

Santiago as a Seat for International Commercial Arbitration

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* Gonzalo Vial is senior associate at Bulnes, Urrutia & Bustamante and teaches Civil Procedure at Universidad Católica de Chile and Adolfo Ibáñez University. He recently worked as a visiting scholar at the University of Sydney and in the Australian Centre for International Commercial Arbitration. He holds a Master's Degree from Stanford Law School and was awarded a Fulbright Scholarship.

† Francisco Blavi is a partner at Pellegrini & Cia and a professor of Civil Procedure at Pontificia Universidad Católica de Chile. He recently worked as an international associate at White & Case LLP in Paris. He holds a Master's Degree from Columbia Law School and was awarded the Fulbright Scholarship and the Parker School Certificate in International and Comparative Law.

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INTRODUCTION

The seat of an arbitration is the jurisdiction in which the arbitration procedure takes place.¹ The seat not only influences the law applicable to the arbitration, but its courts also exercise supervisory powers over the proceedings.² Moreover, the seat of the arbitration determines the jurisdiction of the award for recognition and enforcement purposes.³

The venue of an arbitration, on the other hand, is the location where the proceedings take place.⁴ Although the hearings, meetings, and deliberations may be held at the seat—or at any other location—the seat and the venue of an arbitration are typically one and the same.⁵ In fact, the venue usually determines the seat of an international arbitration unless the parties name another seat of the arbitration.⁶

¹ SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, *INTERNATIONAL COMMERCIAL ARBITRATION, AN ASIA-PACIFIC PERSPECTIVE* 54 (CAMBRIDGE UNIV. PRESS 2011).

² Phillip Capper, *When is the ‘Venue’ of an Arbitration its ‘Seat’?*, KLUWER ARBITRATION BLOG (2009), <http://kluwarbitrationblog.com/blog/2009/11/25/when-is-the-%E2%80%98venue%E2%80%99-of-an-arbitration-its-%E2%80%98seat%E%80s%99/>.

³ JULIAN D. M. LEW, LOUKAS A. MISTELIS ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 172 (2003).

⁴ It has also been defined as “a place from which a jury is drawn and in which trial is held”; see Karina Cerro Varela, *The New Chilean Arbitration Law: Will Chile Become a New International Arbitration Venue?*, 10 MAX PLANCK Y.B. U.N.L. 681, 685 (2006) (defining *venue* as “a place from which a jury is drawn and in which trial is held,” citing The Merriam-Webster Dictionary of the English Language); María Fernanda Vásquez, *Importance of Arbitration for Seat and Venue Selection Criteria*, 16 CHILEAN J. PRIV. L. 75, 134 (2011), http://www.scielo.cl/scielo.php?pid=S0718-80722011000100003&script=sci_arttext.

⁵ P.T. Garuda Indonesia v Birgen Air 1 SLR 393, 399 (2002) (rejected the argument that the parties had changed the place of arbitration from Jakarta to Singapore by holding their hearings in Singapore).

⁶ Indu Bhan, *Seat vs Venue*, THE FINANCIAL EXPRESS (2015), <http://archive.financialexpress.com/news/seat-versus-venue/1229641>. (As stated by another author, “Certainly, the designation of a ‘venue’ will be considered as strong evidence of intention that the seat should be in the same jurisdiction.”); Phillip Capper, *When is the ‘Venue’ of an Arbitration its ‘Seat’?*, KLUWER ARBITRATION BLOG (2009), <http://kluwarbitrationblog.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/>.

This Article argues that Santiago, Chile, should be more frequently utilized as a seat for international commercial arbitration. The Article first describes the landscape of arbitration theory and practice in Chile. The Article then provides a comparative analysis of the advantages that Santiago has to offer parties. Finally, it identifies measures that Santiago could adopt in order to improve its reputation as a seat for international arbitrations.

I

ARBITRATION IN CHILE

Arbitration is deeply rooted in the Chilean legal system and is an efficient mechanism for resolving commercial disputes.⁷ In fact, Chilean courts have helped develop modern arbitration theory and practice.⁸ Chile employs a bifurcated approach to arbitration that differentiates between domestic and international law procedures of arbitration.⁹ In the following sections, we will briefly analyze the relevant features of Chilean arbitration legislation that make Chile a desirable seat for international commercial arbitrations.

A. Domestic Commercial Arbitration

Domestic arbitration, for the most part, in Chile follows the mutual consent of the parties.¹⁰ Chilean law recognizes the authority of the parties to empower an impartial third party to resolve disputes.¹¹ Arbitration in Chile is governed under Articles 222 and 243 of the 1903 Chilean Code of Court Organization.¹² Articles 628 and 644 of

7 María Fernanda Vásquez Palma, *Review of Attractive Seats for International Commercial Arbitration: A comparative analysis of the regulatory frameworks in Switzerland, France, U.K., U.S., Spain, China and Chile*, 18 CHILEAN J. PRIV. L. 30, <http://www.scielo.cl/pdf/rchdp/n18/art01.pdf>.

8 Cristián Conejero Roos, *The New Chilean Arbitration Law and the Influence of the Model Law*, 22 J. INT'L ARB. 150 (2005).

9 Felipe Murillo Valderrama, *Breve comentario sobre el arbitraje en Chile y su regulación actual a nivel interno e internacional, a la luz de: "Arbitraje en Chile. Análisis crítico de su normativa y jurisprudencia,"* 1 REVISTA ESTUDIOS JURÍDICOS DEMOCRACIA Y JUSTICIA 102 (2012), <http://cedej.cl/web/wp-content/uploads/2014/04/MURILLO1.pdf>.

10 Patricio Alwyn, *El Juicio Arbitral*, 15 (6th ed. 2014).

11 Patricio Alwyn, *El Juicio Arbitral*, 15, 124 (6th ed. 2014).

12 There are too many articles to be cited here, but you can access the pensioned Chilean code in this web page: <https://www.leychile.cl/Navegar?idNorma=25563&idParte=0>.

the 1943 Chilean Code of Civil Procedure and other arbitral laws add other procedural considerations.¹³

Article 222 of the Code of Court Organization establishes the jurisdictional rules of domestic arbitration, whereby arbitrators chosen by the parties preside over proceedings.¹⁴ In 2015, a Chilean court held that “arbitrators are in charge of the administration of justice, and therefore, they perform a public function, because jurisdiction is an attribute of the State and only organs authorized by it are entitled to exercise it.”¹⁵ Accordingly, arbitrators in Chile are subject to the correctional, disciplinary, and economic supervision of the Chilean Supreme Court.¹⁶

Chile has a long-standing tradition of using arbitration to resolve commercial disputes.¹⁷ Traditionally, the parties appoint a well-known practitioner to act as arbitrator and agree on ad hoc rules of procedure, using similar rules to those applicable to litigation. It is precisely this assumption that arbitrators are homologized to judges, as well as the use of litigation-based proceedings, that has rooted the arbitral institution deeply in the national legal culture.¹⁸

The use of arbitration has increased since 1992 following Santiago’s creation of the “Centro de Arbitraje y Mediación” (CAM) for appointing arbitrators and administering arbitral proceedings.¹⁹ Similar arbitral institutions have appeared since the opening of CAM,

¹³ EDUARDO PICAND ALBÓNICO, *ARBITRAJE COMERCIAL INTERNACIONAL*, TOMO I, 44 (2005).

¹⁴ Julio Guzmán, *Arbitraje y Medidas Precautorias*, CENTRE FOR ARBITRATION AND MEDIATION OF THE SANTIAGO CHAMBER OF COMMERCE (Oct. 30, 2015, 4:18 PM), http://www.camsantiago.com/articulos_online/39_arbitraje_medidas_precautorias.pdf.

¹⁵ Elina Mereminskaya, *Arbitraje Comercial Internacional en Chile: Una Mirada jurisprudencial*, REVISTA ECUATORIANA DE ARBITRAJE, 262 (Sept. 23, 2015, 10:03 AM), (citing the Court of Appeals of Santiago in *Urrutia con De la Maza* (July 29 of 1986), mentioned in the work *El Arbitraje en la Jurisprudencia Chilena* by the Santiago Chamber of Commerce (2005). The aforementioned is a free translation of the following disposition: “los árbitros están encargados de administrar justicia y desempeñan, por consiguiente, una función pública, toda vez que la jurisdicción es atributo exclusivo del Estado y solo los órganos por él autorizados pueden ejercerla.”).

¹⁶ *Id.* at 263 (citing PATRICIO ALWYN, *EL JUICIO ARBITRAL* 49 (ED. JURÍDICA 2005)).

¹⁷ See Conejero Roos, *supra* note 8.

¹⁸ Mereminskaya, *supra* note 15 (citing Carlos Eugenio Jorquera & Karin Helminger, *Chile*, in NIEGEL BLACKABY, DAVID LINDSEYS & ALESSANDRO SPINILLO, *INTERNATIONAL ARBITRATION IN LATIN AMERICA* 89–110 (Kluwer Law International 2002).

¹⁹ See CAM SANTIAGO CENTRO DE ARBITRAJE Y MEDIACION, <http://www.camsantiago.cl/> (last visited Oct. 17, 2016).

such as the National Center of Arbitration²⁰ and the Arbitration Centre of Concepcion.²¹ Importantly, CAM, in Santiago, has emerged as a leader in the field and has rules of procedure both for domestic and international commercial arbitrations.

It is important to understand that Chileans have a history of utilizing arbitration. Domestically, parties choose arbitration because the adjudication proceeding can usually be completed in less time than litigation. Indeed, Chilean law limits the time for an arbitral tribunal to two years.²² Arbitration is also favored because it offers the possibility of having a commercial dispute resolved by renowned legal experts confidentially.²³ Consequently, domestic arbitration has long been used as a method for resolving commercial disputes in Chile.

B. International Commercial Arbitration

The International Commercial Arbitration Act of 2004 (ICA Act) provides an effective mechanism to adjudicate transnational business disputes and makes Chile an attractive hub for international commercial arbitration, particularly in the Latin American region.²⁴

The ICA Act closely mirrors the UNCITRAL Model Law and introduced significant improvements to the Chilean international commercial arbitration legal framework.²⁵ As one author observes:

The Chilean Law [Law 19971] has overcome archaic features of the prior laws on several issues such as, inter alia, (i) the distinction

²⁰ See CNA CENTRO NACIONAL DE ARBITRAJES, <http://www.cna.cl/> (last visited Oct. 17, 2016).

²¹ See CAMARA DE LA PRODUCCION Y DEL COMERCIO DE CONCEPCION, <http://www.cccc.cl/servicios/centro-de-arbitraje-y-mediaciones-ceam-bio-bio/> (last visited Oct. 17, 2016).

²² CHILEAN COD. OF CT. ORG. ART. 235; *Why prefer the ANC?*, CNA, CENTRO NACIONAL DE ARBITRAJE, <http://www.cna.cl/index.php/porque-preferir-cna>.

²³ Andres Jana, *Arbitration Guide: Chile*, INTERNATIONAL BAR ASSOCIATION 1 (2012).

²⁴ See RULES OF INTERNATIONAL ARBITRATION (Arbitration & Mediation Ctr. 2015), https://www.google.cl/?gws_rd=ssl#q=mensaje+poder+ejecutivo+ley+arbitraje+comercial+internacional.

²⁵ Cristián Conejero Roos, *supra* note 8. (Definition of “commercial” originally placed in a footnote of the Model Law was incorporated in the text and a new paragraph 5 was added to Article 34 providing that the action for setting aside the award should be scheduled immediately and that priority be given to its decision.); Albert Jan van den Berg, *Recent Developments in Arbitration Law and Practice: Chile*, YEARBOOK COMMERCIAL ARBITRATION 2005, 336 (2005).

between an arbitration clause and a formal submission, (ii) the necessity of submitting certain matters to compulsory arbitration, (iii) the lack of legal recognition of the principles of separability and Kompetenz-kompetenz, (iv) the distinction made between different types of arbitration, (v) the requirement that only Chilean nationals could serve as an arbitrator in certain types of arbitrations, (vi) the establishment of rigid rules for the conduct of the proceedings, with little freedom for the parties and the arbitrators, and (vii) the existence of ample grounds to attack the award, especially through actions to set aside the award if it was rendered in Chile.²⁶

The main features of the ICA Act are the recognition of the party autonomy principle, the protection of due process, and the limited judicial intervention of the domestic courts over the arbitration proceeding—all of which have been adopted under the international standards of the UNCITRAL Model law.²⁷

Several provisions of the ICA Act confirm the preeminence of the parties' authority. Article 7 broadly defines the term "arbitration agreement."²⁸ Articles 10 and 11 grant the freedom to constitute the arbitral tribunal in accordance with the rules, and Articles 19, 20, 24(1) and 28(1) grant the arbitral tribunal autonomy to determine the procedural rules that will govern the process.²⁹ In turn, Article 18 of the ICA Act provides that the parties must be treated equally and each of them shall have the full opportunity to assert their rights.³⁰

²⁶ See Conejero Roos, *supra* note 8.

²⁷ Dyalá Jiménez Figueres & Angie Armer Ríos, *Notas sobre la nueva ley Chilena de arbitraje comercial internacional*, REV. FUEYO LANERI 311 (2005).

²⁸ As an "agreement by which the parties decide to submit to arbitration all controversies or some controversies that have arisen or that might arise between them, with respect to a specific juridical relationship, contractual or non-contractual" (free translation).

²⁹ Article 19 states that "parties will have the liberty to agree the procedure that the tribunal will have to follow," and that in the absent of such an agreement, the arbitral tribunal will be able to, within the frames of ICA Act, "direct the arbitration in the way it considers appropriate." In turn, Article 20 states that the parties could freely determinate the place of the arbitration, but in the absence of such agreement, "the arbitral tribunal would determine the place of the arbitration." According to Article 24, unless otherwise agreed by the parties, "the arbitral tribunal would decide if audiences shall be held" for different purposes. Finally, Article 28 states that if the parties have not agreed on the substantive law applicable to the controversy, "the arbitral tribunal would determine it according to the conflict of law rules that it determines applicable."

³⁰ *Id.* at 315.

The statute also codifies the principle of minimal intervention of national courts,³¹ providing that “no tribunal shall intervene, except in those cases mandated by the law.”³² Chilean courts have given broad deference to the arbitral process as well as to the powers of the arbitral tribunal, confirming the limited role of domestic courts in international arbitration proceedings.³³ Moreover, Article 34 of the ICA Act provides that the motion for annulment is the only method for setting aside an award,³⁴ impeding the parties from using other procedural remedies that are usually applied in domestic procedures to challenge awards.

In addition to its modern law, Chile ratified the New York Convention in 1975 without reservations. Such convention is a “universal constitutional charter for the international arbitral process,” that focuses on the recognition and enforcement of arbitral agreements and arbitration awards.³⁵

Later, in 1976, Chile signed the Panama Convention, which provides international standards for the recognition of arbitral agreements and the enforcement of arbitral awards.³⁶ Thus, Chile is fully part of a group of jurisdictions guaranteeing a common standard in the field, which provides the parties, arbitrators, and practitioners with legal certainty and predictability.³⁷

Chilean arbitral institutions have also enacted their own rules of international arbitration to provide cost-efficient alternatives to the most widely used rules, like those from the International Chamber of Commerce (ICC) or the London Court of International Arbitration

³¹ María Fernanda Vásquez, *Recepción del Arbitraje Comercial Internacional en Chile desde una óptica jurisprudencia. Una revisión ineludible*, 38 CHILEAN L.J. (REVISTA CHILENA DE DERECHO), ISSUE 2, 351 (2011), <http://www.scielo.cl/pdf/rchilder/v38n2/art08.pdf>.

³² Free translation from Article 5 of Law 19.971, which states that: “En los asuntos que se rijan por la presente ley, no intervendrá ningún tribunal salvo en los casos en que esta ley así lo disponga.” (Sept. 28, 2015, 9:34 AM), <http://www.leychile.cl/Navegar?idNorma=230697>.

³³ Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration Anniversary Contributions—International Litigation & Arbitration*, 30 U. PA. J. INT’L L. 1099, 1113 (2014).

³⁴ Artículo 34 of ICA Act states, “an arbitral award can be challenged in court only through a motion of annulment” (free translation).

³⁵ GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 41 (2d ed. 2015).

³⁶ See Picand, *supra* note 13.

³⁷ Figueres & Ríos, *supra* note 27, at 308.

(LCIA). For instance, in 2006 the Chamber of Commerce of Santiago launched an international arbitration service and adopted a set of rules based on generally recognized standards, guaranteeing celerity and confidentiality.³⁸

II FEATURES OF AN ATTRACTIVE SEAT FOR INTERNATIONAL ARBITRATION

Scholars have identified several features that any city seeking to become a seat of international arbitration should guarantee. First, the place of arbitration should provide the parties with a supportive legal environment³⁹ that favors and protects international commercial arbitration as well as the enforceability of the final award.⁴⁰ Additionally, the seat should have national courts capable of supporting and assisting the arbitrators without unduly interfering with the proceeding.⁴¹ Indeed, the best place for arbitration is where domestic courts “safeguard the integrity of the procedure, but [do] not unduly interfere with honest mistakes of law or fact.”⁴² Furthermore, the seat should be located in an economically and politically stable

³⁸ See *International Arbitration Rules*, CAM SANTIAGO CENTRO DE ARBITRAJE Y MEDIACION, http://www.camsantiago.cl/reglamento_arbitraje_internacional2.html.

³⁹ As inferred from the work from professors Luke Nottage and Richard Garnett, which state the following regarding the case of Australia: “The most contentious question for Australia is which parts of the Trade Practices Act 1974 (and state/Territory counterparts), if any, cannot be referred to arbitration.” Luke Nottage & Richard Garnett, *The Top Twenty Things to Change In or Around Australia’s International Arbitration Act*, FINAL SUBMISSION TO THE AGD’S REVIEW OF THE INTERNATIONAL ARBITRATION ACT 4 (2009), http://sydney.edu.au/law/scil/documents/2009/SCILWP20_NottageGarnett.pdf. (As inferred from the work from professors Luke Nottage and Richard Garnett, which state the following regarding the case of Australia: “The most contentious question for Australia is which parts of the Trade Practices Act 1974 (and state/Territory counterparts), if any, cannot be referred to arbitration.” In addition, the experts refer to other issues that shall be stated clear in a particular law, like matters that are arbitrable.)

⁴⁰ See Varela, *supra* note 4, at 685.

⁴¹ Jonathan Sacher, *Traditional arbitration centres hold strong, but South East Asia emerges as a new challenger*, BERWIN, LEIGHTON & PAISNER LLP (2014) (Sept. 17, 2015, 1:18 PM), <http://www.blplaw.com/media/press-releases/traditional-arbitration-centres-hold-strong-south-east-asia-emerges-new-challenger/> (“In looking at why commercial parties regretted choosing a particular city, local court involvement emerged as one of the most common causes. Over one quarter (28%) of people said that they regretted their choice because of too much court intervention, while 20% said they felt the local courts had not given them the support they needed.”)

⁴² JEFF WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 171 (2012).

and neutral country.⁴³ Thus, costs and the societal indicia are important factors,⁴⁴ as is having a personal connection with the forum.⁴⁵ The possibility of being represented by lawyers from other jurisdictions and having a pool of experienced practitioners are certainly relevant,⁴⁶ just as other practical considerations, such as the language and the accessibility of the location, can play an important role when choosing the seat.⁴⁷

The results of the 2015 Queen Mary Survey on International Commercial Arbitration confirm the importance of these features. When asked about the four main considerations for selecting a seat, the most recurrent responses were the neutrality and impartiality of the local legal system, the national arbitration laws, the track record of enforcing both agreements to arbitrate and resulting arbitral awards, and the availability of quality arbitrators familiar with the seat.⁴⁸

⁴³ See Vásquez, *supra* note 4; Collins Namachanja, *The Challenges facing Arbitral Institutions in Africa*, CIA CENTENARY CONFERENCE 15 (2015); *Supportive legal environment*, SYDNEY ARBITRAL ADVANTAGE, <http://www.sydneyarbitration.com> (last visited Sept. 3, 2016) (promoting Sydney as an arbitration venue).

⁴⁴ ALAN REDFERN, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 295 (2009); Vásquez, *supra* note 4; *e.g.*, as stated by another author,

The parties to an international commercial arbitration value that the place chosen is equipped with institutions and facilities with high standard to support the arbitration process and to ensure that it runs efficiently In most cases such structure is provided by 1) International Organizations (such as the International Chamber of Commerce), 2) National Chambers of Commerce, or 3) Independent Arbitration Centers.

Cherro Varela, *supra* note 4, at 687.

⁴⁵ Sacher, *supra* note 41 (explaining that in a survey to lawyers among 34 different jurisdictions, 75% of them indicated that having a personal connection with a city was an important factor in choosing it as a venue).

⁴⁶ See Varela, *supra* note 4, at 687.

⁴⁷ PIERRE A. KARRER, INTRODUCTION TO INTERNATIONAL ARBITRATION PRACTICE 16 (2014).

⁴⁸ QUEEN MARY UNIVERSITY OF LONDON & WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 14 (2015) (stating that “the three paramount factors relate to the ‘formal legal infrastructure’ of a seat: (1) neutrality and impartiality of the local legal system; (2) national arbitration law; and (3) track record for enforcing agreements to arbitrate and arbitral awards. The fourth reason ‘availability of quality arbitrators who are familiar with the seat’ is arguably a strong secondary factor supporting the formal legal infrastructure.” The other reasons were cultural familiarity, efficiency of local courts proceedings, location of people, availability of specialized lawyers at the seat, costs, location and quality of hearing facilities, location of the arbitral institution chosen for the arbitration, language and transport connections).

III

SANTIAGO AS A SEAT FOR INTERNATIONAL ARBITRATION

Santiago complies with most, if not all, of the relevant factors for selecting a seat of arbitration discussed above.

A. Supportive Legal Environment

Chile's international commercial arbitration law, which is based on the UNCITRAL Model Law, as well as the fact that the country is also a party to the New York and Panama conventions, makes Chile an attractive seat for international commercial arbitration. An arbitral seat "must virtually always be a state that has acceded to the New York Convention" because the place where the award is made has "significant legal consequences for the enforceability" of the arbitral award.⁴⁹ The same can be said about the UNCITRAL Model Law adopted by Chile, which provides legal certainty and predictability to the parties. Indeed, the referred rules enhance the efficiency of the arbitral proceeding by providing international standards from the very beginning of an international arbitration.⁵⁰

B. Attitude of National Courts Towards Arbitration

Since the enactment of the ICA Act of 2004, Chilean courts have shown deference and a favorable attitude toward international arbitration.⁵¹ Domestic courts have widely respected the principle of minimum intervention established in Article 5 of the statute, recognizing the "autonomous nature of arbitration" and its necessary independence.⁵² Similarly, Chilean courts have shown to be supportive of international arbitration, especially in regards to providing assistance in granting provisional measures before the arbitral tribunal is constituted. Indeed, the ICA Act has been fully incorporated into the legal culture of the country, transmitting legal certainty and promising a great future for Chile to become an

⁴⁹ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2056 (2014).

⁵⁰ Jessica L. Gelandner, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, MARQ. L. REV. 625, 626 (1997).

⁵¹ Elina Mereminskaya, *Arbitraje Comercial Internacional en Chile: Una Mirada jurisprudencial*, REVISTA ECUATORIANA DE ARBITRAJE 284.

⁵² Mereminskaya, *supra* note 15, at 267 (illustrating that different decisions show a consistent approach of Chilean tribunals in order to avoid undue State-interference in international commercial arbitration procedures. For instance, they have stated that Law 19.971 applies even though the arbitration agreement was subscribed before its enactment.); *see* Vásquez, *supra* note 31, at 351.

important place of arbitration.⁵³ Similarly, relevant case law shows “consistent support from Chilean ordinary courts towards international commercial arbitration.”⁵⁴

It is important to highlight the following issues established by Chilean national courts regarding international commercial arbitration:

1. Limited revision of arbitral awards. Pursuant to the principle of minimum intervention, Chilean courts have applied a limited revision of international awards, holding, for example, that the motion for annulment established in Article 34 of the ICA Act is the only applicable recourse.⁵⁵ Chile has thereby limited the grounds for challenging international awards consistent with the UNCITRAL Model Law. Accordingly, Chilean courts have recognized the exceptional nature of the annulment motion and the limited grounds for setting aside an award under international practice.⁵⁶ Although, when drafting the ICA Act, important concerns were raised about the possibility of expressly excluding two particular recourses (*recurso de queja* and *recurso de protección*), which Chilean courts have rejected to date,⁵⁷ recognizing the autonomy of the rules applicable to international arbitral proceedings.⁵⁸ Ultimately, “Chilean courts have

⁵³ See Vásquez, *supra* note 31.

⁵⁴ Mereminskaya, *supra* note 15 (supporting the assertion that Chile is moving in the right direction is also stated by another author in the following terms: “It is difficult to form judgment in relation to an entire region [referring to Latin America], but it is possible to see that several jurisdictions are moving in the right direction creating an increasingly consistent line of jurisprudence Among others, Chile, Colombia, Brazil, Mexico, and Peru are heading in the right direction. In those countries, arbitration and specifically international commercial arbitration, enjoys legislative recognition and finds adequate judicial support. Through these forerunners, Latin America can claim to have finally become an active user of international commercial arbitration”; Andrés Jana, *International Commercial Arbitration in Latin America: Myths and Realities*, 32 J. INT’L ARB. NR 4, 446 (2015).

⁵⁵ See Vásquez, *supra* note 31, at 351 (as stated by another author after a review of decision by the Chilean courts: “These decisions confirm that the available recourses against international awards rendered in Chile are limited to only one, namely, the nullity petition contemplated in Article 34 of Law 19.971”); Mereminskaya, *supra* note 15, at 272.

⁵⁶ Mereminskaya, *supra* note 15, at 270.

⁵⁷ Indeed, in the case number 7.341-2013 the Chilean Supreme Court declared inadmissible the judicial review sought by one of the parties (by a *recurso de queja*) explaining that the ICA Act does not provide for such remedy for international commercial arbitration cases.

⁵⁸ Vásquez, *supra* note 31, at 352.

demonstrated their overall respect for the arbitral process by, among other things, confirming that the role of domestic courts in international arbitration proceedings is limited.”⁵⁹

2. *Binding force of international arbitration agreements.* Several decisions confirm the binding force of arbitral agreements. For example, in a 2007 case, a Chilean civil court ruled that it had no jurisdiction to decide a controversy wherein the parties had previously agreed to submit to arbitration.⁶⁰ In another case, a Chilean court rejected a party’s attempt to exclude the application of an arbitral agreement based on a local rule which allegedly prohibited the submission of controversies to foreign tribunals.⁶¹

3. *National courts are entitled to grant interim measures in aid of international commercial arbitrations.* Chilean courts can also assist the parties of an international commercial dispute by issuing interim measures in accordance with Article 9 of the ICA Act. Under Article 9, an application for a preliminary injunction before a domestic court is fully compatible with an arbitration agreement. As a result, domestic courts are fully empowered to grant such measures.⁶² In practice, Chilean courts have been supportive of international arbitration, providing interim relief just as in other arbitration-friendly jurisdictions.⁶³

In relation to the aforementioned assertion, it is worth mentioning that granting an interim measure, pending the creation of the arbitral tribunal—and even thereafter—does not pose a jurisdictional problem because domestic courts are expressly authorized under the ICAA to order interim measures to aid an international arbitration.⁶⁴ In fact, the necessity of having a venue to request interim relief in aid of international arbitration is the principal reason for having concurrent

⁵⁹ Hamilton, *supra* note 33, at 1113.

⁶⁰ Mereminskaya, *supra* note 15, at 273 (citing 21 Juzgado Civil de Santiago, Rol N 16.361-2006, Nov. 2, 2007).

⁶¹ *Id.*

⁶² Article 9 of ICA Act states that, “It would not be incompatible with an arbitration agreement that a party, prior to the arbitral proceeding or during it, request from a tribunal the adoption of provisional interim measures or that the tribunal grant such measures.” (free translation).

⁶³ For example, a Chilean court (19 Juzgado Civil de Santiago in the case No. C-18.468-2012) granted a preliminary injunction in the context of an international arbitration dispute, prior to the constitution of the arbitral tribunal.

⁶⁴ Melissa Magliana, *Commentary on the ICC Rules, Article 28 [Conservatory and interim measures]*, KLUWER LAW INTERNATIONAL (2013), at 808.

jurisdictional powers between arbitral tribunals and state courts, being an exception to the premise of having only one tribunal to decide the case.⁶⁵

4. *Application of the principle of Kompetenz-kompetenz.* The arbitral tribunal has the power to decide on its own jurisdiction, according to Article 16(1) of the ICA Act, and as confirmed by the Chilean Supreme Court in a 2008 decision.⁶⁶

Notwithstanding the favorable attitude from Chilean courts towards international arbitration, there is still the need to fully embrace the new paradigm and culture that comes with international commercial arbitration theory and practice.⁶⁷ This includes ending certain municipal practices, such as rendering decisions based on the rules of civil procedure rather than applying the ICA Act or the New York Convention.⁶⁸ As noted by one author, the “fact that the courts may have reached the right outcomes . . . does not excuse their lack of clear and coherent reasoning behind their ultimate decisions.”⁶⁹

One way to increase the competence of Chilean courts to adjudicate international commercial arbitration is to concentrate all important decisions in the same national tribunal. For instance, under Chilean law, the application to nullify an award rendered in Chile must occur before the Court of Appeals (Article 34 ICA Act), while

⁶⁵ Gary B. Born, *PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION* 13 (2009).

⁶⁶ *Marlex Ltda. Con European Industrial Engineering*, No. 2026-2007, Supreme Court, July 28, 2008; María Fernanda Vásquez, *supra* note 31, at 358.

⁶⁷ Jana, *supra* note 54, at 425 (“The new paradigm requires the courts to understand that international arbitration does not fit within the traditional category of exercise of jurisdictional powers, but is a new category entirely.”).

⁶⁸ See Mereminskaya, *supra* note 15, at 275.

⁶⁹ Felipe Nazar, *Enforcement in Chile of International Arbitration Awards Vacated in the Seat of the Arbitration*, CENTRO DE ARBITRAJE Y MEDIACION (last visited Oct. 26 2015, 3:47 PM), [http://www.camsantiago.com/articulos_online/Dec.%20Enforcement%20awards%20vacated%20\(Chile\)%20.pdf](http://www.camsantiago.com/articulos_online/Dec.%20Enforcement%20awards%20vacated%20(Chile)%20.pdf); Jana, *supra* note 55, at 433 (stating “the Chilean and Colombian Supreme Courts in part have been facing difficulties to fully embrace the principle of finality of foreign arbitral awards. In Chile, an award issued in Buenos Aires and set aside by local courts was denied recognition on that facts.” Notwithstanding that the aforementioned is a ground accepted in the NYC, the Chilean Supreme Court also cited Article 246 of the Chilean Civil Procedure Code [a provision requiring to show a seal of approval], an outdated provision.); Jana, *supra* note 54, at 433.

the procedure for the recognition and execution of foreign arbitral awards takes place in the Chilean Supreme Court.⁷⁰

To sum up, while domestic courts have limited experience in international arbitration, they have repeatedly affirmed the limited role of domestic courts in international arbitration proceedings, and have a growing reputation for being supportive of international arbitration.⁷¹

C. Economic Reasons

The cost of resolving a dispute is highly relevant when deciding *whether* and *where* to arbitrate a dispute. In fact, the 2015 Queen Mary Survey on International Arbitration found that high cost is the most disfavored attribute of arbitrations “by far.”⁷² Accordingly, among other practical considerations, the fees charged by local lawyers and discovery costs significantly influence the selection of a particular forum as a place of arbitration.⁷³ Furthermore, the choice of language can have cost implications because documents produced or the witness’ testimony may need to be translated.⁷⁴

As a measure of affordability, Santiago is a relatively affordable place to live, a general indicator of the affordability of the city.⁷⁵ According to a ranking regarding the costs of living in different countries (*Expatisan Cost of Living Index*), traditional arbitration seats are noticeably more expensive than Santiago.⁷⁶ For instance, London is ranked 3rd, New York 6th, Singapore 11th, Paris 13th, and Stockholm 32nd, while the Chilean capital comes in at 129th most affordable city. Moreover, Santiago is cheaper than other emerging venues, like Sydney (ranked 24th).⁷⁷

⁷⁰ Colloquium organized by ICC Chile, *La Sede del Arbitraje y los Efectos de su Elección: Perspectiva Chilena y Comparada* [The Seat of the Arbitration and its Selection: Chilean and Foreign Perspectives], Santiago, Chile, Apr. 1, 2016.

⁷¹ Steven Finizio & Victoria Narancio, *Expert View: Surveying Latin America, beyond Brazil*, COMMERCIAL DISPUTE RESOLUTION (2013), [https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/\[CDR18\]%20WilmerHale%20-%20Beyond%20Brazil.pdf](https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/[CDR18]%20WilmerHale%20-%20Beyond%20Brazil.pdf) (last visited Oct. 2, 2016).

⁷² QUEEN MARY UNIVERSITY OF LONDON & WHITE & CASE, *supra* note 48, at 7.

⁷³ See Sacher, *supra* note 41.

⁷⁴ *Id.*

⁷⁵ Varela, *supra* note 4, at 718.

⁷⁶ *Expatisan Cost of Living Index*, EXPATISTAN.COM, <https://www.expatisan.com/cost-of-living/index> (last visited Oct 26, 2016).

⁷⁷ *Id.*

D. Material Conditions

Considering that the arbitral hearings and other proceedings might take place in the arbitral seat, an attractive place of arbitration should be fit for that purpose,⁷⁸ including housing, transportation, and communications infrastructure.⁷⁹ Santiago already has these features.⁸⁰ Moreover, Santiago is conveniently located for Latin American and Trans-Pacific arbitrations.

E. Neutrality of the Place

The 2015 Queen Mary Survey on International Arbitration also found that the neutrality and impartiality of the local legal system is one of the most important factors in selecting a seat.⁸¹ Chile is widely recognized as a neutral and convenient country for international parties.

F. Personal Connection with the Seat

Personal connections also matter. According to the 2015 Queen Mary Survey on International Arbitration, 28% of respondents reported selecting seats because of a personal connection with the venue.⁸² Similarly, under another survey, 75% of the lawyers interviewed indicated that having a personal connection with a city was an important factor when choosing it as the seat of arbitration.⁸³

The Chilean government and several national institutions are making strong efforts to build personal connections with arbitration partners. For example, the government provides funding to thousands of professionals every year allowing them to earn postgraduate degrees abroad through the Becas Chile Scholarship.⁸⁴ The Fulbright

⁷⁸ REDFERN, *supra* note 44, at 295.

⁷⁹ See Sacher, *supra* note 41.

⁸⁰ Varela, *supra* note 4, at 718. (stating the necessity of improving the actual facilities was expressed in a Colloquium organized by ICC Chile titled *La Sede del Arbitraje y los Efectos de su Elección: Perspectiva Chilena y Comparada* [*The Seat of the Arbitration and its Selection: Chilean and Foreign Perspectives*], which took place in Santiago, Chile, April 1, 2016).

⁸¹ QUEEN MARY UNIVERSITY OF LONDON & WHITE & CASE, *supra* note 48.

⁸² *Id.* at 13.

⁸³ See Sacher, *supra* note 41.

⁸⁴ CONICYT SCHOLARSHIP DATABASE, <http://www.conicyt.cl/becas-conicyt/category/bases-concursales/becas-en-el-extranjero/>.

Commission serves a similar purpose.⁸⁵ Most universities have similarly implemented international exchange programs to enable students and professors to travel to other countries for study, research, and networking.⁸⁶ Similar opportunities and networking have been developed for international students and professors attending Chilean universities to study or conduct research.⁸⁷

G. Access to a Pool of Experienced Arbitrators and Good Local Lawyers

Chile's strong pool of arbitrators and international arbitration practitioners is another strength. Article 22 of the ICAA expressly provides that the parties are free to agree on the language to be used in the arbitral proceedings.⁸⁸ That advantage, however, is worthless absent well-trained professionals to conduct procedures in different languages, especially in English.⁸⁹ The choice of language ultimately affects the appointment of the arbitrators as well because it may be indicative of their cultural background, which could impact the way the arbitral tribunal interprets the facts of the case.⁹⁰

H. Political and Economic Stability

Chile's economic and political stability is another attractive feature. According to the World Bank, Chile has long been a Latin American benchmark of progress.⁹¹ One reason that political risk is low is Chile's stability, grounded in its solid institutions, judicial independence, and democracy.⁹² Moreover, Chile "has the most

⁸⁵ FULLBRIGHT PROGRAM IN CHILE, <http://www.fulbright.cl/> (last visited Oct. 26, 2016).

⁸⁶ CATHOLIC UNIVERSITY OF CHILE, INTERNATIONAL EXCHANGE PROGRAMS, <http://relacionesinternacionales.uc.cl/alumnos-uc/todo-sobre-el-intercambio> (last visited Oct. 26, 2016).

⁸⁷ CATHOLIC UNIVERSITY OF CHILE, INTERNATIONAL EXCHANGE PROGRAMS, <http://internationalrelations.uc.cl/intercambio-en-la-uc/student-exchange-program-at-uc> (last visited Oct. 26, 2016).

⁸⁸ Article 22 of ICA Act states that "parties could freely decide the language or languages that shall be used in the arbitral proceeding." (free translation).

⁸⁹ See BORN, *supra* note 49, at 2062.

⁹⁰ RÉMY GERBAY, LISA RICHMAN ET AL., *ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE*, KLUWER LAW INTERNATIONAL 194 (2015).

⁹¹ CHILI OVERVIEW: THE WORLD BANK, <http://www.bancomundial.org/es/country/chile/overview> (last updated Apr. 13, 2017).

⁹² *Hong Kong and Latin America: the Hong Kong International Arbitration Centre Discusses Opportunities and Risks in Latin America*, GLOBAL ARBITRATION NEWS, (Oct. 26, 2015, 4:37 PM), <http://globalarbitrationnews.com/hong-kong-and-latin-america->

competitive and fundamentally sound economy in Latin America” thanks to policies implemented over several decades to encourage investments, secure access to foreign markets, and mitigate the effects of external shocks.⁹³

I. Possibility of Foreign Nationals to Act as Counsel or Arbitrator

In a domestic arbitration, the parties’ counsel must be a Chilean lawyer, but there is no express rule under the ICA Act that disallows foreign counsel in international commercial arbitration cases.⁹⁴ Although the parties must be represented by a Chilean attorney or by foreign residents that have been admitted to practice law in Chile,⁹⁵ it is argued that such a requirement has been suppressed for international commercial arbitrations because the ICA Act is silent on the matter.⁹⁶ In practice, the “parties can partially overcome this restriction by retaining foreign counsel, with supervision by Chilean counsel,”⁹⁷ which is akin to *pro hac vice* practice in the United States. Article 11(1) of the ICA Act expressly provides that nationality shall not be an obstacle for appointing an arbitrator, unless the parties had stipulated otherwise beforehand.⁹⁸

J. Confidentiality

While Chilean law has no specific rule regarding confidentiality, parties can agree to maintain the confidentiality of the procedure.⁹⁹

rounding-the-cape-towards-new-business-routes-the-hong-kong-international-arbitration-cent-discusses-opportunities-and-risks-in-latin-america-20141014/ (solid institutions, judicial independence, and political stability are important factors in reducing country risks—and thus attracting activities by foreigners in Chile—are referenced by Professor José Luis López Blanco in an e-mail dated November 14, 2015).

⁹³ PETER J. MEYER, CONG. RESEARCH SERV., R40126, CHILE: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS 8 (2014).

⁹⁴ INTERNATIONAL COMPARATIVE LEGAL STUDIES, <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/chile> (last visited Oct. 29, 2016).

⁹⁵ JONATHAN C. HAMILTON, OMAR E. GARCÍA-BOLÍVAR & HERNANDO OTERO, LATIN AMERICAN INVESTMENTS PROTECTIONS, COMPARATIVE PERSPECTIVES ON LAWS, TREATIES AND DISPUTES FOR INVESTORS, STATES AND COUNSEL 121 (2012).

⁹⁶ Alfonso Reymond Larraín & Hernán Fleischmann Chadwick, *Chile, Arbitration 2015*, LATIN LAWYER, <http://latinlawyer.com/reference/topics/45/jurisdictions/3/chile/> (last visited Oct. 29, 2016).

⁹⁷ See HAMILTON, *supra* note 95, at 121.

⁹⁸ See Jana, *supra* note 23, at 12.

⁹⁹ See HAMILTON, *supra* note 95, at 121; Figueres & Ríos, *supra* note 27, at 321.

For instance, the CAM rules for international arbitration provide that the arbitral award should be kept confidential unless the parties agree otherwise.¹⁰⁰

As the aforementioned factors indicate, Santiago is an attractive seat for international commercial arbitrations. Indeed, the city offers a clear legal framework, and courts have been supportive of international arbitration as an efficient and autonomous mechanism to resolve international business disputes.

IV

CASES STUDY: DIFFERENT SEATS BUT SIMILAR FEATURES

Traditional and emerging arbitral seats have embraced and adopted most of the features that make a place appealing for resolving transnational business disputes. They have all accepted the importance of allowing the arbitral proceeding to move as autonomously and efficiently as possible, ensuring limited intervention of national courts and offering international standards for the recognition and enforcement of awards. Indeed, the most popular arbitral seats have been renowned for providing a sound system for the practice of international arbitration.

For example, Hong Kong is one of the most preferred seats in the world.¹⁰¹ Hong Kong, which has been highly supportive of international arbitration, follows the UNCITRAL Model Law.¹⁰² Moreover, Hong Kong recognizes the Kompetenz-kompetenz doctrine, and there is a duty of confidentiality regarding the arbitral proceeding.¹⁰³ And Hong Kong courts may grant interim measures in support of arbitration.¹⁰⁴ At the same time, the arbitral tribunal also has the power to grant interim relief unless otherwise agreed by the

¹⁰⁰ Article 33 (8) of CAM rules for international commercial arbitration:

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

¹⁰¹ QUEEN MARY UNIVERSITY OF LONDON & WHITE & CASE, *supra* note 48, at 12.

¹⁰² HONG KONG INTERNATIONAL ARBITRATION CENTRE, ADMINISTERED ARBITRATION RULES, <http://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules> (last visited Oct. 13, 2016).

¹⁰³ GLENN HALEY, ARBITRATION GUIDE: HONG KONG, INTERNATIONAL BAR ASSOCIATION 11 (2012).

¹⁰⁴ HONG KONG INTERNATIONAL ARBITRATION CENTRE, ADMINISTERED ARBITRATION RULES, *supra* note 102, at Sec. 18.

parties.¹⁰⁵ Hong Kong is also a party to the New York Convention, and the grounds for refusing enforcement, established in article 86 of the Arbitration Ordinance, are identical to those provided for in the UNCITRAL Model Law.¹⁰⁶

London, United Kingdom, is currently the other preferred seat,¹⁰⁷ offering mature and predictable conditions as a seat for transnational disputes.¹⁰⁸ The 1996 English Arbitration Act codifies the doctrine of Kompetenz-kompetenz,¹⁰⁹ although a decision in arbitration in London may also be subject to a rehearing by its national courts.¹¹⁰ Moreover, confidentiality is an implied duty in arbitration in London, derived from the arbitral agreement,¹¹¹ with some exceptions.¹¹² Interim measures may be granted by the arbitral tribunal under Article 38 of the English Arbitration Act,¹¹³ even in the absence of an agreement.¹¹⁴ Although in such circumstances the arbitrators cannot “secure the sum in dispute by an order taking effect as an injunction,” it is possible to seek a freezing injunction from the High Court of the nation.¹¹⁵ In addition, the United Kingdom ratified the New York Convention subject to the reciprocity reservation. Although it considers a right of appeal before the courts on a question of law, unless otherwise agreed by the parties, if the parties use institutional rules of arbitration—such as the LCIA Rules or the ICC Arbitration rules—the right to appeal is excluded.¹¹⁶ Finally, an award may be challenged on the grounds that the arbitral tribunal lacked substantive

¹⁰⁵ *Id.* at Sec. 9.

¹⁰⁶ *Id.*

¹⁰⁷ QUEEN MARY UNIVERSITY OF LONDON & WHITE & CASE, *supra* note 48, at 16.

¹⁰⁸ Timothy J. Lindsay, *London as a Centre for International Commercial Arbitration*, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: ARBITRATION 2010, A PRACTICAL CROSS-BORDER INSIGHT INTO INTERNATIONAL ARBITRATION 1-5 (2010).

¹⁰⁹ *Id.* at 2.

¹¹⁰ Guy Pendell & David Bridge, *Arbitration in England and Wales*, CMS GUIDE TO ARBITRATION 308 (2012).

¹¹¹ GLOBAL ARBITRATION REVIEW, KNOW-HOW, ENGLAND AND WALES, <http://globalarbitrationreview.com/know-how/topics/61/commercial-arbitration/> (last visited Oct. 7, 2016).

¹¹² Andrea Dahlberg & Angeline Welsh, *Arbitration Guide: England and Wales*, INT'L BAR ASSOCIATION 9 (2012).

¹¹³ *See* Pendell & Bridge, *supra* note 110, at 309.

¹¹⁴ *See* Dahlberg & Welsh, *supra* note 112, at 8.

¹¹⁵ *See* Pendell & Bridge, *supra* note 110, at 309.

¹¹⁶ GLOBAL ARBITRATION REVIEW, KNOW-HOW, ENGLAND AND WALES, *supra* note 111.

jurisdiction or if there has been a serious irregularity affecting the tribunal.¹¹⁷

Paris, France, is traditionally one of the most popular party-selected seats of arbitration in the world.¹¹⁸ The City of Lights has a renowned reputation¹¹⁹ because its legal framework is highly supportive of international arbitration.¹²⁰ French courts have acted with deference towards the jurisdictional powers of the arbitral tribunal, recognizing that they should not improperly interfere with the procedures.¹²¹ Although France has adopted its own arbitration statute without following the UNCITRAL Model Law, France nevertheless applies the doctrine of *Kompetenz-kompetenz*.¹²² Finally, France is a signatory of the New York Convention and the European Convention on International Arbitration, adopting a narrow approach to the concept of public policy as an exception to enforcing international awards.¹²³

Sydney, Australia, on the other hand, is an emerging seat for international commercial arbitration. International arbitration in Australia is regulated by the International Arbitration Act (IAA),¹²⁴ which adopts the UNCITRAL Model Law and gives effect to the New York Convention.¹²⁵ The arbitral tribunal can determine its own jurisdiction according to Article 16 of the IAA,¹²⁶ although an aggrieved party can request the courts to decide the issue after the arbitrator has decided the issue as a preliminary question. International arbitration is generally not confidential,¹²⁷ but the parties

¹¹⁷ *Id.*

¹¹⁸ See BORN, *supra* note 49, at 2065.

¹¹⁹ ALEXIS MOURRE, INTERNATIONAL BAR ASSOCIATION, ARBITRATION GUIDE: FRANCE 1 (2012).

¹²⁰ *Why Paris*, PARIS ARBITRATION: THE HOME OF INTERNATIONAL ARBITRATION, <https://www.parisarbitration.com/en/why-paris/> (last visited Oct. 26, 2016).

¹²¹ ANNE GRANGER, FASKEN MARTINEAU, PARIS' COMPETITIVE EDGE: SOME CONSTRUCTIVE PROPOSALS 2 (2011).

¹²² See MOURRE, *supra* note 119, at 7.

¹²³ See *id.* at 22.

¹²⁴ ANDREW STEPHENSON & MEVELYN ONG, THE DOMESTIC AND INTERNATIONAL ARBITRATION LANDSCAPE IN AUSTRALIA 1 (2012).

¹²⁵ Geoff Hansen & Jennifer Galatas, *International Dispute Resolution in the Asia-Pacific—Arbitration in Australia Revisited*, KLUWER ARBITRATION BLOG (Apr. 24, 2013), <http://kluwerarbitrationblog.com/blog/2014/04/24/international-dispute-resolution-in-the-asia-pacific-arbitration-in-australia-revisited/>.

¹²⁶ See JONES, INTERNATIONAL BAR ASSOCIATION, ARBITRATION GUIDE: AUSTRALIA 6 (2012).

¹²⁷ *Id.* at 10.

can agree “to keep confidential all matters relating to the arbitration, the award, the material created for the purposes of the arbitration, and the documents produced by the parties to the arbitration.”¹²⁸ Finally, the arbitral tribunal and the national courts are entitled to grant interim measures.¹²⁹

Each of the jurisdictions described above offer an arbitration-friendly system that provides the parties, practitioners and arbitrators with clear rules and international standards for the practice of international commercial arbitration. Interestingly, as the cases of Santiago and Sydney show, in order to compete with traditional venues, it is not enough to adopt the typical conditions of attractive arbitral seats. Even though both cities enjoy most—if not all—of such features, their caseload is significantly lower to the one presented by most popular forums, like London or Paris.¹³⁰ This suggests that the recognition and reputation of the place of arbitration plays a key role for turning a given seat into an international arbitration hub. In fact, 65% of the respondents in the 2015 Queen Mary University survey considered “reputation and recognition of the seat” important.¹³¹ Therefore, the fact that Santiago presents all the features of an arbitration hub should not deter the city from developing new methods for improving its reputation as a seat of international commercial arbitrations. In the next section, we suggest measures that may be adopted for such purpose.

V

MEASURES THAT SANTIAGO COULD ADOPT TO IMPROVE ITS REPUTATION AS A SEAT FOR INTERNATIONAL ARBITRATIONS

Building a reputation similar to those enjoyed by the most popular arbitration seats will necessarily require time and consistent legislative, judicial, and political support for international commercial arbitration. Practitioners and authorities must play an active role in developing the reputation of Santiago. However, certain measures may be particularly useful to accelerate the spread of Santiago’s

¹²⁸ Georgia Quick, *Arbitration in Australia and ACICA* (Nov. 2013), ASHURST PUBLICATIONS (Nov. 1, 2013), https://www.ashurst.com/publication-item.aspx?id_Content=9807.

¹²⁹ *Id.*

¹³⁰ According to information provided personally by CAM Santiago.

¹³¹ QUEEN MARY UNIVERSITY OF LONDON & WHITE & CASE, *supra* note 48, at 13.

reputation as a city worthy of being a hub of international commercial arbitration.

Firstly, Chile should cooperate with other countries in the region, such as Peru or Colombia. Those jurisdictions not only show a strong support for international commercial arbitration, they are also conveniently close to Chile, share a common language, have active arbitral institutions, and have courts that are increasingly arbitration-friendly.¹³² If more countries within the region offer secure systems for international commercial arbitrations, the overall result will be better for all stakeholders.

Secondly, Chile should also leverage its resources to encourage parties to choose Chile as a seat for international commercial arbitration. Chile is formidable in the natural resources market, with a long-standing tradition in the mining industry.¹³³ This may present an opportunity for Chile to leverage its industrial expertise to develop an arbitration niche in this sector. Over time, arbitration success in this niche could subsequently be expanded to other fields. This could lead to edifying Santiago as an international arbitration hub.

Ultimately, leveraging a developed industry in natural resources in Latin America seems a logical position, considering that Chile is far from being the only country with important economic dependence on natural resources in the region. Notably, “Argentina’s economy [benefits from] valuable natural resources,”¹³⁴ Bolivia exports minerals and natural gas,¹³⁵ and Peru expects to host important mining projects in the coming years.¹³⁶ Chile shares territorial borders with all of these countries.

Thirdly, Chile should also leverage support with countries which already maintain embassies in Santiago.¹³⁷ For example, French stakeholders might be keen to submit their disputes under Chilean law

¹³² See Finizio & Narancio, *supra* note 71.

¹³³ Particularly copper, as noted in *Chile: Overview*, WORLD BANK (Oct 27, 2015, 3:34 PM), <http://www.bancomundial.org/es/country/chile/overview>.

¹³⁴ *Argentina: Overview*, WORLD BANK (Oct. 27, 2015, 4:44 PM), <http://www.worldbank.org/en/country/argentina/overview>.

¹³⁵ *Bolivia: Overview*, WORLD BANK (Oct. 27, 2015, 4:42 PM), <http://www.worldbank.org/en/country/bolivia/overview>.

¹³⁶ *Peru: Overview*, WORLD BANK (Oct. 27, 2015, 3:39 PM), <http://www.worldbank.org/en/country/peru/overview>.

¹³⁷ E-mail from José Luis López Blanco, Professor of Law, U. Chile (Sept. 16, 2015) (on file with authors).

if the embassy of France in Santiago supports an initiative to communicate the advantages of Chile as a seat of arbitration.

Additionally, Chile should also gather data concerning arbitration statistics to support its efforts. International commercial arbitration has been criticized for the lack of scientific methods applied to data gathering. Among several advantages, the findings could be useful to understand the reasoning behind arbitral awards, improve the functions of arbitral institutions, and develop the use of precedent in the field, providing certainty to the parties.¹³⁸

Despite the efforts that have been made,¹³⁹ developing data gathering tools for research purposes in the field of international arbitration still seems to be a pending task. Chile is currently in an excellent position to undertake such an endeavor because the country has skilled professionals, solid arbitral institutions, and prestigious universities.¹⁴⁰ The Arbitration and Mediation Centre in Santiago has already taken steps in this regard by publishing compilations of arbitral awards, in which it is possible to identify the legal rationale without jeopardizing the identity of the parties involved. Through the publishing of redacted awards, arbitral institutions safeguard the confidentiality of the arbitral procedure, which is precisely one of the biggest challenges for data gathering in the field.

Ultimately, it is possible that by taking the lead in the implementation of effective methods of data gathering, Chile—and therefore Santiago—could increase its reputation as a seat for international arbitration.

¹³⁸ Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture*, 23 *ARBITRATION INT'L* 357, 378 (2007) (noting “we are facing times in which the changing environment makes “the predictability and consistency of the rule of law . . . more important than ever”).

¹³⁹ School of International Arbitration from Queen Mary University of London, *Research at the School of International Arbitration* (Sept. 16, 2015, 11:41 AM), <http://www.arbitration.qmul.ac.uk/research/index.html> (such as the surveys conducted by the School of International Arbitration from Queen Mary University of London, or the statistics compiled by the International Centre for the Settlement of Investment Disputes of the World Bank, for investment arbitrations); International Centre for the Settlement of Investment Disputes, *News* (Sept. 16, 2015, 11:33 AM), <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>.

¹⁴⁰ *University Rankings* (Oct. 29, 2015, 3:20 PM), <http://www.topuniversities.com/university-rankings/latam-university-rankings/2015#sorting=rank+region+=country+=faculty+=stars=false+search=> (showing that according to the 2015 QS University Ranking, two of the best four universities in Latin America are Chilean).

Finally, Chile could improve or innovate regulations related to third-party funding, which is a mechanism whereby a third party either fully or partially finances the arbitration costs of one of the parties with the expectation of gaining a profit in the event of a favorable result.¹⁴¹ Third-party funding will soon be a standard feature in international commercial arbitration.¹⁴² Among other benefits, external funding improves access to justice for parties incapable of financing arbitrations.¹⁴³ However, it also poses serious risks for the arbitral process, such as the excessive filing of frivolous claims or unrevealed conflicts of interests.¹⁴⁴ These hazards have led the international arbitration community to consider uniform regulation of third-party funding in international arbitration.¹⁴⁵ Accordingly, if Santiago develops a third-party funding rule applicable to international arbitration, the city could gain recognition as an arbitral seat, while also attracting both funders and claimants wishing to arbitrate under a clear system of rules.

CONCLUSION

Santiago has long embraced the main features of an attractive seat of arbitration and is prepared to host a larger caseload of transnational disputes. Chile is part of the New York and Panama conventions, has adopted a modern international arbitration statute according to the UNCITRAL Model Law, and offers a supportive judicial system for the practice of international commercial arbitration. As noted, domestic courts have embraced the principle of minimum intervention with the arbitral process, accepting that their role is to assist with the arbitration without duly interfering with the procedure and ensuring confidentiality when necessary. Additionally, Chile is a stable country

¹⁴¹ Burcu Osmanoglu, *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, KLUWER ONLINE (Oct. 8, 2015, 3:22 PM), <http://www.kluwerlawonline.com/JOIA2015013>.

¹⁴² Thibault De Boule, *Third-Party Funding in International Commercial Arbitration* (2014) (unpublished LL.M. thesis, Ghent University) (on file with authors).

¹⁴³ JEREMY WINTER & STEVE ABRAHAM, BAKER & MCKENZIE, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION*, INTERNATIONAL ARBITRATION 2 (2013).

¹⁴⁴ Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1652 (2013). (Moreover, it even poses a risk for the party benefiting from the funding, because the funder could use his economic power to obtain abusive conditions in the funding agreement.); WINTER & ABRAHAM, *supra* note 143.

¹⁴⁵ Indeed, according to the 2015 Queen Mary University of London Survey, a vast majority of respondents believe that third-party funding requires some type of regulation.

with the potential to conduct arbitral proceedings arising from a multitude of jurisdictions.

However, there are still some issues that the city could address in order to improve its status as an appealing arbitral seat. For example, a specific provision could authorize foreign counsel to lead procedures seated in Santiago, avoiding any potential discussions regarding this matter. In addition, more lawyers should be trained in the English language, and domestic courts should develop a more profound and precise understanding of the international commercial arbitration regime.

Finally, considering that reputation is a relevant feature when selecting the arbitral seat, Santiago will necessarily need time to develop consistent legislative, judicial, and political support for international arbitration. Some measures could accelerate the process of increasing the reputation of the city, such as creating a regional body for international arbitration, developing a natural resources arbitration niche, asking for the support of diplomatic organizations, and taking the lead in current arbitration trends.

In the end, the fact that Santiago already has what it takes to become an attractive seat for international arbitrations should not prevent the relevant players from undertaking additional efforts to further improve the position of the city as an appealing arbitral forum.

