SETTLEMENT OF SHIPPING CLAIMS IN FOREIGN JURISDICTIONS

Overview of the Chilean Compulsory Arbitration System for Maritime Disputes

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General Rules

Article 1203 of the Chilean Commerce Code establishes the general principle that the resolution of any maritime dispute, including those relating to marine insurance, is subject to mandatory arbitration. In short, all maritime disputes must be resolved by an arbitrator.

However, in certain cases the ordinary civil courts may hear maritime disputes, including:

- if the parties mutually agree to this (either by including it in the contract from which the dispute originates or by prior written agreement);
- if a criminal action could arise from the same facts (in this case the civil action can be filed before either the criminal court or an arbitrator);
- claims relating to oil pollution contained under Paragraph 4, Title IX of the Navigation Law;
- claims in which the state harbour or customs agencies are involved; and
- claims in which the amount at stake is less than 5,000 units of account (the special drawing right as defined by the International Monetary Fund), provided that the claimant submits its claim before the ordinary courts.

Appointment of Arbitrators

The key principle is that the applicable rules are those to which the parties have agreed in writing. If the parties reach no agreement the matter is subject to the rules set out by the Tribunal Code and the Civil Procedure Code.

Title IX (Articles 222 to 243) of the Tribunal Code establishes the general rules for arbitration under Chilean law. These rules are complemented by the procedural rules contained under Title VIII of Book III of the Civil Procedure Code. Furthermore, Article 222 of the Tribunal Code establishes that "arbitrators are the judges appointed by the parties or by a judicial authority for the resolution of a litigious matter". Article 223 of the Tribunal Code provides that there are three types of arbitrator as follows:

- arbitrators at law;
- arbitrators *ex aequo et bono* (friendly mediators); and
- mixed arbitrators.

Arbitrators at law are arbitrators who must render a judgment in accordance with the positive law. The judgment must fulfil all the formal requirements established for judgments rendered by the ordinary courts. In addition, the procedure through which the matter is resolved must be in accordance with the law that would be applicable to the claim had it been brought before the courts (Article 223(1) of the Tribunal Code).

Arbitrators *aequo et bono* are arbitrators who are authorized to resolve a conflict in accordance with what they deem to be prudent and equitable. With respect to the formalities of the judgment and the formalities relative to the procedure, these arbitrators must submit themselves to the procedures agreed by the parties that appointed them (Article 223(2) of the Tribunal Code).

Finally, mixed arbitrators must render a judgment according to the positive law, but they may abide by the rules agreed upon by the parties.

To act as an arbitrator it is not necessary to fulfil any special requirements, and only arbitrators at law and mixed arbitrators need be lawyers (Article 225 of the Tribunal Code).

With respect to maritime claims, where the parties have not reached any agreement as to who the arbitrator should be and which type of arbitrator should be appointed, formalities for the arbitrator's appointment may last between 45 and 60 days. These formalities commence with a petition to appoint an arbitrator before the competent ordinary civil court and end with a resolution issued by that court appointing the arbitrator as an arbitrator at law. The procedural rules to be applied during the arbitration are settled in a subsequent hearing before the appointed arbitrator.

Competence

If the maritime provisions of the Commerce Code confer competence on the court of the location where the facts originating the dispute occurred or where the vessel is berthed or is arrested, the parties are free to establish the arbitration tribunal in either the same place or a different place, provided that in the latter case they agree to do so in writing.

In Chile, contracts for the carriage of goods by sea are subject to the Hamburg Rules and domestic regulations contained in the Commerce Code. For these contracts there are special regulations to institute arbitration proceedings and the claimant can institute them in the following places:

- the defendant's principal place of business or habitual residence;
- the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was concluded;
- the port of loading or the port of discharge; or
- any place designated for the purpose of the arbitration in the arbitration clause.

Special Powers of Maritime Arbitrators

The Commerce Code establishes special powers for maritime arbitrators as follows:

- ample freedom to admit any evidence that the arbitrator may deem relevant;
- a proactive role for the avoidance of delays within the trial; and
- the ability to consider the evidence under the *reglas de la sana crítica*, which are special rules allowing the arbitrator to asses the evidence according to his or her own criteria.

Pre-judicial Measures and Special Liens

If pre-judicial measures (whether preparatory, precautionary or evidential) or special liens need to be enforced before the arbitration tribunal is established, the interested party can petition for these before the competent ordinary civil court under the Tribunal Code or the Commerce Code rules.

Institutionalized Arbitration

Chile has three well-known arbitration centres: a) the Santiago Arbitration and Mediation Centre of the Santiago Chamber of Commerce (also known as “CAM”), b) the Arbitration and Mediation Centre of the Chilean American Chamber of

Commerce, both of which are located in Santiago, and c) the Arbitration and Mediation Centre of the Chilean Fifth Region, located in Valparaiso. As stated in the CAM's bylaws, their main objective is to "render arbitration services to national and international disputes and to nominate arbitrators and conciliators when parties so agree". Recourse to the centres is voluntary for the parties in a dispute. In general, the system has been widely accepted and it is usual that contracts contain arbitration clauses that remit disputes to the centres and their arbitrators. The centre's arbitrators are professionals of different disciplines, and include maritime arbitrators. This expertise enables technical matters to be resolved competently.

Comment

The introduction of the mandatory arbitration system for maritime disputes in 1988 was a very positive step. Maritime disputes are now better understood and more fairly settled.

However, maritime law is still practised by very few lawyers so finding arbitrators for maritime disputes is not always easy. Therefore, the use of existing arbitration systems offered by specialized organizations should be carefully considered by those involved in regular maritime disputes, particularly in order to ensure fast, efficient and economic justice by using specialized and impartial arbitrators on pre-defined terms and at pre-determined costs. It is important to choose maritime dispute arbitrators carefully in order to achieve the best possible outcome.

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