

Kluwer Arbitration Blog

Are the Judicial Procedural Rules Issued During the Pandemic Applicable to International Arbitrations Seated in Santiago?

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Chile confirmed its first case of COVID-19 on March 3, 2020. Since then, Chilean institutions have designed several solutions to adjust their operation during the sanitary crisis.¹⁾ This brief report provides information about the legislation passed by the Chilean Congress to regulate judicial proceedings. Specifically, we offer an overview of the impact of [Law 21,226 \(“Emergency Law”\)](#) on international arbitrations seated in Santiago and analyze whether the Emergency Law imposes specific duties over arbitrators relating to the taking of evidence during the pandemic.

Relevant provisions from the Emergency Law

On April 2, 2020, the Chilean Congress passed the Emergency Law, which aims to regulate how courts across the country would function during the state of emergency declared by President Sebastián Piñera to ensure procedural safeguards. In a nutshell, the Emergency Law allows the suspension of hearings and in-person proceedings; prevents courts from enforcing legal proceedings that could affect a party’s right of defense; allows the parties to rely on the COVID-19 pandemic to excuse themselves from complying with judicial terms; suspends the evidentiary terms; suspends running terms applicable to domestic statute of limitations; and regulates the use of virtual technology, allowing hearings to be held remotely.

The Emergency Law specifically deals with arbitral proceedings. Article 2 grants arbitrators the power to suspend hearings unless due process is affected. Nonetheless, it requires arbitral tribunals to move forward with a hearing, where the intervention of the tribunal is urgently required and when the parties request so. In these cases, a remote hearing will be conducted, and the arbitral tribunal must ensure compliance with the procedural guarantees established in the Chilean Constitution and international treaties.

Regarding deadlines, and as explained above, Article 4 of the Emergency Law allows a party to rely on any impediment attributed to a situation caused by the pandemic and that prevented them from complying with a deadline to excuse themselves from that breach. In this case, the arbitral tribunal must analyze the situation and grant an additional term if the impediment is confirmed.

Finally, Article 6 of the Emergency Law imposes the suspension of evidentiary terms across the

country.²⁾ In other words, a procedure can only continue until it reaches the evidentiary phase, at which point, it would have to be suspended. The scope of Article 6 has sparked a heated debate among the arbitral community. Lawyers and arbitrators are questioning whether this article is one of mandatory application, or if they could continue with the arbitration proceedings following an agreement of the parties. So far, there has been no clarification of this issue from the legislative branch.

Applicability to international arbitration

Another interesting question is whether the Emergency Law applies to international arbitrations proceedings seated in Santiago. As a preliminary consideration, note that Chile has a dualist arbitration system, so that domestic arbitration is regulated mainly in the [Procedural Civil Code](#)³⁾ and international arbitration is regulated by [Law 19,971](#) (International Arbitration Commercial Act or “**IACA**”). There are strong grounds to support that the Emergency Law would apply to both, domestic and international arbitrations seated in Santiago. As the Emergency Law refers to “arbitration”, with no distinction between national and international arbitration,⁴⁾ and considering that no distinction or clarification was made during the legislative procedure to enact such act, as a matter of practice, we believe that Chilean courts will sustain this same approach.

Nonetheless, it would be possible to argue that the IACA is a special law that should prevail over the Emergency Law. One of the objectives of the IACA is to establish a special procedural regime for international commercial arbitration to reduce or eliminate the uncertainty relating to local laws. Therefore, IACA will prevail unless a new law specifically amends it.

Article 6 of the Emergency Law

Considering the scope and debate about Article 6 of the Emergency Law, a second question that arises is whether the parties may submit their evidence during the proceedings, or if the arbitral tribunal must suspend the taking of evidence based on the Emergency Law. The answer to this question is relevant when assessing the risk of annulment of the award by the Court of Appeals on the ground of violation of public policy.⁵⁾

Unlike civil procedure and domestic arbitration rules, international arbitration rules do not provide for a specific “evidentiary term”, but allow the parties to submit evidence from early stages of the proceedings (beginning with their Request for Arbitration), and normally with their pleadings. The evidence is then examined at the hearing. Considering the procedural structure of arbitration proceedings, we believe that arbitral tribunals seated in Chile may continue with the proceedings as usual, as Article 6 could not apply where there is no “evidentiary term” to be suspended.

As a matter of practice, arbitral tribunals have taken a different approach towards the applicability of Article 6 in domestic and international commercial arbitrations. Some domestic arbitrations have continued following the agreement of the parties, others were suspended upon the request of one of the parties based on the Emergency Law, and there have also been arbitral tribunals that refused to continue with the proceedings even with the agreement of both parties due to public

policy considerations.

The picture is very different for international arbitrations seated in Santiago. Although there have been some delays due to the pandemic, none of the proceedings that we are aware of have been suspended based on the Emergency Law so far. For instance, some parties have agreed on suspensions of hearings or extensions of deadlines due to restricted access to evidence, or because they would rather have an in-person hearing. In these cases, no party has ever invoked the Emergency Law.

This practice reveals the approach of the arbitral tribunals towards the Emergency Law. Even accepting this law applies to international arbitrations seated in Chile, the proceedings may move forward with the agreement of the parties. We believe this approach is aligned with the design of the IACA. Firstly, the IACA is a “special law”, enacted with the sole purpose of regulating the international commercial arbitrations in Chile, which means its provisions prevail over any other law containing regulations on the subject. Secondly, the IACA expressly regulates the possibility for the parties to stipulate and agree on the procedure for their arbitration. And lastly, IACA only allows the parties to request the nullity of the procedure in strictly limited occasions.

Of course, the question remains on whether an arbitral tribunal may continue with the proceeding if only one party wants to continue and the other is asking for suspension based on the Emergency Law. As we do not know yet how the Court of Appeals will interpret the impact of this law over IACA, and whether they might annul an award based on public policy consideration, some may argue that there is still a risk of annulment if the arbitral tribunal orders to continue with the proceedings when one of the parties objects.

Chilean Courts have shown a friendly approach towards international arbitration since the enactment of the IACA. They have interpreted the concept of public policy in an international sense, which is narrower than domestic public policy so that the annulment of the arbitral award is less likely to be granted. For instance, the Court of Appeals has ruled that local procedural rules are not applicable to international arbitration and that they would annul an award only for serious departures from fundamental notions of procedural justice.⁶⁾ We believe that if national courts follow their previous decisions on public policy, they will respect the decision taken by arbitral tribunals to continue with the proceedings.

Of course, as there is no objectively agreed upon set of rules for public policy on an international level, we will need to wait to see whether a party decides to request the annulment of an award based on the Emergency Law provisions.

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References

- Specifically, the President declared a “state of constitutional exception of catastrophe”, which allows the Executive branch to take an array of measures to face the sanitary crisis. See: (Decree N°104 of 2020: <https://www.bcn.cl/leychile/navegar?idNorma=1143580> and Exempt Ruling N°208 of 2020: https://www.minsal.cl/wp-content/uploads/2020/03/1745861_web.pdf). To get more information about the legal reactions to the pandemic in Chile, see: https://drive.google.com/file/d/1Tpo_6jfO8ZQXUXr25d3r8Mx2FXT2LRp1/view.
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- ?2 The evidentiary term is a specific time frame provided in the procedural code where the parties have to offer their evidence.
- ?3 The Judiciary Code (*Código Orgánico de Tribunales*) and the Chilean Constitution: <https://www.bcn.cl/leychile/navegar?idNorma=242302> also provide rules on arbitration.
- ?4 Chile enacted an international commercial arbitration act in 2004, based on the 1985 UNCITRAL Model Law. According to Article 19 of the IACA, the parties remain free to structure their arbitration as they choose, so that the Chilean law as *lex arbitri* supplies rules only to the extent the parties fail to do so, and few of them are mandatory.
- ?5 According to Article 34 of the IACA, the violation of public policy is a ground for annulment of an award.
- ?6 Court of Appeal of Santiago, case file N°1971-2012, labeled “EGI-VSR, LLC vs. Winecorp S.A.”: <https://adipri.cl/v1/wp-content/uploads/2014/07/ROL-ICA-1971-2012-1.pdf>. See also: Court of Appeal of Santiago, case file N°1420-2010, labeled “Ann Arbor Foods S.A. vs. Domino’s Pizza International Inc.”: <https://adipri.cl/v1/wp-content/uploads/2014/07/ROL-ICA-1420-2010.pdf>.

This entry was posted on Wednesday, October 7th, 2020 at 4:00 am and is filed under [Chile](#), [COVID-19](#), [Emergency Law](#), [International Commercial Arbitration](#), [Santiago](#), [Suspension of Proceedings](#)

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