



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA  
PROJECTS

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

**PERU**

José María de la Jara  
Andrea Ávila

PERU

[José María de la Jara](#)\*

[Andrea Ávila](#)\*\*

**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.

Arbitration cases taking place in Peru are governed by Legislative Decree 1071 (the Peruvian Arbitration Law or the "PAL"). Enacted in 2008 and applicable to international and domestic arbitration, the PAL does not expressly provide for 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: It can be excluded.

As the PAL does not expressly provide for the parties' right to a physical hearing, we have assessed whether such right can be inferred or excluded from the provisions provided therein. In order to do so, we have analyzed the provisions of the PAL dealing with the determination of the rules governing the arbitration proceedings, hearings of the parties, witnesses and experts, and place of arbitration.

Throughout these provisions, the law operates on the same two-tier basis for discretion which characterizes the UNCITRAL Model Law. First, the parties are free to agree to the procedure and the means of the arbitration procedure. Second, if no agreement is reached between the parties, the arbitral tribunal holds broad discretion to determine the procedure and the means to conduct hearings. As the law is silent on the means to conduct such hearings, the tribunal's discretion in choosing them is broad, only limited by the principles of equality of the parties and opportunity of defense. Therefore, the tribunal is empowered to order remote hearings and, collectively, these provisions may not be construed as suggesting a right to a physical hearing.

---

\* José María de la Jara is Global Visiting Lawyer at Covington & Burling.

\*\* Andrea Ávila is a candidate for the Peruvian and New York bars.

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

In particular, article 34.1 of the PAL (in accordance with Article 19 of the UNCITRAL Model Law), dealing with the procedure of the arbitration, grants parties freedom to agree on the procedure. Failing such agreement, it provides the arbitral tribunal with broad discretion to decide how to conduct the procedure, including whether a hearing, or what type of hearing should be conducted.<sup>1</sup> The only limit to the tribunal's discretion is the mandatory obligation to treat both parties with equality and give each party a sufficient opportunity to present its case.<sup>2</sup>

Similarly, article 42.1 of the PAL (which closely follows Article 24 of the UNCITRAL Model Law) confirms the broad discretion vested in the tribunal to decide on the hearings, including the option to conduct the case solely on the basis of documents.<sup>3</sup> The second part of Article 42.1 presents the only limit to this discretion as it provides for the celebration of a hearing at the appropriate stage of the proceedings at the request of one of the parties, unless they had previously agreed that no hearings would be held. This provision, nevertheless, remains silent as to the means used to conduct the requested hearings. With a wide-reaching discretion, the tribunal is empowered to handle the “when” and the “how” of the hearings as it deems appropriate.<sup>4</sup>

Another provision illustrating the tribunal's procedural discretion resides in Article 35 of the PAL. Under this Article, the parties have the first say as to the place of arbitration, and, failing such determination, the tribunal's discretion extends to the place where the witnesses, experts or the parties will be examined.<sup>5</sup> Once again, this discretion allows the tribunal the possibility to hold remote hearings, which consequently impedes the inference of a right to a physical hearing.

In conclusion, the PAL, following the UNCITRAL Model Law, excludes a “right” to a physical hearing as it (i) does not in any way require a specific type of hearing, (ii) grants parties with freedom to decide whether and how the proceedings should be

---

<sup>1</sup> PAL, Article 34.1: “The parties may freely agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement and in the absence of applicable arbitration rules, the arbitral tribunal will decide the rules it deems most appropriate, taking into account the circumstances of the case”. This and the following translations of the PAL are offered by the Authors.

<sup>2</sup> PAL, Article 34.2: “The arbitral tribunal shall treat the parties with equality and give each party sufficient opportunity of presenting its case”.

<sup>3</sup> PAL, Article 42.1: “The tribunal shall decide whether to hold oral hearings for the presentation of statements, evidence or closings, or whether the proceedings shall be conducted on the basis of written materials. [...]”.

<sup>4</sup> PAL, Article 42.1: “[...] Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party”.

<sup>5</sup> PAL, Article 35.1: “The parties are free to determine the place of arbitration. Failing such agreement, the arbitral tribunal shall determine the place of arbitration, having regard to the circumstances of the case and the convenience of the parties”.

conducted and (iii) failing such agreement, provides that the arbitral tribunal is free to decide how to conduct the proceedings.

**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.

In our view, the Peruvian *lex arbitri* does provide a conclusive answer regarding the lack of existence of a right to a physical hearing under Peruvian law.

Notwithstanding the foregoing, it is worth looking at the Peruvian general rules of civil procedure also in light of the fact that the Peruvian Judiciary has been holding remote hearings for the past months. Even though Article 203 of the Peruvian Rules of Civil Procedure (“PRCP”) provides that hearings shall be held in the court’s facility and that parties are required to personally attend the hearing, the Executive Council of the Judiciary decided through Resolution No. 482-2020 to approve the use of Google Hangouts Meet as long as the declared health emergency remains in the country.

In addition, Peruvian judges<sup>6</sup> have endorsed a shift to remote hearings as it is aligned with Article 203 of the PRCP for multiple reasons. In particular: (i) procedural formalities cannot impede a judge to propose remote hearings as she is responsible for directing the hearings without exception pursuant to Article 202;<sup>7</sup> (ii) the principle of

---

<sup>6</sup> Judge Olga Fiorella Julia Vasquez Rebaza from the Specialized Civil Court of the Superior Court of Justice of Callao. See Olga F.J. VASQUEZ REBAZA, “El servicio de administración de justicia en materia civil durante y después del aislamiento social obligatorio”, Polemos (6 May 2020) at <<https://polemos.pe/el-servicio-de-administracion-de-justicia-en-materia-civil-durante-y-despues-el-aislamiento-social-obligatorio/>> (last accessed 16 November 2020). Judge Johan Mitchel Quesnay Casusol from the Specialized Civil Court of Justice of Trujillo and Court Coordinator of Oral Civil Litigation for Corporate Law Module. See Johan M. QUESNAY SASUSOL, “Impacto del COVID-19: ‘Las audiencias virtuales’”, La Ley (13 April 2020) at <<https://laley.pe/art/9547/impacto-del-covid-19-en-el-proceso-civil-las-audiencias-virtuales>> (last accessed 16 November 2020).

<sup>7</sup> In addition to Article 203, Article 202 of the PRCP states that the evidence hearings will be conducted by the Judge personally, otherwise they are subject to invalidity. Therefore, being the one responsible for the hearings, the Judge may define the means of the hearings. Judge Vasquez argues that as long as the principle of immediacy is guaranteed and the parties’ rights are not violated, Article 203 of the PRCP regulates only a procedural aspect which cannot limit the Judge’s acts. Judge Quesnay adds that as long as communication is

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

immediacy is guaranteed by virtual means;<sup>8</sup> and (iii) remote hearings guarantee the exercise of other procedural principles derived from orality (concentration, economy, speed and publicity).<sup>9</sup>

Having said that, the Peruvian Judiciary has put physical and remote hearings on an equal footing, which results in the exclusion of a right to a physical hearing.

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: Even if the ordinary civil procedure were to provide for a right to a physical hearing, which it does not, such rules would not extend to arbitration.

Article 34.3 of the PAL states that the PAL applies as a set of suppletive rules when the procedural rules determined by the parties or by the tribunal fail to provide a specific rule. In the absence of applicable rules in the PAL, the arbitral tribunal may resort, at its own discretion, to the principles, usages and customs of arbitration.

This provision, as part of the PAL's reform in 2008, aims at excluding civil procedure rules and therefore provides greater autonomy to the arbitral proceedings through its own arbitral rules and institutions. According to the lawmakers, the adoption of the 2008 Legislative Decree No 1071 stemmed from deep concerns of excessive judicial intervention, along with the use of civil procedure rules, in arbitral proceedings.<sup>10</sup>

---

immediate, direct and effective, the use of technologies would not violate the parties' procedural rights.

<sup>8</sup> Immediacy should be understood as a procedural guarantee that assures that immediate and effective communication with the Judge is being held. This principle is enshrined in Article V of the Preliminary Title of the Peruvian Civil Code by which the hearings and production of evidence must be conducted before the Judge only. Immediacy seeks to guarantee the parties' right to be heard, present their evidence and interact with the Judge. Judge Vasquez states that the immediacy guarantee is satisfied by remote hearings as long as they are held in real time, so that (i) the Judge can interact with the parties, (ii) parties have equal access to the technological means, and (iii) sufficient sound and image quality is provided so that the Judge can hear the parties' identities, declarations and observations.

<sup>9</sup> The Peruvian Judiciary still relies heavily on written procedures. However, until this year, eight Oral Civil Litigation Modules were implemented for civil cases seeking to stop the Judiciary's dependency on written submissions and streamline case management and adjudication. In particular, these Modules introduce a simplified hearings scheme which has so far been working successfully. See Eduardo AVILA ALVARADO, "El Modulo Civil Corporativo de Litigación Oral en la Corte de Lima: ¿Cómo funciona?", *Ius 360* (7 January 2020) at <<https://ius360.com/gideproc/el-modulo-civil-corporativo-de-litigacion-oral-en-la-corte-de-lima-como-funciona-gideproc/>> (last accessed 16 November 2020).

<sup>10</sup> Alfredo BULLARD GONZALEZ, "El control judicial del arbitraje" in Alfredo BULLARD GONZALEZ, *Litigio Arbitral* (Palestra 2017) p. 2.

**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

As clarified above, a right to a physical hearing in arbitration does not exist in Peru. Accordingly, the parties would certainly be free to agree to hold hearings remotely.

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: The tribunal cannot disregard the parties' agreement. Such breach would be a valid ground to vacate the award.

As explained above,<sup>11</sup> the PAL provides that the parties' agreements regarding the arbitration proceedings must be enforced according to their terms, unless they are fundamentally unfair. Therefore, if the arbitration agreement unambiguously requires a physical hearing, either expressly or by reference to the arbitration rules, an arbitral tribunal could not order a remote hearing contradicting the parties' agreement. Such order would be ground for an award annulment under Article 63.1.c of the PAL by which the arbitral procedure must conform to the agreement of the parties.

Having said that, an agreement demanding a physical hearing coupled with reluctance to change it would be highly unlikely. The Peruvian arbitrators we talked to in preparation for this report disclosed that they have been able to nudge parties to reach agreements to hold remote hearings. Notably, a very well-known practitioner mentioned that the commercial judges (in charge of annulment proceedings) also understood that we are living an unforeseen circumstance, that arbitral tribunals have within their direction power to continue the arbitration proceeding, and that suspending the proceedings until it is safe to hold a physical hearing could be viewed as a denial of justice. Another notable practitioner said it is easy to find good reasons not to uphold the parties' agreement to hold a physical hearing during the pandemic, and that the real challenge would be when the pandemic is over.

**d. Setting Aside Proceedings**

---

<sup>11</sup> See sub-paragraph a.2 above.

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

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, as long as a physical hearing was agreed.

As clarified above, the PAL does not contemplate the parties' right to a physical hearing. Assuming, however, that the parties agreed to hold a physical hearing and the tribunal issued an order dismissing such agreement, a failure to raise such breach during the arbitral proceedings would undoubtedly prevent using that as a ground for challenging the award.

According to article 63.1(c) of the PAL, like Article 34.2(iv) of the UNCITRAL Model Law, one of the grounds to set an award aside is if the arbitration procedure was not in accordance with the agreement of the parties.<sup>12</sup> The same provision states that the annulment ground would only be applicable if it was subject to an express claim at the time and before the arbitral tribunal.<sup>13</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: N/A

This question is not applicable, as the Peruvian arbitration legal framework does not recognize a right to a physical hearing.

---

<sup>12</sup> PAL, Article 63.1(c): "That the composition of the arbitral tribunal or the arbitration proceedings have not been adjusted to the agreement between the parties or the applicable arbitration regulations, unless said agreement or provision was in conflict with a provision of this Legislative Decree from which the parties could not deviate, or in the absence of said agreement or regulation, which have not been adjusted to the provisions of this Legislative Decree".

<sup>13</sup> PAL, Article 63.2: "The grounds provided in sections a, b, c and d of numeral 1 of this article will only be applicable if they were the subject of an express claim at the time before the arbitral tribunal by the affected party and were rejected".

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, as long as due process was guaranteed.

As explained above, the PAL does not provide for a right to a physical hearing. Moreover, it is highly unlikely that parties expressly agree to hold hearings physically. In this scenario, failing to conduct a physical hearing and ordering a remote hearing instead would not generate an annulment risk, as long as arbitral due process is guaranteed. Indeed, certain annulment grounds of Article 63.1(a) to (g) of the PAL will seek to guarantee those arbitral due process principles. Notably, under Article 63.1(b) of the PAL a party may set aside an award if that party has been denied the opportunity to present its case. Similarly, Article 63.1(c) of the PAL provides that an award may be set aside when the arbitral proceedings have failed to comply with mandatory provisions of the PAL such as the threshold standard of hearings set under Article 34.2 of the PAL.<sup>14</sup> In sum, as one notable interviewed practitioner stated, arbitrators conducting remote hearings need to guarantee the parties' right to present their case and be treated equally.

**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: No, as long as due process was guaranteed.

Peruvian courts, especially since the issuance of the PAL, have recognized the importance of the New York Convention<sup>15</sup> and followed the international standard of interpretation of its provisions, including Article V. Specifically, Peruvian Courts have recognized that (i) the grounds provided by the New York Convention to deny the recognition or enforcement of an award constitute an exhaustive list that cannot be

---

<sup>14</sup> See sub-paragraph a.2 above.

<sup>15</sup> *Stemcor UK Limited v. Guivece*, First Civil Chamber with Commercial Subspeciality of the Lima Superior Court of Justice, Resolution No. 8 (April 28, 2011) (stating that the New York Convention is “the cornerstone of international commercial arbitration”) (free translation by the Authors).



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

extended through interpretation,<sup>16</sup> (ii) that courts are required to conduct interpretation restrictively<sup>17</sup> and (iii) that they are prohibited to decide the merits of the case.<sup>18</sup> Overall, the PAL closely follows the grounds for refusal provided by Art. V of the New York Convention.

As explained above, the PAL does not provide for a right to a physical hearing . Therefore, Peruvian courts would not accept the argument that an award, resulting from a proceeding where no physical hearing was held, should be considered contrary to Peruvian procedural public order.

Instead, it would require a serious violation of due process to seek protection under the New York Convention. According to an interviewed practitioner, a request to deny recognition under a public order ground would not be accepted, as both arbitration and judicial proceedings have been commonly practiced remotely in recent months.

### 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: The arbitration players have tried to adapt to the new circumstances.

During the first weeks of the national lockdown, the arbitration institutions suspended proceedings. This did not last long. Soon after, the institutions issued directives to digitalize the arbitration procedure.

For example, the Arbitration Center of the Lima Chamber of Commerce ordered (i) that requests for arbitration would only be presented digitally and explained how to do

---

<sup>16</sup> *Ibid.* (“[...] the New York Convention provides [...] seven exhaustive grounds to deny the recognition and enforcement of a foreign award”) (free translation by the Authors).

<sup>17</sup> *Gobierno Regional de Pasco v. Consorcio ACruta Tapia Ingenieros S.A.C.*, First Commercial Chamber of the Lima Superior Court of Justice (October 2, 2013) (stressing that the grounds to vacate an arbitration award “must be interpreted restrictively”. Given the similar language of provisions dealing with award annulment and grounds for recognition, the approach followed by the court in the former could be extended to the latter) (free translation by the Authors).

<sup>18</sup> *Great Harvest International Investment v. Shougan Corporation*, Second Civil Chamber with Commercial Subspeciality of the Lima Superior Court of Justice, Resolution No. 13 (December 10, 2014) (“Both the recognition of a judgement and of an award by a foreign tribunal require to follow a specific procedure to be effective in the country, called exequatur. [...] This procedure has an ‘homolyzing’ nature where the court in charge cannot get to know the merits of the case, limiting itself (with the exception of public order) to verifying certain formal aspects [...]”) (free translation by the Authors).

so; (ii) the general rule would be to notify the parties only through digital means; (iii) the communications with the arbitrators would also be through e-mail; (iv) the payment of fees would also be done through the institutions' digital platform. Also, the institution exhorted tribunals, either already constituted or not, to apply several rules to facilitate a remote arbitration. Significantly, the Note states that "as long as there are restrictions on meetings due to the pandemic generated by COVID-19 and until such time as the Council determines it, the conferences, hearings and meetings between the parties and the Arbitral Tribunal must be non-physical, using for such purposes virtual platforms, videoconferences, teleconferences, or any other means of communication that the Center makes available, coordinating for this purpose with the Arbitration Secretariat".<sup>19</sup>

---

<sup>19</sup> See Cámara de Comercio de Lima, Practical Note 1/2020 (25 April 2020) at <<https://www.arbitrajeccl.com.pe/wp-content/uploads/2020/04/Nota-practica-N-1-2020.pdf>> (last accessed 27 November 2020).