follow the original agreement of the parties and to apply the set of Rules specifically chosen. With this in mind, the most radical difference between the two sets of CAM Santiago Rules lies specifically in the pool of arbitrators available for appointments through CAM Santiago.

C. Arbitrators

According to Article 14 of the Bylaws, the Center has to maintain an arbitrators' roster for domestic arbitration. As stated in Article 15 of the Bylaws, while inviting a person to join the CAM Santiago roster, the Council must "take into consideration his or her capacity, professional experience, prestige and moral solvency." Pursuant to the same provision, each arbitrator must have 10 years of professional experience, cannot be suspended in his or her civil or political rights, and cannot have been sanctioned for professional unethical misconduct.

The list currently includes over 200 names. Although an arbitrator *ex aequo et bono* does not have to be a Chilean lawyer, as a matter of fact all CAM Santiago arbitrators have legal education. This is in line with the traditional Chilean jurisdictional notion of arbitration as analog to judicial proceedings rather than an alternative method for dispute resolution.

Pursuant to Article 11 of the Rules of Arbitration Procedure, if required by the circumstances of the case, CAM Santiago Council may appoint arbitrators from outside the arbitrators' roster, be they Chilean or foreigners.

With regard to international arbitration, Article 14 of the Bylaws further states:

> There will not be an arbitrator's roster for international commercial arbitration. In each particular appointment, the Council should take into consideration elements of the case such as the nationality of the parties, the applicable laws, the seat of arbitration, and the languages involved.
>
> To assist the Council with the accomplishment of that task, the Secretariat of the Center will keep a referential list of international arbitrators that would include persons of recognized prestige and trajectory in the realm of arbitration. Once the person appointed as arbitrator under the Rules of International Commercial Arbitration accepts designation, he or she will be subject to general arbitrators' duties as provided in these Bylaws.

Those duties encompass the duty to comply with the principles of the Center, to act at any moment with due diligence, and to guarantee the parties confidentiality, equal treatment, and impartiality (Art. 18 of the Bylaws).

In summary, arbitrators appointed under the domestic Rules with almost no exception come from a close roster of Chilean lawyers. Under international rules, arbitrators can be drawn from an unlimited universe of international experts. This is the main feature that would presumably make foreign parties opt for the CAM Santiago Rules for International Commercial Arbitration over the CAM Santiago Rules of Arbitration Procedure.

Pursuant to Article 8.1 of the International Rules, failing' an agreement by the parties on the number of arbitrators, the dispute will be resolved by a sole arbitrator unless CAM Santiago decides that a three-member arbitral tribunal should be appointed. This provision reverts the solution established by Article 10.2 of the ICAL, which calls for a three-member panel as a default solution.

Compared to the ICAL, the International Rules impose stricter requirements with regard to arbitrators' nationality. While designating an arbitrator, the President of the Court of Appeals should take into account "the advisability of appointing an arbitrator of a nationality other than those of the parties" (Article 12.5 of the ICAL). Article of 9.4 of the CAM Santiago International Rules, provides in a more mandatory form that the nationality of the sole arbitrator and the president of a three-member arbitral tribunal appointed by the Center shall be different from that of the parties, "unless CAM Santiago deems otherwise after consulting the parties, who may oppose this for good reason." On one occasion the Center indeed used this option and designated local arbitrators only.[19] This happened in an arbitration between a Chilean party and an American party. The seat of arbitration was Santiago, the applicable law was Chilean law, and the language of arbitration was Spanish. Both parties retained local lawyers and also requested the Center to appoint all three members of the arbitral tribunal. After consulting with the parties and in order to promote the efficiency of the proceedings, the Center appointed three Chilean members of the arbitral tribunal. In other international cases, CAM Santiago has appointed arbitrators seated in North and South America.

D. Costs, Fees and Other Service Charges

Article 40.1 of the Rules for International Commercial Arbitration provides for mandatory application of the CAM Santiago fees in effect at the time the arbitral proceedings begin.

[19] CAM Santiago Docket No. 1278-2010.

Article 39.1 clarifies that after the establishment of the arbitral tribunal, the Center is authorized to request each of the parties to provide a deposit for an advance on costs that should cover the fees of the arbitral tribunal and the CAM Santiago administrative fees.

The arbitral tribunal should make the final determination on costs in the final award (Art. 38.1).

Arbitrators' fee charges are based on the amount in dispute.[20] The scale used under the International Rules is expressed in US dollars. The fees resulting per segment of the amount in dispute are added to the fees resulting from the previous segments. The international arbitrator's fees are calculated according to the following table:

US Dollars	**Minimum**	**Maximum**
Up to 50,000	US$ 2500	17 %
from 50,001 to 100,000	2,00%	8,250%
from 100,001 to 500,000	1,00%	4,125%
from 500,001 to 1,000,000	0,75%	2,625%
from 1,000,001 to 2,000,000	0,50%	2,063%
from 2,000,001 to 5,000,000	0,25%	0,840%
from 5,000,001 to 10,000,000	0,10%	0,462%
from 10,000,001 to 50,000,000	0,05%	0,145%
from 50,000,001 to 80,000,000	0,03%	0,102%
from 80,000,001 to 100,000,000	0,02%	0,084%
above 100,000,000	0,01%	0,042%

The values above apply to a sole arbitrator. When the tribunal is comprised of three members, the fees may be increased up to three times.

As stated on the CAM Santiago webpage:

> The arbitral tribunal will set its fees within the margins resulting from application of the above table, which must be submitted by the tribunal to approval by CAM Santiago at any stage in the arbitration proceedings. In making its decision, CAM Santiago will take into account, when necessary, information such as the estimated duration of the arbitration demand, its degree of complexity, how efficiently it was handled, and other relevant circumstances.[21]

[20] http://www.camsantiago.cl/en/tarifas.htm.
[21] Idem.

The Center charges an administrative fee for its services. In order to file a request for arbitration, an initial payment of USD 2,500 should be made. The further fees are also calculated based on the amount in dispute. The scale works the same way as the scale above, that is, fees resulting from one segment must be added to the sum resulting from the previous segments.

US Dollars

Up to 50,000	US$ 2.500
from 50,001 to 100,000	1,75%
from 100,001 to 500,00	0,85%
from 500,001 to 1,000,000	0,58%
from 1,000,001 to 2,000,000	0,35%
from 2,000,001 to 5,000,000	0,15%
from 5,000,001 to 10,000,000	0,10%
from 10,000,001 to 50,000,000	0,04%
from 50,000,001 to 80,000,000	0,03%
above 80,000,000	US$ 45.650

This formula is different to the one used in domestic arbitration, where CAM Santiago charges 10% of the arbitrators' fees. This amount of fees is usually charged by the secretaries of arbitral tribunals in *ad hoc* arbitrations in Chile.[22]

To give a practical example, a CAM Santiago arbitration over the amount of USD 100,000 can cost between USD 3,500 and 12,626 in sole arbitrator's fees, and USD 3,375 in CAM Santiago administrative fees. An arbitration that involves a claim for USD 10,000,000, could costs between USD 28,750 and USD 111,175 in arbitrator's fees, and USD 22,650 in CAM Santiago administrative fees.

CAM Santiago also offers services as an appointing authority. A fee of USD 2,500 is charged for the appointment of one international arbitrator. This fee includes the appointment of the arbitrator and any of his or her replacements, should the arbitrator be challenged and removed.

[22] Actually the local term is "actuario", which acts as a secretary of the arbitral tribunal but also as a minister of faith.

II. ARBITRAL PROCEDURE BEFORE THE CAM SANTIAGO

In view of the international nature of this publication, the description will mainly discuss the Rules for International Commercial Arbitration.

A. Commencement of Proceedings

In order to request arbitration, the claimant should send the respondent and CAM Santiago a request for arbitration together with a certification of the payment of the initial administrative fee (Art. 5.1). Pursuant to Article 5.3, the request for arbitration must contain:

a. A petition to submit the dispute to arbitration;

b. The full name and address of the parties and persons representing them as well as the nature of that representation;

c. A reference to the arbitration agreement or arbitral clause on which such request is based;

d. A reference to the contract or other legal instrument from, or in relation to, which the dispute arose;

e. A description of the general nature of the claim by the claimant and, to the extent possible, the sum claimed, if any;

f. All information on the number of arbitrators and their selection pursuant to these Rules as well as the appointment of one or more arbitrators whenever the intervention of the Center is required; and,

g. Any comment on the arbitration location, the governing rules of law, and language of the arbitration.

As provided by Article 6.1, the respondent shall send CAM Santiago and the claimant an answer to the request for arbitration in a period of 30 days of receipt of such request. Pursuant to Article 6.2, the answer to the request for arbitration should contain at least the following information:

a. The full name and address of the parties and persons representing them as well as the nature of that representation;

b. Their comments on the nature and circumstances leading to the request for arbitration as well as their position in regard to the claims by the claimant and, to the extent possible, the amount claimed, if any;

c. All information on the number of arbitrators and their selection as proposed by the claimant pursuant to these Rules as well as the appointment of one or more arbitrators whenever the intervention of the Center is required; and,

d. Any comment on the arbitration location, the governing rules of law, and language of the arbitration.

All candidates for arbitrators must sign and send the Center a written declaration of impartiality and independence from the parties (Art. 11.2). This declaration is a necessary condition for CAM Santiago's confirmation of an arbitrator nominated by one or both of the parties (Art. 11.3). The arbitrators appointed or confirmed by CAM Santiago should accept the nomination as soon as possible and the Center will notify the parties of such acceptance.

B. Terms of Reference

CAM Santiago Rules for International Commercial Arbitration do not provide for the agreement upon Terms of Reference as a necessary stage of the proceedings. However, in domestic arbitration a similar document called Bases of Procedure is produced with almost no exception. Article 23 of the National Rules even provides for a mandatory preliminary hearing where such Bases of Procedure are agreed upon.

Chilean arbitrators usually put forward the procedural rules of their choice. In CAM Santiago domestic arbitrations, the Center provides its arbitrators with model rules that reflect the best practice gathered through the Center's vast experience. The parties mostly negotiate minor details such as term periods applicable during the proceedings or the way the written submissions are filed. This relatively simple procedure seems pacific in a uniform legal environment of domestic arbitration where everybody shares the same educational background. In any case, the Chilean Code of Civil Procedure applies in default of parties' agreement.

In line with this practice, Chilean lawyers well versed in domestic arbitration might tend to adopt a rather passive stance

towards the negotiation of Terms of Reference. However, growing experience in the international area makes them increasingly aware of the relevance Terms of Reference have in a multi-cultural context where no procedural laws apply in default of parties' agreement.

In line with the traditional domestic approach, Article 21.5 of the International Rules provides for interaction between the arbitral tribunal and the parties in order to agree upon procedural aspects of the arbitration. In furtherance of that norm, the arbitral tribunal may hold preliminary meetings with the parties to:

a. Agree upon the procedure to which the arbitration will be subject;
b. Set the period of time indicated in these Rules;
c. Set the dates for hearings; and,
d. Decide on any aspect established or permitted in these Rules in order to ensure an efficient functioning of the arbitration procedure.

C. Consolidation, Joinder, and Multi-Party Issues

CAM Santiago International Rules do not provide for specific solutions for consolidation of proceedings or joinder. In a multi-party arbitration before a three-member arbitral tribunal, the multiple claimants or respondents should jointly appoint one arbitrator each side (Art. 10.1). Whenever there is no agreement on such appointment, the Center will appoint the arbitrator concerned (Art. 10.2). Therefore, CAM Santiago does not follow the logic of the Siemens-Dutco decision of the French Cour de Cassation that implied the arbitral institution should name both co-arbitrators in order to safeguard the equality of the parties.[23]

D. Confidentiality

Because Chilean law equates arbitrators to judges and arbitral tribunals are seen as part of the state judicial system, arbitration does not enjoy privacy or confidentiality by virtue of law. On the contrary, Article 9 of the Chilean Code of Judicial Organization provides that all acts before tribunals are public. Article 644 CCP

[23] 7 January 1992 – XV Yearbook Com. Arb. (1992) 124 et seq.

requires that after the termination of the proceedings, the arbitration file and the award be deposited into judicial archives.

Notwithstanding these legal provisions, the CAM Santiago has always kept all information on arbitration strictly confidential. As mentioned above, the Center has published arbitral awards but left the names of the parties anonymous. Such confidentiality was considered part of the services provided by the CCS to the business community. However, the confidentiality of arbitration is lifted if ordered by an arbitral or ordinary tribunal. In practice it has happened on rare occasion only, always when it was required by the nature of other proceedings.

The International Commercial Arbitration Rules provide explicitly for "oral hearings and meetings of the arbitral tribunal" to be private (Art. 25.5). With regard to the award, Article 33.8 states:

> The award will be confidential unless disclosure thereof is required for a challenge procedure, fulfillment or enforcement of the award, or the law or any judicial authority requires disclosure thereof, or the parties mutually agree to stipulate that it is not confidential. However, the CAM Santiago may publish the awards while protecting the confidentiality of the identity of the parties.

The CAM Santiago website does not currently display awards rendered under International Rules. However, it shows three awards issued under the Rules of Arbitration Procedure but within the framework of Law N° 19.971.

E. Legal Seat and Language of the Proceeding

The International Commercial Arbitration Rules' solution on the seat of arbitration is closely modeled upon the relevant ICAL provisions.

Article 19.1 of the CAM Santiago International Rules acknowledges the parties' freedom to choose the seat of arbitration. If no agreement has been reached, the seat will be determined by the arbitral tribunal taking into account "the positions of the parties and the circumstances of the case, including the convenience of the parties."

The following paragraph of the same article reflects the idea of the seat as legal fiction stating that:

> Without prejudice to the provisions in the preceding paragraph, the arbitral tribunal may, save agreement otherwise by the parties, meet, hold hearings, deliberate and conduct inspections of assets or documents in any location(s) it deems appropriate. If the location chosen by the arbitral tribunal in those terms turns out to be different from the arbitration location, the arbitration procedure shall be deemed, for all pertinent purposes, to have been conducted, and any award rendered, in the arbitration location.

The validity of this juridical notion of the seat has been confirmed by the Santiago Court of Appeals in an annulment proceeding against an arbitral award. In an ICC arbitration, a Mexican national residing in that same country was appointed as the sole arbitrator. The award was rendered against a Chilean franchisee who filed for its annulment. The requesting party alleged that the arbitrator had violated its "judicial" duty to be present at the place of the arbitration that applies to domestic arbitrators. The Court relied on the ICC Rules for Arbitration as well as on Article 20 of the ICAL in order to discharge those allegations.[24]

With regard to the language of the arbitration, the Rules entail a useful modification over the ICAL concerning the stage prior to the constitution of the arbitral tribunal. Article 20.1 of the Rules provides:

> Save stipulation otherwise by the parties, prior to establishment of the arbitral tribunal, the parties shall use the language or languages of the arbitration agreement for all communications relating to the arbitration.

The following paragraph of the norm authorizes the arbitral tribunal to determine the language(s) of the arbitration absent agreement by the parties. The tribunal shall take into consideration the parties' written submissions as well as the language or languages of the arbitration agreement (Art. 20.2 of the Rules).

> The arbitral tribunal may order that any documentary proof be submitted together with a translation into the language(s) agreed upon by the parties or determined by the arbitral tribunal.

[24] Santiago Court of Appeals, Docket No. 1420-2010, 9 October 2012.

The International Rules further mirror Article 22.2 of the ICAL when allowing the arbitral tribunal to order a translation of documentary evidence into the language(s) of the arbitration (Art. 20.3 of the Rules). This stipulation is rather less relevant for the practice. In current practice, the parties mostly prefer the opposite solution, that is, the possibility to produce documents in a language different than the language of the arbitration.

F. Applicable Law

With regard to the applicable law, the International Commercial Arbitration Rules come close to the one provided in Article 28 of the ICAL. The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties (Art. 29.1). The tribunal only can decide *ex aequo et bono* if expressly authorized by the parties (Art. 29.4 of the Rules). In any case, the arbitral tribunal must take into consideration the contract stipulations and the pertinent commercial usages (Art. 29. 5 of the Rules).

The only relevant difference with regard to the ICAL is when the parties fail to agree upon the applicable law. The arbitral tribunal will apply "the rules of law it deems appropriate according to the circumstances of the case" (Art. 29.3 of the Rules). Thus, the Rules have opted for the so-called direct path, avoiding the application of conflict of law provisions, which is the more efficient solution. On that point, the ICAL, in line with the UNCITRAL Model Law, provides for the arbitral tribunal to apply "the law determined by the conflict of laws rules which it considers applicable" (Art. 28.2 of the ICAL).

Article 33.7 of the International Rules, under the title "Form and Content of the Arbitral Award," adds a provision of a substantive nature. It authorizes the arbitral tribunal to "order the payment of simple or compounded interest, including interest prior or subsequent to the award," that will be paid once the parties have fulfilled the award. The arbitral tribunal should also determine the currency or currencies for the payments upon the award.

G. Interim Measures

Article 17 of the Rules provides for the arbitral tribunal's power to order precautionary and provisional measures:

> Save agreement of the parties otherwise, the arbitral tribunal may, at the petition of any of the parties, order cautionary or provisional measures it deems suitable against any of the parties regarding the objective of the litigation (Art. 17.1).

It further stipulates that the arbitral tribunal may request a petitioner to furnish a guarantee to ensure redress for eventual damages that may be caused to the opposing party (Art. 17.2).

The norm replicates the logic of Article 17 of the ICAL that also authorizes the arbitral tribunal to issue interim measures against a party to the arbitration. This solution is different from the one contemplated for national arbitration. Once again, because domestic arbitrators are treated as judges, they may issue interim orders to be complied with by third parties such as banks or public faith registrars.

In one CAM Santiago arbitration conducted under the ICAL, the sole arbitrator made use of Article 17 of the ICAL and issued a precautionary measure in the form of an anti-arbitration injunction. The arbitrator ordered the foreign party to the arbitration to refrain from litigating the dispute before foreign national courts. However, the arbitration was conducted in default of that party, so it is unlikely that the order was complied with.[25] There is no information available on precautionary measures issued under the Rules for International Commercial Arbitration.

Article 17 of the Rules also follows Articles 9 of the ICAL in as far as it authorizes the parties to resort to ordinary courts to obtain provisional measures and states that it does not entail a breach or a waiver of the arbitration agreement (Art. 17.3). The Rules do not emphasize the parties' right to resort to ordinary courts during arbitration proceedings. This is a very welcomed clarification made by Article 9 of the ICAL. Because in domestic arbitration courts and arbitral tribunals are considered legally equal, the parties may resort to ordinary courts only prior to the constitution of an arbitral tribunal. After the tribunal is constituted, it becomes the only forum with jurisdiction to order, maintain, or to lift interim measures. However, Article 17.3 of the Rules makes clear that both, arbitral tribunals and ordinary courts, have jurisdiction regarding interim measures even after the arbitral tribunal is constituted. It follows from Article 17.3 statement that any petition to ordinary courts or

[25] CAM Santiago Docket No. 1136-2009, 12 October 2010, published on line.

their corresponding orders have to be "communicated by the petitioner to the arbitral tribunal as soon as possible."

H. Hearings or Evidence

Before addressing the matter of this section, the issue of party representation will be briefly treated. Article 18.1 of the International Rules provides:

> The parties may be represented or advised during the arbitration procedure by persons of their choice, without any restriction on nationality or professional title.

This perhaps very clear provision was a necessary one in a Chilean context. According to Article 527 of the Chilean Code of Judicial Organization, before Chilean courts a party must be represented by a lawyer, that is, a lawyer admitted to practice in Chile. Evidently, there is no requirement within the ICAL for arbitrators to be local lawyers, even if they have to apply Chilean law. However, doubts had existed regarding the participation of foreign lawyers in arbitral proceedings seated in Chile.[26] During this uncertainty, the recognition the Rules made of the parties' freedom to select legal representatives of their choice was particularly relevant.

More recently, the Santiago Court of Appeals confirmed that it is permissible for foreign attorneys to participate in international arbitrations seated in Chile.[27] The party seeking annulment challenged the award because the opposing party had been represented by foreign attorneys, in alleged violation of Chilean public policy. The Court disagreed.

The Court affirmed that lack of representation by local lawyers could be only of prejudice to the party that relied upon such representation. However, that party did not questioned the engagement of foreign attorneys. The Court further highlighted: "The

[26] The Minister of Justice, Luis Bates that presented the ICAL draft to the Chilean Parliament seemed to support the idea that Article 527 of the Code of Judicial Organization to be applicable. Discussion from 15 de junio de 2003. For more details see Dyalá Jiménez Figueres and Angie Armer Ríos, "La Nueva Ley Chilena sobre Arbitraje Comercial Internacional", *Revista Chilena de Derecho Privado*, July 2005, pp. 307-326.

[27] Santiago Court of Appeals, Docket No. 9211-2012, 10 April 2014.

provisions the requesting party relies upon are fully applicable to proceedings before Chilean courts, quality that arbitral tribunal lacks." The Court of Appeals thus highlighted a distinction that exists between international arbitral tribunals and domestic Chilean tribunals. This is a welcomed clarification confirming the efficiency of the provision of Article 18.1 of the Rules.

With regard to the production of evidence, the Rules first establish that each party bears the burden to prove the facts that sustain its claims or defenses (Art. 24.1 of the International Rules). At the same time it allows the arbitral tribunal to assume a more leading role in the evidence production:

> The arbitral tribunal may occasionally request that the parties furnish additional documents, appendices, and evidence, and may set the date or period of time for delivery thereof.

The open language of this provision indicates that the arbitral tribunal might act *ex oficio* as well as in response to a petition filed by one of the parties.

Turning now to the hearings, the International Rules provides that they are to be optional, save agreement otherwise of the parties, as the arbitral tribunal should decide whether a hearing must be held to present evidence or oral arguments (Art. 25.1).

Somewhat surprisingly, according to Article 25.2 of the Rules, it is for the arbitral tribunal to make some logistical arrangements for the hearings. More specifically, the tribunal should:

> Make the necessary arrangements for the translation of oral statements made at hearings and for the taping of hearings, all of which will be covered by the parties:
>
> a. If the arbitral tribunal deems it necessary according to the circumstances of the case; or,
>
> b. If the parties agreed and so petitioned the arbitral tribunal reasonably in advance of the hearing.

With regard to witness statements, the International Rules are slightly ambiguous. At first, Article 25.3 of the Rules requires the parties presenting a witness at the hearing to:

> Notify the arbitral tribunal and the other party in a period set by the arbitral tribunal:
>
> a. Of the full names, surnames, addresses, occupation or trade of the witnesses it wishes to present; and,
>
> b. The subject on, and language in, which the witnesses will give their testimony.

At first, this suggests that the witness will appear for a direct examination. On the other hand, Article 26.2 stipulates that:

> Save a provision otherwise of the arbitral tribunal, the testimony of a witness should be in the form of a written and signed statement.

In line with this last stipulation, Article 26.3 further elaborates:

> A party may petition that the witness presented by the other party attend the hearing in order to cross-examine him. If the arbitral tribunal so decides, and the witness fails to attend without good reason, the arbitral tribunal, if it deems necessary, may consider the written testimony of the witness or disregard it completely, depending on the circumstances of the case.

The stipulation indicates that cross-examination is not a necessary but an optional mechanism for testing a witness' credibility, and the witness' appearance at the hearing has to be ordered by the arbitral tribunal. If the witness does not appear in front of the tribunal, and is lacking a justified reason, the CAM Santiago International Rules do not establish a presumption regarding the value of witnesses' testimony.[28]

In domestic proceedings, witnesses are called to the hearing by parties' that are presenting them. They are most commonly

[28] Compare to the IBA Rules on Taking the Evidence, that establishes a presumption against the consideration of the written witness testimony: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise."

introduced before the arbitral tribunal through direct examination. The idea of having to request the appearance of the other party's witnesses is uncommon in the Chilean practice. The author has observed some CAM Santiago arbitrations where such divergent approach has led local lawyers to announce the appearance of their own witnesses instead of summoning the witnesses of the other party.

The CAM Santiago International Rules do not take any stance on party-appointed experts. Instead, Article 28 of the Rules, under the title "Experts," provides exclusively for the tribunal-appointed expert. The norm determines the basic procedural framework for expert participation with its main focus on the principles of bilateralism and due process.

This solution is also mostly in line with the local arbitral practice that does not favor party-appointed experts. The status of experts is reserved to professionals appointed by order of the arbitral tribunal. They can be nominated by parties' agreement or by the tribunal in default of the agreement.[29]

Even though the resort to party-appointed experts is not part of the habitual Chilean procedural practice, in recent annulment proceedings, the Santiago Court of Appeals confirmed that under the ICAL it was permissible for the arbitral tribunal to rely on such expert opinions. The arbitral tribunal was under no obligation to appoint an additional expert in order to duly assess the evidence before it.[30]

I. Awards

Different to the ICAL, the CAM Santiago International Rules lists different types of arbitral awards that can be rendered. Article 33.1 states: "In addition to the final award, the arbitral tribunal may render provisional, interlocutory awards and final partial awards".

As a general rule, all types of awards shall be rendered in writing and signed by the members of the arbitral tribunal (Art. 33.2 of the Rules). According to Article 33.3 of the International Rules, all the awards can be signed by the majority of the arbitral tribunal provided the award states reasons for the absence of the remaining signature. This requirement follows closely Article 31.1 of the ICAL.

This norm is slightly contradicted by one of the following stipulations that allows the chairman of the arbitral tribunal to issue

[29] Article 414 of the Code of Civil Procedure.
[30] Santiago Court of Appeals, Docket No. 9211-2012, 10 April 2014.

the award with solely his or her vote. Pursuant to Article 31.1 of the Rules, "if there is no majority to decide on the dispute, the chairman of the arbitral tribunal shall render the award alone." This solution is more efficient than Article 29 of the ICAL that states that arbitral tribunals with multiple members should make their decisions by the majority of all its members. Instead, under the CAM Santiago Rules no "truncated" tribunal will hinder the award from being rendered.

It seems that Article 31.1 should prevail over Article 33.3. The first provision bears the title "Rendering of the Award and Period for Issuance Thereof." Instead, Article 33 has the title "Form and Content of the Award." It should be understood that in case the award is issued by the majority of the arbitral tribunal, an explanation for the missing signatures is required. This requirement cannot annul the provision of Article 31.1 that expressly authorizes the chairman to decide the dispute. Most soundly, the requisite to state reasons for the failing signatures should be applied by analogy when the award is issued by the minority word of the tribunal's chairman.

In any case, the chairman of the tribunal can decide on procedural matters when authorized by the parties or by the members of the tribunal (Art. 31.2 of the Rules the same as under Art. 29 of the ICAL).

According to Article 31.3 of the Rules, the arbitral tribunal has to issue the final award within 6 months from the date the answer to the statement of claim, or the counterclaim, has been filed (Art. 31.3). The arbitral tribunal may extend that time period once by issuing a reasoned procedural order to that regard (Art. 31.4). This provision is important because like the UNCITRAL Model Law, the Chilean Law does not provide for a time limit for rendering the award.

Article 32 of international Rules provides for the possibility to issue an award by agreement of the parties. The provision follows closely Article 30 of the ICAL.

The award shall be reasoned unless the parties have agreed otherwise or it is an award rendered by agreement of the parties (Art. 33.4 of the International Rules).

The final award shall state the date that it is rendered and the place of arbitration determined in accordance with the Rules. The award shall be deemed rendered in the place of arbitration (Art. 33.5 of the Rules).

The arbitral tribunal must send the original version of the final award to CAM Santiago. The Center will notify each party of the text of the award. However, the condition thereon is the full payment of

expenses and costs of the arbitration by the parties (Art. 33.6 of the International Rules).

In line with the general CAM Santiago policy to publish the awards, Article 33.8 of the Rules states:

> The award will be confidential unless disclosure thereof is required for a challenge procedure, fulfillment or enforcement of the award, or the law or any judicial authority requires disclosure thereof, or the parties mutually agree to stipulate that it is not confidential. However, CAM Santiago may publish the award while protecting the confidentiality of the identity of the parties.

A further provision, Article 33.9 of the Rules indicates:

> The parties are obligated to comply with the award without delay because they have submitted their dispute to these Rules.

The norm echoes Article 33.2 of the Rules, pursuant to which final and other awards are "not appealable and are binding upon the parties."

Both provisions highlight the binding nature of the arbitral award but do not manifestly encompass a waiver to challenges against arbitral awards. The idea that seems to transcend here is the general assumption that the ability to request an award be set aside cannot be waived under the Chilean law.

The International Rules also provide for the possibility to request a correction or interpretation of the award that basically reproduces Article 33 of the ICAL.

III. APPENDIX

A. Institution Contact Details

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