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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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Does a Right to a  
Physical Hearing Exist  
in International  
Arbitration?

**CHILE**

Andrés Jana Linetzky

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**a. Parties' Right to a Physical Hearing in the *Lex Arbitri***

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

Chile has a strict dualist system for arbitration. International commercial arbitration is regulated by a special law (Law No. 19.971 on International Commercial Arbitration, "ICAL"),<sup>1</sup> while domestic arbitration is mainly governed by the Code of Civil Procedure of 1902 ("CCP").<sup>2</sup> With respect to international arbitration, the ICAL follows almost verbatim the 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law").<sup>3</sup> Indeed it has provisions identical to Articles 18 ("Equal treatment of the parties"), 19 ("Determination of rules of procedure"), 20 ("Place of arbitration"), and 24 ("Hearing and written proceedings") of the Model Law. Accordingly, Article 24(1) of the ICAL states that: "Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for

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<sup>1</sup> Law No. 19.971 of International Commercial Arbitration, published in the official gazette on 29 September 2004.

<sup>2</sup> See JANA, "National Report Chile (2010 through 2018)" in *ICCA International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 2.

<sup>3</sup> According to the Mensaje No. 5-349 of the ICAL, an arbitration is considered "international" when one of the following criteria is met: "[...] that the parties to the arbitration agreement have their establishments in different States (Art.1. No. 3. letter a.) This criterion is recognized in our legal system regarding the international sale of goods (Art. 1 of the Convention of the United Nations on contracts in this matter). Furthermore, the arbitration will be international if, the place of arbitration or the place of performance of a substantial part of the obligations of the commercial relationship or the place with which the subject of the dispute has a closer relationship is located outside the State in which the parties have their establishments (Art.1.nº3. Letter b.). Lastly, arbitration is considered international if "the parties have expressly agreed that the matter that is the subject of the arbitration agreement is related to more than one State" (Art.1.nº3. Letter c.). Naturally, this recognition of the autonomy of the will has limits insofar as a dispute could not be declared international if it does not actually have some foreign element of certain relevance or contravenes public order rules, such as those relating to consumer protection" (free translation by the Author).

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oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials”. Notwithstanding it adds that “unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if so requested by a party”. As the text demonstrates, while Article 24 does contain a right to a hearing, it does not require the hearing to be held physically. That provision, interpreted together with other provisions of the law, such as Article 19(2), suggests the most likely conclusion is that under the ICAL the parties are not entitled to a physical hearing.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: Likely not.

As mentioned above, under Article 24 of the ICAL (the exact same provision of the UNCITRAL Model Law), arbitral tribunals are required to hold oral hearings when requested by a party. Notwithstanding that in Chile there is no case law regarding this provision nor doctrine that has discussed the issue, nothing in the ICAL indicates that an “oral hearing” means that hearings must take place in person and that such requirement cannot be satisfied remotely. The purpose of an oral hearing is to allow the parties to orally and simultaneously present arguments and evidence and challenge evidence given by the other party, all of which does not require a physical presence. It is therefore highly unlikely that Chilean courts would construe the reference of ICAL to an “oral hearing” as containing a right to a physical hearing.

### **b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration**

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Most probably.

Under the general rules of civil procedure contained in the CCP, litigation proceedings in Chile are conducted in writing with certain exceptions. Among the two

most relevant ones are the presentation of certain evidence (i.e., witness statements),<sup>4</sup> and oral arguments in the Courts of Appeal and the Supreme Court, for which physical hearings are provided.

Article 370 of the CCP establishes that witness testimony must be provided in a physical hearing, typed and signed by the judge and the deponent, as well as by the parties if “they are appearing in the hearing”.<sup>5</sup>

Secondly, the CCP provides physical hearings for cases in which the witness is domiciled outside the territory of the civil court in which they are to testify.<sup>6</sup> In these cases, the law does not establish that the hearing will be held remotely, nor does it empower the parties to agree to this modality. Instead, the CCP establishes that the statement will be taken by the competent civil court in the jurisdiction where the witness is located.<sup>7</sup> This same solution is offered for the case in which the witness is located outside the country, with the exception that in these cases a request must be made via a rogatory letter to the country in which the witness is domiciled.<sup>8</sup>

Finally, and with regard not only to civil litigation, the right to a physical hearing can be inferred from the provisions of Law No. 21.226 that established a regime of exception for judicial proceedings in the wake of the COVID-19 pandemic in Chile.<sup>9</sup> The Law provides, in the final section of Article 1, that courts can only hold remote hearings if they cannot be suspended.<sup>10</sup> The same rule was extended in Article 2 to “ad hoc and

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<sup>4</sup> Mario CASARINO, *Manual de Derecho Procesal. Tomo IV* (Editorial Jurídica de Chile 2009) p. 17.

<sup>5</sup> Article 370 CCP: “(1) Statements shall be recorded in writing, and the expressions used by the witness shall be kept as short as possible. (2) After being read aloud by the receiver and ratified by the witness, they shall be signed by the judge, the declarant, if he knows, and the parties, if they also know and are present, and they shall be authorized by a consignee, who shall also serve as an actuary in the incidents that occur during the evidentiary hearing” (free translation by the Author).

<sup>6</sup> Article 388 CCP: “(1) If the court does not require the secretary or another minister of faith to do so, it must summon the litigant who is to make declaration to appear on a specific day and time. (2) Whenever either party so requests, the court shall receive the statement from the litigant itself. (3) If the litigant is outside the territory of the court hearing the case, his declaration shall be taken by the competent court, which shall proceed in accordance with the two preceding paragraphs” (free translation by the Author).

<sup>7</sup> Articles 371 and 388 CCP.

<sup>8</sup> Article 76 CCP. Previously, all rogatory letters had to be processed through the Foreign Ministry. Currently, the Judiciary has exclusive power to process active and passive rogatory letters. In this regard, see: Judicial Branch <[https://www.pjud.cl/web/guest/noticias-del-poder-judicial/-/asset\\_publisher/kV6Vdm3zNEWt/content/cancilleria-entrega-al-poder-judicial-facultad-de-tramitar-exhortos-internacionales](https://www.pjud.cl/web/guest/noticias-del-poder-judicial/-/asset_publisher/kV6Vdm3zNEWt/content/cancilleria-entrega-al-poder-judicial-facultad-de-tramitar-exhortos-internacionales)> (last accessed November 25<sup>th</sup>, 2020).

<sup>9</sup> Law No. 21.226, published in the official gazette on 2 April 2020. For a deeper analysis of this Law, see sub-paragraph f.11 below.

<sup>10</sup> Article 1, final clause, Law No. 21.226: “Similarly, when a suspension is ordered by the Supreme Court, the respective courts, pursuant to the terms of Article 10, may proceed

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institutional arbitrations of the country”.<sup>11</sup> And, if hearings are held remotely, they must be held with “all necessary measures to ensure the conditions for compliance with the judicial guarantees of the process, as provided for in the Political Constitution of the Republic and in the international treaties ratified by Chile and currently in force”.<sup>12</sup>

Notwithstanding that Article 2 of Law No. 21.266 refers in general to “ad hoc and institutional arbitrations in Chile”, it should be considered that is not applicable to international commercial arbitrations seated in Chile. As previously mentioned, the Chilean legal system is based on a strict dualism, in which international arbitration is regulated only by the ICAL and other rules of procedure contained in the CCP or elsewhere are not applicable to it.<sup>13</sup> Consequently, one of the first guiding principles of the ICAL is “Specialization in International Commercial Arbitration”, according to which the Law “establishes a special and autonomous legal regime, both in form and substance, for international commercial arbitration”.<sup>14</sup> This principle is in harmony with the principle of minimum intervention, enshrined in Article 5 of the ICAL,<sup>15</sup> on the basis

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remotely to conduct the hearings and hearings of cases that cannot be suspended pursuant to the second paragraph, which may also be requested by the parties or interveners” (free translation by the Author).

<sup>11</sup> Article 2 Law No. 21.226: “(1) The special courts that do not form part of the Judicial Branch and the ad hoc and institutional arbitration tribunals of the country, during the validity of the state of constitutional emergency of catastrophe, due to public calamity, declared by supreme decree No. 104, of March 18, 2020, of the Ministry of the Interior and Public Security, and the time in which this is extended, if it is the case, may suspend any hearing that corresponds to carry out in the framework of the procedures that they know, with the exception of those that require the urgent intervention of the court, in the same terms referred to in the previous article. Once a hearing has been suspended, the court shall reschedule it for the earliest possible date after the end of the state of constitutional emergency, and the time in which it is extended, if applicable. (2) The respective courts, under the terms of Article 10, may proceed remotely to hold the hearings that cannot be suspended pursuant to the first paragraph, which may also be requested by the parties” (free translation by the Author).

<sup>12</sup> Article 10 Law No. 21.226: “In cases where, in accordance with the provisions of this law, a court orders to proceed remotely, it must take all necessary measures to ensure the conditions for compliance with the judicial guarantees of the process, as provided for in the Political Constitution of the Republic and in the international treaties ratified by Chile and currently in force” (free translation by the Author).

<sup>13</sup> María Fernanda VÁSQUEZ, *Tratado de Arbitraje en Chile: arbitraje interno e internacional* (Thompson Reuters 2018) p. 729.

<sup>14</sup> Official Message of the President of the Republic N° 15-349.

<sup>15</sup> Article 5 ICAL: “Extent of court intervention. In matters governed by this Law, no court shall intervene except where so provided in this Law” (English translation based on the equivalent provision of the UNCITRAL Model Law on International Commercial Arbitration).

of which legal scholarship has advocated the exclusion of any general or residual power given to the courts of any judicial system that is not mentioned in the ICAL.<sup>16</sup> Thus, the ICAL represents a self-contained regulatory system, in which other procedural laws of the Chilean legal system are not applicable either in a supplementary form or otherwise.

Consequently, the dual regulation of arbitration in Chile makes it possible to conclude that Article 2 of Law No. 21.266 only refers to domestic arbitrations, and its provisions do not alter the special statute that governs international commercial arbitration.

In conclusion, even though the rules governing Chilean civil procedure do not define what is to be understood by “hearing”, it is possible to infer from the provisions of the CCP and from general legal principles that Chilean rules of civil procedure provide for physical hearings.

Recently, the Supreme Court issued two procedural orders of general application (*Auto Acordados*) to address the challenges arising from the COVID-19 crisis in Chile. Under *Auto Acordado* No. 41-2020 enacted on March 13, 2020, the Supreme Court provided rules to allow teleworking and the use of videoconferencing by the Judiciary, authorizing that emergency hearings should be held remotely, and only if the parties do not object to said procedure. This *Auto Acordado* was enacted before the publication of Law No. 21.226 on April 2, 2020, and provided an emergency set of rules to provide continuity to the Chilean judicial system.

On the other hand, Law No. 21.226 formalized and confirmed the Supreme Court’s decision to hold hearings remotely and authorized the Supreme Court to suspend hearings or provide the platform to perform them via teleconference, under certain circumstances. On November 20, 2020, the Supreme Court amended its previous *Auto Acordado*, providing that the hearings shall be held via videoconference during the COVID-19 crisis, eliminating the right of the parties to object.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

There are no rules regarding this matter in the CCP applicable to international arbitration. For international commercial arbitrations, the ICAL is the only law applicable.<sup>17</sup>

Thus, to the extent that a right to a physical hearing exists under the rules of the CCP for the situations mentioned in the previous answer, the provisions of the CCP are not

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<sup>16</sup> María Fernanda VÁSQUEZ, “Recepción Del Arbitraje Comercial Internacional En Chile Desde Una Óptica Jurisprudencial. Una Revisión Ineludible”, 38 *Revista Chilena de Derecho* (2011) p. 351.

<sup>17</sup> Corte de Apelaciones de Santiago (C. Apel. Santiago) [Court of Appeal of Santiago], 9 de septiembre de 2013, “*Vergara Varas c. Costa Ramirez*”, Rol de la causa: 1971-2012.

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applicable to international commercial arbitrations, which are exclusively regulated by the ICAL.

### c. **Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

As detailed in the previous answers, the right to a physical hearing does not exist in international arbitrations seated in Chile.

Even in domestic arbitrations, the parties have a broad freedom to agree on the rules of procedure and therefore waive their right to a physical hearing. In fact, it is very common in the context of institutional arbitrations for the parties to agree on the rules that will govern the entire arbitration procedure, as is the case with the Centro de Arbitraje y Mediación de Santiago, the most widely used centre in Chile.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: No.

As previously mentioned, the ICAL in Chile follows verbatim most of the provisions of the Model Law. Therefore, the discussion under the ICAL is the same as the discussion under the Model Law. In that respect, Article 19(1) ICAL establishes that the parties' agreement prevails in defining the procedural rules that the arbitration will follow and the arbitral tribunal must follow the agreement of the parties.<sup>18</sup> Only in the absence of such agreement does the arbitral tribunal have the power to conduct the arbitration in the manner it considers appropriate.<sup>19</sup>

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<sup>18</sup> Article 19(1) ICAL: "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" (English translation based on the equivalent provision of the UNCITRAL Model Law on International Commercial Arbitration).

<sup>19</sup> Article 19(2) ICAL. "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility,

With respect to the legal consequences, if the arbitration agreement requires a physical hearing and the tribunal contradicts such an agreement, the award may be subject to annulment under the rules of the ICAL, based on the ground set forth by Article 34(2), letter (a), number (iv).<sup>20</sup> This ground establishes that an award in an international commercial arbitration may be annulled if the requesting party proves that “the arbitration procedure did not comply with the agreement between the parties”.

**d. Setting Aside Proceedings**

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Yes.

As was mentioned, the ICAL does not provide for a right to a physical hearing.

Assuming, however, that such a right would be recognized in a specific case and be used as a ground for challenging the award as it would be further explained in question number 9, Article 4 of the ICAL refers to the “waiver of the right to object”. Specifically, the Article states:

“A party who proceeds with the arbitration knowing that any provision of this Law from which the parties may derogate, or any requirement of the arbitration agreement has not been complied with and does not promptly express an objection to such non-compliance or, if a time period is provided for doing so, within such time period, shall be deemed to have waived its right to object”.<sup>21</sup>

While Article 34 ICAL (which provides for the grounds to challenge the award) does not expressly require the parties to raise the breach of a procedural rule during the arbitral proceeding as a condition to later challenge the award, it is understood that Article 4

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relevance and value of the evidence” (English translation based on the equivalent provision of the UNCITRAL Model Law on International Commercial Arbitration).

<sup>20</sup> Article 34(2), letter (a), number (iv), ICAL (“The petition for annulment as the only recourse against an arbitral award”): “[...] (2) The arbitration award may only be annulled by the respective Court of Appeal when: (a) The party making the application furnishes proof that: [...] (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law [...]” (English translation based on the equivalent provision of the UNCITRAL Model Law on International Commercial Arbitration).

<sup>21</sup> Article 4 ICAL (free translation by the Author).

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ICAL is of general application, as it refers to the principle of preclusion.<sup>22</sup> This means that Article 4 ICAL would prevent a party to challenge the award, if it failed to raise the alleged breach of the right to a physical hearing during the arbitral proceeding.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: It depends.

As previously mentioned, the ICAL does not contain a right to a physical hearing. Accordingly, the failure to conduct a physical hearing by itself cannot be claimed as a ground for challenging the award.

Notwithstanding, if the tribunal contradicts an agreement of the parties to hold a physical hearing, or under the circumstances of the case the lack of a physical hearing may have affected the right to due process of one of the parties, including its ability to present its case, it may give ground for setting aside the award.<sup>23</sup>

It should be mentioned, however, that the Chilean courts have been conservative in assessing possible grounds for annulment in international arbitration cases, giving deference to the arbitral tribunals in procedural matters and narrowly construing the concept of public order, establishing a high bar for setting aside an award.

In June 2020, the Supreme Court rejected an annulment motion filed by the defendant in a criminal case where the trial was held via videoconference, holding that the remote

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<sup>22</sup> Principle of preclusion corresponds to the loss, extinction or consummation of a right or opportunity. M.F. VÁSQUEZ, *Tratado de Arbitraje en Chile*, fn. 13 above, pp. 798-799.

<sup>23</sup> Article 34(2), letter (b), number (ii), ICAL: “The arbitration award may only be annulled by the respective Court of Appeal when: [...] (b) The court finds that: [...] (ii) The award is in conflict with the public policy of this State” (English translation based on the equivalent provision of the UNCITRAL Model Law on International Commercial Arbitration).

hearing provided for the fulfilment of all of the due process guarantees for the defendant.<sup>24</sup>

It should also be noted that in August 2020, the Constitutional Court of Chile admitted two requests to declare as unconstitutional Article 9 of Law No. 21.226, which establishes an exceptional legal regime for the judicial processes, in the hearings and legal proceedings, due to the impact of the COVID-19 pandemic in Chile. The requests argue that allowing the holding of oral hearings in criminal matters by videoconference, would constitute a violation of the guarantee of due process, since the holding of an oral trial by videoconference violates the principles of immediacy and orality. This, according to the requesting parties, alters the quality of the information of the evidence to be incorporated in the trial, exposing the defendant to a lower quality trial. Additionally, the parties allege the violation of the right to defence and equality before the law.

On December 18, 2020, the Constitutional Court of Chile granted both constitutional challenges to Article 9 of Law No. 21.226, and held that, regarding criminal cases where the defendant is under custody and under certain circumstances, a remote hearing could affect the defence and the constitutional rights of the parties. Under Chilean Law, these Constitutional Court's decisions are applicable only to the specific cases where the challenges were brought.<sup>25</sup>

**e. Recognition/Enforcement**

*10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: It depends.

In light of the above analysis, it seems unlikely that the absence of a physical hearing could be considered in and of itself a ground for denying recognition and enforcement of a foreign arbitral award under Articles V(1)(b) (right of the party to present its case),

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<sup>24</sup> Corte Suprema (C.S.J) [Supreme Court], 22 de junio de 2020, “*Ministerio Público Arica c. Palechor*”, Rol de la causa: 59.504-2020.

<sup>25</sup> Tribunal Constitucional (T.C) [Constitutional Court], final decision issued on December 18<sup>th</sup>, 2020, Rol de la causa: 9174-20, available at <<http://www.tribunalconstitucional.cl>> (last accessed 16 March 2021) (the official website of the Constitutional Court, which offers open access to all its decisions); Tribunal Constitucional (T.C) [Constitutional Court], final decision issued on December 18<sup>th</sup>, 2020, Rol de la causa: 9246-20, available at <<http://www.tribunalconstitucional.cl>> (last accessed 16 March 2021).

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V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention. Nonetheless, as mentioned earlier, if under the circumstances of the case the breach of a right to a physical hearing could result in a violation of due process or the right to be heard of one of the parties, the recognition and enforcement may be denied under these grounds.<sup>26</sup>

As previously mentioned, the Chilean courts have been conservative in assessing possible grounds for annulment in international arbitration cases.

The Supreme Court, rejecting allegations of violation of public policy, held that due process should be understood as the protection of a rational and fair process, which would mean a judicial guarantee that no one could be deprived of their rights without a proper process.<sup>27</sup> In another case, the Court held that the defendant was personally notified of the claim, answered the claim, filed a counterclaim and objections, was represented by a law firm and notified of the judgment, which he did not appeal, circumstances that refute the assertion that he had no opportunity to defend himself.<sup>28</sup>

Regarding Article V(1)(b), the Supreme Court has accepted that notice was given in accordance with the relevant contractual provisions and arbitral institutional rules, instead of requiring strict compliance with domestic service procedures.<sup>29</sup>

As for Article V(1)(d), the Santiago Court of Appeals has rejected a request for annulment based on the equivalent provision of the ICAL, since the panel of arbitrators challenged by the party requesting the annulment was constituted in accordance with the regulations in force and in accordance with the procedures of Law No. 19.971.<sup>30</sup>

### f. COVID-Specific Initiatives

11. *To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: N/A

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<sup>26</sup> See JANA, “National Report Chile (2010 through 2018)” in *Handbook*, p. 54.

<sup>27</sup> See Corte Suprema (C.S.J) [Supreme Court], 14 de mayo de 2007, “*Street State Bank and Trust Company c. Inversiones Errázuriz Limitada*”, Rol de la causa: 2349-2005.

<sup>28</sup> See Corte Suprema (C.S.J) [Supreme Court], 15 de septiembre 2008, “*Gold Nutrition Industria e Comercio c. Laboratorios Garden House*”, Rol de la causa: 6615-2007.

<sup>29</sup> See Corte Suprema (C.S.J) [Supreme Court], 5 de julio 1996, “*Quote Food Products B.V. c. Sociedad Agroindustrial Sacramento Ltd.*”, RDJ (1999) 2-1 82. See also Corte Suprema (C.S.J) [Supreme Court], 30 de noviembre 2017, “*Almendra y Miel S.A. c. Agrícola Comercial e Inversiones El Camino S.A.*”, Rol de la causa: 82.442-2016.

<sup>30</sup> See Corte de Apelaciones de Santiago, 23 de noviembre 2015, “*Río Bonito S.A., Queltehue S.A. and J.C.M. v. Arbitrators S.T.S., E.P.L. and M.T.R*”, Rol de la causa: 1.739-2015.

The first thing to note is that there are no special, COVID-19 related, regulations concerning international arbitration, which is governed by Law No. 19.971.

The Arbitration and Mediation Centre of the Santiago Chamber of Commerce (“CAM Santiago”), by far the most widely used arbitral institution in Chile, has issued a statement dated March 16, 2020 in which they urge the use of online platforms, including for holding hearings.<sup>31</sup>

Additionally, as previously stated, on April 2, 2020, Law No. 21.226 was enacted to address the negative consequences of the COVID-19 pandemic and therefore to assure that the administration of justice would continue, especially in cases that are time sensitive (such as injunction hearings, emergency rulings, protection of constitutional rights cases, etc.). The law seeks to establish a legal emergency framework to schedule and holding hearings and remote continuation of some judicial proceedings, providing rules to ensure both health and safety measurements and the continuation of the administration of justice.

For said purposes, Law No. 21.226 allows the Supreme Court to suspend hearings across the entire judicial system, including arbitral tribunals. It should be noted that the reference to arbitral tribunals seems to only refer to domestic arbitration, and does not include international arbitration, as it was further explained under sub-paragraph b.3 above.

Notwithstanding the above, when referring specifically to domestic arbitral tribunals, the law allows these to suspend any hearing that is due to take place in the proceedings before them, when as a result of the restrictions imposed by the authority within the framework of the constitutional state of exception or due to the consequences caused by the COVID-19 health emergency, the hearings cannot be held, due to a lack of equality, adversarial guarantees, appreciation of the evidence, procedural impulse of the parties, publicity and other basic guarantees of due process.<sup>32</sup> This power to suspend hearings has an exception in those cases that require the urgent intervention of the tribunal.<sup>33</sup>

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<sup>31</sup> CAM Santiago, Comunicado de Funcionamiento [Operating Statement] No. 1/2020, No. 4 (16 March 2020) at <<https://www.camsantiago.cl/minisites/docs/ComunicadoCuarentena.pdf>> (last accessed 30 November 2020): “Hearings. The arbitrators are urged – in those cases where it is deemed prudent - to suspend the hearings ex officio until further notice. Notwithstanding the foregoing, the Court shall use all the electronic means of CAM Santiago for the processing of the process. If necessary, the hearings and trials may be conducted through systems such as videoconferencing, telephone or similar means of communication. In the case of hearings scheduled for the next 15 days, the arbitrators and the parties are urged to use the electronic means indicated above, contacting the attorneys in charge of the Center to coordinate videoconferencing and/or reschedule the hearings already scheduled for after March 31. For all those hearings where it is not possible to reschedule them, CAM Santiago will take all the necessary sanitary measures to protect the safety of the attendees, keeping our offices available for this purpose in the absence of any notice to the contrary”.

<sup>32</sup> Article 1 Law No. 21.226.

<sup>33</sup> Article 2 Law No. 21.226.

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However, Law No. 21.226 also allows domestic arbitral tribunals, at their own motion or upon the request of the parties, to continue the proceedings remotely with respect to hearings that according to the law cannot be suspended.<sup>34</sup> In this case, the tribunal shall take all necessary measures to ensure the conditions for compliance with the judicial guarantees of due process, as provided for in the Constitution and in the international treaties ratified by Chile and currently in force.<sup>35</sup>

Although this is the main COVID-19-related specific regulation, the Supreme Court has issued various measures to address the health emergency, by issuing procedural orders of a general character called *Autos Acordados*. *Auto Acordado* No. 41-2020 regulates teleworking and the use of videoconferencing in the Judiciary. The interesting aspect to note regarding this regulation is the fact that it takes into consideration the existence of technology, and its ability to recreate a physical hearing by allowing real-time communication at a distance. Accordingly, the Supreme Court allows for hearings to take place virtually by means of audio-visual interaction, making it possible for the judges to be present and produce resolutions of jurisdictional matters with full legal effects. This way, the Supreme Court seeks to ensure that proceedings can continue while restrictions due to COVID-19 are in place, while at the same time ensuring that the rights and guarantees of due process are not impacted.

Finally, on September 1, 2020, the Government introduced a bill to amend procedural rules during the COVID-19 crisis.<sup>36</sup> However, the bill also provides for permanent rules, not contingent to the current pandemic. Among other matters, the bill includes regulations to allow the conducting of hearings via videoconference. The bill is still pending of discussion in Congress.

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<sup>34</sup> Article 2 Law No. 21.226.

<sup>35</sup> Article 10 Law No. 21.226.

<sup>36</sup> Official Message of the President of the Republic No. 158-368.