Chile: Drafting arbitration clauses in international contracts – practical aspects. Por Macarena Iturra

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Given the dynamism of international trade, international arbitration is an important option for parties to international contracts in search of a neutral forum. As a consequence, arbitration has expanded considerably in recent years in Chile and throughout the region. Consistent with this trend, various laws have been enacted in Chile with a view to strengthening international arbitration. In this article, we will analyze various practical aspects to consider when drafting arbitration clauses in international contracts, from the perspective of Chilean law and in light of recent developments in the country.

Key considerations when drafting an arbitration clause

Numerous factors should be considered when drafting an arbitration agreement. As a general matter, a simpler agreement may help avoid misunderstandings that could impede an arbitration. Here, we consider the elements of a clause that must be included to be enforceable under Chilean law. First, the clause must be clear that arbitration is exclusive and mandatory. If it fails to clearly require both elements, it may leave open the possibility of seeking recourse to the courts. Second, the clause must be clear regarding its scope.

Certain additional elements are not essential, but may be desirable under some circumstances to ensure a more efficient proceeding. These include the number of arbitrators who will resolve the conflict, the language of arbitration, and the law applicable to the merits. Though these are not essential under Chilean law to ensure that the arbitration clause is enforceable, they merit consideration and have also been addressed by Chilean law.

Composition of the Tribunal

The parties should indicate the number of arbitrators that will resolve the conflict and normally the arbitral tribunal will consist of one or three arbitrators. Factors that may be considered when making this decision may include the amount in dispute, costs of the proceeding, etc. Law No. 19,971 establishes that if the parties do not indicate the number of arbitrators, there will be three. By comparison, the ICC rules provide that if the parties do not indicate the number of arbitrators, the court will appoint a single arbitrator unless it considers that the dispute justifies the appointment of three arbitrators.

Regarding the appointment of arbitrators, if there is no agreement between the parties, then Law 19.971 establishes that in arbitrations with three arbitrators, each party will appoint one arbitrator and the two party-appointed arbitrators will appoint the third arbitrator. It is also established that in the event that a party does not appoint the arbitrator within a certain period or if the arbitrators do not agree on the appointment of the third arbitrator, the appointment will be made by the president of the respective court of appeals. In the case of arbitrations with a single arbitrator, the arbitrator may also be designated by the president of the respective court of appeals. Importantly, Chilean law establishes that nationality is not an obstacle to serve as an arbitrator.

Seat of arbitration

From a legal standpoint, the seat is the place where the arbitration is carried out, though this does not mean that the proceeding must physically take place there. Factors that should be considered when considering the seat of an arbitration include the law applicable to the proceeding, where enforcement of the award may be sought, and which courts will be empowered to supervise or assist with the proceeding, including potentially with respect to the appointment of arbitrators or the imposition of injunctive or precautionary measures. In the event that the parties do not stipulate the place of arbitration, some arbitration rules empower the arbitral tribunal to make this determination, taking into account the circumstances of the case and the parties. In other cases, the relevant arbitration rules empower an institution to determine the place of arbitration. Importantly, Chile has sought to become a recognized seat for international arbitration proceedings. Indeed, one of the reasons that lead to the enactment of Law 19.971 was to make Chile a more attractive seat.

Language of the arbitration proceeding

Deciding which language the arbitration should be conducted in requires consideration of several factors, including the law applicable to the contract, the place of arbitration, the language of the contract and of the other documents that make up the contract, and the language spoken by eventual witnesses. In practice, it is also important to consider the availability of arbitrators and lawyers to conduct the proceeding in the selected language. The cost of the Arbitration may increase if more than one language is required given the costs related to obtaining translations or an interpreter for witnesses.

Law applicable to the merits

The law applicable to the merits of an arbitration is usually determined in the contract. Beyond the substantive law, however, factors may be relevant to the tribunal’s decision making, such as commercial practices and usages particular to the specific industry relevant to the dispute. Indeed, on some occasions, the parties may decide that the contract be governed by equity or lex mercatoria. In the more common situation where the contract is subject to national law, the parties should consider the law applicable to the proceeding when selecting arbitrators.

Finally, and in the same vein, the award must comply with the requirements established in the New York Convention and the law of the seat to ensure that it can withstand scrutiny by the local courts and challenges to enforcement abroad. As a result, the arbitrator must always take into account the norms not only of the place where the arbitration is located, but also of the country where the execution will probably be requested.