LEBANON

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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.

Lebanese law differentiates between domestic\(^1\) and international\(^2\) arbitration. As a general matter, it acknowledges more freedom to the parties and to the arbitrators in the context of international arbitration.\(^3\)

In international arbitrations seated in Lebanon, the Lebanese procedural law does not automatically apply to the proceedings: the parties elect the rules that will govern the arbitral proceedings and, failing such election, the arbitrator determines such rules.\(^4\)

Article 812 of the Code of Civil Procedure (the “CCP”) explicitly provides that where an international arbitration is subject to Lebanese law, articles 762 to 792 of the CCP\(^5\) shall only apply in the absence of a specific agreement of the parties and without prejudice to articles 810 and 811 of the CPP\(^6\).

Lebanese law does not expressly provide for a right to a physical hearing in domestic or international 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)?*

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\(^1\) Articles 762 to 808 of the CCP.

\(^2\) Articles 809 to 821 of the CCP.

\(^3\) Article 809, paragraph 1, of the CCP provides that: “Arbitration that involves the interests of international commerce is considered international”.

\(^4\) Article 811 of the CCP.

\(^5\) These provisions relate to domestic arbitration.

\(^6\) These provisions relate to the appointment of the arbitrators and to the procedure applicable in international arbitration.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Short answer: It can be excluded as it is not of a public policy nature.

The provisions of Articles 762 to 821 of the CCP, which embody the Lebanese law of arbitration, do not include any language from which a right to a physical hearing can be directly excluded or inferred.

In international arbitration, pursuant to Article 811, paragraph 1, of the CCP, the rules applicable to the proceedings can be directly defined by the parties; they can be drawn from the rules of an arbitral institution or from a national law. Pursuant to Article 811, paragraph 2, of the CCP, where the parties have not elected these rules, the arbitrator determines them.

To the extent that Lebanese law does not directly provide for a regulation of the arbitration proceedings, giving the parties (or the arbitrator) the possibility to choose the rules they wish, it is not possible to find any index from which to directly exclude or infer a right to a physical hearing. However, where the parties or the arbitrator choose a national law or a set of rules that allow for remote hearings, this will not raise any issue as a matter of Lebanese law. For instance, where the designated rules allow for document-only arbitrations, this will not raise any issues from the standpoint of Lebanese law. It is worth noting that the rules of the Lebanese Mediation and Arbitration Centre ("LAMC") specifically contemplate document-only arbitrations “where the parties so request or agree”. The right to a physical hearing is not of a public policy nature.

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: It seems possible to infer a right to a physical hearing from the Lebanese general rules of civil procedure.

As a general matter, where a civil court calls for a party or a witness to appear before it in Lebanon, it appears that their physical attendance is required. This can be inferred from the absence of any explicit law providing for remote hearings in the course of civil proceedings as well as from the practice of Lebanese courts.

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The CCP allows the court to resort to alternatives in situations where these persons cannot physically come to the court, without providing however for their remote participation to the hearing. Thus, where a party cannot attend a court hearing or where it is not domiciled within the jurisdiction of the court or is domiciled abroad, the CCP provides that hearings be carried out before the court of competent jurisdiction or before the foreign court.

However, although the CCP does not expressly provide for the remote taking of witness evidence, it allows the courts to decide that witness evidence will be given in writing.8

Oral hearings are not construed as a core component of the Lebanese law of civil procedure: the CCP thus allows the parties to waive their right to oral pleadings.9

The above however does not necessarily imply that remote hearings for oral pleadings or the remote taking of evidence would be allowed and we have not witnessed any such form of evidence taking being adopted during the pandemic.

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: The right to a physical hearing in the rules of civil procedure does not extend to international arbitrations seated in Lebanon, except in certain instances.

As clarified above under sub-paragraph a.1, different rules apply to domestic and international arbitrations seated in Lebanon.

In domestic arbitration, where the parties have not given arbitrators the power to act as amiables compositeurs and the arbitration is deemed “ordinary”, the CCP rules governing court proceedings automatically apply, save where such procedural rules contradict the CCP’s arbitration provisions or where the parties have set such rules aside.10 To the extent that the CCP provides for physical hearings in the context of civil court proceedings and the parties have not set aside the CCP rules that govern civil court proceedings, a party to a domestic ordinary arbitration will be entitled to request a physical hearing.

In contrast, in international arbitrations seated in Lebanon, the parties may either (i) directly specify the procedural rules that the arbitrators will be required to follow or (ii) refer to either the procedural rules of an arbitral institution or to the general rules of civil procedure of the law of their choice. Failing such agreement by the parties, the arbitrators will have the discretion to determine the procedural rules that govern the arbitration, either directly or by reference to a domestic procedural law or to the institutional rules of their choice.11

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8 Articles 224, 225, 290 and 291 of the CCP.
9 Article 462 of the CCP.
10 Article 776 of the CCP.
11 Article 811 of the CCP.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Therefore, the domestic general rules of civil procedure do not automatically apply to international arbitration, absent an express choice by the parties or the arbitrator.

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:** Lebanese law would acknowledge the waiver of a right to a physical hearing.

In international arbitration, the parties are free to determine the rules that will govern the arbitral proceedings. To the extent that a right to a physical hearing is recognized in a specific case, Lebanese law would therefore not prevent the parties from waiving it in advance.

This is evident if one considers that, in the Lebanese legal system, the right to a physical hearing cannot be deemed to pertain to public policy or to the fundamental rules of procedure. This follows *a fortiori* from the case law of Lebanese courts, which have explicitly acknowledged that the parties may exclude oral pleadings (*audiences*) from their arbitral proceedings.12

Also, in domestic arbitration, the parties may exempt the arbitrator from the CCP’s rules governing court proceedings: the parties may thus, in advance, exclude the rules of the CCP which grant them a right to a physical hearing in the context of court proceedings. Lebanese courts have held that the arbitrators may choose not to hold oral hearings where neither of the parties objects. This position stems from the fact that the right to an oral hearing does not pertain to the fundamental rules of procedure in the Lebanese legal system.13

To the extent that extensive freedom is granted to the parties engaged in arbitration, the above could be an argument *a fortiori* that, if parties can waive their right to an oral hearing *tout court*, they are definitely able to waive their right to a “physical” hearing, as well.

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?*

13 Court of Cassation, Civ. 5th Ch., Decision No. 40, 18 March 2004, not published.
Short answer: The arbitrators are bound by the parties’ agreement.

To the extent that the parties’ agreement to hold a physical hearing is included in the terms of the arbitrators’ mission or terms of reference, the arbitrators are bound by such agreement. As a general matter, where a domestic or an international award made in Lebanon is issued in violation of the terms of reference assigned by the parties to the arbitrators, it may be set aside. Further, where an exequatur is granted to a foreign/international award issued in violation of the parties’ agreement, such exequatur may be appealed on the same basis.

However, in the specific context of a pandemic, holding physical hearings to abide by the procedural rules previously agreed upon by the parties could amount to a violation of the mandatory laws and regulations that govern public health and safety of the seat of the arbitration or of the parties’ place of residence. Where a lockdown imposed by a law/regulation prohibits a party from attending a physical hearing, imposing such a hearing would likely violate due process and expose the award to being set aside on this ground. Raising the issue with the parties and requesting that they choose between postponing the physical hearings and holding remote hearings in replacement may be the only manner to abide both by the core rules of arbitration and by the public policy rules that govern health and safety.

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: Likely yes.

As a general matter, the fact that a party fails to raise a violation of its right to a physical hearing in the course of international arbitral proceedings seated in Lebanon would likely be construed in Lebanon as a waiver of such right, and would thus prevent

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14 Articles 800, 817 and 819 CCP. Article 819 of the CCP (dealing with international arbitration) provides that: “An international arbitral award rendered in Lebanon can be challenged by way of annulment on the grounds provided for in article 817”. Article 817 of the CCP provides that: “A decision granting recognition or enforcement to an award may be appealed only in the following cases: […] (3) The award exceeded the mandate conferred upon the arbitrators”. Similar language can be found under Article 800-3 of the CCP which relates to the setting aside of domestic awards.

15 Article 817(3) of the CCP, fn. 14 above.

16 Article 817 of the CCP provides that: “A decision granting recognition or enforcement to an award may be appealed only in the following cases: […] (4) The award was rendered in violation of the right of the parties to present a defense”.

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that party from invoking the failure to hold a physical hearing as a ground for challenging the award. As a general matter, failure to raise a matter in the course of the arbitral proceedings is construed by the Court of Cassation as a waiver of the underlying right.\footnote{Court of Cassation, 5th Ch., Decision No. 142, 20 November 2001, Baz (2001) p. 434; Court of Cassation, 5th Ch., Decision No. 4, 11 January 2005, 33 Lebanese Review of Arab and International Arbitration, p. 62.}

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: In instances where Lebanese law acknowledges the parties’ right to a physical hearing, a breach thereof does not constitute per se a ground for setting aside the award.

In the context of domestic arbitration, where a right to a physical hearing is generally recognized (refer to sub-paragraph b.4 above), the failure to conduct a physical hearing would not constitute per se a ground for setting aside the award. The party seeking the setting aside of the award on the basis of a violation of its right to a physical hearing would therefore need to establish that the arbitral tribunal’s failure to hold a physical hearing constitutes a breach of their mission or amounts to a violation of that party’s rights of defense.\footnote{Article 800 of the CCP.}

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: The failure on the part of the arbitral tribunal to conduct a physical hearing can constitute a basis for setting aside the award.

Even in instances where a right to a physical hearing is not acknowledged in Lebanon (refer to our response above in sub-paragraph a.2), the failure to conduct a physical hearing by the arbitral tribunal can nevertheless constitute a basis for setting aside the award. This could be the case where a party can establish that the arbitrator’s failure to hold physical hearings leads, in the specific circumstances of the case, to a violation of its rights of defense.\footnote{Article 817(4) of the CCP, fn. 16 above.} Lebanese courts have, for instance, rejected challenges based on
the violation of due process on the sole ground that the arbitrator had failed to hold a “common” hearing (i.e., a hearing whereby both parties are invited to attend): they have held that it is only where the failure to hold such common hearing amounted in the circumstances of the case to a violation of the rights of defense that the award could be validly challenged.\footnote{20}{Court of Appeal, Beirut, Decision No. 1711, 14 October 2004, Revue libanaise de l’arbitrage (2004) p.17.}

Further, as mentioned in sub-paragraph c.6 above, the failure to conduct a physical hearing by the arbitral tribunal can constitute a basis for setting aside if the parties had agreed to hold one.\footnote{21}{Article 817(3) of the CCP, fn. 14 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: Likely not.

Lebanon is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The CCP’s provisions relating to the recognition and enforcement of foreign and international arbitral awards are however deemed more favorable than Article V of the aforementioned Convention and are currently applied.

Pursuant to Article 814 of the CCP, a foreign or international arbitral award will be recognized and enforced in Lebanon where the party seeking such recognition/enforcement can (i) establish the existence of the arbitral award and (ii) such award does not manifestly violate international public policy.

Decisions granting exequatur to foreign arbitral awards may be appealed on the grounds set out under Article 817 of the CCP, which grounds notably include the violation of the rights of defense\footnote{22}{Article 817(4) of the CCP, fn. 16 above.} and the violation of international public policy.\footnote{23}{Article 817(5) of the CCP.} By contrast, Article 817 of the CCP does not provide for a ground for refusal corresponding to Article V(1)(d) of the New York Convention (i.e., the arbitral procedure was not in accordance with the law of the place where the arbitration took place).

To the extent that the disputing parties may waive their right to a physical hearing in the context of domestic civil court proceedings,\footnote{24}{Article 462 of the CCP.} the holding of physical hearings cannot...
reasonably qualify as a public policy rule. However, if a breach of a party’s right to a
hearing did not, in the specific circumstances of the case, afford a party with the
possibility to present and defend its case, then it would be deemed to violate public
policy and would allow the court to refuse exequatur on this basis.

In addition, as mentioned in sub-paragraph c.6 above, a court may refuse recognition
and enforcement of a foreign award based on the arbitral tribunal’s failure to conduct a
physical hearing in violation of the parties’ agreement to hold one.\textsuperscript{25}

f. COVID-Specific Initiatives

11. \textit{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?}

\textbf{Short answer:} No.

The Lebanese legal system has not addressed the challenges presented to holding
physical hearings during the COVID pandemic. Only in the context of criminal court
proceedings has the issue raised by physical hearings in the context of a pandemic been
addressed and funding was accordingly provided to equip criminal courts for remote
hearings. Also, we are not aware of any Lebanese arbitral institution having amended its
rules to address the impact of the COVID on the conduct of arbitral hearings.

\textsuperscript{25} Article 817(3) of the CCP, fn. 14 above.