VENEZUELA

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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.

The Commercial Arbitration Law of 1998 (Ley de Arbitraje Commercial, “CAL”), which applies to both domestic and international arbitration, contains several provisions that recognize the hearing as an essential step in the course of arbitral proceedings. Nevertheless, CAL is silent with respect to whether the parties have an actual right to a physical hearing. As a result, it cannot be said that the lex arbitri of Venezuela expressly provides for a right to a physical hearing in arbitration.1 Whereas CAL is the main arbitration statute in Venezuela, there are at least seven other laws that recognize arbitration for disputes other than commercial, such as labour, public contracts, land and agricultural development, matters involving children and adolescents, and housing and rental regulation.2 Similarly to CAL, none of these statutes expressly recognize the right to a physical either. It is also important to note, that under articles 2 and 12 CAL,3 arbitral institutions in Venezuela are free to establish their own procedures, which could expressly or implicitly regulate whether hearings are physical or not. As most parties tend to submit their disputes to arbitral institutions, CAL’s regime is basically left for ad hoc arbitrations.

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1 According to CAL’s preamble or statement of purpose (exposición de motivos), “attendance to the arbitral hearings” (“asistencia a las audiencias del proceso arbitral”) is one of the main obligations of the arbitrators, but it made no mention to any corresponding right given to the parties.


3 Article 2 CAL: “Arbitration may be institutional or independent. Institutional arbitration is conducted through the arbitration centers referred to herein, or those created under other laws. Independent arbitration is any such regulated by the parties without the participation of the arbitration centers”. Article 12 CAL: “Within institutional arbitration, everything pertaining to the arbitration proceedings, including notices, the establishment of the tribunal, challenge and replacement of Arbitrators and the proceedings, shall be governed in conformity with the provisions of the arbitration rules of the arbitration center to which the parties have submitted themselves”.

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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:** The right to a physical hearing could be inferred from the *lex arbitri*, but there is also the possibility that it can be excluded.

Despite the lack of an express provision on whether arbitral hearings shall be held physically or remotely, the references made by articles 9 and 23 CAL about a “place in which [the hearing] will be held” appear to suggest that the hearing shall occur synchronously and in a pre-established location. Further, article 41 states that “it is the duty of the arbitrators to attend all the hearings”, thus reaffirming that notion. Notwithstanding, neither provision indicates whether all of the participants have to be physically present in the same place, or if some might be allowed to join remotely through telephone, video or other similar technology. We are not aware of any judicial decisions addressing this issue, but local arbitral practice seems to suggest that physical hearings are generally seen as the default option, and remote hearings are the exception.

The first procedural hearing (“*primera audiencia de trámite*”) mentioned in articles 23 and 24 is the only mandatory hearing expressly mentioned in CAL and the first

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4 Article 9 CAL: “The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal taking into account the circumstances of the case, including the convenience of the parties. The arbitral tribunal may nevertheless meet, except as otherwise agreed by the parties, at any place deemed appropriate to deliberate, hear depositions from witnesses, experts or the parties, or to examine merchandises, other goods or documents”. Article 23 CAL: “The arbitral tribunal shall notify the parties of the first procedural hearing ten (10) business days in advance, providing the date, time and place where it is to be held. Such determination shall be notified through written communication to the parties or their empowered attorneys”.

5 Article 41 CAL: “It is the duty of the Arbitrators to attend all the hearings of the arbitration proceedings unless they provide just cause. Should an arbitrator fail to attend two hearings without justification, he or she must be removed from office and shall reimburse the President of the arbitral tribunal, within the following five (5) business days, a percentage of the fees which the latter determines as sufficient for the services rendered. The arbitral tribunal shall notify the appointing party of the removed arbitrator, in order to find a substitute immediately”.

6 Article 24 CAL: “At the first hearing, the document containing the arbitration agreement and the terms of reference shall be read, and the claims of the parties shall be expressed along with a reasonable estimate of their amounts. The parties may present, with their allegations,
personal meeting between the arbitrators, the parties and their counsel. The arbitral tribunal cannot prescind from the first procedural hearing, but has ample power to decide whether to hold any other hearings that it considers necessary for the presentation of evidence or for oral argument, with or without the participation of the parties (article 27 CAL). The arbitral tribunal may also opt instead for a proceeding based only on written submissions and documentary evidence. The power given to the arbitral tribunal to prescind from holding a hearing further reveals that there is no right to a physical hearing in Venezuela.

CAL mentions arbitral hearings as a manifestation of the arbitral tribunal’s authority to manage the proceedings, and not necessarily as a right of the parties. Despite the affirmation in CAL’s preamble about its alignment with the UNCITRAL Model Law on International Commercial Arbitration of 1985 (“1985 Model Law”), CAL did not adopt several of the Model Law’s provisions including article 18, which mentions the obligation to treat the parties with equality and to give them a full opportunity of presenting their case. This does not mean that parties can be treated unequally or that there is no obligation to give them an opportunity to present their case, but merely that CAL omitted to mention those aspects, therefore leaving the protection of those rights to the default provisions contained in articles 49(1) and 49(3) of the Constitution.

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any and every document that they consider relevant or refer to the documents or other evidence that they are to file”.


8 Article 27 CAL: “The arbitral tribunal shall hold the hearings that it considers necessary, with or without the participation of the parties, and shall decide whether to hold hearings for the presentation of evidence or for oral argument or whether the proceedings shall be conducted on the basis of documents and other materials submitted. No incidental proceedings will be permissible in arbitration proceedings. The Arbitrators must rule upon impediments and challenges, the challenging of witnesses and objections to expert opinions, and upon any other matters of similar nature that may arise. Pending opposition proceedings shall not prevent the continuation of the arbitration proceedings”.

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(“Constitution”) and article 15 of the Code of Civil Procedure (“CCP”). The right to be heard and to present one’s case marks, as we explain below, the minimum threshold regarding what the arbitral tribunal can and cannot do regarding the organization and management of the arbitral proceedings, including the possibility of a hearing, and whether it shall be held physically, remotely or as a combination thereof. The discretion given to the arbitral tribunal includes the decision regarding a place to deliberate, to hear the parties, witness and expert testimony, and a place for examining evidence (article 9 CAL). Even though the term hearing is not expressly referenced by article 9 CAL, it is obviously included as part of the activities that comprise the arbitral proceedings.

The arbitral tribunal’s authority to decide whether and how to hold a hearing is ample but not unlimited. Article 9 CAL expressly subjects it to a contrary agreement of the parties (“except as otherwise agreed by the parties”). As a result, if the parties feel strongly about having or not a hearing, or regarding a particular mode of communication and structure for that hearing, they can still make any decision in that regard and the tribunal cannot deviate from it. A second limitation, even though not expressly mentioned in article 9 or in any other CAL provision, is the one imposed by the observance of mandatory provisions by the tribunal, especially the one addressing due process. As mentioned earlier, whereas CAL does not have a provision similar to article 18 of the Model Law, there is a fundamental right to due process in Venezuela guaranteed both at the constitutional and statutory levels. As a matter of Venezuelan law, the arbitrators are deemed to perform a jurisdictional function, which requires them to uphold the principles and guarantees inherent to the administration of justice at which core is the notion of due process. The scope of articles 49 of the Constitution and 15 CCP are sufficiently broad to cover the parties’ rights to be treated equally, to be heard,

10 Article 49(1) of the Constitution: “Due process will be applied to all judicial and administrative acts, and as a consequence: (1) Defense and legal assistance are inviolable rights in all stages and levels of the investigation and the procedure […]”; Article 49(3) of the Constitution: “(3) All persons have the right to be heard in any type of procedure, with all due guarantees and within a legally determined reasonable timeframe, determined by a competent, independent, impartial and pre-established court. […]”

11 María C. DOMINGUEZ GUILLEN, “La indefensión y la inmotivación como causa de nulidad del laudo arbitral en el derecho venezolano”, Revista de Derecho Privado (2016). See also article 15 CCP: “Judges will guarantee the right to maintain a defense […]”.

12 Article 9 CAL: “The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal taking into account the circumstances of the case, including the convenience of the parties. The arbitral tribunal may nevertheless meet, except as otherwise agreed by the parties, at any place deemed appropriate to deliberate, hear depositions from witnesses, experts or the parties, or to examine merchandise, other goods or documents”.

and to present their case. The latter imposes a duty to the judges (the arbitrators, in this case) to guarantee the parties’ rights to due process (*derecho a la defensa*) and to be treated “without preferences or inequalities”. Article 49 of the Constitution casts a wider net by expressing that “due process shall be applied to all judicial and administrative acts” and as a result, “every person has the right to be heard in any kind of process, with the necessary guarantees and within a legally established reasonable timeframe”.

In sum, an arbitral tribunal appointed to decide a dispute governed by CAL shall hold the first procedural hearing synchronously and in a pre-determined place as required by articles 23 and 24 CAL. In deciding where and how this hearing should occur, the arbitral tribunal may decide that all the participants shall be physically present in the same room, or if some or all of them shall be allowed to attend remotely. Further, the arbitral tribunal may schedule any additional hearings geared to obtain testimony from witnesses or experts, to hear arguments by the parties or to examine evidence. In any case, the tribunal’s decision shall be guided by its duty to ensure the parties’ right to equality and due process as provided by articles 49 of the Constitution and 15 CCP. Alternatively, the parties may enter into an agreement altering or limiting the tribunal’s authority to make a decision regarding the place and form of any of the hearings. It is important to note that the requirement of a pre-determined place does not expressly mention the possibility that no one is physically present at that place and everyone is connected remotely.

The only references regarding any hearing requirements are listed in articles 23 and 24 CAL, which conceive the first procedural hearing as a formal act to which the arbitral tribunal summons the parties so they can present their arguments, submit documents and announce any evidence that they plan to file in the course of the arbitration. There are three specific requirements regarding the first procedural hearing. First, the tribunal has a duty to notify the parties or their counsel about the date, time and place of the first procedural hearing, with at least ten days of anticipation. Second, the first procedural hearing is an opportunity for the arbitral tribunal to read “the document containing the arbitration agreement and the terms of reference”, and the claims submitted by the parties, including a reasonable estimate of the amounts in dispute. Finally, the first procedural hearing is also an opportunity for the parties to present their allegations, submit any documents that they deem relevant, or mention any documents or any other evidence that they plan to submit during the proceedings. Since the aforementioned requirements comprise a minimum threshold, the parties and/or the arbitral tribunal could expand the scope of the first procedural hearing in order to maximize or make the proceedings more efficient.

In conclusion, the requirement set forth in article 23 CAL requiring the tribunal to notify the parties about the place “where [the first hearing] is to be held” seems to suggest that the first hearing must be physical, or at least, in hybrid mode but cannot be fully remote. Nevertheless, the broad authority granted by article 9 CAL, also gives the tribunal some discretion to decide regarding the hearing and other procedural acts, when

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14 Article 24 CAL.
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the parties have failed to agree and after “taking into account the circumstances of the case, including the convenience of the parties”.

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: Yes, for some procedural steps.

The general rule under the CCP is that any requests and petitions made by the parties during a litigation (article 187)\(^\text{15}\) and any judicial acts by the court (article 188)\(^\text{16}\) shall be made in writing. Nonetheless, there are certain acts that require the personal appearance of the parties or other persons (i.e., fact witnesses) before a judge, and in the context of a formal hearing. These are, the parties’ interrogatories under oath (posiciones juradas, articles 406, 413, 415 and 417 CCP),\(^\text{17}\) the oral examination of witnesses (articles 483, 485 and 490 CCP), the appointment of experts (articles 454 and 458 CCP) and the oral proceedings (article 859 ff. CCP). In each of these cases, the law is clear that the pertinent act requires both the physical presence of the relevant person (e.g., witness, expert, party), and their appearance in court before a judge. Only exceptionally, the CCP allows an oral judicial act to take place outside the courtroom. The first exception is when a witness is unable to appear in court and the judge takes the witness’ testimony in their home (article 490 CCP). Another exception is when the judge holds an oral hearing at another location because the court lacks adequate facilities (article 870 CCP). The strict observance of the formalities set forth in CCP is such that, in the case of the oral proceedings, it states that they “cannot be renounced or modified by agreement of the parties or by decision of the judge”\(^\text{18}\).

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

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\(^{15}\) Article 187 CCP: “The parties will make their petitions in writing, which will be included in the file during the times announced by the Court as per article 192”.

\(^{16}\) Article 188 CPC: “The acts of the Court will also be done in writing, by dictation or under instructions by the judge, in clear, precise, and succinct terms”.


\(^{18}\) Article 860 CCP.
Short answer: Yes, with respect to aspects that require the application of CCP rules (e.g., judicial assistance in aid of arbitral proceedings).

In principle, CCP provisions are not directly applicable to arbitral proceedings because CAL is *lex specialis* and its passage superseded the CCP arbitration provisions for commercial matters. Nonetheless, there are instances, like for example when the tribunal or the parties to an arbitration require judicial assistance to examine fact witnesses (article 28 CAL), which may lead to an application of the relevant CCP rules governing physical hearings.\(^\text{19}\) Even though article 28 CAL does not expressly mention the CCP, the fact that the assistance sought would be from the competent Court of First Instance means that the rules to be applied are those set forth in the CCP. In the specific case of witness testimony, the rules contained in articles 483 to 498 CCP are deemed of public order and cannot be waived or modified by the parties or even by the judge. Article 483 CCP provides that the examination of witnesses shall take place in a specific date after the filing of the request. Further, article 485 CCP states that the testimony has to be taken in public and in the presence of the judge, the court’s clerk, the parties, and their counsel. As mentioned earlier, such judicial act has to take place in the physical location of the court, except if the witness is unable to appear in court (e.g., when the witness has a disability or another condition that prevents her from moving from one place to another), in which case the judge may decide to take the testimony at the witness’s home (article 490 CCP). The CCP does not allow a witness testimony to be given remotely.

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:** Yes.

Parties can waive their right to a physical hearing which, as explained above, only applies to the first hearing.

Since the right to a physical or in-person hearing does not exist in Venezuela with regard to hearings other than the first one, the arbitral tribunal may, pursuant to the authority that stems from articles 9 and 27 CAL, decide that a hearing will be held partially or totally remotely. Alternatively, pursuant to the principle of party autonomy

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\(^\text{19}\) Article 28 CAL: “The arbitral tribunal or a party with the approval of the arbitral tribunal may request assistance of a competent Court of First Instance in taking necessary evidence and in order to enforce the requested interim measures of protection. The First Instance Court shall respond to such a request within the scope of its jurisdiction and in conformity with applicable norms.”
expressed in article 15 CAL, the parties to an arbitration governed by Venezuelan law may reach an agreement that excludes physical hearings and agree instead to a procedure where hearings are remote or that involves no hearings. Additionally, the parties may submit their dispute to any institutional rules that allow remote hearings, or modify the default regime set forth in CAL. The two leading arbitral institutions that operate in Venezuela – CEDCA and CACCC – have adopted rules and guidelines that allow for the use of new technologies in the course of the arbitral proceedings, both for the filing of documents, the communications between the parties and the arbitral tribunal, and also for arbitral hearings.

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 mentioned earlier, except for the first hearing, the arbitral tribunal has the authority to decide whether to hold any hearings – including for the examination of evidence – with or without the parties, and to decide the form and structure of those hearings. This obviously includes the possibility of scheduling remote hearings. It is important to note, however, that the tribunal’s authority is limited by the agreement of the parties and also by the requirement to observe mandatory rules, so its decisions should not contradict either. As a result, if the parties have expressly agreed that hearings should be physical and the arbitral tribunal orders otherwise, the tribunal’s conduct might give rise to a potential future challenge against the award under article 44(c) CAL. This provision refers to the award issued in an arbitral proceeding that was not in accordance with the law. Given CAL’s respect for the principle of party autonomy, also a direct affront by the tribunal to an agreement of the parties to hold physical hearings would constitute a violation of CAL and could give rise to a potential challenge based on the fact that the proceedings were not in accordance with it. Needless to say, the annulment court would have to examine the specific circumstances of the parties’ agreement (e.g., that the agreement did not result from a unilateral or unjustified decision by the parties, or that it was not in violation of public policy or a mandatory rule) and conversely, the tribunal’s reasons for purportedly going against the parties’ agreement. So, if for example the arbitral tribunal’s decision to hold remote hearings was made in order to protect the integrity of the arbitral process, to uphold the principle of equal

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20 Article 44 CAL: “An arbitral award may be declared void only if: […] (c) The composition of the arbitral tribunal or the arbitration proceedings was not in accordance with the requirements of this Act”.

21 See articles 2, 5, 6, 8, 9, 12 and 15 CAL.
treatment of the parties, or to follow a public health mandate that imposes a lockdown and prohibits physical meetings (e.g., the national emergency decreed by the Venezuelan government on 13 March 2020 prohibiting the free movement of persons due to the Covid-19 pandemic); it might be that the annulment court doesn’t find such conduct as sufficient to justify setting aside the award.

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.

Venezuelan law does not expressly grant the parties to an arbitration a right to a physical hearing. Nevertheless, since – pursuant to the principle of party autonomy – the parties may agree to a specific procedure that includes a physical hearing, a breach by the arbitral tribunal to such an agreement might be a ground for challenging the award on the basis that the procedure was not in accordance with the law (i.e., the parties’ agreement). In order to avoid waiving the right to setting aside the award on this basis, the injured party should raise the breach during the arbitral proceedings. The failure to do so, would prevent that party to be able to invoke the breach at the time of filing an application to set aside the award. As a matter of Venezuelan law (articles 206 and 626(3) CCP), the failure of a party to raise a breach that might give rise to a ground to set aside an award immediately after that party became aware of said breach might be construed as a waiver (convalidación).

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: Maybe.

As mentioned earlier, with exception of the first procedural hearing mentioned in articles 23 and 24 CAL, Venezuelan law does not expressly grant the parties to an arbitration a right to a physical hearing. As a result, any potential challenge to an award

22 Article 206 CCP: “The judges will preserve the stability of all matters, preventing or correcting any errors that may annul any procedural act. Such nullity will not be declared unless established by law, or when there has been an essential formality to the validity of an act”. Article 626(3) CCP: “The arbitral award will be void: […] (3) if no substantial formalities have been observed in the procedure, as long as the nullity has not been validated by the parties’ consent”.

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based on a purported breach of the right to a hearing would only be possible regarding the first hearing, and the affected party would have to prove that such breach violated the fundamental right to due process guaranteed by articles 49 of the Constitution and 15 CCP. In other words, the arbitral tribunal’s deviation from holding the first procedural hearing in person does not constitute per se a ground for setting aside an award.

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:** Yes.

In a situation where the parties are subject to the default regime of CAL (e.g., they did not submit their dispute to an arbitral institution that deviates from CAL), a decision by the arbitral tribunal not to hold physical hearings would not constitute an independent basis for setting aside the award, unless the tribunal’s decision breaches the fundamental right to due process guaranteed by articles 49 of the Constitution and 15 CCP. This could happen when, for example, the tribunal’s decision to eliminate physical hearings impedes one of the parties from effectively presenting their case or from being treated with equality.

If, on the other hand, the parties have agreed to a specific procedure that includes a physical hearing, the refusal of the arbitral tribunal to follow said agreement either by ordering a remote hearing or eliminating the possibility of holding any hearing whatsoever, might give rise to a ground for challenging the award on the basis that the procedure was not in accordance with article 44(c) CAL. In this case, since the parties’ agreement is deemed a source of legal obligations in the same footing as a statute, a breach of the parties’ agreement would entail a violation of the law. Therefore, an arbitral proceeding that does not follow the parties’ agreement would be deemed “not in accordance with the law”. Even though, as we said earlier, an arbitral tribunal might have some procedural discretion under article 9 CAL, this provision is subject to a contrary agreement of the parties, to the arbitral tribunal’s consideration of the circumstances of the case, to the convenience of the parties and, most importantly, to the tribunal’s duty to ensure the fundamental right to due process guaranteed by articles 49 of the Constitution and 15 CCP. Finally, if the parties want to maintain their right to challenge the award on such basis, they must raise the breach in the first opportunity after the parties became aware of its occurrence.

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23 Article 44(c) CAL: “An arbitral award may be declared void only if: […] (c) The composition of the arbitral tribunal or the arbitration proceedings was not in accordance with the requirements of this Act”.

24 Article 1189 of the Civil Code: “Contracts have the same force as law between the parties”.
d. 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 is unlikely.

A Venezuelan court would probably not refuse to recognize and enforce a foreign arbitral award issued in a proceeding despite the fact that an arbitral tribunal did not follow the parties’ agreement to hold a specific type of hearing (physical or remote). Nevertheless, the outcome would depend on the facts of the case, on the seriousness of the alleged breach, and on whether the tribunal was seated in a jurisdiction where the lex arbitri grants the parties a right to a physical hearing. There are no known judicial decisions requiring the analysis or the application of Articles V(1)(b), V(1)(d) and/or V(2)(b), or any other provisions of the New York Convention. Notwithstanding, as a general matter, the principles of due process and public policy that underlie both Article V provisions are recognized and protected by article 49 of the Constitution and other legal provisions that have come into play in a different context such as the recognition and enforcement of foreign judgments. In cases deciding on the recognition and enforcement of foreign judgments, Venezuela’s Supreme Justice Tribunal has found that a violation of public policy is one that is manifestly incompatible with the essential principles of Venezuela’s public order, as defined in articles 5 and 55(5) of the Private International Law Statute (“PILS”).

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As we stated earlier, due process rights are guaranteed both by the Constitution (articles 49(1) and 49(3)) and CCP (article 15). Regarding a possible violation of Venezuela’s public policy or a purported irregularity in the procedure stemming from the breach of a right to a physical hearing, the conduct of the tribunal would have to be sufficiently serious to deprive the parties of their due process rights protected by the Constitution and CCP, namely, the right to be heard “within a legally established reasonable timeframe” (article 49(3) Constitution), to “have access to the evidence and have the sufficient time and means to carry out their defense” (article 49(1) Constitution), and to be treated “without preferences or inequalities” (article 15 CCP). If we consider the “manifestly incompatible” standard relied upon by Venezuelan courts when deciding on the recognition and enforcement of foreign judgments and apply it to the arbitration context by way of analogy, it would be unlikely for the recognition and enforcement of a foreign arbitral award to be refused on the basis that the tribunal did not hold a physical hearing as agreed by the parties. For such a request to be successful, the enforcement court in Venezuela would have to be presented with sufficient evidence that demonstrates that the tribunal’s decision not to hold a physical hearing was in violation of the most basic conditions that permit the parties a reasonable possibility for asserting their rights and that it also made it impossible for the parties to have an impartial proceeding. In other words, the court would have to undertake an analysis of whether such breach has caused an actual prejudice of sufficient gravity to warrant the refusal to enforce the award because of its affront to fundamental principles of Venezuelan law.

### e. 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

As a result of the statement issued by the World Health Organization (“WHO”) declaring the infectious spread of the COVID-19 virus as a pandemic, on 13 March 2020, the Venezuelan government issued a Decree declaring a national state of emergency (estado de alarma) and announcing that the Executive and other branches of government would adopt urgent, effective and necessary measures geared to mitigate and eradicate any risks associated with the spread of the COVID-19 virus. On 20 March 2020, the Plenary Chamber of the Supreme Justice Tribunal issued Resolution 2020-0001 whereby

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it declared that all courts would be closed between 16 March and 13 April 2020, and therefore all judicial matters were suspended, including all filing deadlines and other time limits. Since the situation worsened, the Supreme Justice Tribunal extended the suspension through six successive resolutions that it subsequently issued on 13 April, 13 May, 17 June, 14 July, 12 August and 1 October, respectively. Each of these Resolutions extended the suspension period for one month. The extraordinary situation has persisted, and the suspensions have been extended by subsequent government acts.

Pursuant to the latest Resolution, the Civil Cassation Chamber of the Supreme Justice Tribunal, as the organ in charge of overseeing civil and commercial litigation in the Venezuela, issued Resolution 05-2020 of 5 October 2020 whereby it expressly authorized the courts to hold virtual working days (despacho virtual) starting on 5 October 2020 from 8:30 to 2:00 pm, which is the same schedule regularly observed by local courts. The virtual working day would merely consist of directing the courts and the parties to use electronic mail for official communications, including filings, court orders, evidence submission and review, judgments and appeals. According to the Resolution, all documents would comprise a judicial electronic file (expediente judicial electrónico), which adoption was authorized by Resolution 2018-0014 of 21 November 2014 from the Plenary Chamber of the Supreme Justice Tribunal. Resolution 05-2020 did not make any reference to oral hearings, except for it authorized the courts to schedule any evidence gathering activities, including witness testimony, through the use of any “technological means that ensure the legal certainty, transparency and legality of each act”. This implicitly authorizes the courts to schedule remote hearings for those acts that would be otherwise carried out as physical oral hearings. There is no indication that any of these measures are directly applicable to arbitral proceedings, but insofar judicial assistance might be required from the courts, they are likely to have an impact on the course of arbitrations.

Regarding recent initiatives carried out by arbitral institutions, both the Centro Empresarial de Conciliación y Arbitraje (“CEDCA”) affiliated to the Venezuelan American Chamber of Commerce and the Centro de Arbitraje de la Cámara de Comercio de Caracas (“CACCC”) affiliated to the Caracas Chamber of Commerce, have taken steps to adopt the use of new technologies for case management purposes. In the case of CEDCA, the new Rules that entered into effect on 1 January 2020, opened the door to the possibility of allowing electronic transmission of documents, communications between the parties, the tribunal and the Center. Article 5.4 of the

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31 Civil Cassation Chamber of the Supreme Justice Tribunal, 05-2020 of 5 October 2020.
Rules expressly mention the possibility of scheduling hearings through “telephonic conference, video conference or any other means of communication agreed by the parties” and article 30.2 indicates that the “arbitral tribunal shall hold the hearings […] in the headquarters of CEDCA or in any other place that it deems appropriate”. In the case of CACCC, on 16 July 2020, its governing board approved its “Rules for the Management of Proceedings through Electronic Means” (Reglamento para el manejo de procedimientos a través de medios electrónicos), which not only mention the use of electronic means for the filing, transmission, distribution and storage of documents, but expressly endorse the possibility of organizing virtual or hybrid hearings and address a series of important issues such as when the hearing shall be physical (presencial) or remote (no presencial), the obligation to record the hearings, the mechanisms to determine the participation of the parties, the mechanisms for offering witness and expert testimony, and technical and logistic issues (articles 13 to 33). According to article 34, the Rules can be applied both to new and ongoing proceedings, unless the parties decide otherwise. We are not aware of any current cases being managed pursuant to the CACCC 2020 Rules, but the use of videoconferencing technology has been sometimes used by Venezuela-based parties and arbitral tribunals whenever they have deemed it convenient.