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

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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.

There is no express rule providing for a right to a physical hearing in Ecuador.

Arbitration in Ecuador, both local and international, is ruled by the Arbitration and Mediation Law (hereinafter, also, "AML"). In the case of international arbitration, pursuant to article 42 of the AML, international treaties are also a source of law.¹ Article 37 of the AML also provides for a subsidiary source of law, the Organic Procedural Code (hereinafter, also, "COGEP"). This article states that: "For what has not been foreseen by this Law, the rules of the Civil Code, Civil Procedure Code or Commercial Code and other related laws will apply to supplement arbitrations to be resolved under the applicable rules of law".²

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¹ Article 42 reads: "International arbitration shall be governed by treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Any natural or juridical person, public or private, without any restriction whatsoever, shall be free to stipulate directly or by reference to arbitration rules all matters relating to the arbitration procedure, including the arbitration procedure, including the constitution, procedure, language, applicable law, jurisdiction and seat of the arbitration jurisdiction and the seat of the tribunal, which may be in Ecuador or in a foreign country. [...] Awards rendered in international arbitration proceedings shall have the same effect and be enforceable in the same manner as awards rendered in national arbitration proceedings" (free translation by the Authors).

² Free translation by the Authors.

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It is worth noting that, although this article refers to the Civil Procedure Code, the COGEP (issued in 2015) repealed the previous law, and it should be understood that article 37 refers to the latter.

Neither the AML nor the COGEP has express provisions granting or recognizing a right to a physical hearing.

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

Short answer: The right to a physical hearing can be inferred, but such right is not absolute as a hearing may be held remotely in exceptional circumstances.

The Constitution of Ecuador, in article 76(7), guarantees the "right to be heard in due course and under equal conditions". This article, read together with the relevant provisions in COGEP – which, as discussed above, are applicable by reference – allows the right to be heard in a physical hearing to be inferred.

As mentioned before, article 37 of the AML establishes that the COGEP should be applied subsidiarily when any matter is not expressly addressed by the AML. The AML does not have any provisions regarding the conduct of hearings.

Article 86 of the COGEP establishes that the parties are obligated to appear in court personally unless certain specific circumstances arise, including where the judge explicitly authorizes appearing via videoconference or other means of communication. From this provision, it can be inferred that the general rule is for hearings to be conducted physically and only exceptionally may one appear via video conference.

As to what constitutes an exceptional circumstance sufficient for a judge to allow a remote appearance, the COVID-19 pandemic has been frequently accepted. The pandemic has shifted many courts' opinions regarding the need for physical attendance. Increasingly, hearings are being held remotely given the emergency situation and restrictions on mobility.

Before the pandemic, the most common exceptional circumstance in which courts decided to hold a remote hearing instead of a physical one was that one of the parties resided in another country or significantly far from the courthouse.

Even though the foregoing are the most common reasons for which courts have allowed remote hearings, in theory, any circumstance in which the parties demonstrate that physical attendance is impossible or extremely costly would-be sufficient for the court to consider holding a remote hearing. This conclusion is supported by article 4 of the COGEP, which establishes that: "Hearings may be held by videoconference or other means of communication of similar technology, *when personal attendance is not possible*" (emphasis added).

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It should be noted, however, that these exceptional circumstances in which remote hearings can be held must affect a *party* directly. Thus, for example, if a party's witness could not attend the hearing, such circumstance would not be sufficient to justify having the hearing entirely remote. In this circumstance, the testimony itself can be heard remotely (as provided in article 192 of COGEP) but the hearing can continue to be held physically for all other purposes.

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.

See answer to sub-paragraph a.2 above.

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: Yes, the right extends to arbitration but it does not bar witness testimony from being given remotely.

As discussed in sub-paragraph a.2 above, the COGEP provides that testifying by electronic means can be used as an exception to the general rule requiring physical hearings. Articles 116 and 167, and 192 of the COGEP, applicable to arbitration cases pursuant to article 37 of the AML, provide for the possibility to conduct witness examination remotely. Hence, giving testimony remotely is not barred.

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 the right to have a physical hearing because of the nature of arbitration. The AML fully recognizes that arbitration is based on the principle of

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freedom of contract, and hence, the parties are able to determine the rules of procedure that are to be applied as they see fit, pursuant to article 38 of the AML.

Parties can also adopt institutional rules of arbitration centres, whose provisions regarding remote hearings would then be applicable by reference. In this regard, mostly given the COVID-19 pandemic, the most important arbitration centres in Ecuador have adopted provisions to conduct remote hearings, as will be analysed later.³

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: Yes.

As explained above, the right to a physical hearing is not absolute. If the arbitral tribunal considers that extraordinary circumstances – like the pandemic – cannot allow a physical hearing to take place, then the hearing should be conducted remotely to avoid not conducting a hearing at all, and, consequently, to violate constitutional and procedural principles such as independence, impartiality, concentration, publicity, immediacy, access to justice, among others. No adverse consequences (e.g., annulment) would arise to the extent that the decision of the tribunal is in accordance with guarantees of due process.

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: N/A

As mentioned before, the right to a physical hearing is not absolute. Arbitral tribunals have enough discretion to decide not to entertain a physical hearing, provided there are justifiable reasons. In this regard, the holding of a remote hearing does not represent a breach of this right, but merely an exception to such right. If the tribunal decides to

³ Some Ecuadorean arbitration centres had adopted provisions in respect of use of electronic procedures before the pandemic. The Arbitration Centre of the Chamber of Production of Azuay (seventh general provision of its bylaws) and the Arbitration Centre of the Ecuadorean-American Chamber of Commerce (article 54 of its bylaws) are good examples. On the other hand, as discussed below, the Arbitration Centres of the Chambers of Commerce of Quito and Guayaquil have issued new regulations regarding the use of remote hearings.

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entertain a remote hearing exceptionally, the parties would not have grounds for challenging such a decision immediately after it has been taken. Thus, failure to raise a challenge during the arbitral proceeding is immaterial.

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: No.

As stated above, the grounds for annulment of awards in the Ecuadorian legislation are restricted to the five scenarios foreseen in article 31 of the AML. These are: (i) the party did not receive notice of the arbitration and the proceeding continued in default; (ii) the lack of notification of the tribunal's orders, preventing or limiting one of the parties' right of defence; (iii) failing to summon the parties to the hearing or the failure to allow the production of evidence; (iv) the award was issued on matters that have not been submitted to arbitration, or granted relief that was not requested; and (v) the tribunal was not appointed in accordance with the procedure provided under the law or by the parties' agreement. Ordering remote hearings does not fall into any of the aforementioned categories. There is no case in which an award has been annulled because the hearing has been held remotely.

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: Not applicable, as explained in sub-paragraph d.8 above.

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.

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The first thing to be taken into consideration is that the AML provides that international arbitration shall be regulated by international treaties and conventions ratified by Ecuador. In this regard, the New York Convention, then applies directly.

Furthermore, regarding recognition and enforcement of foreign awards, article 104 of COGEP provides two scenarios: (i) in commercial arbitration procedures in which none of the parties is not the Ecuadorian State, the court enforcing the foreign award should look at the laws of the seat of arbitration, whereas; (ii) in arbitration procedures in which the Ecuadorian State is one of the parties, the court enforcing the foreign award should ensure that the law of the seat does not contravene the Ecuadorian Constitution or its laws. Accordingly, the answer to the current question varies depending on whether or not the Ecuadorian State is a party in the arbitration award submitted to be enforced or recognized.

Subject to the above caveat, and acknowledging that there are no relevant court decisions or academic writings regarding recognition and enforcement of an award that is the subject of a remote hearing (or any analogous cases), the following conclusions can be made:

Regarding Article V(1)(b). Holding a remote hearing does not constitute *per se* a failure to allow a party to present its case. As has been discussed above in sub-paragraph a.2, in exceptional circumstances, it is possible for a party to present its case even if a physical hearing is not held. This is consistent with article 76 of the Constitution of Ecuador. Hence, not conducting a physical hearing, of itself, would not be sufficient cause for refusing to recognize or enforce an award.

Regarding Article V(1)(d). As discussed, the arbitral tribunal has enough discretion to order that a physical hearing need not be held provided there are justifiable circumstances that make a physical hearing impossible to be conducted. In these circumstances, even if the parties agreed otherwise, this would not prevent an award from being recognized and enforced.

Regarding Article V(2)(b). Lastly, since tribunals are allowed to decide to entertain remote hearings, a public policy defense could not impede recognition and enforcement.

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: Yes.

In July 2020, the Ecuadorean Judicial Council (hereinafter, also, “Judicial Council”), the public institution responsible for the administration, vigilance and disciplinary

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control of the Judiciary, issued a “Protocol for the Realization of Video-Hearings”. This protocol was based on article 4 of the COGEP.⁴ Similarly, the Ecuadorian National Court of Justice issued, in May 2020, the “Protocol for the Realization of Virtual Hearings in the National Court of Justice”.⁵ Both those protocols establish general technical guidelines for conducting remote hearings based on the provisions of the COGEP.

On the other hand, the major arbitral centres in Ecuador have issued their own regulations to establish remote hearings as a necessary alternative.⁶

In April 2020, the Arbitral Centre of the Chamber of Commerce of Quito (hereinafter, also, “CCCQ”) approved the “Rules for the Use of Telematic Means in Arbitration and Mediation Processes”. Some relevant points taken into consideration by the CCCQ in these rules are to allow for (i) the filing of written submissions by e-mail; and (ii) the possibility of conducting hearings remotely.⁷ This is followed by general protocols for conducting such hearings and the issuing of procedural orders electronically.

Subsequently, in May 2020, the Arbitral Centre of The Chamber of Commerce of Guayaquil reformed its regulations to encourage the use of electronic means in the arbitral process, permitting both presentation of written submissions and conduct of the hearing to be achieved electronically.⁸

⁴ The Protocol’s background information provides that the use of remote hearings is based in the following principles: (i) independence; (ii) impartiality; (iii) concentration; (iv) publicity; (v) immediacy; (vi) access to justice; (vii) good faith and procedural loyalty; (viii) system-mean to administrate justice; (ix) orality.

⁵ This use of remote hearings is justified on the same principles mentioned in the protocol issued by the Judicial Council, with the addition of the principle of effective judicial tutelage.

⁶ See Alegría JIJÓN, “On the Reform of the Status of the Arbitration and Mediation Center of the Chamber of Commerce of Quito to carry out mediations and arbitrations through telematic means” (free translation by the Authors), Ecuadorean Institute of Arbitration (7 July 2020) at <<https://iea.ec/articulos/sobre-la-reforma-de-estatus-del-centro-de-arbitraje-y-mediacion-de-la-camara-de-comercio-de-quito-para-llevar-mediaciones-y-arbitrajes-a-traves-de-medios-telematicos/>> (last accessed 9 December 2020) and Mateo RUALES ESPINOSA, “Arbitral Darwinism. Regulatory Updates in Times of COVID” (free translation by the Authors), Ecuadorean Institute of Arbitration (21 May 2020) at <<https://iea.ec/articulos/darwinismo-arbitral-actualizaciones-reglamentarias-en-tiempos-de-covid/#>> (last accessed 9 December 2020).

⁷ See CCCQ, Rules for the Use of Telematic Means in Arbitration and Mediation Processes, section 4, available at <<https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:dec7d27e-cb26-4c0c-a886-799914aead5c#pageNum=1>> (last accessed 14 May 2021).

⁸ Article 54 of the Chamber of Commerce of Guayaquil prescribes: “Actions within the arbitration process such as evidentiary proceedings, possession of arbitrators and others, may be carried out using any means that the center or the arbitral tribunal deems appropriate, including, but not limited to, email, communication via internet, telephone, video conference, or any other means offered by technology [...]” (free translation by the Authors).