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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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PROJECTS

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

COSTA RICA

Dyalá Jiménez
Valeria Garro

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[Dyalá Jiménez](#)*

[Valeria Garro](#)**

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.

Law 8937 on International Commercial Arbitration (“Law 8937”) is based on the 2006 Model Law of the United Nations Commission on International Trade Law (“UNCITRAL”) on International Commercial Arbitration, with some modifications in Articles 2, 6, 7, 17 and 35 and the addition of Articles 1(5), 37, and 38. As with the Model Law, we must turn to Chapter V of Law 8937, which governs the “Conduct of arbitral proceedings”, particularly Articles 18 (“Equal treatment of parties”), 19 (“Determination of rules of procedure”), 20 (“Place of arbitration”), and 24 (“Hearings and written proceedings”).¹

Article 24 provides that, failing the parties’ agreement to the contrary, the arbitral tribunal shall have discretion to determine whether hearings for the presentation of evidence or for oral argument will take place or if the case will be decided solely based on written submissions and documentary evidence. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested by a party.

Thus, there is no right to a hearing as an arbitration can proceed without an oral hearing if the parties agree to do so in the arbitration agreement or if the tribunal decides to issue the award solely on the basis of documents and other materials *and* neither party requests said hearing at an appropriate stage of the proceedings.

However, where there is a hearing, nothing in the statute requires that it be conducted physically or prevents that it be conducted remotely. Since commercial arbitration is deemed to form part of private law, and acts that are not expressly prohibited are permissible per the principle of party autonomy, there is no right to a physical hearing in international arbitrations seated in Costa Rica.

* Dyalá Jiménez is Principal at DJ Arbitraje, a firm based in Costa Rica.

** Valeria Garro is Associate at DJ Arbitraje, a firm based in Costa Rica.

¹ Costa Rica has a dualist system with two laws that govern arbitration. Law 7727 on Alternative Dispute Resolution and Promotion of Social Peace governs domestic arbitration while Law 8937 is applicable to international arbitration. For the purposes of this report, focus will be on Law 8937.

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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 inferred that a right to a physical hearing exists only and to the extent that parties in a particular case agree to conduct a physical hearing.

See sub-paragraph a.1 above for rationale.

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 the Costa Rican general rules of civil procedure there is no right to a physical hearing and remote hearings are permitted.

Under Costa Rican rules of civil procedure, per Article 24(4) of Law 9342, which is the Code on Civil Procedure ("CCP"), the courts, the parties and other participants in the proceedings may use authorised technological means for the performance of any procedural act, including the receipt of evidence including remote testimonies and arguments by means of virtual hearings, subject to the established authentication and security mechanisms. This has been reinforced with the "Protocol for conducting oral hearings by technological means in civil matters", approved recently² by the Costa Rican Supreme Court.

Moreover, Article 2 of the CCP establishes the governing principles of civil procedure and includes the principle of "immediacy" in subsection 7. According to both said Article 2(7) of the CCP and jurisprudence,³ "immediacy" requires the personal and uninterrupted presence of the judge/tribunal that will rule on a case before the parties and the evidence presented at hearings of that case. Further, Article 2(7) of the CCP contemplates remote hearings by establishing that the use of technological means that

² On 4 May 2020.

³ See First Chamber of the Costa Rican Supreme Court Decision number 778-F-2019 of 12 hours of June 13, 2019 and Decision number 165-F-2018 of 14:26 hours on 1 March 2018. Also Decisions 948-F-2010, 1000-F-2010 and 1036-F-2010.

guarantee a direct relationship between the judge/tribunal and the parties and the evidence does not breach the principle of “immediacy”.

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

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

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.

Article 19 of Law 8937 provides that, subject to the provisions of that law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. It is only failing such an agreement that the arbitral tribunal may, again, subject to the provisions of that law, conduct the arbitration in such manner as it considers appropriate. In this way, if the parties agreed to conduct a physical hearing, the hearing may not be conducted remotely unless the parties agree to modify such agreement. A tribunal’s decision to hold a remote hearing contrary to the parties’ agreement to conduct a physical hearing could be grounds for setting aside an award according to Article 34(2)(a)(iii) of Law 8937, because the arbitral procedure would not be in accordance with the agreement of the parties.

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.

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A party must object to the violation during the arbitration or be deemed to have waived that violation to later set aside the award, under Article 4 of Law 8937.⁴

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

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 generally. See also sub-paragraph c.6 above.

As mentioned, Article 19 of Law 8937 provides that, subject to the provisions of that Law, 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, again, subject to the provisions of that Law, conduct the arbitration in such manner as it considers appropriate. This discretionary power is supported by the Costa Rican Supreme Court's First Chamber ruling number 114-F-S1-2012 issued in a setting aside recourse in which one of the bases invoked by the award debtor was that the arbitral tribunal had failed to hold a preliminary hearing. As it found that the institutional rules applicable to that case allowed but did not require the tribunal to hold such a hearing, the First Chamber decided that the tribunal's decision not to hold the preliminary hearing was discretionary and could not otherwise constitute a violation of due process or public policy. This case illustrates the discretionary power of the arbitral tribunal, consistent with article 19(2) of Law 8937.⁵

⁴ Law 8937, Article 4: "A party who knows that any provision of this Law 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 Authors).

⁵ Law 8937, Article 19(2): "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence" (free translation by the Authors).

In this way, in the scenario that the parties have agreed to a physical hearing, but the arbitral tribunal orders a remote hearing despite that agreement, the tribunal's order would constitute grounds for a setting aside recourse according to Article 34(2)(a)(iii) (since the arbitral procedure would not be in accordance with the agreement of the parties).

Having said that, the institutional rules chosen by the parties in the arbitration clause should also be considered as they are part of the arbitration agreement, under Article 2(e) of Law 8937. Article 2(e) states that, where a provision of Law 8937 refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.⁶

This would only become relevant in a hypothetical case where the arbitral tribunal considers more appropriate to hold a remote hearing allowed by the applicable rules despite the parties' agreement to the contrary. In such an unlikely case, the arbitral tribunal would have to reason its decision on the basis of the wording of the arbitration clause, the applicable rules, and the needs of the particular case, applying its discretionary power. This type of decision contrary to the parties' agreement might be risky though.

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: Possibly.

If the parties had agreed to a physical hearing and the arbitral tribunal goes against that agreement and the applicable arbitration rules do not allow the arbitral tribunal to do so, this will constitute grounds for denying recognition and execution of the award in Costa Rica under Article V(1)(d) of the New York Convention ("NYC"), since the arbitral procedure would not be in accordance with the agreement of the parties.

Regarding the right of the party to present its case (Article V(1)(b) of the NYC), the First Chamber of the Costa Rican Supreme Court has interpreted it to require respect for the parties' due process. According to the Supreme Court, due process is violated when a party was unable to properly exert its right to defence:

⁶ On existing institutional rules of Costa Rican arbitration centres, see sub-paragraph f.11 below.

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“[...] by violation of due process, national doctrine has understood this to mean infringements of essential and unwaivable procedural rules and relevant stages *agreed by the parties*. For these purposes, it is essential that [such infringements have] harmed the claimant; therefore, there may be minor violations of due process that could well be remedied or overcome during the arbitration, or that do not violate a party’s right to present its case” (emphasis added).⁷

In this way, holding a remote instead of a physical hearing could be deemed inconsequential for the First Chamber since a hearing would have been held and the parties would therefore have been able to present their case. Some examples of procedural guarantees that secure a party’s ability to present their case in arbitration proceedings include: possibility to offer evidence, equal treatment to parties, allowing the parties to be heard, adequately reasoned decisions, the right to challenge the award and actual enforcement of the award.⁸

On the other hand, with respect to breach of Costa Rican public policy (Article V(2)(b) of the NYC), public policy rules are defined by the First Chamber as those “characterized by their mandatory application, [that] cannot be replaced or altered, and are absolutely imposed over individual will. Consequently, they stand as an insurmountable barrier to capacity of disposition, [due to a societal] need or general interest that they prevail over any individual decision”.⁹ As there is no right to a physical hearing under the Costa Rican legislation, it does not form part of Costa Rica’s public policy either.

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: Costa Rican arbitral institutions had previously contemplated the possibility of substituting physical hearings when necessary in their institutional

⁷ First Chamber of the Costa Rican Supreme Court. Decision number 495-F-S1-2008 of 15:30 hours on July 24, 2008 (free translation by the Authors).

⁸ See First Chamber of the Costa Rican Supreme Court Decision number 312-F-S1-10 of 9:40 hours on September 8, 2011.

⁹ First Chamber of the Costa Rican Supreme Court. Decision number 637-F-2007 of 8:50 hours on September 6, 2007 (free translation by the Authors).

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arbitration rules. In addition, the Judiciary has issued several protocols to hold hearings remotely for civil, criminal, juvenile criminal, labour and even internal disciplinary matters.

Costa Rican arbitral institutions, including major arbitration centres such as the Costa Rican-American Chamber of Commerce's *Centro Internacional de Conciliación y Arbitraje* ("CICA") and the Costa Rican Chamber of Commerce's *Centro de Conciliación y Arbitraje* ("CCA"), had already contemplated the possibility of holding remote hearings in their arbitration rules before the COVID-19 pandemic. Article 21(4) of the CICA Rules of Arbitration provides:

"The means to conduct the arbitration proceedings may be those that the arbitral tribunal considers appropriate, after consultation with the parties, including but not limited to e-mail, electronic communication, telephone and video conferences".¹⁰

CCA's International Commercial Arbitration Rules, Article 26(4) provides:

"The arbitral tribunal may decide that witnesses, including experts, be examined by any means of communication that does not require their physical presence at the hearing (such as videoconference)".¹¹

Though this is not arbitration-specific, the "Protocol for conducting oral hearings by technological means in civil matters" approved by the Costa Rican Supreme Court on 4 May 2020 expressly allows and regulates remote hearings and covers topics such as authentication and use of secure technologies, identification of parties, place, proper attire and time of hearings, the issue of evidence handling and backup, ethical duties, publicity, the use of interpreters, accessibility, conduct of the hearing, remote testimony, alternative forms of conflict resolution (only regarding mediation) and what to do if transmission is interrupted are part of the general guidelines. This protocol is expected to outlast the pandemic.

¹⁰ CICA Rules of Arbitration, Article 21(4), available at <<https://cicacr.org/wp-content/uploads/2020/05/Arbitration-Rules-CICA.pdf>> (last accessed 11 March 2021) (free translation by the Authors).

¹¹ CCA International Commercial Arbitration Rules, Article 26(4), available at <<http://camara-comercio.com/camara2/wp-content/uploads/2015/11/reglamentoarbitrajecomercialinternacional.pdf>> (last accessed 11 March 2021) (free translation by the Authors). See also Article 27(2).