ARGENTINA

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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 Argentine *lex arbitri*, which includes (i) the provisions contained in Law No. 27,449 on International Commercial Arbitration (“LICA”) applicable to international commercial arbitrations seated in any Argentine jurisdiction, and (ii) Articles 1649 to 1665 of the National Civil and Commercial Code (“NCCC”) and the respective provisions of the procedural codes of each jurisdiction at domestic level, does not expressly provide for a right to a physical hearing in arbitration.

Argentina is a federal republic, with both federal and provincial levels of political organisation. While substantial provisions (such as civil and commercial law) are enacted by the Federal Congress and are applicable to the whole nation, rules of procedure are passed by the legislative branch of each province. Until 2015, arbitration proceedings were exclusively governed by the procedural codes of each jurisdiction. The National Code of Civil and Commercial Procedure (“NCCCP”) governed arbitration proceedings seated in the city of Buenos Aires, and several provincial procedural codes contained similar provisions to that regulation. In 2015, the NCCC entered into force and, since then, it regulates arbitration agreements whose provisions are applicable to all jurisdictions. On 4 July 2018, the LICA was enacted, which mostly adopts the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”), as amended in 2006. It expressly regulates international commercial arbitration seated in any city of Argentina.

Therefore, while at a domestic level arbitration proceedings are regulated by the NCCC (as a unique set of substantial rules applicable to all jurisdictions) and the procedural codes (for procedural matters) of each jurisdiction, international commercial arbitration proceedings are exclusively regulated by the LICA.

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1 The National Civil and Commercial Code, enacted by Law No. 26,994.

2 See Articles 5, 75, Subsections 12, 121 and 123 of the Argentine Constitution.

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Neither the NCCC nor the LICA are applicable to disputes to which the State or a State entity is a party. Hence, this matter is left to special laws, international treaties and conventions.

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 be inferred.

As stated above, the Argentine law on arbitration does not establish a right to a physical hearing.

In international commercial arbitration, Article 72 of the LICA – following the rules adopted in Article 24 of the UNCITRAL Model Law – states that (i) unless the parties have agreed otherwise, the arbitral tribunal 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, and (ii) 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.

Therefore, on the one hand, the arbitral tribunal has discretion to hold a hearing when the parties have not reached an agreement on the matter, but it does not necessarily mean that the hearing should take place physically. On the other, if one of the parties requests a hearing, the arbitral tribunal is also empowered to decide how such hearing will be conducted. Actually, there is no mandatory provision or precedent that requires that the hearing should take place physically.

In domestic arbitration, Article 1658 of the NCCC allows the parties to an arbitration agreement to freely agree on the proceedings that the arbitral tribunal should follow. Therefore, the parties may agree that physical hearings should be conducted in a given arbitration proceedings, but it is not a right that derives from the general legislation. Further, Article 1662 of the NCCC states that once the arbitrator has accepted the appointment, the arbitrator automatically enters into a contract with each of the parties and assumes the obligation to participate personally in the hearings. Nevertheless, a right to a physical hearing cannot be inferred from that obligation since the personal participation of the arbitrator could be either physical or remote.

Consequently, both in international and domestic arbitration, a right to a physical hearing cannot be inferred from the Argentine lex arbitri and, in case that a party has requested a hearing, the arbitral tribunal has discretion to decide whether such hearing should take place physically or remotely.
Although Argentine courts have not so far decided a petition of a party claiming that a right to a physical hearing exists, the fact that the Argentine civil and commercial courts have started to hold hearings remotely speaks volumes about the likelihood of success of a potential challenge of an award based on the lack of 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: No.

Argentine civil and commercial court proceedings are mainly written. The NCCCP – applicable to court proceedings seated in Buenos Aires – sets out three oral stages or hearings before the court.

First, the “conciliation hearing” established in Article 36(2) of the NCCCP, in which the court – even ex officio – should call the parties and try to conciliate or settle the dispute (totally or partially).\(^4\)

In practice, this hearing normally takes place at the end of the proceedings, once the whole evidence was produced and before the final decision of the court. In the context of the restrictions on travel and personal mobility imposed by the government as a result of the Covid pandemic, this hearing is currently conducted remotely by the Argentine courts if so requested by the parties.

Second, the “main procedural hearing” set out in Article 360 of the NCCCP, which takes place immediately after the parties have submitted their main written pleadings (i.e., statements of claim and defence) and before the evidentiary stage. In this hearing, the court shall (i) invite the parties to conciliation or to another method of dispute resolution, including mediation (if the circumstances justify it) for thirty days, where court proceedings remain suspended, (ii) receive and decide any petition of the parties concerning the evidence phase, (iii) determine the relevant facts of the dispute, on which the evidence will be produced, (iv) receive the confessional evidence if it has been offered by the parties, (v) decide which evidence is admissible and will be produced during the course of the proceedings, and (vi) determine that no evidentiary

\(^4\) Article 36 of the NCCCP states: “Even without the request of any party, the courts shall: […] (2) Attempt a total or partial conciliation of the dispute or procedural incident, being able to propose and promote that the parties avoid litigation and move to other alternative means of dispute resolution. At any time the personal appearance of the parties may be requested to attempt conciliation” (free translation by the Author).
 DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

stage is needed, stating that the case will be decided solely on the documents submitted by the parties.5

Nevertheless, in practice (even before the Covid pandemic), the courts normally request the parties to confer among themselves and submit their respective positions or any agreement on the issues described above in writing. The court also decides any disagreement or pending issue in writing.

Third, the “hearing of the witnesses” set out in Articles 426 to 456 of the NCCCP, which is held during the evidentiary stage if the court decides so. Under the NCCCP regime, any person over fourteen (14) years old may be proposed as witness and shall have the duty to appear and testify before the court, except for the exceptions established by law.6 If any of the witnesses is unable to appear before the court under justified reasons, such witness will be examined at his/her domicile, before the clerk, whether the parties are present or not, depending on the circumstances.7 Witnesses domiciled outside the court seat may testify in writing.8 Some public officers are also allowed to testify in writing.9

Although Article 360 of the NCCCP states that the judge should be present at the hearing in which the witnesses are examined, this condition is not met in practice. The courts often request that counsel of parties examine together the witnesses outside the court and then submit the minutes of the testimony, signed by both counsel and the

5 Article 360 of the NCCCP establishes: “For the purposes of the preceding section, the court will summon the parties to a hearing, which the judge will personally preside. If the judge is not present, the hearing will not be held and this will be recorded in the attendance book. In such hearing: (1) the court will invite the parties to conciliation or any other method of dispute resolution that they will agree at the hearing. The court may, if the circumstances of the dispute so justify, refer the parties to mediation. In this case, the proceedings will be suspended for thirty (30) days from the notification of the mediator. Once this period has expired, the proceedings will be resumed at the request of any party, which the court will order and notify to the opposing party; (2) the court will receive the statements of the parties with reference to the provisions of Article 361 of this Code […]; (3) after hearing the parties, the court will determine the relevant facts of the case…, on which the evidence will be produced; (4) the court will receive the confessional evidence if it has been offered by the parties […]; (5) the court will decide at the hearing which evidence is admissible and will be produced. It will hear all the witness testimonies at the same hearing, which will be held in the presence of the judge under the conditions established in this chapter. This obligation may only be delegated to the clerk or, where appropriate, to the deputy clerk; (6) if appropriate, the court will determine at the hearing that the case shall be decided solely on the basis of the documentary evidence submitted by the parties” (free translation by the Author).
6 Article 426 of the NCCCP.
7 Article 436 of the NCCCP.
8 Articles 453 and 454 of the NCCCP.
9 Article 455 of the NCCCP.
witness. In addition, when the hearing is held at the court, an employee of the court takes the testimony. Further, based on the restrictions on personal mobility imposed by the Argentine government as a consequence of the Covid pandemic, witness testimony is allowed to be provided by videoconference if so agreed by the parties. If the parties request that the witness hearing takes place physically, the courts simply postpone such hearing until the sanitary conditions and health requirements allow such option.

Therefore, under Argentine law, there is no right to a physical hearing even in local litigation. In other words, being physically present at the court is not a mandatory requirement for a hearing to be compatible with the rule of due process in Argentina.

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: N/A

Not applicable. Under Argentine law, there is no right to a physical hearing in local litigation. In any event, as mentioned under sub-paragraph a.1 above, the provisions of the NCCC do not apply to international arbitration.

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

Not applicable.

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.

Argentine law recognizes the principle of party autonomy in the framework of arbitration agreements. Further, Article 63 of the LICA and Article 1658 of the

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10 See Article 1649 of the NCCC. The parties’ freedom to determine the content of the arbitration agreement is specifically recognized in Articles 958 and 2651(c) of the NCCC. Further, the LICA also recognizes the same principle through different provisions, such as Articles 63, 65, 68, 72, among others.
NCCC – in line with Article 741 of the NCCCP – state that the parties to an arbitration agreement can freely agree on the proceedings which the arbitral tribunal should follow. Obviously, this comprises the right to decide how hearings should be conducted. Only if the parties have not reached an agreement, the arbitrators are entitled to conduct the arbitration in the way they consider appropriate.

Therefore, if the arbitration agreement requires a physical hearing or the parties agreed on holding a physical hearing during the course of the arbitration proceedings, the arbitral tribunal is bound by such agreement. In that case, if restrictions to personal mobility or to hold meetings in person are in force, the arbitral tribunal has no option but to postpone the hearing until such restrictions are lifted and the hearing can be held physically.

The solution is different if only one of the parties objects to holding the hearing remotely. In that case, absent an agreement on the matter, the arbitral tribunal may decide to reject such objection and proceed with the remote hearing if the other party has requested so or provided its consent to proceed in that way. Even though there is no case law on this matter so far, Article 72 of the LICA (for international arbitration) and Article 1658 of the NCCC (for domestic arbitration) provide a basis for applying this criterion.

As to the consequences of an eventual order to conduct a hearing remotely despite the parties’ agreement to the contrary, the parties may, jointly or individually, resort to the courts in order to vacate such order or to suspend such hearing, on the grounds that such order would be contrary to Article 63 of the LICA, which provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Actually, the arbitral tribunal has discretion to conduct the arbitration in such manner as it considers appropriate only when the parties have not agreed otherwise, as stated in Article 64 of the LICA.

In addition, although it is highly unlikely that, in practice, an arbitral tribunal decides to hold a remote hearing when both parties have agreed on a physical hearing, if that were the case, such decision would likely affect the validity of the final award. In this regard, Article 99(a)(III) of the LICA states that an award can be set aside when it contains decisions which exceed the arbitration agreement. Further, Article 99(a)(IV) of the LICA provides that an award can be annulled if “the arbitral procedure was not in accordance with the agreement of the parties”. This ground for annulment may naturally include any agreement of the parties as to the conduct of the proceedings. Notwithstanding this, the aggrieved party should also prove that the arbitral tribunal’s decision (i.e., the failure to conduct a physical hearing despite the parties’ agreement) has deprived it of the right to present its case or has caused actual prejudice, as explained below.

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.

Argentine law does not provide for a right to a physical hearing. Nevertheless, if the parties have agreed on holding a physical hearing – either through the arbitration agreement or during the course of the arbitration proceedings – but such hearing is ordered to take place remotely, the parties should promptly object to such decision. Article 11 of the LICA, applicable to international arbitration, sets out that “a party knowing that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating an objection to such non-compliance within twenty (20) days, shall be deemed to have waived his right to object”.

Therefore, if a party fails to raise a breach of the right to a physical hearing – as agreed during the proceedings or contained in arbitration agreement, such failure prevents that party from using it later as a ground for challenging the award. It is considered that if the party has not objected to such failure timely, it has consented that the arbitration could validly proceed despite such non-compliance and thus, it cannot raise the issue afterwards.

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

Not applicable. Argentine law does not recognize a right to a physical hearing in international or domestic arbitration.

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:** Maybe in only one exceptional case.

Under Article 99 of the LICA, the grounds for annulment are: (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the Argentine law; (ii) the party making the application was not given proper
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (iii) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions which exceed the scope of the arbitration agreement; (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 law which the parties cannot derogate, or, failing such agreement, was not in accordance with the LICA.

Article 99 of the LICA also states that Argentine courts may annul an award if they find that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the Argentine law; or (ii) the award is in conflict with the public policy of Argentina.11

The annulment remedy cannot be waived and, accordingly, the parties cannot waive in advance either any or all of the grounds for annulment.

Generally, since Argentine law does not establish a right to a physical hearing in arbitration, the failure to conduct a physical hearing by the arbitral tribunal in a given case does not constitute per se a ground for setting aside the award.

In addition, as stated above, if there is no agreement to hold a physical hearing and only one of the parties objects to holding the hearing remotely, based on Article 72 of the LICA, the arbitral tribunal may decide to proceed with the remote hearing if the other party has requested so or provided its consent to proceed in that way. In this case, it is extremely unlikely that the Argentine courts would consider this as a violation of due process.

Exceptionally, in case where (i) both parties had agreed to a physical hearing, (ii) the arbitral tribunal nonetheless decided to conduct a remote hearing, (iii) one of the parties objected timely to such decision, and (iv) such objection was rejected and the hearing was conducted remotely, then the party that objected timely to the decision to hold a remote hearing may seek annulment of the award based on an essential procedural error (i.e., the arbitral tribunal did not call for a physical hearing as agreed by the parties).

Article 99(a)(IV) of the LICA provides that an award can be annulled if “the arbitral procedure was not in accordance with the agreement of the parties”.

11 In domestic arbitration, the grounds for setting aside an award are as follows: (i) essential procedural errors in the proceedings; (ii) the award was rendered after the term for making the award had elapsed; (iii) the award includes decisions on issues that were not submitted to the arbitrators (a provision that has been construed as including ultra petita, infra petita and extra petita awards); (iv) the award is inconsistent and contains contradictory decisions; (v) the award is contrary to public policy principles and mandatory provisions of Argentine law (see Articles 760 and 761 of the NCCCP). By mandatory provisions of Argentine law, it should be understood that reference is made to rules of law from which rights or obligations are derived that cannot be waived.
Nevertheless, in accordance with the criteria applied by Argentine courts, not only should the aggrieved party prove the departure from a rule of procedure, but also it should prove that the failure to conduct a physical hearing has deprived it of the right to present its case or has caused actual prejudice. In other words, to meet the standard for annulment before Argentine courts, a party should prove that the procedural error (or the departure from a rule of procedure agreed upon by the parties) has had a material effect on the affected party or the outcome of the case would have been different if such procedural rule (holding a physical hearing) was applied.

Although there is no case law on this issue, it is expected that Argentine courts would annul an award if the above-mentioned conditions are satisfied.

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: Likely not.

Argentina is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Upon ratifying the New York Convention, Argentina made both reservations authorized under its Article I(3). Thus, the Convention shall only be applied, on the basis of reciprocity, to awards rendered in another member country in respect of disputes arising out of commercial transactions.

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12 Actually, Article 62 of the LICA provides that: “Parties must be treated equally and each of them must be given a full opportunity to present its case” (free translation by the Author). Equally, Article 1662 of the NCCC obliges arbitrators to guarantee in all cases the equality of the parties and the principle of adversarial debate, and to grant each of the parties a sufficient opportunity to present its case.


14 On 28 September 1988, the Argentine Congress passed Law No. 23.619 whereby it approved the New York Convention. This law was promulgated by the Executive Branch through Decree 1524/88 dated 21 October 1988, and the ratification instrument was deposited with the United Nations on 14 March 1989.
By ratifying the New York Convention, Argentina has federalized and therefore rendered uniform throughout the country the system governing recognition and enforcement of foreign awards originating in other New York Convention countries.\(^{15}\) By doing so, within the sphere of application of the New York Convention, the provisions of the Argentine provincial codes that are not fully in compliance with such treaty should no longer be considered applicable.\(^{16}\)

As a general remark, Article 102 of the LICA states that “an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced […]” in accordance with the provisions of the LICA and New York Convention (free translation by the Author).

While Argentine courts will revise the request for recognition and enforcement, together with the award and any petition for refusing recognition and enforcement in accordance with Article V of the New York Convention, they usually adopt a “pro-enforcement” approach. In other words, the conditions established in Article V of the New York Convention to refuse recognition and enforcement (which were transposed almost verbatim into Article 104 of the LICA) will be interpreted in a restrictive manner.

In the case at hand, if the award was issued in a foreign country, Argentine courts will review whether the right to a physical hearing exists in the seat of the arbitration and, in the affirmative, whether the failure to conduct a physical hearing by the arbitral tribunal has deprived the aggrieved party of the right to present its case or has caused actual prejudice (i.e., the outcome of the award would have been different if the arbitral tribunal had conducted a physical hearing) in accordance with both Articles V(1)(b) and V(1)(d) of the New York Convention.

However, although there is no case law on this matter so far, it is expected that Argentine courts would find that the failure to conduct a physical hearing during the proceedings in which the award was rendered is not per se a breach of the right of a party to present its case or a contravention of public policy pursuant to Articles V(1)(b) or V(2)(b) of the New York Convention. The party requesting that the award should not be enforced has to conclusively prove how the lack of a physical hearing has actually affected its right to due process by preventing it from presenting its case and that such failure is material to the outcome of the case.\(^{17}\)

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\(^{15}\) This has been confirmed by the Argentine Supreme Court of Justice in a 1995 decision. See *Corte Suprema de Justicia de la Nación* (26 December 1995), Méndez Valles, Fernando c/ A.M. Pescio SCA. s/ ejecución de alquileres, Fallos: 318:2639.

\(^{16}\) See Articles 31 and 75(22) of the Argentine Constitution.

\(^{17}\) See *Cámara Nacional de Apelaciones en lo Comercial* [Court of Appeals on Commercial Matters], Chamber D (5 November 2002), Reef Exploration Inc. c/ Compañía General de Combustibles S.A., Revista Jurisprudencia Argentina 2003-III-90. See also *Cámara
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

In the recent years, Argentine courts have admitted electronic filings. The Covid pandemic has accelerated this practice, turning the whole court proceedings paperless, including court decisions.¹⁸

As stated above, Argentine court proceedings are mainly written. While hearing proceedings may vary from court to court, remote hearings were allowed in some cases, notably for “conciliation hearings”, during the Covid pandemic. In addition, some Argentine courts are using video platforms for specific remote hearings, when both parties have accepted to proceed remotely.¹⁹ In other cases, Argentine court practice – even before the Covid pandemic – had already allowed that a hearing between the parties and the court can be substituted by simultaneous written submissions from the parties stating their agreement or disagreement on procedural issues and, afterwards, the court decides any petition in writing too.

Exceptionally, in cases where both parties have preferred not to have remote hearings but physical hearings before the court, such hearings were postponed or the proceedings were suspended until current restrictions on personal mobility and in-person meetings are lifted.²⁰

Conversely, during the Covid pandemic, it must be highlighted that remote hearings have been fully used and adopted in international arbitrations seated in Buenos Aires or administered by Argentine arbitration centres.

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¹⁹ Ibid., where it is established that when the court decides that a hearing will take place remotely, by using electronic systems of videoconference, it shall be duly notified to the parties in order to obtain their prior consent to proceed in that way.
²⁰ Ibid., where it is stated that “in the light of the current extraordinary situation, courts are exempted from holding physical hearings” (free translation by the Author).