



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA  
PROJECTS

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

## **MEXICO**

Francisco González de Cossío

## MEXICO

[Francisco González de Cossío\\*](#)

**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 Mexican *lex arbitri*, Title IV, Book Fifth, of the Commerce Code (a Federal and monist statute applying equally to domestic and international cases) includes a quasi-verbatim copy of the UNCITRAL Model law on International Commercial Arbitration ("Model Law"), which does not expressly require physical hearings. The *form* of a hearing is one of the many things that the arbitral tribunal can decide as part and parcel of its discretion to tailor a procedure in the manner necessary or convenient to confer a solution to a problem in a sensible, expedited and efficient manner, and in accordance with due process.

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: No.

Mexican arbitration law, judicial-procedure case law, and the bulk of judicial practice make it clear that the *lex arbitri* is a specialized and self-contained regime, which should remain untouched by domestic judicial procedural norms. Whilst some have sought to apply judicial proceedings provisions and rules to arbitration-related cases, the (unanimous) response has been a firm rebuke: these are two different and separate regimes. These efforts occurred mostly when arbitration law was in its infancy (the Mexican *lex arbitri* dates back to 1993). But as time has passed and the bar and judiciary became more sophisticated on the matter, those arguments were raised with less and less frequency – and never successfully.

---

\* Dr. Francisco González de Cossío is the founder and managing partner of González de Cossío Abogados, SC in Mexico City.

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

Therefore, albeit (as indicated in response to question 3, *infra*) no right to a hearing exists in judicial proceedings, even if it existed, it would not seep into the fabric of arbitration law.

### **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.

No procedural right exists to have hearings held physically.<sup>1</sup>

The Supreme Court of Justice has spearheaded initiatives to utilize technology to impart justice despite the health challenges triggered by Covid-19. Six different regulations (“*Acuerdos*”)<sup>2</sup> have been issued which address the use of electronic means in judicial proceedings.<sup>3</sup> Two of them specifically and expressly establish that

---

<sup>1</sup> For instance, Articles 341-344 of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*) govern hearings but never allude to the need of it being physical. The same is true for Articles 385-400 of the Code of Civil Procedure for Mexico City (*Código de Procedimientos Civiles para el Distrito Federal*) and Article 1080 of the Commerce Code (*Código de Comercio*).

<sup>2</sup> “*Acuerdos*” are regulations issued by the Judiciary in order to govern matters within their scope of jurisdiction.

<sup>3</sup> Chronologically, the *Acuerdo General 74/2008* issued by the Federal Judiciary Oversight Council (*Consejo de la Judicatura Federal* – “CJF”), published in the Federal Official Gazette (*Diario Oficial de la Federación* – “DOF”) on 19 November 2008, which deals with the use of videoconferencing in judicial proceedings. *Acuerdo General 11/2010* issued by the CJF on 27 July 2010, which expands the use of technology throughout judicial acts. *Acuerdo General conjunto 1/2013* issued by the Mexican Supreme Court of Justice, published in the DOF on 8 July 2013, which establishes the scope of the Certified Electronic Signature for the Federal Judiciary (known as “FIREL”). *Acuerdo General conjunto 1/2015* issued by the Mexican Supreme Court of Justice, published in the DOF on 9 December 2015, which addresses the technological services regarding the electronic filing procedure in constitutional (*amparo*) proceedings, official communications and oral criminal proceedings. *Acuerdo General 12/2020* issued by the CFJ, published in the DOF on 12 June 2020, which provides a comprehensive regime on electronic means in judicial proceedings and hearings held through videoconferencing. *Acuerdo General 13/2020* issued by the CJF which establishes diverse judicial measures to tackle the justice-imparting challenges faced by the

videoconferencing should be used to hold hearings and hear witnesses.<sup>4</sup> It is foreseeable that those new measures will remain in force even after Covid-19 is long gone.

Over and above the foregoing, the question, as framed, requires consideration of what Mexican case law and jurisprudence have said on the overarching topic: what are the requirements to be met for a specific procedural regime to pass the test of “due process”. On the subject, binding precedent exists which addresses what is understood as “due process” under Mexican Constitutional law, which rationale will surely serve to guide the discussion as to challenges that may exist. In *Amparo en revisión* 431/2012, the Supreme Court held that due process (“*formalidades esenciales del procedimiento*” as characterized by Mexican Constitutional argot further to Article 14 of the Federal Constitution – the due process clause) will be met when a certain procedural regime observes four canons: (i) notice exists of the commencement of the procedure and its consequences; (ii) opportunity to present evidence is granted which includes the possibility to comment on the opposite side’s evidence; (iii) opportunity to argue the case; and (iv) the issuance of a resolution which addresses and solves the disputed issues.<sup>5</sup>

A nuance is advanced by a Supreme Court decision which is worth citing *ad extenso*:<sup>6</sup>

“[...] the Constitution [...] however does not establish procedural terms, time limits nor deadlines. For the right to be heard to be respected it is sufficient that the secondary norm establish an adequate procedural mechanism so that the specific procedure may respect the enunciated due process guidelines. To such end, it is not necessary that phases or interdependent procedural moments with concrete timeframes exist for each period since said elements are subject to the legislative

---

judiciary as a result of Covid-19, one of which is the use of electronic means to pursue virtual hearings.

<sup>4</sup> *Acuerdo General* 12/2020, Article 27. *Acuerdo General* 13/2020, Articles 1.III, 2.VIII, 2.XV, 18, 19, 20 and 22.

<sup>5</sup> Judgment by the Second Chamber of the Supreme Court, Registry 2002500, *Tesis* 2a. LXXXVII/2012 (10a.). The same view is articulated in a 1995 binding precedent (*Jurisprudencia*): Registry 200234. P./J. 47/95.

<sup>6</sup> Free translation of: “[...] la Constitución [...] sin embargo, no [...] establece expresa ni tácitamente la manera, los tiempos o plazos en que han de cumplirse esas condiciones; es decir, para la plena satisfacción del derecho de audiencia, basta que la norma secundaria prevea los mecanismos procesales adecuados para que dentro de un procedimiento concreto se dé cabida a los aspectos mencionados, sin que para ello sea condición ineludible que existan etapas o momentos procesales independientes entre sí o plazos concretos para cada periodo, dado que esos extremos dependen del diseño legislativo propio de cada procedimiento; luego, el espíritu del artículo 14 constitucional no puede interpretarse en el sentido de que el legislador ordinario deba ceñirse a un modelo procesal concreto, pues evidentemente el Constituyente no tuvo la intención de someterlo a un esquema procesal específico, sino únicamente al deber de respetar los elementos inherentes al derecho de audiencia”.

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

design of each procedure. The spirit of Article 14 of the Constitution cannot be interpreted to mean that the legislative power need adhere to a specific procedural model since it is evident that the drafters of the Constitution did not wish to have a specific procedural scheme but rather the duty to respect the elements inherent in the right to be heard”.

The cited rationale is important as it makes the point that procedural regimes may differ. The Constitution does not carve in stone one single form of procedure. Congress may tailor different regimes involving diverse procedures. And said possibility falls within the realm of the law-tailoring liberty (“*libertad de configuración*”) vested by the Constitution upon different legislative organs. What the Supreme Court, acting as a Constitutional Court, did in the cited case was provide guidelines which a legislative organ need observe in crafting procedural regimes so as to make sure “due process” is respected. Within the described bounds, procedures may differ without necessarily triggering due process concerns. This *ad fortiori* includes procedural steps – such as hearings.

This rationale is relevant to our topic in that, there is no reason to believe that virtual hearings would be outside of the four-prong due process test. Given said backdrop, it is safe to construe that adopting said procedural device will be found to be within the acceptable bounds of (i) the legislative-liberty (“*libertad de configuración*”) vested on legislative organs, including the Federal Congress as the formal issuer of the *lex arbitri*, (ii) parties’ margin of maneuver in crafting their procedures; and (iii) arbitrators’ authority to ensure that the procedure they follow meets due process standards.

In a nutshell, virtual hearings pass the existing due process test.

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

No right to a physical hearing exists.

### 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: No right to a *physical* hearing exists.

In a nutshell, virtual hearings pass the existing due process test.

Not only is there no right to a *physical* hearing, but the paradigm is moving in the opposite direction. The Judiciary has been quite active in using technology and instilling the notion that justice may be imparted through technological means. For instance, Article 27 of *Acuerdo 12/2020* instructs judicial organs to perform hearings through videoconference. It provides:<sup>7</sup>

“[J]udicial organs shall order the performance of the hearings, sessions and judicial proceedings through videoconferences [...] Videoconference may be used in all hearings [...] where it is totally or partially applicable [...]”.

Article 18 of *Acuerdo 13/2020* specifically favors holdings hearings that need occur through videoconferencing. It instructs that hearings be preferably held by videoconference (“*Las audiencias que [...] deban desahogarse, preferentemente mediante el uso de videoconferencias*”).

Hence, further to current practice and zeitgeist, it is foreseeable that holding virtual hearings either by express party agreement or arbitrator-decision will pose no issues.

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; although different views exist.

Article 1435 of the Commerce Code provides that:

“Subject to the provisions of this Title, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Title, conduct the arbitration in such manner as it considers appropriate” (free translation by the Author).

The cited provision recognizes the parties’ right to agree to the procedure of their preference, and the duty of arbitrators to act accordingly. Said duty is admittedly not without exceptions (which are not addressed here), but these would not include going against and overruling the parties’ wishes to have a physical hearing.

---

<sup>7</sup> Free translation of “los órganos judiciales ordenarán la celebración de audiencias, sesiones y diligencias judiciales a través de videoconferencias [...] El uso de videoconferencia podrá realizarse en todas aquellas audiencias [...] en que se estime total o parcialmente procedente [...]”.

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

The above view is not without detractors; and no binding precedent exists on the matter.<sup>8</sup>

In this Author's opinion, absent countervailing reasons warranting a different outcome, arbitrators are well advised to respect the preference of the parties even if the arbitrators personally feel that undue delay exists. Otherwise, they risk opening a (valid) discussion as to the validity of the award under the regularity of procedure ground of annulment<sup>9</sup> (see discussion in sub-paragraph e.10 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.

Parties are entitled to have their stipulations and procedural agreements observed. Absent such compliance, they need object. Failing to object amounts to procedural consent barring a party from validly raising said procedural irregularity as a ground to set aside the award. The legal basis of said proposition is Article 1420 of the Commerce Code, which provides:

“A party who knows that any provision of this Title 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 his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object” (free translation by the Author).

Said principle has been forcefully respected by the Mexican Judiciary. In a famous case, a recalcitrant party objected to the constitutionality of said provision, among the many challenges against the award. The Supreme Court exercised the Mexican-equivalent of *certiorari* to review this case and make it clear that the provision was not

---

<sup>8</sup> However, salient arbitration rules impose a positive duty upon arbitrators to be efficient. Should the parties' agreement to hold the physical hearing translate in practice that the case is unnecessarily delayed, it could be argued that arbitrators may have a duty under the said arbitration rules to modify said procedural-arrangement on pain of not fulfilling their efficiency-duty.

<sup>9</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“NYC”) Article V(1)(d). Commerce Code Articles 1457(I)(d) and 1462(I)(d).

only constitutionally-valid but served an important procedural purpose: the concentration of remedies; to dissuade dilatory tactics.<sup>10</sup>

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.

No right to a physical hearing exists. But over and above said fact, the current understanding on both public policy and due process would not support holding that absence of a physical hearing translates into said grounds of annulment, since:

(i) *Public policy* has been construed as a substantive and narrow ground for non-enforcement of an award. The blackletter rule is that the concept relates to the “fundamental interests of society” (“*intereses fundamentales de la sociedad*”)<sup>11</sup> (see discussion in sub-paragraph e.10 below).

(ii) *Due process*: No case exists that construes the due process ground of annulment<sup>12</sup> as requiring the need to have a *physical* hearing. And given the judicial trend explained in sub-paragraph b.3 above, it is highly unlikely that a court would find that failure to hold a physical hearing is in itself covered by said ground of annulment.

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: No.

Article 1435 of the Commerce Code provides that:

---

<sup>10</sup> *Amparo en Revisión* 2160/2009, First Chamber, Supreme Court of Justice, Judgment of 8 September 2010.

<sup>11</sup> *Amparo en Revisión* 755/2011. Judgment of the First Chamber Supreme Court of Justice of 13 June 2012, ¶81. Also, *Amparo en Revisión* 71/2014, Judgment of the First Chamber of the Supreme Court of Justice of 18 May 2016, ¶¶255-256.

<sup>12</sup> NYC Article V(1)(b). Articles 1457(1)(b) and 1462(1)(b) of the Commerce Code, which provide that “the party against whom the award is invoked was otherwise unable to present his case” (free translation of “[...] *no hubiere podido, por cualquier otra razón, hacer valer sus derechos*”).



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

“[...] the arbitral tribunal may, subject to the provisions of this Title, conduct the arbitration in such manner as it considers appropriate” (free translation by the Author).

As no provision exists in the *lex arbitri* that mandates that physical hearings occur, it is well within the authority of the arbitral tribunal to decide how the hearing will take place—including whether it need occur by electronic means.

In addition to said *ex lege* answer, case law supports the said proposition. Not only has no court set aside an award for failure to hold a physical hearing, but – as explained in sub-paragraph b.3 above – the observable judicial trend is to encourage the use of technology in legal proceedings. Therefore, albeit no (binding or other) precedent exists on the matter, it is foreseeable that a Mexican court entertaining a request for setting aside an award solely on the basis that no physical hearing occurred, would view the argument with skepticism.

### 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.

Articles 1457 and 1462 of the Commerce Code are verbatim copies of the setting aside grounds extant in the UNCITRAL Model Law as well as the non-enforcement grounds found both in the New York Convention and the UNCITRAL Model Law. Therefore, the discussion to follow will focus on how Mexican courts have thus far approached and conceived those provisions.

*Public policy*<sup>13</sup> has been much analyzed. A string of decisions exists gradually analyzing and giving content to the notion of public policy. The seminal Mexican case on public policy is *Amparo en revisión 755/2011* where the Court,<sup>14</sup> after it recognized

---

<sup>13</sup> NYC Article V(2)(b); Commerce Code Articles 1457.II and 1462.II.

<sup>14</sup> Judgment of the First Chamber of the Supreme Court of Justice of 13 June 2011.

that it is an open concept (“*concepto jurídico indeterminado*”) in need of a definition, cited arbitral literature,<sup>15</sup> to define public policy as:<sup>16</sup>

“[A]n arbitral award is contrary to *public policy* and therefore constitutes a ground for annulment when the decision transgresses the limits of said order, that is to say, it violates the legal institutions of the State, the principles, norms and institutions which form part of it and it shocks the conscience of the community given the offensiveness and severity of the mistake made in the decision. An arbitral award of that type would disturb the limit that the public policy establishes, to wit, the mechanism through which the State prevents that certain particular acts affect fundamental interests of society”.

*Amparo Directo 71/2014*<sup>17</sup> furthers, strengthens and amplifies the concept. The First Chamber of the Supreme Court echoed with approval the principles above, applying them to a (sensitive and complex) electricity case, emphasizing that public policy need be “evident” and involve “truly serious and notorious circumstances” (“*circunstancias verdaderamente graves y notorias*”). It clarified that public policies are not public policy,<sup>18</sup> that public policy may be substantive and procedural,<sup>19</sup> the latter case being understood as “serious violations of fundamental procedural principles” (“*violaciones graves a principios fundamentales de justicia procesal*”), and defining it as:<sup>20</sup>

“[T]he breach of the fundamental principles of the State that transcend the society due to the offensiveness and severity of the mistake in the decision”.

---

<sup>15</sup> It cited with approval a specialized arbitration article – Francisco GONZÁLEZ DE COSSÍO, “Hacia una definición mexicana de ‘orden público’”, *Revista del Club Español del Arbitraje* (2009) p. 39 –, premising its definition on said piece.

<sup>16</sup> Judgment of the First Chamber of the Supreme Court of Justice, fn. 14 above, ¶81. Free translation of “un laudo arbitral es *contrario al orden público* y que, por ende, constituye una causa de nulidad, cuando la cuestión dilucidada se coloque más allá de los límites de dicho orden, es decir, más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. Un laudo de ese tipo estaría alterando el límite que marca el orden público, a saber, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad”.

<sup>17</sup> Judgment of the First Chamber of the Supreme Court of Justice of 18 May 2016.

<sup>18</sup> *Ibid.* ¶410.

<sup>19</sup> *Ibid.* ¶257.

<sup>20</sup> *Ibid.* ¶97. Free translation of “violación a los principios esenciales del estado que trascienda a la comunidad por lo ofensivo y grave de la equivocación en lo decidido”.

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

*Due process*<sup>21</sup> has been argued with less frequency but has been the subject of some rulings. The most in depth discussion is to be found in *Amparo Directo 71/2014* where the First Chamber of the Supreme Court reasoned that:<sup>22</sup>

“[W]hen a party proves that it has not been able to exercise its rights. This occurs when the parties have not been given the same opportunity to argue and prove when they thought it was convenient and the proof presented was not judged with the same standard nor in equal conditions”.

The analysis currently observed in court decisions could be read to support the view that a procedural breach would not *ipso iure* warrant setting aside. Convincing evidence of prejudice would need to exist.

*Regularity of procedure* has not been much discussed.<sup>23</sup> However, given the wealth of precedent emphasizing the contractual nature of arbitration, it stands to reason that party-agreed procedure will be made to be respected at the setting-aside and enforcement stage (see discussion in sub-paragraph c.6 above).

### 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, the Mexican Judiciary has been active in seeking to find intelligent solutions to the dilemmas caused by Covid-19, including fostering the use of technology.

A (fervent and laudable) judicial movement ensued soon after the Covid-19 pandemic broke out which seeks to introduce technology into Mexican procedural practice as much as possible. The Mexican Federal Judiciary and the Judiciary of several States (for instance, the State of Mexico – *Estado de México*) have been not only *active* but *pro-active* in tackling the challenges stemming from the Covid-19 pandemic. Their lodestar has been seeking to ensure that justice is imparted. That problems are channelled and disposed of. That the judicial dockets do not become saturated with cases, to no avail to litigants. In a nutshell, conferring “e-Justice”.

---

<sup>21</sup> NYC Article V(1)(b). Commerce Code Articles 1457(I)(b) and 1462(I)(b).

<sup>22</sup> *Amparo Directo 71/2014*, ¶98. Free translation of “cuando parte pruebe que no ha podido hacer valer sus derechos. Ello ocurre cuando no dio a las partes la misma oportunidad de alegar y probar cuanto estimaran conveniente ni valoró con el mismo estándar o idénticas exigencias de juicio los medios probatorios aportados”.

<sup>23</sup> NYC Article V(1)(d). Commerce Code Articles 1457(I)(d) and 1462(I)(d).

## THE ICCA REPORTS

As indicated in sub-paragraph b.3 above, several regulations have been issued which display a desire to foster the use of electronic means to pursue judicial proceedings in a more efficient and expedited manner. Two stand-out: *Acuerdo 12/2020* and *Acuerdo 13/2020* (both of June 2020).

*Acuerdo 12/2020* provides a comprehensive regime seeking to encourage the general use of electronic means in judicial proceedings, including the integration of electronic files, and the use videoconference to conduct hearings and other judicial steps. It created an electronic system for the Judiciary, electronic services by the Judiciary Oversight Council (*Consejo de la Judicatura Federal* – “CJF”), an online portal available 24/7 for filing pleadings and reviewing files remotely, and allowing the electronic lodging of lawsuits, incidents, challenges and appeals, as well as electronic notifications. A specific chapter on videoconferencing exists which indicates how hearings are to be conducted through videoconference.

*Acuerdo 13/2020* addresses urgent matters. It provides a definition and examples of matters which are to be addressed online and in an expedited and immediate manner.<sup>24</sup>

It is too soon to assess the results of those initiatives. Whilst some cases have moved with impressive speed, others have suffered delays. And as may be expected, human error involving electronic files and their proper assortment have existed. Nonetheless, in general, in this Author’s experience, the overarching trend seems laudable and promising.

---

<sup>24</sup> Examples include interim relief, ongoing alimony claims, matters involving interests of children, interim relief in bankruptcy, strikes, and matters compromising human rights or involving differentiated impact on vulnerable groups.