



MASTER IN INTERNATIONAL LAW (LL.M. INT) INVESTMENTS, TRADE AND
ARBITRATION.

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**“Non-intervention principle and its possible
lege ferenda enhancement in the Chilean
international commercial arbitration law.”**

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INDEX

INTRODUCTION	1
CHAPTER I.....	5
NATIONAL COURTS' INTERVENTIONS EXPRESSLY ESTABLISHED IN THE 19.971 LAW ON INTERNATIONAL COMMERCIAL ARBITRATION.....	5
Assistance and supervision functions of the Chilean Courts in the international commercial arbitration processes	8
1) Naming of arbitrators	8
1.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	8
1.1.1) Particular analysis of article 11 N° 3 and 4.....	9
1.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28 th , 2008)	12
1.3) Irish Arbitration Law (Arbitration Bill 2008).....	15
1.4) Proposal	15
2) Challenging of arbitrators.....	19
2.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	19
2.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	20
2.3) Irish Arbitration Law (Arbitration Bill 2008).....	22
2.4) Proposal.	23
3) Lack of or impossibility to exercise arbitration functions.....	25
3.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	25
3.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	26
3.3) Irish Arbitration Law (Arbitration Bill 2008).....	27
3.4) Proposal.	27
4) Decision of the court of arbitration to declare its own competence.....	28
4.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	28
4.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	30
4.3) Irish Arbitration Law (Arbitration Bill 2008).....	31
4.4) Proposal.	32
5) Assistance in evidence-taking	33
5.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	33

5.2)	Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	34
5.3)	Irish Arbitration Law (Arbitration Bill 2008).....	35
5.4)	Proposal.	36
6)	Referral of a case to arbitration by a local court	37
6.1)	Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	37
6.2)	Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	38
6.3)	Irish Arbitration Law (Arbitration Bill 2008).....	39
6.4)	Proposal.	39
7)	Adoption of interim measure.....	41
7.1)	Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	41
7.2)	Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	41
7.3)	Irish Arbitration Law (Arbitration Bill 2008).....	42
7.4)	Proposal.	43
8)	Request for the setting aside of the arbitral award	44
8.1)	Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	44
8.2)	Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	46
8.3)	Irish Arbitration Law (Arbitration Bill 2008).....	49
8.4)	Proposal.	50
9)	Recognition and enforcement of the arbitral award	51
9.1)	Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)	51
9.2)	Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)	53
9.3)	Irish Arbitration Law (Arbitration Bill 2008).....	57
9.4)	Proposal.	58
CHAPTER II		61
ARTICLE 5 IN THE 19.971 LAW ON INTERNATIONAL COMMERCIAL ARBITRATION		61
1)	The formation process of article 5 of the Chilean 19.971 law on international commercial arbitration	61
1.1)	Processing in the House of Representatives.....	63
1.2)	Processing in the Senate.....	65
1.3)	Constitutional Court control of constitutionality	67

2) Conservation, disciplinary and economical competences of the Supreme Court of Justice of the Republic of Chile (Related Competences)	67
2.1) Conservation Competences	68
Application with regards to the Constitution and the laws	69
Protection of constitutional guarantees	69
2.2) Disciplinary Competences	69
2.3) Economical Competences	70
3) Application of the conservation, disciplinary and economical competences of the Supreme Court to the processes protected by the 19.971 Law on International Commercial Arbitration	71
3.1) Appeal [legal remedy] for Protection	71
3.2) Appeal for inapplicability based on unconstitutionality of the law	72
3.3) Legal Remedy of Complaint	72
a) The existence of a serious failure or abuse, committed in the pronouncement of the resolutions of jurisdictional character	73
b) That such resolution is an interlocutory one which puts at an end the trial or makes its prosecution impossible, or that it refers to a definite award	73
c) That such resolutions are not susceptible to any further motion, whether ordinary or extraordinary	75
4) Application for Setting Aside in Criminal Matters	76
CONCLUSIONS	80
BIBLIOGRAPHY	83

INTRODUCTION

Nowadays, it is not a surprise that phenomena such as globalisation and the integration of the different regions of the world have provoked a change in the economical structure of various countries. It cannot be denied that such development makes necessary a restructuring of diverse concepts and the incorporation of new elements to the domestic legal system, which, for years, only regulated internal affairs in different areas.

It has to be understood that a country which does not have regulations in accordance to the needs of international trade will, little by little, lose ground in this new world scenario, making it imperative for developing countries, as Chile, to receive this institution and, in that way, place themselves in a position of equality in relation to other countries that have already incorporated it.

Until 2004, international arbitration in Chile was not adequately regulated. There were laws related only to arbitration within the domestic sphere, which were clearly insufficient for this enterprise. Even though certain previous antecedents existed, none of them were directly addressing the topic of international commercial arbitration. This situation suffered a drastic change beginning on May, 2003, when, in the context of the inauguration of the 26th Inter-American International Commercial Arbitration Conference, the then Minister of Justice, Mr. Luis Bates Hidalgo, announced that the Executive would be sending, close to that time, a message to regulate international commercial arbitration, based on the model law (from now on, “Model Law”) created by the United Nations Commission on International Trade Law (UNCITRAL). This piece of news was very encouraging, as the adoption of a law on international commercial arbitration based on a model law created by UNCITRAL would finally provide an integral regulation of international commercial arbitration, which could favour an important development of this institution in our country.

It is important to emphasise the relevance of the fact that the bill sent by the Executive was based on the UNCITRAL model law, as it was created with great technical precision and incorporated by diverse national legal systems. The aforementioned gives confidence to

international trade actors and a position to the country in accordance to the economic development and openness reached by it.

As in all bills, during its processing there were certain issues generating debate. It is one of them that inspired me to write these lines. There is no doubt that article 5 of the 19.971 Law on International Commercial Arbitration, which refers to the intervention of national Courts in the matters ruled by this law, provoked more than one conflict. This issue is one of the preponderant principles within the processes of international commercial arbitration, as, no doubt, what parties look for is the access to a means of solution of controversies that is fast and efficient, and where national Courts intervene as little as possible, avoiding, in this way, unnecessary interferences and possible delays in the solving of the conflict.

During the processing of the bill, and in relation to the opinion coming from the Supreme Court of Justice, the issue of the collision produced by the restriction to intervene imposed on national Courts by article 5 in the bill and the constitutionally established superintendence competences of the highest Court of the Republic was raised. The details of the processing will be analysed along this work, but what needs to be discussed now is that the Constitutional Court, exercising a preventive control of constitutionality, pointed out that article 5 would be constitutional only if the Supreme Court's competences established in the current article 82 of the Political Constitution of the Republic were left unchanged and untouchable, as well as the appeal for inapplicability based on unconstitutionality of the law and the legal actions contemplated by the Constitution in favour of those whose rights are affected by the application of this law.

Finally, the complete processing ended with the enactment and publication of the 19.971 Law on International Commercial Arbitration, where article 5 was approved just as it was stated in the UNCITRAL model law; the directive, correctional and economical superintendence competences of the Supreme Court, the appeal for inapplicability based on unconstitutionality of the law and the legal actions aforementioned were considered incorporated to the law.

When analysing the Chilean international commercial arbitration law, it can be observed that there are two kinds of intervention on the proceedings of national Courts: the ones provided by the law, and the ones allegedly incorporated by the ruling of the Constitutional Court.

The provided interventions are not clearly developed and they do not give clear orientation to the parties or the Courts. This may interfere with the efficiency and the procedural economy of the proceedings.

On the other hand, the ruling declaring the constitutionality of the Chilean Constitutional Court hinders the interpretation of the non intervention principle of the Chilean international commercial arbitration law.

The general objective of this work is to analyze how the non-intervention basic arbitration principle can be strengthen in order to have a proper and effective operation of the international commercial law in Chile.

On the first chapter of this work, I am going to analyze the interventions of national Courts authorized by the Chilean arbitration law and see if the regulations are self operative or if they need further regulation in order to work properly. In those cases were the provisions are not self operative or the current writing difficult their interpretation and application I will propose modifications and the incorporation of amendments.

For this task I will compare, when possible, the Chilean provisions with the corresponding provisions of the Peruvian and Irish arbitration laws and make a parallel with the Chilean international arbitration regulations. The reason why the Peruvian and Irish arbitration laws were chosen to develop this work is because these laws have been recently enacted and adjusted to the amendments of the UNCITRAL model law of 2006, so they can reflect the last tendencies in the subject. These laws may include interesting or relevant provisions that may be included in the Chilean law.

On the second chapter, I will refer to the decision of the Constitutional Court referred to article 5 of the Chilean law and check if the interventions consecrated on the conservation,

disciplinary and economical competences of the Supreme Court of Justice of the Republic of Chile are applicable to the processes under the international commercial arbitration law. Particularly, I will focus my work on trying to understand the legal nature of the ruling of Chilean Courts of Appeal that decides the set aside consecrated on article 34 of the Chilean arbitration law. Having established the mentioned legal nature I will try to demonstrate that the legal nature of that ruling does not entitle anyone to invoke the Chilean legal remedy of complaint against that ruling, leaving the non-intervention principle intact.

CHAPTER I

NATIONAL COURTS’ INTERVENTIONS EXPRESSLY ESTABLISHED IN THE 19.971 LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

One of the ruling principles of the Model Law on International Commercial Arbitration, and as a result, of the Chilean arbitration law, is the limited and narrowed down intervention that national or local courts have in those proceedings subjected to these laws. This tendency finds its substantiation in the parties’ deliberate adoption of the exclusion of local juridical competences from an arbitration agreement, opting for the practical benefits of these proceedings.¹

In this sense, article 5 in the Chilean international commercial arbitration law (identically to the Model Law) establishes that: “*In matters governed by this Law, no court shall intervene except where so provided in this Law.*” In accordance to the aforementioned, it is evident that the Chilean international commercial arbitration law considers certain cases in which a narrowed down, but necessary², intervention is allowed from national courts of justice.

The interventions of national courts established in the international commercial arbitration are the following:

Those consecrated in article 6, which grants ordinary courts the following assistance and supervision functions: **a)** in relation to the naming of arbitrators (article 11, numbers 3 and 4) when there is no agreement between the parties as to the proceeding or this is not fulfilled; **b)** in those cases where the challenge procedure of arbitrators exist (article 13, number 1) when there is no agreement between the parties as to the proceeding or this is not fulfilled; **c)** in cases of failure or impossibility to act of the arbitrator (article 14) when there is disagreement between the parties in relation to the grounds of the failure or impossibility to act; **d)** in cases in which one of the parties file a plea that the court does not

¹ UNCITRAL. Explanatory note by UNCITRAL on the Model Law on International Commercial Arbitration of 1985, in its amended version of 2006. pp. 29-30. Available online at: <http://www.uncitral.org/pdf/spanish/texts/arbitration/ml-arb/07-87001_Ebook-s.pdf> [consulted: February 7th, 2009].

² FIGUEROA, Juan Eduardo. *La nueva Ley chilena sobre Arbitraje comercial Internacional (Ley 19.971)*. Application for Best Work Award, 18th Committee, International Arbitration Law, 41th Inter-American Bar Association Conference. Santiago. 2005. pp. 18.

have jurisdiction, as it has exceeded its term of office and it pleads competent (article 16, number 3); **e**) the assistance for evidence-taking (article 27); **f**) the referral of the parties to arbitration by the court in which a claim on an issue object of the arbitration agreement is carried out (article 8); **g**) the adoption of interim precautionary measures (article 9); **h**) the cases in which one of the parties request the setting aside of the arbitral award (article 34); and **i**) when the recognition and/or enforcement of a foreign arbitral award is requested (articles 35 and 36).

It is worthy to mention that article 6 of the Chilean international commercial arbitration law consecrated in an identical way the established by article 6 in the Model Law, just incorporating the competent court. With regards to this point, during the processing of the Chilean bill, the Supreme Court of Justice suggested that, in virtue of the work load existing in the Judicial System, the courts that should know of these matters should be first instance Professional Judges.³ Finally, the bill was approved granting the jurisdiction to the President of the Court of Appeals from the place where the arbitration would take place as a one-judge court.

Herewith, a brief analysis of those interventions of the courts of justice that the Chilean international commercial arbitration law expressly consecrates will be carried out. Together with this, the dispositions that regulate the same situations in the Peruvian⁴ arbitration law and in the Irish⁵ arbitration law will be reviewed.

These bodies of regulations were chosen as one of them is framed within Continental Law (just as Chilean law) and the other one within the Common Law, and both have assimilated the 2006 modifications of the Model Law.⁶ With any doubt, the fact that both laws had

³ EXCELENTÍSIMA CORTE SUPREMA DE JUSTICIA (CHILE). *Oficio N° 1306*. July 9th 2003 [online] Available at: <http://www.camara.cl/pley/pley_detalle.aspx?prmID=3553&prmBL=3252-10> [Consulted: February 7th, 2009]

⁴ To go deeper into the study of the Peruvian arbitration law see: <<http://asadip.wordpress.com/2009/01/30/nueva-ley-de-arbitraje-peruano/>> <<http://www.limaarbitration.net/>> and <<http://www.minjus.gob.pe/ley%20de%20conci-2008%20-%20LEY%201071.pdf>> among other.

⁵ To go deeper into the study of the Irish arbitration law see: <<http://www.justice.ie/en/JELR/Pages/Publication%20of%20Arbitration%20Bill%202008>>; <<http://www.oireachtas.ie/documents/bills28/bills/2008/3308/B3308D.pdf>>; <<http://debates.oireachtas.ie/DDebate.aspx?F=DAL20081119.XML&Node=H14>>; <<http://www.oireachtas.ie/viewdoc.asp?DocID=9597&&CatID=59>> among others.

⁶ Up to the present, four countries have incorporated the Model Law to their national legal orders with the modifications carried out in 2006, namely: Ireland (2008), New Zealand (2007), Peru (2008) and Slovenia (2008). UNCITRAL. *Actual Situation. 1985 - Model Law on International Commercial Arbitration*. [Online]. Available at:

incorporated the 2006 amendments of the Model Law (including all the new tendencies in the area) was the main reason to choose them for the comparative analysis. It has to be considered that the Chilean international arbitration law was promulgated and published on 2004, so the last amendments made by the Commission were not included.

The current Peruvian international arbitration law has its background on the arbitration law of 1996, Law N°26.572, which was also inspired on the UNCITRAL Model Law. The actual law collects the aforementioned 2006 amendments and the arbitral developments of Spain, Sweden, Belgium, Germany, England, Switzerland and the United States.⁷

Referring to the Peruvian arbitration system it has to be said that, differing from the Chilean situation⁸, it has only one law that addresses the national or local arbitration and the international arbitration.

The background of the Irish Arbitration Bill of 2008 is the Arbitration Act 1998 that adopted the UNCITRAL Model Law on international commercial arbitration.⁹ The Arbitration Bill 2008 incorporates the 2006 amendments of the Commission.

The Irish arbitration system, as the Chilean system, divides the regulation of domestic and international law. Currently, the domestic arbitration is ruled by the Arbitration Act 1954 amended by the Arbitration Act 1980.¹⁰

It is important at this point to highlight that the purpose of this compared review does not intend to incorporate the dispositions of one legal order into another, but just to serve as reference to fill the possible voids or lacks the Chilean international commercial arbitration

<http://www.uncitral.org/uncitral/es/uncitral_texts/arbitration/1985Model_arbitrationstatus.html> [Consulted: February 7th, 2009]

⁷SOTO, Carlos. *Nueva Ley Peruana de Arbitraje 2008*. [on line] Available at:

<<http://asadip.wordpress.com/2009/01/30/nueva-ley-de-arbitraje-peruano/>> [quoted: March 9, 2008]

⁸ In opposition of the monist system, Chile has a dual system, which means that has different laws for local and international arbitration. See: MEREMINSKAYA, Elina. *Arbitraje doméstico e internacional en Chile: en búsqueda de la armonía*. [on line] Available at: <http://www.camsantiago.cl/articulos_online/61_1_97-114.pdf> [quoted: March, 9, 2009]. pp. 96.

⁹ DUBLIN INTERNATIONAL ARBITRATION CENTER. *Why chose Ireland?* [on line] Available at:

<<http://www.dublinarbitration.ie/wci/>> [Quoted: March 9, 2009]

¹⁰ DOYLE, John. *Ireland*. The International Journal of Public and Private Arbitration. Global Arbitration Review. [on line] Available at:

<<http://www.globalarbitrationreview.com/handbooks/14/sections/54/chapters/523/ireland>> [quoted. March 9, 2009]

law may have. In the same way, we need to highlight that this chapter has as its objective to analyze exclusively those interventions of national courts in the Chilean legal system, and has no intention in carrying out a general “diagnosis” of the possible improvements that could be made to the 19.971 law.

For these purposes, it will be kept present at all times that the fact of not radically modifying the central issue of the regulation established by UNCITRAL in its Model Law eases, no doubt, the maintenance of the juridical security of the possible users of international commercial arbitration in Chile.

Asistance and supervision functions of the Chilean Courts in the international commercial arbitration processes

1) Naming of arbitrators

1.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

In general terms article 11 in the Chilean law on international commercial arbitration is dedicated to regulate matters germane to the appointing of arbitrators.

To complement this, its first clause points out that the nationality of a person, except for when there is agreement of the contrary, will not be an obstacle for that person to act as an arbitrator.¹¹

In its second clause, and as a clear manifestation of the fundamental principle of free will in the international commercial arbitration law, the parties are granted full liberty to establish the procedure they want to carry on with the naming of the arbitrator or arbitrators.

¹¹ Referring to this matter professor Picand says that this sort of “general authorization” could violate Chilean internal provisions because, according to Chilean law, one person needs the Chilean nationality in order to act as a lawyer. PICAND, Eduardo. *Arbitraje Comercial Internacional*. Santiago, Chile, Editorial Jurídica de Chile, 2005. pp. 315. See also article 526 of the Chilean Código Orgánico de Tribunales (Organic Code of Courts). In my personal opinion, this “general authorization” does not violate any Chilean provision, because arbitrators are not acting like lawyers, they are acting as judges of a tribunal. This interpretation allows the appointment of foreign lawyers or professionals of other areas to act as arbitrators in Chile.

In the third and fourth clauses, the law focuses in regulating the situations in which the parties did not establish any type of agreement in relation to the procedure of naming the arbitrator or arbitrators and those cases in which the procedure established by the parties fails and it is not possible to carry on with the naming of the arbitrators.

In article 11, number 5, the Chilean international commercial arbitration law establishes that all the decisions of the President of the Court of Appeals by virtue of the preceding numerals 3 and 4 will be subject to no appeal.¹² In the same way, it is pointed out that when naming an arbitrator, the court or another authority will have to consider the conditions needed by the arbitrator in accordance to the agreement of the parties and will take the necessary measures to guarantee the naming of an independent and impartial arbitrator. In the case of a sole arbitrator or third arbitrator, it will consider the convenience of naming an arbitrator with different nationality from the parties.

1.1.1) Particular analysis of article 11 N° 3 and 4

a) Article 11 N° 3 from the Chilean 19.971 law on international commercial arbitration.

In those cases where the parties have not agreed upon a procedure for the naming of arbitrators, N°3 of article 11 sets the following rules to proceed with their naming:

In the case of an arbitration where three arbitrators have to participate (article 11 N°3a), each party will name one of them and the designated arbitrators will name the third by mutual agreement.

In those cases in which one of the parties does not appoint its arbitrator within a period of thirty days since receiving the request to do so from the other party, or if the arbitrators appointed by the parties are not able to agree in the naming of the third arbitrator within the thirty days since their appointment, one of the parties may call upon the President of the Court of Appeals corresponding to the place where the arbitration takes place to proceed in the appointment of the arbitrator or arbitrators.

¹² We believe that the inapplicability character of the decisions made in the exercise of the mentioned functions is completely accordant with the spirit of the law and it undeniably reflects the principle of limited intervention from local courts in the international commercial arbitration proceedings carried out in Chile.

In those cases in which the arbitration is held by a sole arbitrator (article 11 N°3 b), if the parties do not reach an agreement in his/her appointment, any of the parties may call upon the President of the Court of Appeals corresponding to the place where the arbitration takes place to proceed in his/her appointment.

b) Article 11 N°4 from the Chilean 19.971 law on international commercial arbitration.

In those cases in which the procedure established by the parties fail and it is not possible to proceed in the appointment of the arbitrator(s), due to one of the parties not acting in accordance to the established procedure, if the parties, or the two arbitrators designated by the parties are not able to reach an agreement accordant to the established procedure or a third person, where institutions are included, does not fulfil the role conferred upon it in such procedure, any of the parties may request the President of the corresponding Court of Appeals to adopt the necessary measure, unless another means to achieve the appointment are set down in the agreement in relation to the naming procedure.

This article gives certain guidelines for the Court of Appeals and other authorities (we understand that these “other authorities” must be comprehended as arbitral institutions) to use when proceeding to the appointment of the arbitrator(s). N°5 in article 11 establishes that, when proceeding to the appointment the required conditions to become an arbitrator in the case in accordance to the agreement between the parties must be taken into consideration, and the necessary safeguards and measures must be taken in order to name independent and objective arbitrators. In the case there is a sole arbitrator, the convenience of naming an arbitrator belonging to a different country from the parties must be taken into account.

Practical difficulties in the application of the aforementioned provisions may arise regarding the following issues:

- a. By observing article 11 in the Chilean international commercial arbitration law, we can appreciate that neither the way nor the requirements the request for the naming of an arbitrator by the President of the corresponding Court of Appeals must have are pointed out.

- b. Number 4 of article 11 of the Chilean international commercial arbitration law points out that in the case that the assumptions in letters a., b., or c. in this number are fulfilled, any of the parties may request the corresponding President of the Court of Appeals “to adopt the necessary measures.” It is not clear from the reading of the regulation what is the law referring to when pointing out that “necessary measures” will be taken. Does it refer to, in the case of article 11 N°4, that it will order the party in default to fulfil the procedure agreed by the parties? Or that in the case of article 11 N°4b. it looks for the agreement between the parties? Or that in the case of article 11 N°4c. it will order the third person to carry out the role conferred upon him/her? Or is it that adopting the “necessary measures” is translated into the President of the corresponding Court of Appeals taking charge of the appointment of the arbitrator(s)?
- c. Even though in article 11 N°3 the intervention of the President of the corresponding Court of Appeals is established after the passing of certain time-limits, the procedure or the time-limits the court has to follow in order to solve this matter are not mentioned.
- d. In the case settled down in article 11 N°3b. (the case of the appointment of a sole arbitrator) no time-limit is established for the parties to come to an agreement.
- e. In accordance to the established in article 11 N°5, the President of the corresponding Court of Appeals should take into account the conditions required by the agreement of the parties to be an arbitrator and the necessary safeguards and measures must always be taken to appoint “independent and objective arbitrators”. In the Chilean law on international commercial arbitration, the way in which the court takes the safeguards to ensure the independence and objectivity of the arbitrators is not mentioned.

1.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law regulates matters in relation to the naming of arbitrators in its Title III, ARBITRATORS, article 19 onwards.

In its article 22 N°3, the Peruvian law points out that arbitrators can be appointed by the parties, an arbitral institution or any third person or institution mandated to fulfil this role. It is stipulated that the designated arbitral institution or third person will be able to request the information it considers necessary for the fulfilment of the assignment.

In its article 22 N°5 it points out that if a party, being its role to name an arbitrator, does not do it within the agreed time-limit (or otherwise, the one established by the law¹³), the parties will be able to resort to the designated arbitral institution or the third person to fulfil the appointment. When not covered by these, the case can proceed following article 23, which considers a supplementary naming procedure.

In accordance to the established in article 23 of the Peruvian arbitration law, the parties can freely agree the procedure for the naming of arbitrators. If there is no agreement, the procedure should go onwards as follows:

- a. If it was agreed that a sole arbitrator or all arbitrators or the President of the court should be named by mutual agreement, the party required to complete the appointment will have a 15-days time-limit to do so;
- b. If three arbitrators were agreed, each party will name one within 15 days, and the appointed arbitrators will have to name a third, who will preside the court, within a 15-days time-limit;
- c. If there is a plurality of claimants and respondents, the ones forming a party will have to name their arbitrator by mutual agreement between them;

¹³ As established in article 23, the time-limit established to proceed with the appointment is of 15 days.

d. If by any of the aforementioned suppositions no arbitrator is named, the Chamber of Commerce belonging to the place of arbitration will name him/her, or the Chamber from the place of celebration of the arbitral agreement in the case there was no pact to subject themselves to the Chamber from the arbitration place. If no Chamber exists in the aforementioned places, the naming of arbitrators will become the jurisdiction of the Chamber of Commerce from the nearest locality;

e. Under the assumptions of the preceding letter d., but in cases of international arbitration, if the Chamber of Commerce belonging to the arbitration place was not established as competent, the Chamber of Commerce of Lima will proceed in the naming of arbitrators.

In accordance to the established in article 24 of the Peruvian arbitration law, if the designated arbitral institution or third person does not proceed to appointment within the corresponding time-limit, the rejection of the assignment will be understood and the procedure will follow the already mentioned article 23.d., being the role of the corresponding Chamber of Commerce to fulfil the naming of arbitrators.

Article 25 established the procedure for the naming of arbitrators by the Chamber of Commerce as follows:

When this law establishes that naming of arbitrators will be done by a Chamber of Commerce, it will be done by the person chosen by the Chamber, and if there was no one to fulfil this duty, the decision becomes the competence of the highest organ of the institution. The party requesting the naming to the corresponding Chamber will have to identify and indicate the domicile of the opposing party, describe the controversy and certify the agreement. If the Chamber did not have a procedure, it will communicate the request to the other party for 5 days, after which it will proceed with the appointment. The corresponding Chamber, in the cases of articles 23d. and e. and 24, will have the obligation to complete the appointment of arbitrators within a reasonable time-limit,¹⁴ being the rejection of the request a possibility in the excepcional case of proving that the arbitral agreement does not exist. The corresponding Chamber will have to take into consideration the requirements

¹⁴ It calls our attention that there is no definition as to what is understood as a reasonable time-limit.

established by the parties and by the law to become an arbitrator when appointing them and will undertake the necessary measures to guarantee the independence and objectivity of the arbitrators. In international arbitrations, whenever a sole arbitrator or the president of the court must be appointed, the convenience of naming someone belonging to a different country from the parties will be taken into consideration.

In national arbitration, the arbitrator will be assigned in a random way through technological means.¹⁵

Interesting issues pointed on the Peruvian law:

- a. In this type of procedures there is no jurisdictional intervention. There is only the intervention of the parties, third people and arbitral institutions and Chambers of Commerce.
- b. It seems interesting that the Peruvian arbitration law considers a procedure for those cases in which the Chambers of Commerce must take over the naming (when they have to take over the naming in a supplementary way).
- c. It calls our attention that to request the naming of the arbitrator(s) by the Chamber of Commerce, it is necessary to identify and indicate the domicile of the opposing party, describe the controversy and certify the agreement. It seems to us that the identification of the conflict is a necessary antecedent to be able to appoint the most suitable arbitrator. From the description of the controversy it will be followed the technical requirements the arbitrator must have.
- d. In article 23a., on the contrary from what happens in the Chilean law, a time-limit is established, after due request, for the parties to proceed with the naming of a sole arbitrator.

¹⁵ The regulation comprised by article 25 N°6 regulating national arbitration matters seems to be very remarkable, as it points out that: "In national arbitration, the Chamber of Commerce will carry out the naming of the arbitrator by following a procedure of random appointment through technological means, respecting the specialty criteria." It seems questionable that a technological means can cover all the variants that must be considered when naming an arbitrator.

- e. In article 25 N°4, it is pointed out that the Chamber may reject the request for the designation of the arbitrator when the document contributed by the parties do not clearly establish the existence of an arbitral agreement. This is not the case of the Chilean law.
- f. In the Peruvian international commercial arbitration law there is no definition as to how the necessary measures to protect the “due independence and objectivity of the arbitrator.”

1.3) Irish Arbitration Law (Arbitration Bill 2008)

The Irish arbitration law does not consider modifications to the established by the 1985 UNCITRAL Model Law.

In accordance to the established by article 9 (1) and (2) in the Arbitration Bill, the competent organ to proceed in the naming of arbitrators, situation that is established in number 3 and 4 of article 11 in the 1985 Model Law with the approved ammendements of 2006, is the President of the Irish High Court or any judge of a court designated by the President, bound to the regulations that the Court may pronounce in this matter.¹⁶

Article 9 (3) established that the requests made to the President of the High Court or to the designated judge may be done in a summary manner.¹⁷

1.4) Proposal

In relation to the Irish international commercial arbitration law, we considered the fact that the presentations made in the court may not require many formalities. This element seems to be of great importance, as the establishment of formalities and ritual requirements may obstruct the obtaining of assistance from the President of the corresponding Court of Appeals.

¹⁶ After examining the Web pages: <<http://debates.oireachtas.ie/DDebate.aspx?F=DAL20081119.XML&Node=H14>> and <<http://www.ucc.ie/law/irishlaw/>> that collect the Irish laws and regulations, we can appraise that the High Court have still not dictate such regulations [consults: January 20th, 25th, 28th and February 1st, 3rd and 7th, 2009].

¹⁷ We understand that the expression “*summary manner*” consists in a petition that can be made without great formalities and in the quickest possible way.

We believe that the request must consider the individualisation of the parties, the description of the conflict¹⁸ and the clear exposition of the disagreement in relation to the appointment of the arbitrator(s). In relation to the documents that must accompany the presentation made to the President of the Court of Appeals, it seems to be convenient to add the list of those arbitrators in regards to whom there is no agreement in order to avoid unnecessary delays.

We also think that, as contemplated by the Peruvian arbitration law, in the case there is an agreement to designate a sole arbitrator a time-limit must be established (as of the request of one of the parties) for the parties to reach an agreement. Otherwise, any of the parties will be able to call directly upon the President of the Court of Appeals, without even trying to reach an agreement with the other party.

With regards to the situation produced when one of the parties does not act as stipulated in the agreement, or the parties, the arbitrators, a third person or an institution cannot reach an agreement in the appointment of the arbitrator(s) or they do not fulfil their mandate (article 11 N°4), we believe the expression “adopt the necessary measures” must mean that it will be the President of the corresponding Court of Appeals who will complete the naming of the arbitrator(s). The aforementioned has sense if we understand that the fact that the court starts to order the parties, the arbitrators, the third person and the institutions to fulfil the agreement may derive in the unnecessary dilation of the process, as the parties, the arbitrators, the third person or the institutions may begin to point out the reasons why they cannot fulfil their duty and a procedure should have to be established for each of the situations in which the neglect of duty or disagreement is produced. In conclusion, in virtue of the principle of efficacy and quickness arbitration looks for, it must be the President of the Court of Appeals who proceeds in these cases to the appointment.

In relation to the procedure the President of the Court of Appeals must follow for the appointment of arbitrators, we think it is necessary to have a brief and focused procedure, where both parties have the opportunity to show what they believe is important.

¹⁸ The description of the conflict is not considered for the court to dismiss a petition, but it is established so the candidate considered by the court may carry out a statement in which he/she shows if his/her independence and/or impartiality are compromised in the present case and to determine the technical knowledge required for a concrete case.

With respect to the safeguarding of the due independence and objectivity of arbitrators, it is a good alternative to endow this expression with content, would be the fact that the President of the corresponding Court of Appeals requests whom he/she considers as candidates for the appointment to give a statement in which they point out if there is any reason their independence and objectivity should be affected in the case. We understand that in this case, the disposed in article 12 N°1 of the Chilean international commercial arbitration law has full application.

In consideration to all of the aforementioned, we propose to modify numbers 3, 4 and 5 of article 11 as follows:

Article 11 - Appointment of arbitrators.

3) Failing such agreement:

a) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the President of the Court of Appeals corresponding to the place where the arbitration takes place.

The request addressed to the President of the corresponding Court of Appeals must contain the individualisation of the parties, the description of the conflict and the names of the arbitrator(s) for which there has been no agreement.

When the President of the corresponding Court of Appeals has to acknowledge his/her duty, once the request is entered for his/her knowledge, the court will have to notify the other party for a period of 10 days, after which the President will give his/her ruling within a time-limit of 20 more days.

b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the appointment of the arbitrator within 30 days since the request from one of the parties to

proceed with the appointment, he/she shall be appointed, upon request of any of the parties, by the President of the Court of Appeals corresponding to the place the arbitration takes place, following the procedure stipulated in the preceding clause three, letter a.

4) Where, under an appointment procedure agreed upon by the parties,

a) a party fails to act as required under such procedure, or

b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

c) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or,

any party may request the President of the corresponding Court of Appeals where the arbitration takes place to take the necessary measure, proceeding with the appointment of the arbitrator(s) in conformity with clause three, letter a from the preceding number three, unless the agreement on the appointment procedure provides other means for securing the appointment.

5) All decisions on the matters entrusted by paragraphs (3) or (4) of this article to the President of the corresponding Court of Appeals shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. For this effect, the candidates will be required to write a report in which the expose if their independence and impartiality will be affected by the concrete case. Such report will be answered in a 5 days time-limit as of the date of request of the President of the Court of Appeals. In the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

2) Challenging of arbitrators

2.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

As it was already pointed out, the Chilean arbitration law maintains the structure of the regulation with regards to the challenge procedure established in the Model Law unchanged.

In this way, N°1 in article 13, in virtue of the ruling principle of the autonomy of will, established the possibility that the parties may fix a challenge procedure by mutual agreement.

N°2 in article 13 of the Chilean arbitration law established that if there is no agreement as pointed out in the previous paragraph, the party wanting to challenge an arbitrator will have to send to the arbitral court a writing in which it the reasons for the challenging are exposed, within a 15 day time-limit after becoming aware of the constitution of the arbitral court or of any of the circumstances established in number 2 in article 12 of the law.

Article 13 N°3 of the Chilean arbitration law deals with the situation produced in the case that the established procedure in number 2 of this article does not prosper. In such circumstances, the challenging party will be able to request the President of the corresponding Court of Appeals to decide over the admissibility of the challenge, within a time-limit of 30 days following the reception of the notification of the decision rejecting the challenge. This decision will be subject to no appeal. While the request is being solved by the President of the corresponding Court of Appeals, the arbitral court, and even the challenged arbitrator, will be able to continue with the proceeding and dictate an award.

Practical difficulties in the application of the aforementioned provision may arise regarding the following issues:

It can be observed that the petition to challenge an arbitrator does not comprise any formality, being the only demand that the reasons motivating the challenge must be exposed.

In the case that the established in article 13 N°2 is applied, no time-limits are pointed out in which the arbitral court to resolve the petition to challenge, nor the possibility is given to the challenged arbitrator and to the counterpart to manifest what they believe to be necessary.

In the case that the established in article 13 N°3 is applied, no procedure is pointed out out for the President of the corresponding Court of Appeals to follow.

No express causality is pointed out for the challenging nor any body of regulations where to find such causalities.

2.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law approached the subject of the challenging of arbitrators in its 28th and 29th articles. The first discusses the motives for abstention and challenging. The second to the procedure that must be followed to proceed with the challenging of an arbitrator.

With regards to the procedure that must be followed to challenge an arbitrator, article 29 points out that the parties may agree a challenge procedure or be subjected to an arbitral regulation (art. 29 N°1); in lack of such agreement, the following rules will be applied (art. 29 N°2):

- a. the challenging must be formulated as soon as the causality motivating it is known;
- b. after being notified of the challenging, the challenged arbitrator and the counterpart may manifest their opinions within a time-limit of 10 days;
- c. if the challenged arbitrator resigns or the counterpart agrees with the challenging, and with the exception of a surrogate being named, another arbitrator will be appointed in the way the challenged arbitrator should have been appointed;
- d. if there is no resignation or agreement from the counterpart, the procedure will be as follows:

i) if it is a sole arbitrator, the corresponding arbitral institution or Chamber of Commerce will have to resolve following article 23.

ii) if it is a court composed by more than one arbitrator, the other arbitrators will give a resolution by absolute majority, and in the case of a tie, the president will solve the issue, with the exception of the president being the one challenged, in which case the corresponding arbitral institution or the Chamber will resolve.

iii) if more than one arbitrator is challenged for the same reason, the corresponding Chamber will resolve; but if the president is not challenged, he/she will solve the issue.

Nº3 in article 29 points out that, with the exception of having a contrary agreement, once the time-limit for the emission of an award has started, there cannot be any challenge, without detriment to compulsory resignation of the arbitrator that knows a causality for his/her objectivity to be affected.

Nº 4 in article 29 establishes that challenges do not interrupt the proceeding of the arbitration, except when arbitrators decide so.

Nº5 in article 29 points out that the resignation of an arbitrator or the acceptance of one of the parties in the termination of the arbitrator's duty, will not be acknowledged as the recognition of the admissibility for the challenging; no decision of the court may be used as a basis for a challenge procedure.

Nº 6 in article 29 points out that if a Chamber is called to resolve the challenge, it will be done by the person chosen by it to do so. If there is no previous determination as to the person or people that have to solve the challenge, the decision will be made by the highest organ in the organisation.

Nº7 in article 29, as we see it, acting a clear manifestation of the basic principle of limited intervention of national courts, establishes that the decision solving the challenge is definite and unchallengeable whatever the procedure used to solve it, and might only be questioned through an appeal of annulment against the award.

Interesting features of the Peruvian law:

A period is established in which to present the petition for the challenge. No challenge of an arbitrator can be requested once the time-limit for the issuing of the award has already started. This regulation does not exist in the Chilean law or in the Model Law.

There are no express causalities for the challenging in the Peruvian arbitration law.

Nº 4 in article 28 points out that the causalities for the challenge may be excused. This regulation seems appropriate, as it allows that in certain cases the best qualified person is appointed arbitrator, regardless of the existence of any reason that might make doubts arise about his/her objectivity and independence. As far as we know, this regulation has its basis in the specificity principle and technical preparation that arbitrators must have. This regulation would allow for the best qualified people in certain matters to be arbitrators in cases where their technical knowledge must be applied.

In the case that one of the parties presents a petition for a challenge, the challenged arbitrator and the counterpart have a 10 days time-limit to point out what they think to be of importance. The bilateralism of the audience manifested in this regulation does not exist in the Chilean international commercial arbitration law.

In those cases in which there is no agreement as to the challenge and the court overrules it, a supplementary procedure is established following letters d. and e. in article 23 (appointment by the Chambers of Commerce).

2.3) Irish Arbitration Law (Arbitration Bill 2008)

The Irish arbitration law does not consider modifications to the established by the 1985 UNCITRAL Model Law.

In accordance to the established in article 9 (1) and (2) of the Arbitration Bill, the competent organ to try the challenge in the case it is not accepted under the procedure established in article 13 Nº3 of the 1985 Model Law with its 2006 amendments, is the

President of the Irish High Court or any judge of such court appointed by the President, subjected to the regulations the Court may pronounce judgement on in that regard.

Article 9 (3) established that petitions made to the President of the High Court or to the appointed judge may be made summarily.

2.4) Proposal.

It seems very interesting that neither the Chilean law nor the Peruvian or the Irish ones consecrate express causalities for challenging arbitrators. As we understand it, this is mainly due to the fact that the establishment of specific listings (as the one consecrated in the Chilean legal system, articles 196, 197 and 198 of the Organic Code of Courts) would make difficult the interposition of petitions for the challenge as the “necessary framing” would be have to be sought for each of the causalities.

It is absolutely necessary to establish a quick and condensate procedure for the President of corresponding Court of Appeals to decide over the petition for the challenge. This procedure is needed every time the fact of the petition for the challenge does not impede the continuation of the arbitral procedure (even an award may be pronounced).

In virtue of the technical specificity that arbitrators must have and the principle of autonomy of will, it seems interesting to be able to incorporate to the Chilean law the possibility to excuse, by mutual agreement, the causalities for the challenge. This would allow for the people truly qualified for the resolution of a particular case to do work in it without any obstacles.

Considering the aforementioned, the modification of article 13 is proposed as follows:

Article 13 - Challenge Procedure

- 1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
- 2) Failing such agreement, the party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after

becoming aware of any circumstance referred to in article 12 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. The arbitral tribunal will communicate the challenge to the challenged arbitrator and the counterpart for five days for them to manifest themselves as thought appropriate. The arbitral tribunal will give its resolution to such challenge in a time-limit of 10 days since the expiration of the aforementioned communication.

3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court President of the Court of Appeals corresponding to the place where the arbitration takes place, to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

4) After the petition for the challenge mentioned in number 3) is received by the President of the Court of Appeals, this will communicate the party that has not filed the petition for five days. After the time-limit is over, the tribunal will give its resolution as to the petition in a time-limit of 10 days.

5) The parties, by mutual agreement, will be able to excuse the reasons they know for the challenge and in that case the challenge or recourse against the award will not be found appropriate for such reasons. For that effect, the party which proposes the excusing will notify this fact to its counterpart in the same time-limits expected for the petition of the challenge. The excuse will be presented in writing. If such an agreement does not exist in relation to the excusing of the causality of the challenge, it will be understood that the challenge was filed at the time in which the excuse was filed by the counterpart.

3) Lack of or impossibility to exercise arbitration functions

3.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

In its article 14, the Chilean arbitration law adopts in an identical form the regulations established by the 1985 and the 2006 Model Law.

Number 1 in the aforementioned regulation establishes that when an arbitrator is impeded for the exercise of his/her functions, whether for *de facto* or *de jure* reasons, or because he/she cannot fulfil the assign duty within a reasonable time-limit, he/she will terminate his/her mandate if he/she withdraws or the parties agree in his/her removal. If no agreement exists with regards to any of the mentioned reasons, any of the parties will be able to request the President of the corresponding Court of Appeals to reach a verdict in which the termination of the mandate is declared. The resolution of the President of the Court of Appeals will be subject to no appeal.

In its number 2, article 14 points out that if an arbitrator withdraws from his/her office or one of the parties accepts the termination of an arbitrator's mandate, it will not be considered as an acceptance of the appropriateness of any of the motives mentioned in this article or in number 2 of article 12 (circumstances giving place to justified doubts as to the arbitrator's independence or objectivity).

Practical difficulties in the application of the aforementioned provision may arise regarding the following issues:

Article 14 in the Chilean arbitration law does not clearly establish what must be understood for “reasonable time-limit” during which the arbitrator cannot fulfil his/her duties.

No procedure is established for the President of the corresponding Court of Appeals to pronounce judgement in relation to the termination of one or more arbitrators.

3.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law approaches the subject of the termination of mandate of arbitrators in its article 30.

Number 1 in article 30 establishes that if an arbitrator is impeded to fulfil his/her duty, whether *de facto* or *de jure*, or by any other reason does not exercise his/her functions in a reasonable time-limit, the parties may agree on his/her termination of mandate. In lack of such agreement, and if not procedure has been established by the parties to solve this difficulty, or no subjection to a set of rules has been established, they shall proceed in accordance to the established in article 29 of the Peruvian arbitration law (Challenge Procedure). The resolution will be unchallengeable. Without detriment to the above stated, any arbitrator may be removed by mutual agreement of the parties.

Numbers 2 and 3 in article 30 deal with the subject of the reluctant arbitrator. If an arbitrator shows to be reluctant to the exercise of his/her duties, the others may decide, after notifying the parties and the reluctant arbitrator of the problem, to continue with the arbitration without his/her participation, with the exception of an opposite agreement existing between the parties or a different stipulation of the arbitral set of regulations. If the arbitration goes on, the decision will be notified to the parties, any of them being able to request the institution which appointed the arbitrator or to the corresponding Chamber of Commerce to terminate his/her mandate or for him/her to be replaced.

Interesting features of the Peruvian law:

The Peruvian arbitration law consecrates the possibility that the parties agreed on a procedure for the termination of mandate of an arbitrator or to the subjection to a set of rules regulating the matter.

Just as in the Chilean law, there is no proposition of what to understand for a reasonable time-limit during which the arbitrator cannot exercise his/her functions.

The Peruvian law establishes that if the parties do not reach an agreement, the procedure established for the challenging of arbitrators will be applied.

3.3) Irish Arbitration Law (Arbitration Bill 2008)

The Irish arbitration law does not consider modifications to the established by the 1985 UNCITRAL Model Law.

In accordance to the established in article 9 (1) and (2) of the Arbitration Bill, the competent organ to try the termination of mandate of an arbitrator in virtue of the established by article 14 of the 1985 Model Law with the amendments approved in 2006, is the President of the Irish High Court or any judge of such court appointed by the President, subjected to th regulations the Court might pronounce in this respect.

Article 9 (3) establishes that all petitions made to the President of the High Court or to the appointed judge, may be made summariy.

In the Irish arbitration law, even though it is pointed out that it must be done summarily, no procedure is fixed to proceed with the termination of mandate of one or more arbitrators.

3.4) Proposal.

- a. It seems interesting to be able to incorporate the possibility contemplated in the Peruvian arbitration law, in the sense of allowing for the parties, by mutual agreement, to establish a mechanism which solves their differences in relation to causalities of termination of mandate, or to establish to be subjected to some set of rules for the solution of these differences.
- b. It is necessary to define what is understood by “reasonable time-limit” under the scope of international commercial arbitration. We believe that a 3 months’ time-limit is more than reasonable in this case.

Considering the aforementioned, the modification of article 14 is proposed as follows:

Article 14 - Failure or impossibility to act

1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, which cannot be more than 3 months, his mandate terminates if he withdraws from his office or if the parties agree on the termination.

If a disagreement exists between the parties as to the reasons of termination of mandate and no procedure has been established to solve such a disagreement, or the parties are not subjected to any set of rules, any of the parties will be able to request the President of the Court of Appeals corresponding to the place the arbitration takes place to declare the termination of the mandate. The President of the corresponding Court of Appeals will resolve this petition within a maximum time-limit of 10 days. The decision will be subject to no appeal.

2) If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it will not be considered an acceptance of the validity of any ground referred to in this article or article 12 (2).

4) Decision of the court of arbitration to declare its own competence

4.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

Article 16 of the Chilean arbitration law, just as the 1985 Model Law, approaches the subject of the competence of the arbitral court.

It is worthy to mention at this point, that article 16 contains a doctrinaire principle called *Kómpetenz-Kómpetenz*,¹⁹ which consists in the jurisdiction of an arbitral court to decide upon its own competence, even about the exceptions in relation to the existence or validity of the arbitral agreement.

¹⁹ We understand this expression as “competence on its competence”.

Together with the already mentioned principle of *Kómpetenz-Kómpetenz*, we can find the principle of autonomy of the arbitration clause in article 16, or, as pointed out by some professors, the principle of separability of the arbitration clause.^{20 21}

Number 2 in article 16 of the Chilean law regulates the opportunities in which the exceptions of the court not having jurisdiction must be presented, particularly, the one about exceeding the mandate by the arbitrator. It is established that an arbitral court will be able, if the delay is considered justified, to consider any of the exceptions presented at a later time from that required by this number.

Article 16 N°3 points out that it will be the same arbitral court, previously or at the moment of pronouncing an award about the central issue of the matter, the one to decide with regards to the exceptions mentioned in the previous paragraph.

If, as a previous matter, the arbitral court is declared to have jurisdiction, any of the parties will be able to petition the President of the corresponding Court of Appeals, within a time-limit of thirty days following the reception of the notifications of this decision, to resolve the matter. The resolution of this court is subject to no appeal. It is worthy to highlight that while the request is pending, the arbitral court will be able to continue its proceeding and to pronounce an award.

Practical difficulties in the application of the aforementioned provision may arise regarding the following issues:

In the regulation established in article 16 (3) of the Chilean arbitration law, it is not clearly established the way in which the request to the President of the corresponding Court of Appeals is to be made.

²⁰ This nomenclature is brought to notice by the Uruguayan Professor José Antonio Moreno Rodríguez. Class belonging to the Master program in International Law (LL.M. int.) Investments, Trade and Arbitration, Universidad de Chile and Heidelberg University. Santiago, Chile, October 2008.

²¹ To go deeper into the understanding of these principle examine: GONZALES de COSSIO, Francisco. *Arbitraje*. Mexico, Editorial Porrúa, 2004. pp. 113-132; FIGUEROA, Juan. *The principle of kompetenz-kompetenz in international commercial arbitration*. Thesis submitted in fulfillment of requirements for the academic degree of Master in International Law (LL.M. int.). Heidelberg University and Universidad de Chile. Heidelberg, 2007.

It is also not pointed out the procedure the President of the corresponding Court of Appeals is to follow in order to resolve the petition. This subject is of great importance as, just as it is pointed out in the regulation, the arbitral procedure keeps its course of action, even being able to reach the pronouncement of an award.

4.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law regulates this matter in its article 41 titled “Competence to decide the jurisdiction of the arbitral court”.

Number 1 in article 41 points out that the arbitral court is the only one with the jurisdiction to decide over its own jurisdiction and the existence and validity of the agreement.

Number 2 in this article consecrates the principle of independence of arbitral clause pointing out what arbitral arrangement contained in a contract will be considered an independent agreement, being able to survive despite the inefficacy of the contract, and allowing the court to resolve disputes about the validity of the contract.

Number 3 established the procedural opportunities in which the exceptions must be presented. It establishes that the exceptions about the competence may be opposed until the communication of statement of defence, without the participation in the formation of the court impedes its opposition. The exception about the court exceeding its competence must be opposed as soon as the matter exceeding the competence is suggested. The delays in the exercise of exception must be justified. It is pointed out that the arbitral court may try these matters *ex officio*.

Number 4 in article 41 becomes of great importance as it establishes the procedure applicable to the case in which the court rejects the exceptions or objections. This number establishes that, for the exception of the existence of a contrary agreement, the court may resolve the exceptions or objections as a previous matter or in the award. If the exceptions or objections are rejected (whether as a previous matter or in the definite award), the decision can only be challenged through a resource for the setting aside of the award.

Number 5 in article 41 establishes that if the court accepts the exception as a previous matter, it will stop trying the issue. In this case, the decision will be challengeable through an appeal for annulment. If the exception is accepted only in reference to certain matters, it will continue to try the rest. In this last case, only the interposition of the resource for the setting aside of the award will be accepted.

Interesting features of the Peruvian law:

We believe that the established in the Peruvian arbitration law, specifically in article 41 (4), does not seem to be an adequate solution, as, if the arbitral court rejects the exception of the non existence of jurisdiction as a previous matter, the only alternative to challenge the decision is the interposition of an appeal for the setting aside of the award. There are no possibilities to call upon any court. The same happens in the Chilean arbitration law.

We also believe that this opportunity comes too late and that it may have as a consequence the loss of everything that has been done during the arbitration procedure, distorting the efficiency going through the whole of the arbitration law.

4.3) Irish Arbitration Law (Arbitration Bill 2008)

The Irish arbitration law does not consider modifications to the established by the 1985 UNCITRAL Model Law.

In accordance to the established by article 9 (1) and (2) in the Arbitration Bill, the organ with the jurisdiction to resolve the petition of one of the parties when the arbitral court has rejected the exceptions or objections as a previous matter, situation established in article 16 (3) of the 1985 Model Law with the 2006 amendments, is the President of the Irish High Court or any judge of this court appointed by the President and subject to the regulations the Court may pronounce in this respect.

Article 9 (3) establishes that the petitions made to the President of the High Court or to the appointed judge may be made summarily.

4.4) Proposal.

Following the Irish law, we do not think it necessary to have any kind of formality when presenting a petition, but we do believe it necessary that, to be able to present a petition to the President of the corresponding Court of Appeals, the antecedents justifying the incompetence of the court accompany the request.

In the same way, we believe it is necessary for the counterpart to have the opportunity to answer to the charges.

Considering that the procedure carried out in front of the President of the corresponding Court of Appeals must be as quickly as possible, we recommend to modify article 16 (3) of the Chilean law as follows:

Article 16 - Competence of arbitral tribunal to rule on its jurisdiction

3) The arbitral tribunal may rule on the exceptions referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, by writing an accompanying all of the antecedents that base the request, to the President of the corresponding Court of Appeals to resolve on the matter.

After receiving the request, the President of the corresponding Court of Appeals will communicate the counterpart for five days, after which he/she will decide the matter in a 10 days' time-limit. The decision of this court shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

5) Assistance in evidence-taking

5.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

Article 27 of the Chilean international commercial arbitration law establishes that the arbitral court or any of the parties, with the due approval of the arbitral court, will be able to request the assistance of a competent court in Chile for the taking of evidence. It is established that the court will be able attend such request within the scope of its jurisdiction and in conformity with the regulations that might be applicable to the taking of evidence.

Practical difficulties in the application of the aforementioned provision may arise regarding the following issues:

Even though article 27 does not point out which will be the court with the jurisdiction to assist the court or the properly authorised party, we understand that it will be the Civil Court of First Instance corresponding to the place where the taking of evidence must take place. This analysis gives as a result that in one same arbitral procedure there can be a request for assistance to diverse professional Judges in different points of the national territory, without a need of centralising the petitions to the professional Judge corresponding to the place the arbitration takes place. We do not believe convenient for the President of the corresponding Court of Appeals to be the competent court in this matter. This is due to the established in article 207 of the Civil Procedure Code, which consecrates the principle of the limitation of the evidence in second instance.²² Even though, the President of the corresponding Court of Appeals works as a one-person court, and not as a court of second instance, we think that the taking of evidence is a complex procedure (one that can take a lot of time) that could overload the function of the President of the corresponding Court of Appeals, being preferable for the Civil Courts of First Instance to try this matter in virtue of the experience they have.

²² Article 207, first clause: “In second instance, with the exception of the established in the final clause of article 310 and in articles 348 and 385, no evidence will be admitted.”

It can be understood from the text of article 27 of the Chilean arbitration law that the local court may assist the arbitral court or the properly authorised party, but the form of such assistance is not pointed out.

The time-limit in which a court must take the evidence is also not pointed out, as well as the fact that no time-limit is set for the gathered information to be submitted to the arbitral court after the taking of evidence is over.

It can be understood from the reading of article 27 that the local court “will be able” to attend the request of the court, but no causalities for the denial of the enforcement of the assistance is pointed out. This is particularly delicate as it leaves the possibility to give or not assistance in the taking of evidence to the judgement of the local court.

In the present article no mention is made to the case in which the taking of evidence is made overseas. We understand that there is no need to mention this point, as it is incorporated in the regulations related to the evidence in general.

There is also no mentioning to the fact of the validity of some opposition or motion in front of the request for assistance. In this respect, we understand that, under the ruling principle of limited intervention of local courts, it is not necessary to mention the matter.

5.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law regulates these matters in its articles 8 and 45.

Article 8 of the Peruvian arbitration law establishes in relation to the judicial assistance in the taking of evidence, the pronouncement of precautionary measures and the forced enforcement of the award will be the competence of the commercial judge, or failing this, the civil one, pertaining to the place of the arbitration or where the assistance will be given. When the evidence or the precautionary measures must be carried out abroad, the taking of evidence will be subject to the treaties for the obtaining of evidence overseas or to the applicable national legislation (article 8 N°1, 2 and 3).

Article 45 of the Peruvian arbitration law points out that the arbitral court or one party may ask for judicial assistance for the taking of evidence, which could consist in the taking of evidence in front of the judicial authority or to the adoption of the necessary measures for the taking of evidence in front of an arbitral court (article 45 N°1 and 2).

Unless the requested is evidently contrary to public order or express laws, the judicial authority will carry out the request without delays, nor qualifying its origin or admitting any opposition or motion (article 45 N°3).

In the case declarations must be presented to the judicial authority, the arbitral court might, if considered pertinent, hear the declarations and make questions in due time (article 45 N°4).

Interesting features of the peruvian law:

The Peruvian arbitration law expressly points out the form of the assistance of the local court. The assistance may have the form of “the taking of evidence in front of a judicial authority or the adoption of the necessary measures for the taking of evidence in front of an arbitral court” (article 45 N°2).

The causalities for which the court may deny the request are pointed out. On the contrary, it will be forced to accept the petition.

The possibility that the arbitral court may, in the case of having to take a testimonial evidence, to go to the evidence audience and even make some questions.

Article 45 regulates those situations in which a taking of evidence must be made abroad.

5.3) Irish Arbitration Law (Arbitration Bill 2008)

The Irish arbitration law does not consider modifications to the established by the 1985 UNCITRAL Model Law.

In accordance to the established in article 9 (1) and (2) of the Arbitration Bill, the competent organ to assist the court in the taking of evidence is the President of the Irish

High Court or any judge of this court appointed by the President, subject to the regulations the Court may pronounce in this respect.

Article 9 (3) establishes that the requests made to the President of the High Court or to the appointed judge may be made summarily.

Article 10 (1) of the Arbitration Bill establishes that the President of the high Court or the appointed judge will have, in relation to article 9 and 27 of the 1985 Model Law with the 2006 amendments, the same powers he/she has for any other matter submitted to ruling of the Court.

Article 10 (2) points out that in the exercise of powers in relation to articles 9 and 27 of the 1985 Model Law with the 2006 amendments, and with the exception of the existence of an agreement between the parties, no order may be issued to ensure the costs of the arbitration or to carry out the process of “discovery” of some document.

5.4) Proposal.

Taking the established by the Chilean, Peruvian and Irish arbitration law the following proposal is made:

Article 27 - Court Assistance in taking evidence

The arbitral tribunal or any of the parties with the approval of the arbitral tribunal may request the assistance of a competent Chilean court in the place where the taking of evidence takes place.

The request of the arbitral tribunal or the party properly authorised by the arbitral tribunal, must clearly describe the requested taking of evidence and be accompanied by a copy of the arbitral agreement.

The tribunal must attend such request in as little time as possible (which cannot exceed three months) within the scope of its competence and in conformity with the regulations applicable to the taking of evidence. The tribunal may only decline to carry out the procedure in the case it is contrary to the national public order.

The tribunal may not execute different procedures from that of the requested by the tribunal or the properly authorised party.

The assistance of the competent tribunal may consist in the taking of evidence or in the adoption of the necessary measures for the taking of evidence in front of an arbitral tribunal. In the case testimonial evidence must be taken, the arbitral tribunal will be allowed to be present in the corresponding audience, and after previously consulting with the judge carrying out the taking of evidence, will be able to ask questions.

Once the request is fulfilled, the tribunal will have a 5 days' time-limit to refer the antecedents to the arbitral court.

6) Referral of a case to arbitration by a local court

6.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

Article 8 of the Chilean arbitration law establishes that the court to which a claim is subjected in relation to a matter object of an arbitration agreement, will refer the parties to arbitration if any of them request him/her to do so, at the latest, by the time of presenting the first writing on the merits of the case, unless it is proved that such agreement is null, inefficacious or of impossible enforcement.

This regulation regulates the relation existing between ordinary justice courts and arbitral courts when an arbitration agreement exists. The present article suggests a solution in front of the hypothesis that a matter is promoted in a Chilean court with the existence of an arbitral agreement between the parties. When faced with this situation, this article establishes the referral of the matter to an arbitral court. This referral is subject to some of the parties requesting it.

The legal opportunity for the parties to make this request is, at the latest, in the moment of presenting the first writing on the merits of the claim.

Number 2 in article 8 allows for, in order for the case in which a motion is interposed before an ordinary court in relation to the central issue of the conflict, the initiation or the continuation of the arbitral procedure and the pronouncement of an award while the matter is still pending.

Practical difficulties in the application of the aforementioned provision may arise regarding the following issues:

From the reading of article 8, it is not clear what the procedure will be to declare the setting aside, inefficacy or inexecutability of the arbitral agreement.

It is also not clear if the resolutions pronounced in this procedure are susceptible to any type of motion. We understand that in accordance to the principle of limited intervention of national courts, resolutions pronounced under the protection of this article are not susceptible to any motion.

6.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

Article 16 of the Peruvian arbitration law, titled “Exception of the Arbitral Agreement”, regulates these matters. Numbers 4 and 5 specifically, deal with the regulation of these matters in international commercial arbitration processes.

Number 4 in article 16 of the Peruvian arbitration law establishes that in international arbitration procedures, if the arbitration has not been initiated, the judicial authority will only deny the exception when it proves that the arbitral agreement is evidently null in accordance to the legal regulations chosen by the parties to rule the arbitral agreement or the legal regulations applicable to the central issue of the controversy. However, if the arbitral agreement complies with the requirements established by the Peruvian law, it cannot deny the exception. If the arbitration has already been initiated, the judicial authority will only deny the exception when it proves that the matter manifestly violates the international public order.

Number 5 in article 16 of the Peruvian arbitration law establishes that the arbitration can be initiated or continue its course or even pronounce an award, while the exception of the arbitral agreement is still pending.

Interesting features of the Peruvian law:

The Peruvian law establishes two opportunities to present the action declaring the setting aside of the arbitration agreement: when the arbitration has not still started and when it has already started, without making any distinction in relation to the diverse motions carried out in the arbitral process.

The causality of setting aside the agreement for manifestly violating international public order is incorporated (only set aside causality once the arbitral proceeding has started).

The Peruvian law does not fixate a procedure to declare the set aside of the arbitral agreement.

6.3) Irish Arbitration Law (Arbitration Bill 2008)

In accordance to the established by article 8 in the Arbitration Bill, the competent organ to pronounce judgement over the referral to an arbitral court, will be the Court to which the claim is submitted.

Article 11 of the Arbitration Bill establishes that all resolution pronounced by the corresponding Court will be subject to no appeal.

In contradistinction to the established in the Chilean and Peruvian law, the Irish law expressly points out the character of not being subject to an appeal of the resolutions pronounced by the High Court in relation to these matters.

6.4) Proposal.

We do not believe it necessary to modify the central issues in the disposition of article 8 of the Chilean arbitration law. This is due mainly to the fact that in this way the established in

the Model Law is properly followed, which no doubt grants security to the users of the international commercial arbitration in Chile.

We believe that what should be incorporated is the mentioning of the procedure applicable to the declaration of nullity, inefficacy and non-enforceability of the arbitral agreement. In this sense, we think that the regulations established in Title XI of the Civil Procedural Code, “On the Summary proceeding”, are perfectly adapted for this purpose. The summary proceeding has as a characteristic to be a brief and centralised procedure,²³ and at the same time guarantees the due process of law.

In accordance to the aforementioned, and considering the established by the Peruvian and Irish arbitration law, the modification of article 8 is proposed as follows:

Article 8 - Arbitration agreement and substantive claim before court

- 1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- 2) If the action referred to in paragraph (1) of this article has been brought, the arbitral proceeding may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
- 3) The action referred to in paragraph (1) will be tried under the regulations established for a summary proceeding. The resolutions of the court will be subject to no motion.

²³ In accordance to the established in article 680 of the Civil Procedure Code of the Republic of Chile, the summary proceedings will be applied, failing any other special rule, to the cases in which the deduced action requires, because of its nature, a quick intake for it to be efficacious.

7) **Adoption of interim measure**

7.1) **Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)**

Article 9 of the Chilean international commercial arbitration law, in accordance to the 1985 Model Law, establishes that it will not be incompatible with an arbitration agreement that one party, whether previous to the arbitral performance or during its course, requests from a court the adoption of interim precautionary measures or that a court grants such measures.

Practical difficulties in the application of the aforementioned provision may arise regarding the following issues:

From the reading of article 9, it is not clear which will be the competent court to declare the interim precautionary measures.

There is no pointing out of which will be the antecedents that must accompany the request nor the procedure that must be followed for its establishment.

7.2) **Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)**

The Peruvian arbitration law regulated these matters in its articles 8 and 47.

Article 8 (2) points out that the judge with a sub-specialty in the commercial matters will be competent or, failing this, the judge with a specialty in the civil matters from the place where the measure must be executed or from the place where the measures must show its efficacy. When the precautionary measure must be adopted or executed abroad, it will be subject to treaties on the enforcement of precautionary measure abroad or to the applicable national legislation.

In matters relating to international commercial arbitration, the Peruvian law is very bald, pointing out in its article 47 (9) that the parties, during the course of the proceeding, may request the judicial authority for precautionary measures, with the previous authorisation of the arbitral court.

Interesting features of the Peruvian law:

The Peruvian law enables the parties to request for interim precautionary measures in international commercial arbitration during the course of the arbitral proceedings. In this sense, the Chilean arbitration law enables the parties to request the interim precautionary measures previously to the beginning of the proceeding and during its course.

The Peruvian law requires the authorisation of the arbitral court to proceed with the petition for precautionary measures. In contrast with the aforementioned, the Chilean law does not require this authorisation.

7.3) Irish Arbitration Law (Arbitration Bill 2008)

In accordance to the established by article 9 (1) and (2) of the Arbitration Bill, the competent organ to grant the interim precautionary measures stipulated in article 9 of the 1985 Model Law with the 2006 amendments, is the President of Irish High Court or any judge from this court appointed by the President, subject to the regulations the Court may pronounce in this respect.

Article 9 (3) establishes that all requests made to the President of the High Court or to the appointed judge may be made summarily and in a simplified manner.

Article 10 (1) of the Arbitration Bill establishes that the President of the high Court or the appointed judge will have, in relation to articles 9 and 27 of the 1985 Model Law with the 2006 amendments, the same powers they have for any matter subject to the trying of the Court.

Article 10 (2) points out that in the exercise of the powers in relation to articles 9 and 27 of the 1985 Model Law with the 2006 amendments, with the exception of an agreement between the parties, it will not be able to issue any order to ensure the costs of the arbitration or to carry out the process of “discovery” of any document.

In the Irish arbitration law there is no establishment of any procedure to grant the interim precautionary measures.

7.4) Proposal.

It seems very interesting to us the established in the Irish arbitration law in the sense of designating the President of the High Court (or whoever he/she appoints) to try these matters. Even though in Chile it may be thought that the competent courts in these cases are the Civil Courts of First Instance corresponding to the place where the provisional precautionary measure takes place, we believe that in virtue of the work load the these courts currently have and the technical knowledge the President of the corresponding Court of Appeals possesses, it should be the last one the one to try these matters.

In contradistinction to what happens in the Peruvian law we understand that the faculty of the parties to request a provisional precautionary measure as established by the Chilean arbitration law, is totally independent from the relation that may exist with the arbitral court. In this way, we understand that the petitioner must be submitted to the regulations and requirements established by the Chilean law to request these measures.

We understand that the established by article 10 of the Irish Arbitration Bill relates to the fact that the local court will not be able to issue any order different from the requested by the parties to ensure the result or the costs of the trial. This mentioning seems necessary to us as Chilean courts do not possess autonomous attributions to ensure the costs or results of the trial.

With regards to the question if the resolutions of the courts are appealable or not, we believe that as it deals with arrangement carried out in the margin of the arbitral proceeding, they must be subjected to the recursive regime established by the Chilean legislator.

Considering the aforementioned, the modification of article 9 is suggested as follows:

Article 9 - Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party, before or during arbitral proceedings, to request from a court the adoption of an interim precautionary measure and for a court to grant such measure.

The competent tribunal to grant the measures announced in the previous paragraph, will be the President of the Court of Appeals corresponding to the place where such measure takes place.

The granting of interim precautionary measures will be done in conformity to the regulations established in Titles IV and V of Book II in the Civil Procedure Code.

8) Request for the setting aside of the arbitral award

8.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

Article 34 in the Chilean international commercial arbitration law expressly establishes that the appeal for annulment will be the only motion against an arbitral award, this way granting a specific listing of causalities that may be invoked (articles 34 N°1 and 2). The competent organ to try the appeal for annulment will be the corresponding Court of Appeals.

The causalities for the annulment established in article 34 of the Chilean arbitration law, as in the Model Law, are the following:²⁴

- When the party making the request proves:
 1. that any of the parties in the agreement was affected by some disability, or that such agreement was not valid in virtue of the law to which the parties have submitted it, or in its silence, in virtue to the law of this State;
 2. that the designation of an arbitrator or his/her proceedings have not been properly notified, or that he/she has not been able, for any other reason to execute his/her rights;
 3. that the award dictates over controversies which are not part of the arbitration agreement, or that it contains decisions that exceed the terms of the arbitration,

²⁴ Within these grounds for the setting aside of the arbitral award, the grounds for the mentioned set aside can be easily recognized in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

however, being able to separate the disposition of the award that are referred to the questions submitted to arbitration;

4. that the composition of the arbitral court or the arbitral procedure have not been adjusted to the agreed, with the exception to what relates to the conflict between the agreement and the set of regulations not available from this law.
- When the court verifies:
1. that the subject matter of the controversy is not subject to arbitration in accordance to the Chilean law;
 2. that the award is contrary to public order in Chile.

The opportunity set for the presentation of the petition for annulment is of up to three months after the date of reception, or in the case of having presented a petition for the correction and interpretation of the award and/or of an additional award, the time-limit will be considered since the date in which the court pronounced judgement for that request (article 34 N°3).

In its turn, number 4 in article 34 of the Chilean arbitration law allows for the arbitral court to dictate the provisional postponement of the annulment proceedings for a time-limit that the same court will determine. Such postponement has as a finality to give the opportunity to restart the arbitral proceedings or to adopt any other measure that in its opinion eliminates the grounds justifying the petition for annulment.

Number 5 in article 34 of the Chilean arbitration law established that the Courts of Appeals called to rule over the appeal for annulment must put on the boards the petitions for annulment as soon as they receive them, having preference for its trying and ruling.²⁵

Practical difficulties in the application of the aforementioned provision may arise regarding the following issue:

²⁵ This is one of the modifications incorporated to the Model Law by the national legislator to avoid unnecessary delays and procrastinations.

Within article 34 there is no establishment as to the procedure to conduct the appeal for annulment in the corresponding Court of Appeals.

An example of the confusion that the lack of clarity may provoke in the procedure to follow for the proceeding of this motion may be found in the only appeal for annulment presented in Chile, case N° 9134-2007, “PUBLICS GROUPE HOLDINGS B.V. / ARBITRATOR MR. MANUEL JOSE VIAL VIAL”, where the proceeding has already lasted more than a year without any final conclusion.

8.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law deals with this matter in Title VI, “Annulment and enforcement of the award”, article 62 and ss.

Article 62 of the Peruvian arbitration law approaches the subject of the appeal for annulment.

Only an appeal for annulment based on the causalities of article 63 can be presented against the award. The verdict that resolves it can only pronounce judgement over the validity or nullity of the award, and not on the merits of the controversy or the reasoning of the arbitral court.

Article 63 of the Peruvian arbitration law fixes the causalities for which an appeal for annulment can be presented.

1. Causalities:

- a. Inexistence, nullity, ground for annulment, invalidity or inefficacy of the arbitral agreement.
- b. Lack of a valid notification of the appointment of an arbitrator or of the arbitral proceedings to a party or any other reason obstructing the assertion of his/her rights.

- c. Fail to submit to the arbitral agreement or set of rules, or failing these, to this law, in relation to the composition of arbitral court or to the arbitral proceedings, with the exception in those parts where the proceeding was followed in conformity with the dispositions of this law which must be applied.
- d. Pronouncement of judgement of the arbitral court on matters which are not submitted to its decision.
- e. Pronouncement of judgement of the arbitral court, in a national arbitration, on matters which are manifestly not susceptible to arbitration.
- f. If it deals with international arbitration, the object of the controversy is not susceptible to arbitration according to the Peruvian laws or to an award adverse to the international public order.
- g. A decision made outside the time-limit agreed by the parties, set down in the arbitral set of rules or established by the arbitral court.

Causalities a., b., c. and d. are only appropriate if they were claimed before an arbitral court and rejected (article 63 N°2).

The annulment granted by causalities d. and e. will affect only those matters which are not subjected to arbitration or are not susceptible to arbitration, when they can be separated from the rest; otherwise, the annulment will be total. Causality e. will only be able to be tried ex officio by the Superior Court which tries the appeal for annulment (article 63 N°3).

Causality g. will only be appropriate if the affected party expressly manifests itself by writing to the arbitral court and has not done any action that might be incompatible to the intention of annulment (article 63 N°4).

In international arbitration, causality a. will be resolved according to the most favourable regulations for the validity of the controversy, which might be: the Law chosen by the parties, the Law applicable to the central issue of the controversy, or the Peruvian Law (article 63 N°5).

In international arbitration, causality f. will be tried ex officio by the Superior Court which tries the appeal for annulment (article 63 N°6).

The annulment is not appropriate if the invoked causality may have been remedied through rectification, interpretation, integration or exclusion of the award and the interested party has not complied with requesting it (article 63 N°7).

When no party has a domicile, an habitual residence or a place of main activities in Peru, the withdrawal of the appeal for annulment or its limitation to one or more causalities in this article may be agreed (article 63 N°8).

Article 64 in the Peruvian arbitration law establishes a procedure for the intake of the appeal for annulment.

Intake of the appeal.

1. The appeal is presented before the competent Superior Court within 20 days since the notification of the award. If the rectification, interpretation, integration or exclusion of the award is requested or would have been done by initiative of the arbitral court, the time-limit starts from the notification of the last decision made on these matters or from the deadline of the time-limit to resolve them, in case of silence.

2. The appeal must indicate with precision the causality or causalities in which it is based and accompany it with documentation that will serve as evidence. It can only be offered to present documentary evidence.

3. The Court will resolve the admissibility within 10 days, except for in the case of article 66 (4).²⁶ When admitted, the other party will be communicated the decision for 20 days.

4. Once the time-limit is over, a date will be established for the hearing of the case within the following 20 days. The Court will be able to postpone the procedure for up to 6 months in order to give the opportunity to the arbitral court to continue the trial and repair the

²⁶ Article 66 N° 4: "The challenged party will be able to request the decision of the High Court in knowledge of the motion as to the banking bail fixed in the previous number, when the arbitration court had not determine it. It will also be able to request its evaluation, when it did not agree with the decision of the arbitration court. The High Court will fix the definitive amount as an unchallengeable decision, after communicating the decision to the other party for three (3) days."

possible vices. If it did not comply with this, the Court will resolve within the following 20 days.

5. There is no other motion against this sentence that the cassation before the Supreme Court and only in the case the annulment was totally or partially accepted.

In this work we will not deal with article 65 of the Peruvian arbitration law, “Consequences of the annulment”, as this law considers different causalities for annulment than the Chilean and the Model Law.

Interesting features of the Peruvian law:

In the Peruvian arbitration law new causalities for annulment are incorporated, different from those established by the Model Law. It seems enough to say at this point, that we do not believe that this position benefits the international commercial arbitration in that country as one of the main effects in adopting the Model Law is granting juridical certainty, an element which is broken under the dispositions of the Peruvian Law.

The most remarkable element in the Peruvian arbitration law is that it deals with regulating the procedure applicable to the intake of the appeal for annulment.

One element that seems negative to us is the fact that the resolutions accepting the appeal for annulment in a partial or total way are susceptible to the appeal for cassation (article 64 N°5).

The Peruvian arbitration law considers the possibility of withdrawing the appeal for annulment when none of the parties have a domicile, habitual residence or place for main activities in Peru.

8.3) Irish Arbitration Law (Arbitration Bill 2008)

In accordance to the established by article 9 (1) and (2) of the Arbitration Bill, the competent organ to grant the appeal for annulment established in article 34 of the 1985 Model Law with the 2006 amendments, is the President of the Irish High Court or any

judge of this court appointed by the President, subject to any regulation the Court may pronounce in this regard.

Article 9 (3) establishes that all requests made before the President of the High Court or the appointed judge may be made summarily.

Article 11 of the Arbitration Bill establishes that the resolutions pronounced by the corresponding Court will be subject to no appeal.

8.4) Proposal.

We propose to keep article 34 of the 19.971 law unchanged, without any modification or alteration of the causalities for annulment there established.

Taking the Peruvian arbitration law as a model, but only in the sense of establishing a procedure for the intake of the appeal for annulment, we propose the creation of article 34 bis, which contemplates a quick and expedite procedure for the intake of the appeal for annulment.

Article 34 bis - Intake of the appeal for annulment.

1) Within the time-limit established by article 34 (3), the party that wishes to present an appeal for annulment will have to present by writing, with no formality, a copy of the award²⁷ besides a precise indication of the causality or causalities for annulment properly founded and accredited with the corresponding evidence.

2) Within the 5 days following the presentation of the appeal, the court will carry out a test for admissibility in which it will verify the compliance of the required by the previous paragraph. If the compliance is not confirmed, the appeal will be rejected, with no possibility of further motions.

²⁷ An authorized or certified copy of the award is not required in relation to the current tendency, which avoids excessive formalisms and ritualism's. This tendency is manifested in the modification of article 35 of the Model Law by the Commission in 2006.

3) Once the appeal is accepted for intake, the court will communicate the party which has not presented the appeal for a time-limit of 10 days. In such resolution, a report will be petitioned to the judicial prosecutor, who will have to present the report within the same time-limit established for the communication.

4) Once the 10 days time-limit pointed out in number 3 is over, the court will immediately put the case on the board, having preference for its hearing and ruling.

5) The resolution pronounced in relation to the appeal for annulment will be subject to no other motion.

9) Recognition and enforcement of the arbitral award

9.1) Chilean International Commercial Arbitration Law (Law 19.971 on International Commercial Arbitration)

It is worthy to mention that in these matters a direct relation can be appreciated between the 1958 New York Convention and the UNCITRAL Model Law.

The subjects of the recognition and enforcement of the arbitral award are dealt with, just as in the Model Law, in chapter VIII of the Chilean international commercial arbitration law, in which through article 35 and 36, the procedure by which the recognition and enforcement of an arbitral award are requested is dealt with, as well as the reasons to deny them.

Maintaining the principle of efficiency of the arbitral procedure, number 2 in article 35 of the Chilean arbitration law, only establishes two requirements in which it refers to the party that wishes to petition the enforcement and/or the recognition.

These minimal requirements are:

- presenting the properly authenticated original of the award or a properly certified copy of it, and

- presenting the original arbitration agreement referred to in article 7 or a properly certified copy of it.

All of the aforementioned must be accompanied by a written petition to be presented before the competent court.

Besides the documents required for the petition of recognition and enforcement of the award, such presentation does not require any type of additional formality.

Even though the causalities for the denegation of the recognition and enforcement of the award present in the Chilean international commercial arbitration law and in the New York and Panama Conventions are practically identical, we must point out that the object with which they operate are different. In the national case, the object of application of the 19.971 law is the recognition and enforcement of all the sentences pronounced in international commercial arbitration procedures, even those pronounced in the State in which such recognition and enforcement have been requested, while in the New York and Panama Conventions are not applied to Foreign Arbitral Awards, i.e., those which have not been pronounced by a court of the State in which the recognition and enforcement were requested.²⁸

We understand that the procedure to petition the recognition and enforcement of the awards pronounced under the protection of the Chilean arbitration law is the procedure of *exequatur* before the Supreme Court, where the presentation of the documents pointed out in number 2 in article 35 must be presented.

Even though the Chilean international commercial arbitration law does not expressly point out the procedure that the party which requires the recognition of the award must follow, we understand that it does not comprise mayor problems as the regulations of the *exequatur* or any other juridical body that may result applicable will be applied.

²⁸ PICAND, Eduardo. Op. Cit. pp. 347; SANDOVAL, Ricardo. *Régimen Jurídico del Arbitraje Comercial Internacional. Análisis de la ley N° 19.971, de 29 de Septiembre de 2004, sobre arbitraje comercial internacional*. Op. Cit. pp. 123.

9.2) Peruvian Arbitration Law (Legislative Decree regulating arbitration. Legislative Decree 1071, dated June 28th, 2008)

The Peruvian arbitration law regulates these matters in Title VIII, “Recognition and enforcement of arbitral awards”.

Article 74 of the Peruvian arbitration law expressly point out the regulations that will be applied at the moment of recognising and executing foreign awards. The cited article makes the emphasis that all legal instruments mentioned are subject to the prescription time-limits established in the Peruvian law.

Article 74 (1) points out that the foreign awards will be recognised and executed in conformity with the following instruments, bearing in mind the prescription time-limits fixed in the Peruvian law:

- a. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, approved in New York on June 10th, 1958, or
- b. the Inter-American Convention on International Commercial Arbitration, approved in Panama on January 30th, 1975, or
- c. any other treaty on the recognition and enforcement of arbitral awards signed by Peru.

Article 74 (2) points out that, with the exception of the parties agreeing something different, the applicable treaty will be the most favourable for the recognition and enforcement of the award.

In its article 75, the Peruvian arbitration law establishes the causalities for the denegation of the award.

This article is applicable when there is no treaty or in the case it seems more favourable for the recognition and enforcement of the award, bearing in mind the prescription time-limits in the Peruvian law.

Number 2 in article 75 states that the recognition will be denied if the party, to which the award stands as opposites, proves:

- a. That one of the parties was disabled for the arbitral agreement, or that the award is invalid, according to the law to which the parties were submitted, or, if there is no stipulation of it, to the law in which the award was pronounced.
- b. That the appointment of one arbitrator or the arbitral proceedings were not properly communicated, or that, by any other reason, that party has not been able to defend his/her rights.
- c. That the award refers to a controversy not stated in the arbitral agreement or that it contains decision that exceeds its jurisdiction.
- d. That the composition of the arbitral court or the arbitral proceedings did not adjust themselves to the agreement between the parties, or, failing these, to the law of the country where the arbitration took place.
- e. That the award it is still not compulsory for the parties or that it has been annulled or postponed by a judicial authority in the country – or in conformity to the law,- where it was pronounced.

Number 3 in this article exposes that the recognition will be denied if the judicial authority proves:

- a. That the controversy is not susceptible to arbitration in accordance to the Peruvian law.
- b. That the award is contrary to the international public order.

Numbers 4, 5, 6 and 7 in article 75 point our diverse situation in which the denegation of the recognition is conditioned.

Article 75 (4): Causality a. in number 2 cannot be invoked if, having appeared in the arbitral trial, the incompetence of the court as to the invalidity of the agreement was not invoked; if the arbitral agreement is found to be valid according to the Peruvian law.

Article 75 (5): Causality b. in number 2 cannot be invoked if, having appeared in the arbitral trial, the failing in the notification of the appointment of an arbitrator or of the arbitral proceedings or the vulnerability of the right for defence were not invoked.

Article 75 (6): The recognition will not be denied because of causality c. in number 2 if the award refers to matters submitted to arbitration which can be separated from those that were not.

Article 75 (7): Causality d. in number 2 cannot be invoked if, having appeared in the arbitral trial, the same vice was not invoked.

Number 8 in article 75 grants the possibility for the Superior Court that tries the request for the recognition, to postpone its decision in waiting for the resolution of the annulment or the postponement of the award in the country that pronounced it.

Article 76 - Recognition

Article 76 of the Peruvian arbitration law deals with the establishment of a procedure to recognise foreign awards. In this sense, it points out that the party which requests the recognition will have to present the original award or its copy, properly translated if necessary, authenticated in accordance to the regulations of the country of origin of the award (article 9 of the Peruvian arbitration law). In the case the request is not contentious the intervention of the Public Ministry will not be required. After the admission of the request, the Superior Court will communicate the other party for 20 days (Article 76 N° 1 and 2).

After the time-limit for the communication is over, a date will be appointed for the hearing of the case within a time-limit of 20 days. In the hearing, the Court may adopt the decision of number 8 in article 75 (decision to postpone the pronouncement). If it does not, it will resolve within 20 days.

Number 4 in article 76 points out that only the appeal for cassation is appropriate against the resolution, when the award was not totally or partially recognised.

Article 77 from the Peruvian arbitration law. Enforcement of the arbitral award.

After the award is recognised, whether in its totality or partially, the competent judicial authority will try its enforcement as set down by article 68.²⁹

Article 78 of the Peruvian arbitration law consecrates the application of the most favourable regulation, pointing out that when the Convention on the Recognition and Enforcement of Foreign Arbitral Awards apply, it must be boar in mind:

1. In conformity to paragraph 1) in article VII of the Convention, the disposition of this law will be applied when they are the most favourable to the recognition.
2. In conformity to paragraph 1) in article VII of the Convention, the interested party will be able to avail itself of rights it may have in virtue of the laws or treaties signed by Peru, to obtain the recognition of the validity of this arbitral agreement.
3. When paragraph 2) of article II of the Convention is applicable, this disposition will be applied recognising that the described circumstances are not exhaustive.

Interesting features of the Peruvian law:

We do not think it is necessary to expressly establish (in matters of recognition as well as of enforcement of the awards) that the regulations which seem more beneficial must be applied. Even though the Peruvian arbitration law does not point out under what criteria must a law be measured to be more or less beneficial, we understand that a law will be beneficial when it delivers results in the most expedite way. We also understand that, in

²⁹ Said article points out that the interested party will be able to petition the enforcement of the award by the judicial authority, which, only by merit of the copy of the ruling, will pronounce judgment for the other party to comply in five days under penalty of enforcement of judgment. The challenged party will be able to oppose only if it certifies the compliance of the mandate or suspension of the enforcement in accordance to article 66. If it does, the opposition will be communicated for 5 days, after which the judge will decide within 5 days. The resolution that declares that the opposition has a founded basis will be appealable with a suspensive effect. The judicial authority cannot admit motions that obstruct the enforcement of the award.

virtue of the principle of autonomy of will, the possibility to choose one or other regulation must always be open for the parties.

With regards to the causalities for which the denegation of the recognition of the award may be requested, we must mention that they are practically the same from the established in the Chilean and the Model Law. The only exception is found in letter b from number 3 in article 75 in which it is pointed out that the causality for denegation of the recognition of the award will that which is contrary to international public order. This causality seems inadequate to us as it carries consequences which exceed the scope of jurisdiction of the organ pronouncing judgement over the recognition of the award. If the competent organ must evaluate if the award is contrary to international public order or not, the logical consequence of finding it contrary to such ordeal would be that its recognition could not be requested in any part of the world, which, to our understanding, exceeds its competence. We believe that maintaining the application of national public order is the most coherent alternative in this case.

Numbers 4, 5, 6 and 7 in article 75 point out diverse situation in which the denegation of the recognition is conditioned. We understand that it is not necessary to do this enumeration in virtue of the principle of preclusion (gathered in the Chilean arbitration law, article 4).

It seems very adequate to establish a brief procedure for the recognition of international awards, in which clear steps to follow are established (article 76).

9.3) Irish Arbitration Law (Arbitration Bill 2008)

The Irish arbitration law deals with these matters in its article 35 and 36. As the Model Law in which the Irish text is based corresponds to the 1985 text with the 2006 amendments, it comprises a modification to the text which is in force in Chile.

With regards to the competent organ to try the recognition and enforcement of the arbitral award, the already mentioned dispositions of article 9 are applicable. In consequence, it will be the President of the Irish High Court or any judge of this court appointed by the President, subject to the regulations the Court may pronounce in this respect.

The request will be made summarily.

Number 2 in article 35 points out that:

“(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.”

As it can be appreciated, the requirements of the documents that must be presented when requesting the recognition or enforcement are less rigorous from those established in the Chilean law. The reason of this modification is due to the Irish law being based in the 2006 revised Model Law, where this article was modified.³⁰ The objective of this modification is to establish a maximum number of requirements to ease this procedure.³¹

9.4) Proposal.

We believe that it can be a good alternative to incorporate a brief procedure for the recognition of awards pronounced under its protection to the Chilean international commercial arbitration law. This incorporation would avoid the procedure of *exequatur* (which it takes 1 year average).³² In this sense, the Peruvian arbitration law contemplates a procedure that may serve as a model for the national regulation.³³

We believe that the competent court to try these matters must continue to be the Supreme Court. We mention this for reasons of coherence, as such Court will continue to try the request for the recognition of foreign awards, and it could even try the requests for the recognition of foreign awards by means of the procedure of *exequatur*.

On the contrary from what happens in the Peruvian law, the resolution pronounced by the court which tries the request for the recognition cannot be susceptible to any motion. This is

³⁰Article amended by the Commission in its 39th period of sessions, celebrated in 2006.

³¹ UNCITRAL. *Explanatory note by UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*. Op. Cit. Footnote 22.

³² Information provided by the secretary of the Honourable Supreme Court of the Republic of Chile.

³³ We believe that within this procedure, in contrast with the Peruvian law, the possibility that the Public Ministry gives its opinion should be left unchanged.

clearly explained by understanding that in Chile, it will be the Supreme Court the one to try these matters, being no hierarchical superior to which to appeal the resolution.

The Irish arbitration law, by comprising the 2006 modifications to the Model Law, “de-formalise” the requirements previously established to proceed with the request for recognition or enforcement. We believe that this could be a good alternative to incorporate the national legal system, as what the parties are looking for is as rapidity and efficacy as possible, leaving aside all “ritualism’s”, sometimes excessive, from each of the national jurisdictions.

Considering the aforementioned we propose to modify number 2 in article 35 as follows:

Article 35 - Recognition and enforcement

2) The party invoking an award or applying for its enforcement shall supply the original award or a copy thereof. If the award was not written in an official language of this State, the court may request the party to supply a translation of the award into that language.

We propose to incorporate an article 35bis which contains the procedure applicable to the recognition of foreign awards:

Article 35 bis - Procedure for the recognition of an award

1. The competent court to try the request for the recognition of awards under protection of this law will be the Honourable Supreme Court of Justice.
2. In all those cases in which the Court considers it pertinent, the Public Ministry will be heard.

When the Public Ministry is needed to be heard, this will present a report within a maximum time-limit of 10 days.

3. After the admission of the request, the Supreme Court will communicate the other party for it to express what it feels to be pertinent in a time-limit of 20 days.

4. Once the time-limit for the communication is over, a date will be chosen for the hearing of the case within the following 10 days.

CHAPTER II

ARTICLE 5 IN THE 19.971 LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

In this chapter I will show how article 5 of the Chilean arbitration law, considering the ruling of the Constitutional Court, has introduced the doubt if some interventions of the local courts that are not established on the law are allowed in this kind of processes.

Considering the non-intervention principle consecrated on article 5, no other intervention of local courts can be allowed in order to maintain the benefits of international commercial arbitration.

In the Chilean legal scenario, because of the aforementioned ruling of the Constitutional Court, some authors³⁴ have developed the idea that some legal remedies like appeal for inapplicability based on unconstitutionality of the law, the appeal [legal remedy] for protection and the legal remedy of complaint are applicable in the processes developed under the arbitration law. It is my intention to demonstrate that those legal remedies are not applicable.

In order to be clear, first I will make a brief summary of the formation process of article 5 and then I will address the most interesting point and legal remedies. I will focus my analysis on the legal remedy of complaint because it is the legal remedy that creates more confusion on arbitration users.

1) The formation process of article 5 of the Chilean 19.971 law on international commercial arbitration

The analysis of the formation process of article 5 in the Chilean international commercial arbitration law – the discussions taken place in both chambers of Congress above all, -

³⁴ ARMER, Angie and JIMÉNEZ, Dyalá. *Notas sobre la nueva ley chilena de arbitraje comercial internacional*. *Fueyo Laneri Magazine* 4 p65: 307- 326.pp. 323; See also: CHERRO, Karina. *The New Chilean Arbitration Law: Will Chile Become a New International Arbitration Venue?* *Max Planck UNYB* 10 (2006). pp. 722.

proves to be of vital importance when interpreting the regulations contained in such a law. The importance of this process lies in the fact that it makes it possible for us, in the case of doubting or having difficulties in its interpretation, to know what the intention and will of the legislator were.³⁵

As it is known, the Chilean international commercial arbitration law was based directly on what was established by the UNCITRAL Model Law of 1985 to which only small changes were made. In this sense, I believe it necessary to point out that the work carried out by the United Nations Commission on International Trade Law must be considered as an important part of the reliable history of the Chilean international commercial arbitration law.

The aforementioned is justified if we consider that the discussions about the central issue of each statute were carried out by the designated commissioners within the already mentioned United Nations commission. It was in the heart of this organism that the regulations of this law were really given shape and content. In our point of view, in Chile, as in most of the countries that have adopted the Model Law, the discussions arising from its formation were in direct relation with the applicability of certain articles and the possible conflict they could have with the national legal order, but not in relation to the central issue of each of the statutes.³⁶

After bringing forth the issue mentioned above, it is appropriate to briefly enunciate the formation process followed by the law in relation to article 5.

³⁵ According to the established in article 19 of the Chilean Civil Code, when an obscure expression of the law needs interpretation, one may resort to its intention or spirit clearly manifested in the same law or in the reliable history of the law.

³⁶ It is worth it to highlight that the message sent by the Executive Power for the processing of the law in the Congress points out that the following documents were considered in its elaboration: a) the report of the United Nations Commission on International Trade Law on the work done during its 18th period of sessions – June 3rd to June 21st, 1985, - General Assembly, Official Documents: Fortieth Period of Sessions, Supplement 17 (A/40/17), United Nations, New York, 1985; b) Most recent positive law regulations consecrated in comparative law in relation to international commercial arbitration; and c) current contributions of doctrine and international practice in matters of international arbitration. Within these contributions, it is important to highlight the works: "A guide to the UNCITRAL Model Law on International Commercial Arbitration" by Holtzmann and Neuhaus, and "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions" by Peter Binder. Message 15-349 by H.E. the President of the Republic, Santiago, June 2nd, 2003, pp 6 and 7.

1.1) Processing in the House of Representatives

Once the presidential message was sent to the House of Representatives, dated June 10th, 2003, it was accounted for and the decision to send it to the Foreign Affairs, Inter-parliamentary Affairs and Latin American Integration Commission was made. With that same date the Supreme Court is notified to emit its opinion about matters within its competence.³⁷

The Supreme Court notification 1306, year 2003, accounts for the request emitted by the House of Representatives and establishes the basis in the discussion around the validity in the Chilean legal order of article 5 of the law on international commercial arbitration. The just-mentioned notification of the Supreme Court comments on the proposed article 5 that “it should leave unchanged that which was established in article 79 (current article 82) of the Political Constitution of the Republic.” In this sense, we understand that what the Supreme Court wanted was to make an explicit reference to the directive, correctional and economical superintendence competences of the Supreme Court – national courts above all, - in the writing of the article.³⁸ Together with the already mentioned competences, the Supreme Court points out that the possibility to present an appeal for inapplicability based on unconstitutionality of the law.³⁹

The discussion in relation to article 5 of the law, which had as an antecedent that which was pointed out by the Supreme Court in its notification N° 1306, continued in the Foreign Affairs, Inter-parliamentary Affairs and Latin American Integration Commission. It is relevant to point out that the commission carried out its work with the collaboration of a series of important political and academic authorities in the national sphere of that time, among whom the Minister of Justice Mr. Luis Bates, the Procedural Law professor Mr.

³⁷ Notification 23063 of June 10th, 2003. The participation of the Supreme Court in this formative process renders necessary considering the dispositions of the second clause and the following of the then article 74 (current second and third clauses of article 77) of the Political Constitution of the Republic of Chile. In such clauses it is established that when any modification is considered for the Constitutional Organic Law of Justice Courts, such as the one this bill may provoke, the opinion of the high court of the Republic must be previously heard.

³⁸ Currently, the directive, correctional and economical superintendence is consecrated in article 82 of the Political Constitution of the Republic of Chile. The Constitutional Court, the Elections Qualifying Court, and the Regional Electoral Courts are excluded from this control.

³⁹ Currently consecrated in article 93 of the Political Constitution of the Republic of Chile.

Cristián Maturana Miquel, the President of the Bar Association and Vice-President of the Arbitration and Mediation Centre of the Santiago Chamber of Commerce Mr. Sergio Urrejola Monckeberg, the Executive Director of the Arbitration and Mediation Centre of the Santiago Chamber of Commerce Mrs. Karin Helmlinger Casanovas stand out. The report produced by this commission highlighted, in the first place, the benefit this law entails, and – which seems to be even more important, it laid emphasis on the fact that the true importance of this law is directly related to the supposition which states that international commercial arbitration processes are not ruled nor should be by the traditionalist procedure-based mentality, which allows dilating the procedure through the use of motions, incidental proceedings and even intentional delays, which only dilate the trial.⁴⁰

In strict reference to article 5 of the international commercial arbitration law in relation to which was pointed out by the Supreme Court concerning its directive, correctional and economical superintendence, diverse opinions were given in the commission, of which the following stand out:

- Mr. Bates pointed out that the express indication of these competences was not justified nor necessary every time that in a state under the rule of law the constitutional supremacy rules over all legal regulations. Having to incorporate these express references would make it essential to incorporate the constitutional regulations to each of the newly created laws and regulations, which is an absurd. According to the Ministry of Justice legal advisors' opinion, it should be the highest court the one to reach verdict with regards to the legal basis of the aforementioned superintendence in relation to the arbitration courts established by this law.
- The authors of the project pointed out that the main objective of this article is to promote and shelter the proceedings protected by this law, and that this fact does not prevent the highest court of the Republic to exercise those functions granted by the Constitution. What this article intends to do is to keep dilations and unnecessary delays out of the process in order to deliver and efficient alternative.

⁴⁰ Professor Alessandri Besa's opinion in Bulletin 3252-10. Foreign Affairs Commission report, pp.6.

As a result to these discussions, the commission espoused the standpoint pointed out by the Minister of Justice approving the idea of legislating without the incorporation specified by the Supreme Court.⁴¹

The Commission’s report is accounted for on October 29th, 2003. This brief pointed out that there is no need to expressly safeguard the constitutional supremacy principle, as it is not understandable that a regulation with legal rank may constitute a restriction to the fundamental regulations.⁴²

Despite what is indicated in the previous paragraph, article 5 was rejected by the House of Representatives in particular voting (due to a possible modification or alteration of a constitutional organic regulation) by 56 votes against it and 17 in favour (8 abstentions).

1.2) Processing in the Senate

The work done in the Senate, just as in the House of Representatives, was done by a commission. There was also a notification to the Supreme Court as to hear its opinion concerning certain topics, among which was not article 5 of the law.

As a summary, we need to point out that the result of the work of this Commission established the need to reincorporate article 5, as to keep the necessary congruence with the UNCITRAL Model Law. Their argument was that if the intention was for Chile to constitute an international commercial arbitration centre, then there should be as least modifications as possible to maintain the international coherence and credibility of the system.

Among the most outstanding opinion in this legislative procedure we can mention:

– Professor Ricardo Sateler pointed out that the limitation of the jurisdictional control of local courts did not make it more effective. He said that if the competences of local courts

⁴¹ The representative Riveros abstained himself of voting and a record was made of his adherence to the Supreme Court’s standpoint.

⁴² *Diario de Sesiones de la Cámara de Diputados*. First Constitutional Proceedings in front of the Honorable House of Representatives. 12th Session, October 29th, 2003. Official publication, pp. 37-41. Available at: <<http://sil.congreso.cl/pags/index.html>>

are widened, one of the fundamental elements – and guiding principle, - of international commercial arbitration would be weakened, namely the liberation of local judicial control.⁴³

– Professor Raúl Bertelsen points out that the bill ensures a rational and fair proceeding, which offers all the necessary guaranties. Specifically, the cited professor expressly points out that article 5 does not suffer from constitutionality issues, since, just as professor Cristián Maturana, he expresses about the directive, correctional and economical superintendence of the Supreme Court that by being a regulation with constitutional rank, it is not necessary to safeguard it in the text intended for approval.

– Senator Coloma questioned the constitutionality of article 5 in the bill linking it to the ruling of the Constitutional Court, which comments on the Statute of Rome that expresses that to grant jurisdiction to courts different to those consecrated in the Constitution, a constitutional reform needed to be done.⁴⁴ This standpoint had no acceptance in the discussion.

In regular session, dated June 9th, 2004, the report in which the consensus reached in relation to the reincorporation of article 5 to the bill is expressed is accounted for. In consideration to the aforementioned, an indication to modify the bill approved by the House of Representatives is taken to the Secretary, in order to reincorporate article 5. After the brief the voting was postponed for June 15th, 2004.

In session, dated June 15th, 2004, the Senate approves the bill in general and in detail, notifying the modifications to the chamber of origin.⁴⁵

Back in the House of Representatives, the bill is approved in single discussion.⁴⁶

⁴³ Mr. Ricardo Sateler's opinion in Bulletin 3252-10. Foreign Affairs Commission report, pp. 18.

⁴⁴ See the Chilean Constitutional Court's ruling 346, April 8th, 2002, on the constitutionality of the Statute of Rome of the international Criminal Court.

⁴⁵ Notification 23.802 with modifications made by the Senate for the Chamber of Origin, June 16th, 2004.

⁴⁶ Dated July 21st, 2004.

1.3) Constitutional Court control of constitutionality

According to the Chilean law formation process, after the approval of a bill in both chambers of Congress, the Constitutional Court had to carry out the control of constitutionality.⁴⁷

The Constitutional Court issued a resolution in the ruling 420 on August 25th, 2004, making express reference to article 5 in the sixteenth and seventeenth recitals.

In the sixteenth recital, the ruling recovered the standpoint suggested by the Supreme Court and representative Riveros, in the sense of leaving the competence of exercising the directive, correctional and economical superintendence over all courts of the nation given to it by article 79 of the Political Constitution unchanged, as well as the knowledge of the appeal for inapplicability based on unconstitutionality of the law of the laws conferred to it by article 80 of the Constitution.⁴⁸

The seventeenth recital of the ruling declares the constitutionality of article 5 on the assumption that the attributions the Constitution grants the Supreme Court are left unchanged, as well as the jurisdictional actions contemplated in the Constitution for those whose constitutional guarantees could be affected by the application of this law.⁴⁹

2) Conservation, disciplinary and economical competences of the Supreme Court of Justice of the Republic of Chile (Related Competences)

Having established that the constitutionality of article 5 of the Chilean arbitration law was subject leaving unchanged the conservative, disciplinary and economical competences the Supreme Court has over all courts in the Republic and the appeal for inapplicability based

⁴⁷ Consecrated on article 93 N°1 of the Political Constitution of the Republic of Chile.

⁴⁸ CONSTITUTIONAL COURT, ID 420, on the constitutionality of the bill on the regulation of international commercial arbitration, dated August 25th, 2004, sixteenth recital. Available at <<http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/200>>

⁴⁹ Idem, seventeenth recital.

on unconstitutionality of the law, it is a good moment to briefly point out the content of each of these competences.⁵⁰

These faculties are defined by Professor Cristián Maturana as “*those attribution linked to the exercise of the jurisdictional function located in courts, by mandate of the constitution or the law*”.⁵¹

These attributions find its source in article 3 of the Chilean Organic Code of Courts, which points out that: “*Courts also have the conservative, disciplinary and economical competences that each of them assigns in the corresponding titles of this Code*”.⁵²

From the same article 3 the classification of these competences is understood: **1)** conservative competences; **2)** disciplinary (or corrective) competences; and **3)** economical competences.

Complementing the aforementioned, we must point out that article 82 of the Political Constitution of the republic of Chile, grants the control of these competences over all of the court in the Republic to the Supreme Court of Justice.

2.1) Conservation Competences

The conservative competences are defined as: “*Those conferred to courts to watch over the respect for the Constitution in the exercise of the legislative function and for the protection of the guarantees and rights contemplated in the Constitution.*”⁵³

⁵⁰ In the present paragraph, only a brief description of each of the competences will be carried out, highlighting only its main characteristics. To go deeper into the study of these attributions see: CASARINO, Mario. *Manual de derecho Procesal*. 3rd edition, Santiago, Chile, Editorial Jurídica de Chile, 1977; LÓPEZ, Edgardo. *Nociones generales de derecho procesal*. Valparaíso, Chile, Editorial EDEVAL, 1987-1988; MATURANA, Cristián. *La Jurisdicción*. (Notes), Santiago, Chile, Universidad de Chile, Procedural Law Department, 2001; ORELLANA, Fernando. *Manual de derecho procesa orgánico*. Santiago, Chile, Librotecnia, 2005; among others. For these brief lines we followed the work by Professor Maturana Miquel.

⁵¹ MATURANA, Cristián. *La Jurisdicción*. Op. Cit. pp. 48.

⁵² Law N° 7.421. CÓDIGO ORGÁNICO DE TRIBUNALES. Chilean Official Gazette, Santiago, Chile, June 15th, 1943. National Congress Library [online] [cited: February 8th, 2009] p. 1. Available at: <<http://www.bcn.cl/leyes/pdf/actualizado/25563.pdf>>

⁵³ MATURANA, Cristián. *La Jurisdicción*. Op. Cit. pp. 49.

The application of the conservative competences may be divided into two groups⁵⁴: **a)** conservative competences with regards to the Constitution and the law; and **b)** conservative competences with regards to the protection of constitutional guarantees.

Application with regards to the Constitution and the laws

Within this group we may find the following manifestation: **a)** appeal for inapplicability based on unconstitutionality of the law⁵⁵; and **b)** the resolution of the struggles of competences which arise between the political or administrative authorities and the inferior courts of justice.⁵⁶

Protection of constitutional guarantees

Within this group we may find the following manifestations: **a)** Appeal [or motion] for protection; **b)** Appeal for legal protection; **c)** Access to courts; **d)** Appeal for reclamation as to repudiation or loss of nationality; and **e)** Protection before the Supervisory Judge.

2.2) Disciplinary Competences

These competences are defined as “*those conferred to court to watch over the maintenance and safekeeping of the correct and normal functioning of the jurisdictional activity, being able to repress the failings and abuses incurred by diverse officers, as well as the particulars intervening or assisting in courts.*”⁵⁷

The relevant manifestations of these competences for these brief lines are the following:⁵⁸

a) Disciplinary Complaint: this request is not deduced from a reason or motive of a judicial resolution, but in virtue of the infraction of duties and obligations of judicial officers and of those people which exercise jurisdiction. In consequence, it does not have the finality of

⁵⁴ This division in the application of the conservative competences has its basis in the doctrinaire creation.

⁵⁵ Law N° 20.050. Constitutional Reform introducing diverse modifications to the Political constitution of the Republic of Chile. Chilean Official Gazette, Santiago, Chile, August 26th, 2005.

⁵⁶ See: ZÚÑIGA, Francisco (coordinator). *Reforma Constitucional*. Lexis Nexis, Santiago, Chile, 2005. Specially the work by Professor Humberto Nogueira Alcalá called: *El control represivo concreto y abstracto de inconstitucionalidad de leyes en la reforma constitucional 2005 de las competencias del tribunal constitucional y los efectos de sus sentencias*.

⁵⁷ MATURANA, Cristián. *La Jurisdicción*. Op. Cit. pp. 50.

⁵⁸ To go deeper into this matter see: MATURANA, Cristián. *La Jurisdicción*. Op. Cit. pp. 51.

modifying what has been resolved in some resolution, but to sanction the behaviour of the judicial officer that pronounced it.⁵⁹

b) Legal Remedy of Complaint: it is defined as: *“the procedural juridical act, which is exercised directly before a hierarchically superior court and against the inferior judge or judges who pronounce, in a process they are trying, a resolution with a great fault or abuse, requesting him/her to solve the problem motivating his/her interposition through an amendment, revocation or invalidation of it, without detriment to the application of appropriate disciplinary sanctions by the Court with regards to this judge or judges.”*⁶⁰

It is worthy to mention that in virtue of the modification suffered by this motion in 1995, it stop being some kind of third instance, currently becoming a full and completely extraordinary motion.

2.3) Economical Competences

The disciplinary competences are defined as: *“those conferred to courts to watch over the better exercise of the jurisdictional function and to dictate the rules or instruction destined to allow for the compliance of the obligation to grant quick and full administration of justice in all the territory of the Republic.”*⁶¹

As main manifestation of these competences we must mention: **a)** the appeal for rectification, clarification and amendment; and **b)** the possibility to dictate *“auto acordados”*.⁶²

⁵⁹ We believe that, even though the 19.971 law does not consider the disciplinary complaint as one of the interventions allowed for local courts, pursuant to the Constitutional Court ruling, it would be allowed to file a disciplinary complaint against the behaviour of the arbitrator. We do not believe that this is an obstructing element of arbitration, but that it may work as an additional guarantee for the parties.

⁶⁰ MATURANA, Cristián. *Los Recursos*. Op. Cit. pp. 273.

⁶¹ MATURANA, Cristián. *La Jurisdicción*. Op. Cit. pp. 51.

⁶² The meaning of this legal term is a provision established in order to regulate an internal procedure of an institution. In most of the cases these provisions are established by superior organisms of the same regulated institution.

3) Application of the conservation, disciplinary and economical competences of the Supreme Court to the processes protected by the 19.971 Law on International Commercial Arbitration

In the light of the already commented ruling of the Constitutional Court, it has been suggested that the resolutions pronounced in the processes under the protection of the 19.971 law, would be susceptible to the appeal for protection, the appeal for inapplicability based on unconstitutionality of the law and the legal remedy of complaint.⁶³ All of the interventions of national courts would supposedly be adept by the conservative, disciplinary and economical competences saved by the Supreme Court of Justice and the Constitutional Court.

In the following, a brief revision will be made to the applicability of the appeal for protection and of the appeal for inapplicability based on unconstitutionality of the law, so as to approach the appropriateness of the legal remedy of complaint before the resolution of the corresponding Court of Appeals pronouncing judgment in relation to the appeal for annulment interposed against the arbitral award.

3.1) Appeal [legal remedy] for Protection

The application of the appeal for protection with regards to the jurisdictional resolutions has never been a peaceful subject in the doctrinaire scope as much as in the jurisprudential one.

It is enough to mention in these lines, as stated by the barrister Julio Guzmán, in relation to the opinions of professor Soto Kloss, that the jurisprudence, in general terms, has denied the appropriateness of the appeal [motion] for protection with regards to judicial resolutions.⁶⁴ We understand that arbitrators are real judges exercising some sort of

⁶³ ARMER, Angie and JIMÉNEZ, Dyalá. Op. Cit. pp. 323.

⁶⁴ GUZMÁN, Julio. *Recursos de Protección y Resoluciones Judiciales*. CAM Santiago, On-line articles [online]. No publishing date, N° 37 pp. 1 [consulted: February 10th, 2009] Available at: <<http://www.camsantiago.com/html/archivos/espanol/articulos/RECURSOSPROTECCION.pdf>>.

jurisdiction⁶⁵, so the aforementioned jurisprudential criteria must be fully applied in relation to the arbitral awards.⁶⁶

After going over the cases information system of the Judicial Power in the Republic of Chile, and consulting the officers of the Special Secretary of the Court of Appeals of Santiago⁶⁷, no appeals for protection are registered against any arbitral award under the protection of the international commercial arbitration law.

3.2) Appeal for inapplicability based on unconstitutionality of the law

In this respect, we believe that the only possibility for this motion to proceed is that article 5 and 34 of the international commercial arbitration law is applied not in conformity to the established in the ruling of the Constitutional Court.

It is enough with saying at this point that after consulting the Constitutional Court system, there no motions registered in relation to the international commercial arbitration law.⁶⁸

3.3) Legal Remedy of Complaint

No doubt, the analysis of the appropriateness of the appeal for annulment must be carried out in relation to the resolution of the corresponding Court of Appeals pronouncing judgment over the annulment consecrated in article 34 of the Chilean arbitration law, considering that in relation to this resolution the requirements established in article 545 of the Organic Code of Courts may be complied. This exercise must be carried out only in relation to this resolution as it is not possible to image the appropriateness of this motion in relation to arbitral resolutions that are being pronounced throughout the process. The

⁶⁵ In accordance the pointed out by the Chilean Honourable Supreme Court of Justice, the jurisdiction of arbitrators "...brings in an analogous jurisdiction to that of official courts and judges are true judges invested with public authority." *Revista de Derecho y Jurisprudencia, Tomo XLI, secc. 1ª*, pp. 396. Quoted by TOLEDO, Christian. *Arbitraje comercial internacional: características y principios*. Thesis (Bachelor in Juridical and Social Sciences). Santiago, Chile, Universidad de Chile, Law School, 2003. pp. 13. It is important to mention that arbitrators lack judicial authority or competences to execute what has been judged.

⁶⁶ To examine other reasons for which the appeal for protection is inappropriate in relation to the awards decided under the protection of the 19.971 law, see: DOMÍNGUEZ, Rodrigo and ORIZOLA, Alejandro. *Análisis particular del Artículo 5º de la ley Nº 19.971, sobre Arbitraje Comercial Internacional*. Thesis (Bachelor in Juridical and Social Sciences). Santiago, Chile, Universidad de Chile, Law School, 2007, chapter 4.3.

⁶⁷ The Special Secretary of the Court of Appeals of Santiago is the one in charge of administering the appeals for protection within the jurisdiction of the Court of Appeals of Santiago.

⁶⁸ See: DOMÍNGUEZ, Rodrigo and ORIZOLA, Alejandro. Op. Cit. Chapter 4.4

aforementioned is due to such resolutions not complying with the prerequisites established by the same legal remedy of complaint, i.e., that the resolution is not susceptible to any further motion.⁶⁹ With regards to the resolutions that are being pronounced throughout the procedure, there is also the possibility of presenting an appeal for annulment. In this same sense, professor Maturana has given his opinion.⁷⁰

With the intention of clarifying the appropriateness of this appeal before the already mentioned resolution, we must observe the three copulative requirements demanded by article 545 in the Organic Code of Courts.

a) The existence of a serious failure or abuse, committed in the pronouncement of the resolutions of jurisdictional character.

The determination of this first requirement of article 545 is subject to the particular circumstances of each case. Such circumstances shall be evaluated by the Court to see if they carry a serious failure or abuse.

b) That such resolution is an interlocutory one which puts at an end the trial or makes its prosecution impossible, or that it refers to a definite award.

Considering the requirement, we must establish if the juridical nature of the sentence ruling the appeal for annulment is a definite sentence or an interlocutory sentence which puts an end to the trial and makes its continuation impossible.

Article 158 of the Civil Procedure Code defines the different types of resolution, which gives us their different classifications.

The aforementioned article points out in its second clause that: *“It is a definite sentence the one that puts an end to the instance, solving the question or matter object of the trial.”* Considering this definition, we must point out that the resolution pronounced over the appeal of annulment cannot be a definite sentence as the resolution does not put an end to

⁶⁹ Article 545 first clause, Organic Code of Courts.

⁷⁰ DOMÍNGUEZ, Rodrigo and ORIZOLA, Alejandro. Op. Cit. pp 134.

any instance, as the appeal for annulment does not go over the issues *de facto y de jure* dealt with in the trial.⁷¹

After being clear that the sentence ruling over the appeal for annulment is not a definite sentence, we must analyze if it is one putting an end to the trial, or making its continuation impossible.

It is worthy to mention at this point that article 158 does not consecrate this type of sentences. This nomenclature appears in relation to the appeal for cassation in the form as well as on the merits.⁷²

Considering the aforementioned, we must point out that this type of sentences is defined only, or has tried to be defined, by doctrine.⁷³ In this sense, professor Maturana holds that this type of resolutions are those that simply put an end to the trial and the procedure or postpone it if it cannot be continued,⁷⁴ and points out that whether they are first degree⁷⁵ or second degree interlocutory sentences⁷⁶.

Professor Maturana believes that the awards that put an end to the trial or make its continuation impossible cannot ever be second degree interlocutory sentences, as that type of sentence is precisely defined as those which resolve over a proceeding that could serve as a basis for the pronouncement of a definite or interlocutory award.⁷⁷

In accordance to the aforementioned, professor Maturana considers that those award which put an end to the trial or make its continuation impossible must be immersed within the first degree interlocutory sentences.

⁷¹ MATURANA, Cristián. *Los Recursos*. Op. Cit. pp. 78.

⁷² See articles 766 and 767 of the Civil Procedure Code.

⁷³ In this sense, the doctrine is very hesitant and does not give a clear concept of this type of sentences. The only thing achieved is the confirmation for the reader that these types of interlocutory sentences have a rather confusing and hazy concept.

⁷⁴ MATURANA, Cristián. *Los Recursos*. Op. Cit. pp. 78.

⁷⁵ In accordance to article 158, third clause, first degree interlocutory sentences are those that rule over an incident of the trial establishing permanent rights in favour of the parties.

⁷⁶ In accordance to article 158, third clause, first degree interlocutory sentences are those that rule over an incident of the trial deciding over some proceeding that must serve as a basis in the pronouncing of a definitive or interlocutory sentence.

⁷⁷ MATURANA, Cristián. *Los Recursos*. Op. Cit. pp. 31.

In contradistinction to the appointed by professor Maturana, we believe that the award ruling over the appeal for annulment established in article 34 cannot be a sentence ruling over an incident of the trial, resolving some proceeding which must serve as a basis for the pronouncement of a definite or interlocutory sentence, as the trial is already over, not existing already any possibility of promoting any kind of incident.

Just as it is presented in article 82 of the Chilean Civil Procedural Code, incidents are all those accessory matters in a trial, which require special pronouncement with the presence of the parties in the hearing. It is our concept that the resolution ruling the appeal for annulment does not make any pronouncement over any incident, as the arbitral trial as such is already over, eliminating any possibility to promote any accessory matter to the same, therefore, the mentioned resolution cannot be an interlocutory sentence.

In accordance to the previously mentioned, we understand that the resolution ruling over the appeal for annulment does not comply with the requirement referring to the juridical nature of resolutions susceptible in the motion.

The juridical nature of the resolution ruling over the appeal for annulment is of those we can call “sui generis”,⁷⁸ which do not fit within the conceptual system established in article 158 of the Civil Procedure Code. This situation must not be of wonder, as many resolutions exist sharing these characteristics, e.g., the resolution ruling the appeal for cassation.⁷⁹

c) That such resolutions are not susceptible to any further motion, whether ordinary or extraordinary.

In accordance to the Chilean procedural system, the resolution of the corresponding Court of Appeals, which pronounces judgement over the appeal for annulment, could be susceptible to the appeal for cassation in the form as well as on the merits. We deny the appropriateness of such motion as article 5 in the 19.971 law imposes a clear limitation to intervention, where in no case the applicability of such motion is pointed out. For the rest,

⁷⁸ In this sense, the High Court has pointed out in several occasions, and in relation to the admissibility of the appeal for annulment in criminal matters, that the nature of the resolution that decides over an appeal for annulment is of special character, so a legal remedy of complaint against it is not justified.

⁷⁹ Idem. pp. 33.

what leaves the ruling of the Constitutional Court unchanged are the conservative, disciplinary and economical competences and the appeal for cassation is known in virtue of the jurisdictional competences of courts.⁸⁰ In accordance to the aforementioned, we understand that there is no motion, ordinary or extraordinary, which proceeds against the resolution of the corresponding Court of Appeals ruling over the appeal for annulment of article 34 in the 19.971 law.

4) Application for Setting Aside in Criminal Matters

The Criminal procedural reform of 2000⁸¹ introduced to the Chilean legal system the called Appeal for Annulment (consecrated in Chapter IV of Book III in the Criminal Procedural Code).

It calls the attention the similitude this new motion has with the appeal for annulment established in the 19.971 law: both motions are of extraordinary nature, of special regulation, destined to go over specifically typified causalities, and, finally, both motions are dealt with by superior courts in virtue of their jurisdictional competences. Professor Maturana, in reference to the appeal for annulment in criminal matters, points out that it is a true reformation on the merits and not a simple terminological change.⁸²

We understand that, just as the appeal for annulment in the 19.971 law, the appeal for annulment in criminal matters produces a conceptual twist and innovations that find no model in the Chilean legal system. In consequence, trying to apply reasons and considerations applied to other motions with regards to these new creations would be an error that could carry serious difficulties.

Bearing in mind the similitude mentioned in the previous paragraphs, we believe it is time to mention the criteria used by the maximum court in the Republic of Chile to resolve the matter of the applicability of the legal remedy of complaint before the resolution ruling over the appeal for annulment in criminal matters.

⁸⁰ MATURANA, Cristián. *Los Recursos*. Op. Cit. pp. 180.

⁸¹ This year starts the implementation of this reform in regions IV and IX, finishing in 2005 with the Metropolitan region.

⁸² In this sense, professor Maturana, quoting the work *Reforma Procesal Penal. Génesis, Historia Sistematizada y Concordancias*, refers to the appeal for annulment in the Code of Criminal Procedure as a true central innovation, and not as a simple terminological change. MATURANA, Cristián. *Los Recursos*. Op. Cit. pp. 232.

The revision of the treatment given to this motion may give us an idea as to what the maximum court can resolve when in front of the interposition of a legal remedy of complaint in relation to the resolution failing over an appeal of annulment in matter of international commercial arbitration.

The main criteria applied by the Supreme Court has been to systematically deny the appropriateness of the legal remedy of complaint with regards to the resolution ruling over the appeal for annulment in criminal matters, because of the opinion that the appeal for annulment does not constitute an instance, for which the resolution ruling it cannot be a definite award, nor a matter accessory to the trial, for which it cannot be an interlocutory award putting an end to the trial or making impossible its continuation. Finally, and as it has already been indicated with regards to the juridical nature of the resolution ruling over the appeal for annulment in an arbitral matter, it is pointed out that the nature of the resolution ruling the appeal for annulment is of a special character, for which it does not fit within the classifications of article 258 of the already mentioned legal body of regulations.⁸³

It is worthy to mention that a minority criteria exists, hold by the Ministers of the Supreme Court, Mr. Rodríguez and Mr. Dolmestch, which has established the appropriateness of the legal remedy of complaint against the resolution ruling over the appeal for annulment in criminal matters.⁸⁴

To finish with this point, we believe it is important to highlight the opinion of professor Maturana in relation to way in which the Chilean international commercial arbitration law should be interpreted. When this professor was consulted as to the juridical nature of the resolution ruling over the appeal for annulment established in the international commercial arbitration law, he pointed out that beginning this sort of questioning was deeply wrong and

⁸³ In this sense, rulings: ID 3138-2006; 199-2006; 3598-2006; 3190-2006; 7124-2008; among others.

⁸⁴ See the Supreme Court rulings ID 1386-2002; 1788-2004 and 3515-2007. To go deeper into this minority standpoint examine: WEGNER, Veronika. *Algunos aspectos destacables del Recurso de Nulidad en el Nuevo Sistema Procesal Penal*. Thesis (Bachelor in Juridical and Social Sciences). Viña del Mar, Chile, Universidad Adolfo Ibáñez, Law School, 2008. Chapter IV.

an incorrect starting point.⁸⁵ According to this professor, it is enough to attend the literal tenor of the law, understanding that it does not allow for the intervention of national courts, which are not properly authorized by the same law. This professor states that to be able to interpret the international commercial arbitration law in an adequate manner, this must be interpreted under the perspective of international law in observance of the principles established by the law.⁸⁶

In a coincident manner with the observations of professor Maturana in relation to the way in which the international commercial arbitration law should be interpreted, the United Nations Commission for International Trade Law, approved in 2006 the amendments to the Model Law, within which was the incorporation of a new article 2A⁸⁷, where it is expressly pointed out that when interpreting the Model Law its international origin should be considered and that the matters related to the matters regulated by the Model Law, which are not expressly solved in it, will be decided in conformity to the general principles in which it is based. In consequence, and understanding that the principle of no intervention by local courts is one of the fundamental principles of the Model Law, all those situations in which local courts are doubtful as to the interpretation of the law (as it can be the case of interpreting article 5 of the law), must be solved under those principles and not under the local principles of each country.

We believe that incorporating this new article 2A approved by the commission would help national judges to be clearer as to the limits established for their intervention.

Even though, it is still not possible to know what the position of Chilean courts will be with regards to the appropriateness of the mentioned motions in processes under the protection of the 19.971 law, there is no doubt that the incorporation of the new article 2A, where it is

⁸⁵ Opinion by the Procedural Law professor Cristián Maturana Miquel, given on October 29th, 2007, when personally consulted about the judicial nature of the resolution ruling the appeal for annulment of article 34 of the 19.971 law. In: DOMÍNGUEZ, Rodrigo and ORIZOLA, Alejandro. Op. Cit. pp. 130.

⁸⁶ Ibidem.

⁸⁷ Article 2 A. International Origin and general principles. (Approved by the Commission in its 39th period of sessions, carried out in 2006)

1) In the interpretation of the present Law, its international origin and the need to promote the uniformity of its application and the observance of good will must be taken into account.

2) The issues in relation to the matters ruled by the present Law, which are not expressly solved in it, will be settled in conformity to the general principles in which this Law is based.

expressly pointed out that by the time of interpreting the disposition of the law, the international origin of the same should be boar in mind to help reaching an unambiguous interpretation in relation to the appropriateness of interventions not clearly consecrated in the international commercial arbitration law. WE understand that this incorporation gives the judge the necessary tools for a full understanding of the law.

Because of this, it is recommended to incorporate this new article 2A to the 19.971 law on international commercial arbitration.

CONCLUSIONS

No doubt, the Chilean international commercial arbitration law constitutes a quantitative and qualitative advance with regards to the law applicable to national arbitration.

It must always be kept in mind that the Chilean 19.971 law on international commercial arbitration based its disposition in the UNCITRAL Model Law, which eases the understanding and confidence of the users of international commercial arbitration.

It is worthy to point out that the Chilean law on international commercial arbitration did not only used the Model Law as a reference, but that it practically adopted its same text with very little modifications (non on the merits).

One of the objectives suggested by the impellers of the international commercial arbitration law was to achieve that Chile got a position in a preponderant place at a Latin American level in matters of international commercial arbitration, exploiting the comparative advantages (mainly in economical and political stability) that this country has over many of its neighbours.

To achieve the aforementioned objective, and, even more important, to achieve the correct application of the law, there must be sufficient clarity in relation to the procedures this law follows.

In matters of the intervention of national courts in cases protected by the procedures of the 19.971 law, just as in the Model Law, there are two groups established in which the referred intervention is allowed. Throughout these brief lines, it can be clearly appreciated that the dispositions which contemplate and authorise the intervention of national courts are not sufficiently detailed and elaborated as to allow for a practical performance.

The referred practical performance is totally necessary to completely understand the law and avoid unnecessary delays and confusions in international commercial arbitration procedures in Chile.

As an example, and as a framework, the Chilean arbitration law was compared to that of Peru and Ireland. This exercise, besides the merely academic sense it may have, has served to appreciate how the regulation in relation to international commercial arbitration has developed and been elaborated in other countries. Obviously, none of these sets of rules is intended to be copied, but we believe its use as a framework is very useful.

After revising the dispositions which enable the intervention on national courts in the Chilean international commercial arbitration law, we believe it is completely necessary to incorporate the proposals presented in this work. Even though, it might be thought that the proposals seem, in some cases, inadequate, we believe that the road to follow in this matter is to endow the 19.971 law with practical performance, avoiding in this way that the users of arbitration not having the certainty as to what course of action takes each procedure, or even not having the clarity as to what court will have jurisdiction to try each of the matters.

In this work, those interventions supposedly incorporated to the law in virtue of the ruling of the Constitutional Court which pronounced judgement in respect to the constitutionality of the 19.971 law, were also approached.

With regards to this subject I have to conclude that the action of protection is not applicable in relation to the arbitral awards protected by the procedure of the 19.971 law, considering that this action was not created to challenge jurisdictional resolutions. It must be mentioned that rarely the Court of Appeals has admitted this action against the awards of a national office. When it has done so, it has been for extremely qualified circumstances.

In relation to the appeal for inapplicability based on unconstitutionality of the law, it is enough to say that at the moment none of these appeals have been presented against the central law of this work.

In reference to the validity of the legal remedy of complaint against the resolution of the corresponding Court of Appeals ruling over the appeal for annulment in matters of international commercial arbitration, we have to deny its validity.

We understand that the negative in the validity of this motion, as exposed in Chapter II, is mainly due to the fact that the judicial nature of the aforementioned resolution does not correspond to the type of resolution susceptible to such motion.

We believe that the Chilean international commercial arbitration law must always be interpreted in virtue of the autonomy this body of regulations possesses. To understand that the fact that it is part of the national legal system, and thereby, all categories and traditional principles of the national legal system are applied to it, to our understanding, is a wrong starting point, which would have as a consequence the denaturalisation of the law and its principles. We believe that the established in the ruling of the Constitutional Court referring article 5 of the bill, has as a finality only to save the competences of the Supreme Court, but in no case, to make appropriate the already mentioned legal remedy of complaint.

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