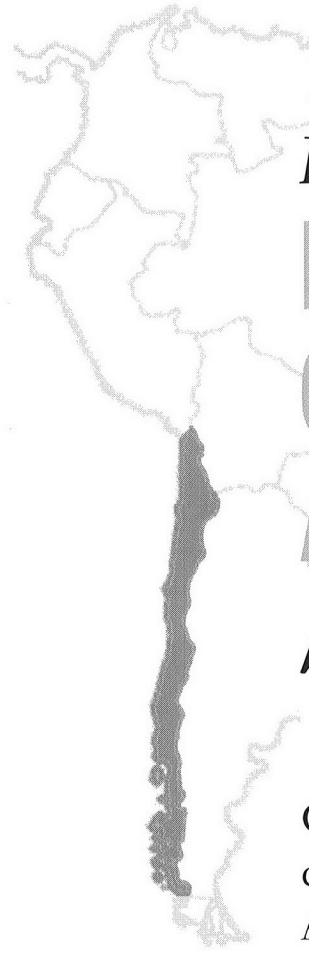

Breakthrough for INTERNATIONAL COMMERCIAL ARBITRATION IN CHILE

The enactment of an arbitration bill is expected shortly in Chile based on the United Nations Commission on International Trade Law Model Law for International Commercial Arbitration.[1] This enactment should give a significant boost to international commercial arbitration in Latin America. This article discusses Chile's existing arbitration regime, the circumstances prompting its latest arbitration initiative, and the proposed new arbitration law.

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Background

Chile's arbitration law is quite old, having been in force since 1875. Inspired by old Spanish laws,[2] it has been extremely effective in regulating domestic arbitration. But, like many other developing countries, Chile failed to appreciate the significance of international arbitration in encouraging international commercial transactions and foreign investment. This omission is inconsistent with Chile's recent macroeconomic structural reforms, its broad liberalization of the economy, and its adoption of major international commercial and investment agreements. For example, in recent years, Chile has signed bilateral free trade agreements with Canada in 1997, Mexico in 1998, the European Union, Korea and the United States in 2003. In addition, Chile has signed bilateral investment protection treaties with most of the industrialized countries.[3] Each of these agreements contains special arbitration mechanisms for settling disputes that may arise between the parties. Chile's free trade agreements with Canada and the United States include a provision, identical to that of the North American Free Trade Agreement (NAFTA), requiring Chile to promote and facilitate mechanisms for the resolution of international commercial disputes.[4]

Chile has also ratified a number of international treaties that concern international arbitration, including the 1975 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); the 1976 Inter-American Commercial Arbitration Convention (Panama Convention or IACAC); and the 1975 Washington Convention, which established the International Centre for the Settlement of Investment Disputes (ICSID).

In addition, Chile is an active participant in the current negotiations for a Free Trade Area of the Americas (FTAA), which will extend from Alaska to the Strait of Magellan, and include every country of the Western Hemisphere with the exception of Cuba. Its adoption, expected in 2005, is relevant because it will enhance and promote the use of international commercial arbitration throughout the region. A similar positive development is expected from the Asia-Pacific Economic Corporation (APEC),[5] whose 2004 annual meeting will be hosted by Chile.

Also encouraging Chile toward adopting more hospitable laws concerning international arbitration was a seminar on that subject held in Santiago in July 1998, co-sponsored by the Chilean American Chamber of Commerce (AMCHAM) and the American Arbitration Association's International Centre for Dispute Resolution (ICDR), with participation by, among others, the late Michael Hoellering, a well-known expert in international arbitration and a former general counsel of the AAA, Florence Peterson, who recently retired as AAA general counsel, Bernardo Cremades, a leading international arbitrator and jurist from Spain, and prominent members of the Chilean legal community, including Chile's Minister of Justice. The seminar created the opportunity to exchange ideas about the importance of international arbitration to international commerce, which reinforced the concern that it was disadvantageous to "retain old laws that detract from the ready enforceability of agreements to arbitrate ... which by making arbitration difficult ... hinder investment...."[6]

The cumulative impact of the international treaties, investment and trade agreements that rely on arbitration to resolve international commercial disputes, and efforts elsewhere to enact international commercial arbitration statutes, along with discussions in Chile about international arbitration, has created an environment leading to the drafting of an international arbitration law and the submission of that legislation to Chile's Congress.[7] Once adopted, the new law will supplement the international agreements to which Chile is a party and become the inseparable complement of Chile's international trade and investment policies. Approval of the legislation is expected in 2004.

Chile's Domestic Arbitration Regime

The existing domestic arbitration regime in Chile is regulated by two separate codes. The first regulates the condition of arbitrators and their jurisdiction.[8] The second regulates arbitration proceedings.[9]

The existing arbitration law recognizes the freedom of the parties to settle their disputes by arbitration with two general exceptions. The first exception refers to disputes where arbitration is prohibited, (e.g., criminal and certain family matters). The second exception is for matters where arbitration is mandatory (e.g., disputes concerning water rights and domestic disputes among commercial partners).

Once appointed, arbitrators have the status of judges and are subject, during the conduct of arbitration, to the same responsibilities as judges.

Existing arbitration legislation contemplates three separate categories of arbitrators: arbitrators in law, who must apply the applicable law during the conduct of the proceedings and in the award; arbitrators *ex aequo et bono* (in equity), who may conduct the proceedings and issue an award in accordance with the rules freely agreed by the parties; and mixed arbitrators, who may conduct the proceedings as arbitrators in equity but must issue their award as arbitrators in law.

Chile's Code of Civil Procedure regulates the recognition and enforcement of foreign judgments. This applies to foreign arbitral awards.[10] Under the Code, Chile's Supreme Court must first determine whether an international treaty is applicable. If that is the case, the procedures established in the treaty must be followed. In the absence of an applicable treaty, the "principle of reciprocity" applies. (This means that a foreign judgment or award will be enforced in Chile if it was issued by the court or an arbitral tribunal in a country that recognizes Chilean judgments). But if this is not feasible, the foreign arbitral award will have, if the requirements of the law are complied, the same degree of enforceability as a Chilean arbitration award. Since Chile is a party to the New York Convention, foreign arbitral awards will, in most cases, be enforced under the Convention.

Institutional arbitration started in Chile in 1993, with the establishment of an arbitration and mediation center[11] by the Santiago Chamber of Commerce. This institution has experienced exponential yearly growth of 70%. In 1998, Amcham established its own centre, which has been devoted mainly to the resolution of disputes between foreign parties.[12]

The Proposed Chilean Bill

The proposed international arbitration law the government submitted to the Chilean Congress was identical to the UNCITRAL Model Law. However, during discussions in the Chamber of Deputies, Article 5 of the bill (which provides, "In matters governed by this Law, no court shall intervene except where so provided in this Law.") was deleted at the request of Chile's Supreme Court. The justification for eliminating Article 5 was to allow parties to have recourse to the courts on the ground that an award may violate Chile's Constitution.

The bill is now in the Senate and it is doubtful the government will insist on the restoration of Article 5 of the Model Law. Should it do so, that would likely delay approval of the bill.

The Chilean bill designates in Article 6 the Court of Appeals to carry out the functions speci-

fied in Articles 11(3), (4), 13(3), 14, 16(3) and 34(2).

If enacted, the new legislation addressing international arbitration will coexist alongside Chile's domestic arbitration regime.

Comparison with Spain's New Arbitration Act

The proposed new arbitration law for Chile and the recently adopted Spanish arbitration law both follow the UNCITRAL Model Law. However, there are differences between them because Spain follows a monist legal system which integrates the regulation of domestic and international arbitration, while Chile, if the proposed bill is enacted, will follow a dualist arbitration system under which domestic and international arbitration will coexist but be regulated by separate statutes.

As a result, a number of provisions in the Spanish law are absent from the Chilean bill. These include provisions governing

- the treatment of State and State enterprises in international arbitrations (requiring them to be treated exactly the same as private individuals);[13]
- the timing of the issuance of the award (providing that unless the parties have determined otherwise, the award must be issued within six months from the date on which the defendant's term for responding to the claim has expired. If this period expires without the award being issued, the arbitral proceedings and the arbitrator's mandate terminate);[14]
- the agreement to arbitrate in adhesion contracts and testaments;[15]
- institutional arbitration;[16]
- the arbitrator's acceptance of appointment;[17]
- court procedures for the appointment of arbitrators in the absence of the parties' agreement;[18]
- repetition of proceedings when a substitute arbitrator is appointed;[19]
- damages incurred by arbitrators and arbitral institutions;[20]
- the right of arbitrators and arbitration institutions to suspend or terminate arbitration proceedings on the failure of the parties to fund administrative expenses and fees;[21]
- provisional measures (extending to them the rules applicable to the annulment and enforcement of arbitral awards;[22]
- the duty of the arbitrators to rule in accordance with the parties' agreement on the costs, expenses and fees of the arbitration;[23]
- the parties' right to request the "protocolization" or registration of the award before a public notary;[24]
- the qualifications of the arbitrators in domestic arbitrations not decided in equity (requiring the arbitrators to have the status of practicing attorneys unless the parties otherwise agree);[25]
- requests for clarifications (allowing the parties to request clarification from the arbitrators at any time during the proceedings);[26] and
- confidentiality of the proceedings (requiring the arbitrators, the parties and the arbitration institutions to maintain confidentiality of the information they receive during the arbitration proceedings).[27]

Some subjects are addressed in Chile's bill but not in the Spanish law. For example, the Chilean bill provides it will not affect any law which prohibits certain matters to be submitted to arbitration or which may be submitted to arbitration only in accordance with the provisions of a different law.[28]

Some matters are treated differently in the two approaches to arbitration. For example, the Spanish statute states that, absent party agreement on the number of arbitrators, only one shall be appointed.[29] Chile's bill states that in that case, there shall be three arbitrators.[30]

The Spanish law states that if the parties' agreement does not state the applicable law, the arbitrators shall apply the laws they consider appropriate.[31] Chile's bill provides that, in such a case, the tribunal shall apply the law that is determined by the conflict-of-law rules.[32]

Both the Chilean bill and the new Spanish law contemplate the annulment of an award in certain circumstances. However, the Spanish statute states that if the award is annulled because it extends to matters not submitted to arbitration or to matters not subject to arbitration, it remains valid if its findings as to non-arbitrable matters can be separated from those affected by the annulment.[33] It also states that an award has *res judicata* effect and that it can be reviewed only in accordance with Spain's Civil Procedure Law.[34] Spain's new law also regulates the proceedings in an action to annul the award. Chile's arbitration bill does not address these matters.

Conclusions

Spain recently enacted its new arbitration law. Chile's law is still under review but is expected to be adopted. Given the relationship Spain and Chile have with the rest of Latin America, it is likely that these developments will contribute to the adoption of similar legislation within this region. ■

(Endnotes are on the next page)

ENDNOTES

[1] On June 21, 1985, the UNCITRAL approved a Model Law for International Commercial Arbitration. On Dec. 11, 1985, resolution 40/72, of the General Assembly of the United Nations recommended its use by member States.

[2] See Gonzalo Biggs, "The Process Towards International Commercial Arbitration in Chile," in "Papers of the International Commercial Arbitration Conference, AMCHAM, Chile," p. 117, July, 29-30, 1998 (AAA).

[3] See www.direcon.cl for a list of bilateral investment treaties signed by Chile.

[4] On the basis of Article 2022 of the NAFTA, which is replicated in Article N-21 of the 1997 Chile-Canada Free Trade Agreement, the AAA, together with the Mexican National Chamber of Commerce, the British Columbia Arbitration Centre, and the Quebec International Arbitration Centre, formed the Commercial Arbitration and Mediation Centre for the Americas (CAMCA). Article 22.21 of the Chile-US. Free Trade Agreement replicates article 2022 of the NAFTA.

[5] The Asia-Pacific Economic Cooperation (APEC) forum was established in 1989 and has 21 member countries from the Asia Pacific region. Its purpose is to facilitate economic cooperation, trade and investment in its member countries.

[6] David Rivkin & Donald Francis Donovan, "Introduction to the Papers of the International Commercial Arbitration Conference, AMCHAM, Chile," July 29-30, 1998 (AAA).

[7] Bill No. 3252-10, approved by the Chamber of Deputies and under consideration of the Senate since Oct. 29, 2003 (the Chilean Bill).

[8] On this subject, see Hernan Somerville, "Arbitration in Chile" in *International Commercial Arbitration in Latin America*, Special Supplement of the *ICC International Court of Arbitration Bulletin* (April 1997); Carlos Eugenio Jorquiera & Karin Helmlinger's chapter on Chile, in Nigel Blackaby, David Lindsey & Alessandro Spinillo (eds.), "*International Arbitration in Latin America* (Kluwer Law International. 2002).

[9] The first arbitration regulations were adopted by the Act of 15 October 1875. These regulations were later incorporated to the *Codigo Organico de Tribunales* (COT), enacted by law N°7421, of 15 June 1943, and now in force.

[10] The Code of Civil Procedure, Articles 242 through 251, enacted on 28 August 1902, regulates domestic arbitration proceedings and constitutes, together with the COT, the law on arbitration now in force in Chile.

[11] The Mediation and Arbitration Center established by the Santiago Chambers of Commerce was established with the financial support of the Inter-American Development Bank. See www.camsantiago.com

[12] See www.amchamchile.cl

[13] 2003 Spanish Arbitration Act, art. 2(2).

[14] *Id.* art. 37(2).

[15] *Id.* arts. 9(2) and 10, respectively.

[16] *Id.* art. 14.

[17] *Id.* art. 16.

[18] *Id.* art. 15(5).

[19] *Id.* art. 20.

[20] *Id.* art. 21.

[21] *Id.* art. 21(1) & (2).

[22] *Id.* art. 23(2).

[23] *Id.* art. 37 (6).

[24] *Id.* art. 37(8).

[25] *Id.* art. 15(1).

[26] *Id.* art. 17(2), second paragraph.

[27] *Id.* art. 24(2).

[28] Chilean Bill, *supra*, n. 7, art. 1(5).

[29] 2003 Spanish Arbitration Act, art. 12.

[30] Chilean Bill, *supra*, n. 7, art. 10(2).

[31] 2003 Spanish Arbitration Act, art. 34(2).

[32] Chilean Bill, *supra*, n. 7, art. 28(2).

[33] 2003 Spanish Arbitration Act, art. 41 (3).

[34] *Id.* art. 43.

New Spanish Arbitration Act

(Continued from page 63)

institution they appoint to administer the proceedings. This is a move in the direction of respecting party autonomy and providing for flexibility in the arbitral proceedings. In addition, the six-month period can be extended for up to two months at the discretion of the tribunal. Thus, as a practical matter, the new law enables the parties to effectively eliminate the six-month mandatory requirement for issuing the award.

The effectiveness of the 2003 Spanish Arbitration Act is likely to be further enhanced, starting on Sept. 1, 2004, with the establishment of new Commercial Courts. These courts will have jurisdiction over arbitral proceedings involving commercial disputes. They will also hear challenges to the appointment of arbitrators and requests for interim and conservatory measures. Judges in the Commercial Courts are likely to develop needed expertise concerning arbitration issues. This should make foreign companies comfortable about selecting Spain as a venue for international commercial arbitration.

Conclusion

The enactment of the 2003 Arbitration Act, based on the UNCITRAL Model Law, the proposed creation of commercial courts, and the establishment of the Euro-American Court of Arbitration, means that legislative, judicial and administrative structures are now in place to promote the use of arbitration within Spain, and to establish Spain as a respected venue for international commercial arbitration.

In furtherance of this goal, the Spanish Court of Arbitration and the AAA's International Centre for Dispute Resolution will be hosting an international conference on arbitration in Madrid scheduled for June 21, 2004. This should raise awareness of Spain's potential as a site of arbitration for European and international arbitration. ■

Endnotes

[1] The Euro-American Court's Rules of Arbitration are a flexible adaptation of the Rules of the Spanish Court of Arbitration.

[2] 2003 Spanish Arbitration Act, art. 34.1.

[3] *Id.* art. 14.

[4] *Id.* art. 24.2.

[5] *Id.* art. 15.2.

[6] *Id.* art. 21.