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

## **BOLIVIA**

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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 Bolivian *lex arbitri*, Conciliation and Arbitration Law No. 708 of 25 June 2015 (“Arbitration Law”), does not expressly provide for a right to a physical hearing in arbitration.

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: It can be excluded.

As mentioned above, the Bolivian Arbitration Law does not expressly provide for the parties' right to a physical hearing. The Arbitration Law provides that the arbitral procedure will be determined by the parties' agreement. Moreover, one of the arbitration principles under the Arbitration Law is the principle of flexibility, which states that the arbitral proceedings will be informal, simple and adaptable to the particularities of the controversy.<sup>1</sup> Pursuant to this principle, the parties can freely agree to hold physical or remote hearings, and even conduct certain procedures physically and others remotely in the same arbitration.<sup>2</sup> In this order, the arbitral proceedings may differ from case to case and will depend on the parties' agreement.

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<sup>1</sup> Arbitration Law 708, Article 3(6).

<sup>2</sup> Plurinational Constitutional Court, Constitutional Sentence No. 0739/2013-L of 22 July 2013, establishes that the parties can adopt the rules of an arbitration and conciliation center, or even create their own procedural rules, and that forcing the parties to submit into another

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A right to a physical hearing would therefore be inferred if the parties agreed to hold one. On the other hand, such a right could not be inferred if the parties had no such agreement.

### **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.

The rules of civil procedure provide for a right to a physical hearing. The Civil Procedure Code establishes that to conduct the hearing, the parties must be physically present before the judicial authority, unless there is a justified reason, in which case a representative of the party shall be present before the judicial authority.<sup>3</sup>

In practice, the judge notifies each party, and they must be physically present before the judge in the hearing. If one of the parties is not able to attend for a justified reason, a representative for the party could be appointed and the representative must attend the hearing in person. In the case of legal entities, their representatives must also appear in person before the judge.

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.

The rules of the Civil Procedure Code are not applicable to arbitration by default. However, the arbitral tribunal may apply them if the applicable rules are silent on a certain issue. The Arbitration Law specifically establishes:

“The Arbitral Tribunal may apply supplementarily the procedural civil rules, when the parties, the institutional regulations adopted or the court itself have not foreseen a specific treatment of an issue”.<sup>4</sup>

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procedure contradicts the principles of party autonomy and flexibility that govern arbitration proceedings.

<sup>3</sup> Civil Procedure Code, Article 365.

<sup>4</sup> Arbitration Law, First Final Disposition (free translation by the Authors).

This means that if the applicable rules do not regulate a certain matter, the tribunal may apply the civil procedural rules for that issue.

**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.

Considering that the right to a physical hearing will only arise out of the parties' agreement, the only way of waiving such right would be if the parties subsequently agreed to modify the previous agreement. For example, if the parties initially agreed to hold physical hearings, they could freely agree to modify the procedure and conduct remote 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, with one exception described below.

As established above, parties are free to decide what procedural rules apply to their arbitration.<sup>5</sup> The arbitration procedure shall comply with such rules, which implies that an arbitral tribunal could not conduct the arbitration process with different rules than the ones agreed by the parties. Therefore, as a general rule, an arbitral tribunal could not hold remote hearings if the parties had agreed otherwise.

Notwithstanding this, there are certain cases where an arbitral tribunal could make an exception and partially modify the rules agreed by the parties (here the obligation to have physical hearings). These cases are not common and may vary on a case-by-case basis.

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<sup>5</sup> Arbitration Law, Article 39. Bolivian law recognizes the parties' right to determine the applicable rules of the arbitration. An example is *ad hoc* arbitration, where the arbitration process is not governed by the rules of an arbitration centre but rather by the rules agreed by the parties. Even when they adopt the rules of procedure of Bolivian arbitration centres, those rules can generally be changed by the parties. See Centro de Conciliación y Arbitraje Comercial of the Cámara de Industria, Comercio, Servicios y Turismo de Santa Cruz ("CCAC CAINCO"), Rules of Procedure, Article 8 (II). The Constitutional Court (highest authority in constitutional matters) has also recognized party autonomy as a ruling principle in arbitration. See Constitutional Decision 1481/2016-S3 of December 16, 2016.

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In Bolivian arbitration practice, an arbitral tribunal could decide to hold a remote hearing even if the parties had agreed otherwise if it considers that (i) it is necessary to guarantee the parties' due process rights;<sup>6</sup> (ii) it would provide crucial evidence to help reaching its decision; or (iii) it would ensure the progress of the arbitral proceeding.

(i) *Holding a remote hearing to guarantee the parties' right to due process.* The Bolivian Constitution imposes on all administrators of justice (in this case, an arbitral tribunal) the obligation to guarantee the due process of the parties.<sup>7</sup> There might be a scenario where the application of a procedural rule adopted by the parties could potentially cause the arbitral tribunal to breach due process. For example, in the event that one of the parties offered a witness who cannot physically attend any hearing, and the arbitral tribunal rejects its testimony solely based on the fact that a remote hearing cannot take place due to the procedural rules of the arbitration, a party could allege that it was not afforded due process. The reason is that the tribunal's decision would effectively prevent one party from producing evidence, which may constitute a breach of its right to due process.

This approach, however, could lead to the award later being challenged for violation of the Bolivian public policy. The reason is that, in arbitration, the procedural rules agreed by the parties are elements of due process. Thus, a unilateral modification of those rules by the arbitrators may also constitute a breach of due process, which is deemed part of Bolivian public policy. See also sub-paragraph c.9 for more detail. Therefore, when considering a subsequent annulment petition, the court would have to balance the due process rights in play (right to have arbitral procedure according to parties' agreement and right to present its case) and decide which due process right should take precedence under the particular circumstances of the case.

(ii) *Holding a remote hearing to obtain crucial evidence to reach a decision.* Under Bolivian arbitration practice, arbitrators must carry out all the necessary steps to reach the *substantial facts* of the controversy.<sup>8</sup> This is often interpreted together with the *substantial facts* principle (*principio de verdad material*), which governs the Bolivian Civil Procedure.<sup>9</sup> That principle establishes that (i) the substantive rights prevail over formal requirements;<sup>10</sup> and (ii) judicial authorities are compelled to ensure the

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<sup>6</sup> Due process implies, among other things, that judicial authorities or tribunals must (a) consider all evidence and arguments submitted by the parties; (b) express the rationale and justification for their decisions; and (c) issue a decision that corresponds to the parties' claims, arguments, and evidence. See Constitutional Decision 1066/2019-S4 of December 18, 2019; Constitutional Decision 1058/2019-S4 of December 16, 2019, among others.

<sup>7</sup> Political Constitution of the State, Article 115.

<sup>8</sup> Arbitration Law 708, Article 82 (I).

<sup>9</sup> Code of Civil Procedure, Articles 4 (16) and 134. Bolivian Civil Procedure rules are suppletive to arbitration rules. Law 708 of Conciliation and Arbitration, First Final Disposition.

<sup>10</sup> Constitutional Decision 83/2018-S3 of March 26, 2018.

constitutional right of the parties to substantial *justice (justicia material)*.<sup>11</sup> Therefore, judicial authorities must gather all the necessary evidence to reach their decision, even if the parties had not offered them. Based on this principle, there are cases where arbitral tribunals (like judicial authorities) overrule procedural rules to collect evidence to reach their decision.

This interpretation could also lead to subsequent challenges against the validity of the award for breach of Bolivian public policy. Similar to the implications established for *point (i)*, overruling the procedural rules agreed by the parties may constitute a breach of due process and, therefore, a breach of Bolivian public policy. The reason is that the substantial facts principle has limits and cannot be interpreted as a permission for the tribunal to freely overrule the parties' agreed upon procedural rules but is strictly limited to ensure the parties' right to due process.<sup>12</sup> Here, the Constitutional Court has stated that the *substantial facts* principle could only be applied when there has been a gross and irreversible breach of the parties' constitutional rights.<sup>13</sup>

Again, the court considering the annulment petition would have to balance the due process right associated with administering the arbitration in accordance with the parties' agreement and the due process right associated with the decision-maker's duty to consider all relevant evidence (*verdad material*).

(iii) *Holding a remote hearing to ensure the progress of the arbitral proceeding.* Finally, Bolivian arbitration law gives arbitrators discretion to increase the efficiency and ensure the progress of the arbitration by adopting the necessary measures for that purpose.<sup>14</sup>

Commonly, arbitrations have a maximum duration. The Arbitration Law provides that an arbitration cannot last more than one (1) year, unless the parties agree otherwise.<sup>15</sup> Most rules of the Bolivian arbitration centres provide a maximum duration for arbitration between six (6) to eight (8) months.<sup>16</sup>

Considering the arbitrators' obligation to complete the arbitration proceedings within a determined time-limit, it is common for tribunals to implement or modify rules to ensure the issuance of the award within the established time-limit. These modifications have increased due to the COVID-19 pandemic as arbitral tribunals have found themselves with the need to conduct phases of the arbitration remotely to ensure the progress of the arbitration. In this sense, in some arbitrations, hearings had to be held

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<sup>11</sup> Substantial justice (*justicia material*) is a principle established in the Political Constitution of the State, which establishes that the purpose of the justice administrations is to "reach the solutions of the controversies" (free translation by the Authors). Political Constitution of the State, Article 1; Constitutional Decision 1617/2013 of October 4, 2013.

<sup>12</sup> Constitutional Decision 1617/2013 of October 4, 2013.

<sup>13</sup> See Constitutional Decision 2266/2012 of November 9, 2012.

<sup>14</sup> Law 708 of Conciliation and Arbitration, Article 82 (I).

<sup>15</sup> Arbitration Law, Article 50. This term applies only for the merits phase, which starts from the constitution of the arbitral tribunal to the issuance of the final award.

<sup>16</sup> See CCAC CAINCO, Article 36 (I); Centro de Conciliación y Arbitraje of the Bolivian National Chamber of Commerce, Rules of Procedure, Article 40 (II).

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remotely rather than physically considering the danger the COVID-19 raised by physical meetings.

If the modification has been adopted by the arbitrators to ensure the progress of the proceedings (such as in the case of the pandemic), it is unlikely that the award would be set aside for violation of public policy, because conducting the proceedings efficiently is considered part of due process; this would need to be analysed on a case-by-case basis, however.

### 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.

Under the Arbitration Law, the award can only be challenged through an annulment petition (*recurso de nulidad*). The annulment petition can only be sought, strictly, on the following grounds: (i) non arbitrable matters;<sup>17</sup> (ii) arbitral award contrary to Bolivian public policy; (iii) nullity or potential nullity of the arbitral agreement or clause; (iv) breach of the right to defence of a party;<sup>18</sup> (v) award outside the scope of the arbitration clause or agreement; or (vi) irregular composition of the arbitral tribunal.

To raise any of these arguments as a basis for an annulment petition, the party must have raised an objection during the arbitration proceeding.<sup>19</sup> If a party fails to do so, the court will reject the annulment petition on the ground that they had waived the objection.

Notwithstanding this, the Constitutional Court has set an exception:<sup>20</sup> there is no need to raise an objection to preserve a violation as a basis to vacate the award when (i) there is a breach of the right to defence; or (ii) the award is contrary to public policy, because, in such cases, it would be impossible to object to the breach during the proceedings.

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<sup>17</sup> Under Bolivian law, the following matters, among others, are excluded from conciliation and arbitration: (i) natural resources; (ii) ownership of tax reserves; (iii) tax and royalties; (iv) administrative contracts (except when a public entity contracts with a company domiciled outside of Bolivia); and (v) public services. Arbitration Law, Article 4.

<sup>18</sup> The right to defence is breached when a party was deprived of its ability to defend itself (*estado de indefensión*). This occurs when the defendant has a total lack of knowledge or notice of the arbitration, and is therefore deprived of the necessary mechanisms and elements to object to the action initiated against him. Constitutional Decision 114/2015-S1 of February 20, 2015; Constitutional Decision 140/2016-S2 of February 22, 2016; Constitutional Decision 649/2010/-R of July 19, 2010.

<sup>19</sup> Arbitration Law, Article 112 (II).

<sup>20</sup> Constitutional Decision 1481/2016-S3 of December 16, 2016.

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

Bolivian law does not explicitly recognize a right to a physical hearing in 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: Yes, if the parties had agreed to hold a physical hearing.

As a starting point, the right to a physical hearing must be established by the parties' agreement (see sub-paragraph a.2). The tribunal is compelled to conduct the arbitration in accordance with the rules agreed by the parties, which form part of due process in the arbitration proceeding.

Therefore, if the arbitral tribunal disregards the parties' agreement, it may be considered as a breach of the right to due process, which may create a basis to challenge the award as contrary to Bolivian public policy. Bolivian law contains specific grounds to set aside an award (see sub-paragraph d.7), including specifically when the award is contrary to public policy. None of the other grounds for annulment are applicable to this hypothetical case: in particular, a breach of the right to a physical hearing cannot constitute a breach of the right to defence, because this breach would not deprive a party from presenting its defence, assuming the party had the opportunity to file its defence within the process.

The violation of due process could, in some cases, constitute a violation of public policy.<sup>21</sup> The scope of public policy is broad, and it is not easily determined. As a result, the Constitutional Court has established strict rules to interpret violations of Bolivian public policy.<sup>22</sup>

The *first rule* is exceptionality. This principle requires that an award may be vacated for being contrary to public policy only in cases where there is a flagrant contradiction between the award and the Bolivian public policy, not when the court does not agree with the arbitral tribunal's decision.

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<sup>21</sup> The Constitutional Court considers public policy as the "basic elements of morality and justice" (free translation by the Authors). Public policy is divided in two: substantive and procedural public policy. Procedural policy is basically the right to due process. See Constitutional Decision 37/2019 of April 1, 2019.

<sup>22</sup> Constitutional Decision 37/2019 of April 1, 2019.

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The *second rule* is restrictive interpretation, which requires courts to interpret the concept and scope of Bolivian public policy restrictively, and not so broadly as to obstruct the arbitration process and the effectiveness of the award.

The *third rule* provides that the award's violation of the Bolivian public policy must be clear from the face of the award, considering that courts are prohibited to analyse the merits of the award.

The application and interpretation of public policy is limited. This means that not all violations constitute sufficient ground to set aside the award for being contrary to public policy, but rather the courts must analyse awards on a case-by-case basis to determine whether such violation has sufficient elements to be contrary to Bolivian public policy.

In view of this, a breach of the right to a physical hearing does not constitute *per se* a breach of Bolivian public policy. Instead, it could amount to a violation of public policy depending on the decision of the arbitral tribunal during the arbitration proceeding.

### 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.

The reasons provided in the New York Convention for refusing the recognition and enforcement of foreign arbitral awards are virtually identical to the grounds provided by Bolivian law to set aside an award.

Therefore, the answer to this question is the same as in sub-paragraph d.9. A breach of the right to a physical hearing does not constitute *per se* a breach of Bolivian public policy or other grounds to deny enforcement of the award. However, in certain cases, if the parties had agreed to hold a physical hearing, the tribunal's decision to conduct a remote hearing could be considered a breach of public policy depending on the exact implications of the decision of the arbitral tribunal during the arbitration proceeding (see sub-paragraph d.9 for more detail).

### 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*

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*COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: Yes.

As a result of the COVID-19 pandemic, the judicial system has implemented measures to ensure the digitalization of the judicial proceedings. For example, the Supreme Court has issued the “Protocol for Virtual Hearings” which establishes general guidelines for implementing remote hearings. Nevertheless, remote hearings have not yet been implemented in all cases, but only for those related to the right to physical liberty and other constitutional rights. Thus, at the moment, hearings for other judicial proceedings (i.e., civil cases) are being conducted physically. Time limits have been extended to account for the resulting delays.

On the other hand, in arbitration, Bolivian arbitration centres have implemented remote proceedings. These measures do not reach only remote hearings but also the filing of any request, claim or defence. As a result, arbitrations are being carried out remotely in their entirety. In practice and since the onset of the COVID-19 pandemic, arbitral tribunals have been suggesting to the parties to adopt remote proceedings before commencing arbitration.