



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA PROJECTS

**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: There is no express right to a physical hearing.

The Austrian Code of Civil Procedure ("ZPO") contains a special part dedicated to arbitral proceedings (Sections 577 to 618 ZPO). This forms the Austrian *lex arbitri*.¹

Section 598 ZPO provides that each party in arbitration has a right to an "oral hearing":

"Oral Hearings and Written Proceedings: Unless the parties have otherwise agreed, the arbitral tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted in writing. Where the parties have not excluded an oral hearing, the arbitral tribunal shall, upon motion of a party, hold an oral hearing at an appropriate stage of the proceedings".²

Based on the fundamental principle of party autonomy in arbitrations seated in Austria, this provision first clarifies that the parties can agree whether there will be an "oral hearing" in their arbitration proceedings or whether they want a documents-only arbitration. If the parties reach such an agreement, this will bind the tribunal. In the absence of such an agreement, Section 598 ZPO gives each party a right to an "oral hearing". This right eliminates the tribunal's discretion in this regard, mandating that

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¹ Section 577(1) ZPO provides that the provisions of this chapter (which include Sections 577-619 ZPO) apply to arbitral proceedings seated in Austria ("Die Bestimmungen dieses Abschnitts sind anzuwenden, wenn der Sitz des Schiedsgerichts in Österreich liegt"); Section 577(2) ZPO provides that Sections 578, 580, 583, 584, 585, 593(3)-(6), 602, 612 and 614 ZPO also apply if the seat is outside Austria or has not yet been determined ("§§ 578, 580, 583, 584, 585, 593 Abs. 3 bis 6, §§ 602, 612 und 614 sind auch anzuwenden, wenn der Sitz des Schiedsgerichts nicht in Österreich liegt oder noch nicht bestimmt ist").

² Section 598 ZPO, official translation available at https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2006_1_7/ERV_2006_1_7.pdf (last accessed 15 March 2021).

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

“[w]here the parties have not excluded an oral hearing, the arbitral tribunal *shall*, upon motion of a party, hold an oral hearing at an appropriate stage of the proceedings”.³

When providing for an “oral” hearing, Section 598 ZPO does not distinguish, let alone impose a textual preference, between physical and remote hearings. Section 598 ZPO does not expressly provide whether a party that requests an “oral hearing” can also insist that there be a physical hearing or whether the tribunal could also decide that the hearing will be conducted remotely.

It bears emphasis that Section 598 ZPO is dispositive law, so that the parties can always establish by agreement their own framework if, and under what circumstances, a hearing should or must be held, and whether such a hearing should be conducted in person or remotely. As elsewhere, the parties’ agreement can take the form of an incorporation by reference of institutional or other arbitration rules. Thus, the Austrian *lex arbitri* allows the parties by agreement to insist on physical hearings or exclude them altogether. Similarly, where the parties’ agreement provides for the application of particular arbitral rules, and these rules provide for, or exclude, a physical hearing, or leave this to the tribunal’s discretion, such agreement is valid under Austrian law.

In Austria, and the CEE and CIS regions, the Rules of Arbitration of the Vienna International Arbitration Centre (“Vienna Rules”) are particularly prevalent. Article 30(1) of the Vienna Rules is textually almost identical to the provision of the Austrian *lex arbitri* (i.e., Section 598 ZPO, discussed above). By requiring an “oral” hearing where a party so requests, without specifying whether that hearing would be conducted physically or remotely, Article 30(1) of the Vienna Rules thus seems to reflect the same ambiguity.

However, the Vienna International Arbitration Centre (“VIAC”) has expressly clarified in its Vienna Protocol of June 2020 that the term “oral hearing” in the Vienna Rules encompasses remote hearings:

“The Vienna Rules are currently silent on the permissibility of conducting hearings remotely rather than in person. Article 30 (1) of the Vienna Rules only requires an ‘oral hearing’, if a party so requests, but not a hearing ‘in person’: a remote hearing that allows parties to orally present their case satisfies this provision in principle”.⁴

Thus, if a party requests an “oral hearing,” the tribunal is free to decide whether to hold a physical or a remote hearing. In its Vienna Protocol, the VIAC considers that this is a consequence of the considerable discretion that tribunals have under the Vienna Rules to conduct the proceedings (see Article 28 Vienna Rules). The VIAC also

³ *Ibid.* (emphasis added).

⁴ VIAC, “The Vienna Protocol, A Practical Checklist for Remote Hearings” (June 2020) at <https://www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf> (last accessed 11 November 2020) at p. 2.

emphasizes, however, that tribunals will have to exercise this discretion within the boundaries of the fundamental procedural principles enshrined in the Austrian *lex arbitri*, specifically the parties' rights to be heard and of being treated fairly and equally:

“As a result, arbitrators in principle have the discretionary power to hold hearings remotely, but they have to consider whether conducting (or not conducting) a remote hearing in the individual circumstances of the case is (i) fair to the parties; and (ii) allows them an adequate and equal opportunity to present their case”.⁵

Moreover, the Vienna Protocol also contains a list of additional factors that may guide the tribunal in determining whether a remote hearing is appropriate in the specific circumstances of a case (e.g., the reasons for holding a remote hearing rather than a physical one, the content of the planned hearing, the number of participants and their location, the technical set-up available to accommodate the needs of the remote hearing etc.).⁶

In conclusion, the language of both the Austrian *lex arbitri* (Section 598 ZPO) as well as the Vienna Rules (Article 30(1)) gives the parties a right to an “oral hearing”, but does not expressly provide for a right to a physical hearing. The VIAC has clarified that a party to an arbitration governed by the Vienna Rules generally does not have a right to a physical hearing (unless both parties previously agreed to a physical hearing). Rather, pursuant to the Vienna Rules, it is within the discretion of the tribunal whether to hold the oral hearing physically or remotely.

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: This question is not finally settled, but the better view, based also on recent case law, is that the existence of a general right to a physical hearing cannot be inferred, and can instead arguably be excluded, by reference to the procedural rules of Austrian law.

The provision in the Austrian *lex arbitri* that is directly relevant for this question is Section 598 ZPO which, as quoted above, provides that “[w]here the parties have not excluded an oral hearing, the arbitral tribunal shall, upon motion of a party, hold an oral hearing at an appropriate state of the proceeding”.⁷ The question whether the term “oral hearing” in this provision should be read as implicitly including or excluding remote

⁵ *Ibid.*

⁶ *Ibid.* at pp. 2-3.

⁷ Official translation, fn. 2 above.

hearings is one of statutory interpretation.⁸ There is arguably no case law directly on point, although the recent decision of the Austrian Supreme Court (*Oberster Gerichtshof*, “OGH”) dated 23 July 2020, which is discussed below, provides some helpful guidance.⁹

The method for interpreting statutes in Austria is derived from Sections 6 and 7 of the Austrian Civil Code. *First*, this method considers the *generally accepted meaning* of the statutory language at issue. As a matter of regular usage, the term “oral” does not exclude remote hearings. “Oral” in arbitration parlance generally refers to the mode of deliverance and is thus juxtaposed with “written submissions”: while the parties typically express their positions “in writing”, they also have the right to address the tribunal “orally”. The title of Section 598 ZPO, “Oral Hearings and Written Proceedings”, reflects exactly this juxtaposition. As a matter of language, such an “oral”, i.e., non-written presentation can be delivered by various technical means, i.e., over the phone, via a video application or facility, or in person. As such, even though the textual reference to an “oral” hearing itself does not appear to provide a conclusive answer as to the permissibility of remote hearings, it does at least not seem to preclude them either.

Arguably, the term “oral hearing” has historically been used in decisions of the OGH and leading commentaries on Austrian arbitration law to denote physical hearings rather than remote hearings. However, the traditional use of the term “oral hearing” as synonymous with a physical hearing is more likely to reflect the absence of adequate technical means in the past to deliver an oral presentation (or take evidence) other than in person, rather than passing normative judgment in the matter.

Second, and for the same reason, the *historic context* at the time of enacting Section 598 ZPO, although generally relevant as an interpretative tool, is unlikely to be decisive here.¹⁰ This provision was enacted in 2006, based on Article 24(1) of the UNCITRAL Model Law of 1985 (as amended in 2006) and 1998 version of Section 1047(1) of the German Code of Civil Procedure (“GZPO”).¹¹ There is no indication that some 15 years ago (and based on a normative framework that dates back some 35 years) the legislature considered whether remote hearings were equivalent to physical hearings. The

⁸ Specifically, it is one of determining whether the term “oral hearing” is to be interpreted narrowly, so as to only captures the core of its meaning (*Begriffskern*), i.e., physical hearing, or broadly, so as to also capture the peripheral zone of its meaning (*Begriffshof*), i.e., remote hearings. See Rudolf WELSER and Andreas KLETECKA, *Bürgerliches Recht I*, 15th edn. (Manz’sche Verlags- und Universitätsbuchhandlung 2020) paras. 88-91.

⁹ Oberster Gerichtshof [OGH] [Supreme Court] 23 July 2020, 18 ONc 3/20s, available at <https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf> (last accessed 15 March 2021).

¹⁰ R. WELSER and A. KLETECKA, *Bürgerliches Recht I*, fn. 8 above, paras. 94-98.

¹¹ Paul OBERHAMMER, *Entwurf eines neuen Schiedsverfahrensrechts* (Manz’sche Verlags- und Universitätsbuchhandlung 2002) p. 101; Lisa BEISTEINER, “§ 598 ZPO” in Gerold ZEILER, ed., *Austrian Arbitration Law* (nww 2016) para. 1.

legislature’s silence again is likely to indicate no more than the absence of adequate technical means that have developed since then that provide the possibility for the tribunal, counsel, parties, and even witnesses to be together in a virtual room.

Third, Austrian statutes are also interpreted by *considering the system of norms* in which the provision at issue is embedded, including any relevant international context.¹² As indicated, Section 598 ZPO was modelled after Article 24(1) UNCITRAL Model Law as well as Section 1047(1) GZPO. There is no indication in the language or *travaux préparatoires* of the Model Law that the notion “oral hearing” was designed to include or exclude remote hearings.¹³ The same is true for the provision in the German *lex arbitri* and there is no consensus on this issue among German commentators that could provide guidance for the interpretation of Section 598 ZPO.¹⁴

Systematically, Section 598 ZPO also does not operate in isolation but in the context of other important precepts of arbitration: the right to be heard;¹⁵ the right to a fair trial;¹⁶ the Austrian procedural *ordre public*¹⁷ and within those parameters, the tribunal’s discretion, in the absence of the parties’ contrary agreement, to establish how the proceedings are to be conducted.¹⁸ In a systematic interpretation, it is thus not apparent that the requirement of an “oral” hearing should only be satisfied if that hearing is also “physical” rather than “remote”: where, in the particular circumstances of a case, a fair opportunity to present the case is ensured through remote means, there does not seem to

¹² R. WELSER and A. KLETECKA, *Bürgerliches Recht I*, fn. 8 above, paras. 92-93.

¹³ See Stephan WILSKE and Lars MARKERT, “§ 1047” in Volkert VORWERK and Christian WOLF, eds., *BeckOK ZPO*, 38th edn. (C.H. Beck 2020) para. 2.1.

¹⁴ While some commentators appear to suggest that Section 1047(1) GZPO grants the party that requests an “oral hearing” a right to a physical hearing, and that a remote hearing will only suffice if both parties agree (see Wolfgang VOIT, “§ 1047 GZPO” in Hans-Joachim MUSIELAK and Wolfgang VOIT, eds., *Zivilprozessordnung*, 17th edn. (Franz Vahlen 2020) para. 2; J. MÜNCH, “§ 1047” in Wolfgang KRÜGER and Thomas RAUSCHER, eds., *Münchener Kommentar zur Zivilprozessordnung Volume 3*, 5th edn. (Beck 2017) para. 9; Reto MANTZ and Jan SPOENLE, “Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung”, MDR (2020) p. 637 at p. 638; Jens-Peter LACHMANN, *Handbuch für die Schiedsgerichtspraxis*, 3rd edn. (Verlag Otto Schmidt 2008) para. 1588; S. WILSKE and L. MARKERT, “§ 1047” in V. VORWERK and C. WOLF, eds., *BeckOK ZPO*, fn. 13 above) others argue (including based on the principle enshrined in Section 128a GZPO that remote hearings are possible as a matter of principle even before German state courts) that remote hearings fall under the definition of oral hearings in arbitration proceedings (see Hanns PRÜTTING, “§ 1047 ZPO” in Hanns PRÜTTING and Markus GEHRLEIN, eds., *Zivilprozessordnung*, 12th edn. (Luchterhand Verlag 2020) para. 2; Nico GIELEN and Christian Johannes WAHNSCHAFTE, “Die virtuelle Verhandlung im Schiedsverfahren”, *SchiedsVZ* (2020) p. 257 at p. 262.)

¹⁵ Section 594(2), second sentence, ZPO; Section 611(1) No. 2 ZPO.

¹⁶ Section 594(2), first sentence, ZPO in connection with Section 611(1) No. 5 ZPO.

¹⁷ Section 611(1) No. 5 ZPO.

¹⁸ Section 594(1) ZPO.

be a qualitative difference that justifies a normative distinction. Put differently, if a party can properly address the tribunal “orally” by video, and this creates no concrete unfairness in the circumstances of the particular case, a requirement of physical presence appears artificial and systematically unwarranted.

Other systemic considerations assist this conclusion. For example, it is a corollary of the parties’ freedom and the arbitrators’ discretion to establish proceedings tailored to the specific case that arbitration proceedings enjoy significant flexibility in procedural matters. This flexibility has been hailed as a hallmark of arbitration, in Austria as elsewhere.¹⁹ In this regard, it bears emphasis that state courts have for a while permitted and even encouraged the remote taking of evidence and, during the COVID-19 pandemic, even remote hearings.²⁰ Indeed, the OGH in its recent decision of July 2020 expressly noted the widespread use of videoconferencing technology in state court proceedings.²¹ As discussed below,²² the fact that the legislature and the OGH consider this as generally compatible with the procedural framework governing state court proceedings, shows that the use of videoconferencing technology at the very least does not violate the mandate of procedural public policy and the right to a fair trial. If this is true in state court proceedings, remote hearings must be even more permissible in arbitrations seated in Austria. Indeed, in addition to the paradigm of flexibility in arbitration, it has long been accepted that the state court principles of full oral presentation of a party’s case (*Mündlichkeitsgrundsatz*) and the principle of immediacy (*Unmittelbarkeitsgrundsatz*) do not have the same unqualified application to arbitration proceedings. In the circumstances, it is difficult to conceive a mandatory requirement of physical presence, when the hearing is in fact conducted “orally” over a video call.

Fourth, a teleological construction of Section 598 ZPO yields the same result. Such an interpretation considers the objective purpose of a provision and the meaning that a statutory provision could reasonably have in the light of changed circumstances,²³ such as technological advances in remote hearing facilities.

¹⁹ Franz T. SCHWARZ and Christian W. KONRAD, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) para. 20-090; Christian HAUSMANINGER, “§ 577” in Hans FASCHING and Andreas KONECNY, eds., *Zivilprozessgesetze IV/2*, 1st edn. (rdb.at 2016) para. 4 ff.; Thomas H. WEBSTER, “Party Control in International Arbitration”, 19 Arb Int’l (2003) p. 119 at p. 142.

²⁰ See First Covid-19 Statute, Section 3(1), and Second Covid-19 Statute, Section 21.

²¹ OGH 23 July 2020, fn. 9 above, para. 11.2.2: “Video conference technology is widely used and accepted in court proceedings for hearings and or the taking of evidence (see e.g. Article 8 European Small Claims Procedure Regulation, Article 10(4) EU Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; §§ 277, 289a, 289b ZPO; §§ 153, 165, 127, 247a, 250 StPO; § 128a GZPO” (free translation by the Authors).

²² See sub-paragraphs b.3 and b.4 below.

²³ R. WELSER and A. KLETECKA, *Bürgerliches Recht I*, fn. 8 above, paras. 99-101.

The core purpose of an oral hearing, as enshrined in Section 598 ZPO, is to guarantee parties a particular expression of their right to be heard. The purpose of granting a party the right to insist on an oral hearing is to give that party the opportunity to address the tribunal directly and in an interactive way, to engage with questions from the tribunal and react to the opponent's arguments, and so to sway the tribunal. Concerning taking of evidence at an oral hearing, the purpose of the right to an oral hearing is to give parties an opportunity to examine witnesses and confront them live with impeaching material, in a way that a purely written process cannot achieve. Technical adequacy assumed, these purposes can be met by either a physical or a remote hearing.

Indeed, the “look and feel” of remote hearings is now very close to that of physical hearings in many ways. As a general rule, given the level of development of teleconferencing and telecommunications technology and as demonstrated by the widespread use of remote hearings during the COVID-19 pandemic, the assumption that, with proper set-up and resources, remote hearings are an adequate alternative to physical hearings appears valid. However, where the technical possibilities are limited or inadequate to fulfill the purpose as outlined above, arbitrators must consider this in exercising their procedural discretion. This may possibly compel them to hold a physical hearing in the individual circumstances of a particular case. This is because arbitrator discretion can only be exercised within the constraints of ensuring both parties' right to be heard and a fair trial.

The relevance of these developments for remote hearings in arbitrations seated in Austria becomes apparent against the backdrop of another recent OGH decision of January 2020.²⁴ In this decision, the OGH indicated amongst other things that Section 598 ZPO is designed to secure one aspect of the principle of full oral presentation (*Mündlichkeitsgrundsatz*)²⁵ that forms part of the Austrian procedural *ordre public* and

²⁴ Oberster Gerichtshof [OGH] [Supreme Court] 15 January 2020, 18 OCg 9/19a, available at

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20200115_OGH0002_018OCG00009_19A0000_000> (last accessed 16 March 2021) para. 3.2.b.

²⁵ As indicated above, the principle of “full oral presentation” of a party's case (*Mündlichkeitsgrundsatz*) does not have the same unqualified application to arbitration proceedings. In proceedings before state courts, this principle demands that a state court judge can only base his or her decision on pleadings and evidence that have been introduced into the proceedings orally (which is, in practice, largely realized by means of a legal fiction that the entire file, including the parties' written pleadings, is read out in the oral hearing if the judge makes a reference to it). See Christoph BRENN “§ 176” in Hans FASCHING and Andreas KONECNY, eds., *Zivilprozessgesetze II/3*, 1st edn. (rdb.at 2015) para. 43. In arbitration proceedings, the *Mündlichkeitsgrundsatz* only applies in the sense that the parties have a right to an oral hearing if one party requests it. As discussed above, this oral hearing usually serves the purpose of granting a party the opportunity to address the tribunal directly and in an interactive way, to engage with questions from the tribunal and react to the opponent's arguments, and to give parties an opportunity to examine witnesses and confront them with impeaching material before the tribunal. However, in arbitral proceedings seated

is applicable in arbitral proceedings as well: the right to an oral hearing if requested by one party pursuant to that provision.²⁶ However, as discussed, holding a remote hearing can in most circumstances be considered a reasonable alternative way to conduct a hearing “orally” and would thus not amount to a ground for setting aside the award.

Granted, the circumstances were somewhat peculiar in that case (and are therefore perhaps a limited basis for extrapolation): one party had announced that it did not intend to be present at the hearing, the second party had waived its right to a hearing, and there were no witnesses to examine. In these circumstances, the OGH held that an arbitral tribunal is free to exercise its discretion not to hold an oral hearing at all, if holding an oral hearing would have no added value and would thus only serve to add cost and time to the proceedings.²⁷ In particular, the court ruled that the benefits of an oral hearing are, first, to allow the parties to present their positions orally and, second, to take evidence. In the event that a hearing is not needed to achieve any of these purposes in the circumstances of the case, the arbitral tribunal’s decision not to hold it does not lead to the annulment of the award.²⁸ Along the same lines, if a tribunal considers, exercising its procedural discretion, that a *physical* hearing is not needed to achieve these purposes, but that a remote hearing will be sufficient, such a decision would also not endanger the award.

The OGH has expressly confirmed this conclusion in its recent July 2020 decision, as discussed above, which has attracted widespread attention.²⁹ Even though the OGH has not addressed, or interpreted, Section 598 ZPO as such in this decision,³⁰ it did examine the technical adequacy of taking witness evidence through a video platform. The OGH concluded that, as a general rule, a remote hearing will comply with the fundamental procedural principles of Austrian arbitration law just as well as a physical

in Austria there is no need – by way of a legal fiction or otherwise – for the parties to present all their pleadings and all their evidence orally to the tribunal in an oral hearing.

²⁶ So that not holding an oral hearing would also constitute a ground for challenging the award pursuant to Section 611(2) No. 5 ZPO.

²⁷ OGH 15 January 2020, fn. 24 above, para. 3.2.b.

²⁸ *Ibid.* at para. 3.2.c.

²⁹ Maxi SCHERER, Franz T. SCHWARZ, Helmut ORTNER and J. Ole JENSEN, “In a ‘First’ Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal’s Power to Hold Remote Hearings Over One Party’s Objection and Rejects Due Process Concerns”, Kluwer Arbitration Blog (24 October 2020) at <<http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/>> (last accessed 23 November 2020) (discussing OGH 23 July 2020, fn. 9 above).

³⁰ Rather, the OGH was asked to assess the challenge to an arbitrator’s impartiality on the basis that the arbitrator had proceeded with a remote hearing against the objections of one party. The OGH held that in the circumstances of that case, the arbitrator could not be challenged for procedural bias.

hearing, they may even be superior to physical hearings in certain respects.³¹ At the very least, therefore, the OGH did not deem remote hearings to be inferior to “physical” hearings, as long as technical challenges were appropriately considered and addressed. This decision thus underscores that, technical adequacy assumed, the objective purpose of Section 598 ZPO to guarantee the parties’ right to be heard by giving them the opportunity to address the tribunal directly and in an interactive way, will generally be achieved in a remote hearing.

On the basis of recent case law, and the proper interpretation of the ZPO, the better view is not to infer an absolute right to a physical hearing, and to instead accept remote hearings as a viable alternative to achieve the statutory purpose of an “oral” hearing. This general conclusion in favor of remote hearings could only be reversed by sufficiently strong countervailing factual considerations in a particular case,³² framed again by the analysis of the OGH in recent jurisprudence.

For example, the OGH emphasized that the right to fair and equal treatment will generally not be impaired by the fact that time zone differences may exist between participants in a remote hearing in an international arbitration. In the case, the time difference between the parties’ places of business meant that the hearing could not take place during core business hours for all hearing participants. The OGH held, however, that by concluding an arbitration agreement providing for VIAC arbitration, an institution based in Vienna, the respondents (who were located in Los Angeles) had, in principle, accepted the disadvantages resulting from the geographical distance to their place of business, including substantial travel and time differences. The OGH also emphasized that these disadvantages were not exacerbated by a remote hearing. To the contrary, the court took the view that starting a hearing at 6.00 am local time was less burdensome for the respondents than having to travel from Los Angeles to Vienna for an in-person hearing.³³

Likewise, the OGH held that blanket allegations concerning the potential misuse of videoconferencing technology in examining witnesses could not render them inappropriate as such. As a preliminary matter, the OGH found that the risk of witness tampering also existed in in-person hearings (e.g., through influencing a witness’ testimony prior to the hearing or feeding the witness information on other evidence adduced during the course of the hearing). The OGH then added that remote hearings allow for measures to control witness tampering that “partly go beyond those available at a conventional hearing”.³⁴ Such measures specific to remote witness testimony include the (technical) ability of all participants to observe the person to be examined closely and from the front; the possibility to record the evidence; the option to instruct the witness to look directly into the camera and keeping his or her hands visible on screen at all times (making it impossible to read any chat messages); and showing a 360 degree

³¹ OGH 23 July 2020, fn. 9 above, para. 11.2.

³² *Ibid.* at paras. 11.2.7 ff.

³³ *Ibid.* at para. 11.2.8.

³⁴ Free translation by the Authors.

view of the room in which he or she is testifying (ensuring that no other person is present).³⁵

It is clear that the OGH proceeds, at a minimum, on the basis that remote hearings are an adequate alternative to a physical hearing. It has been argued that the real-life experience of a physical hearing (including access to the body language of participants in the hearing or the “atmosphere” in the room at critical junctions of the hearing) may be somewhat truncated in a remote setting. But the OGH does not appear to consider these considerations to be decisive – and instead finds that other elements may even be improved and enhanced in a remote setting (including the possibility for each hearing participant to observe up-close and from the front the facial expression of a witness or expert). That a remote examination demands a different approach, and perhaps skill set, of counsel, may be true, but is no reason to label remote hearings systemically inferior if the technical set-up and resources are adequate.

The OGH also discussed another instructive factor that a tribunal may consider in exercising its procedural discretion pursuant to Section 594(1) ZPO to order a remote hearing even over the objection of one party: a party’s access to justice.³⁶ In circumstances in which weighty considerations (e.g., travel restrictions and social distancing measures during the COVID-19 pandemic) may render holding a physical hearing impossible or very difficult, at least for a considerable period of time, a remote hearing becomes the only feasible alternative to having an (oral) hearing at all. As the OGH has emphasized, in such cases, the constitutional³⁷ right to access to justice pursuant to Article 6 ECHR will also have to be taken into consideration when weighing all interests involved,³⁸ which includes the right to an expeditious determination of a dispute. Where there is a choice between no hearing at all and a remote hearing, the risk that holding a remote hearing would violate any fundamental procedural principles is even further reduced in these circumstances.³⁹

It will be interesting to see whether the balance in favor of remote hearings swings differently once the COVID-19 pandemic is under control. For example, once travel restrictions and social distancing measures are lifted, and physical hearings once again become equally possible, there is arguably less need for remote hearings that would justify their use if one accepts their perceived disadvantages and risks. But other considerations may still weigh in favor of remote hearings: if a physical hearing is too expensive for a party to fund, the principle of access to justice may compel a remote hearing as well. And in a world facing numerous other challenges, including climate change and the environmental cost associated with travel to physical hearings, it will be increasingly difficult to disregard the possibility of remote hearings.

³⁵ OGH 23 July 2020, fn. 9 above, para. 11.2.9.

³⁶ *Ibid.* at para. 11.2.4.

³⁷ P. OBERHAMMER, *Entwurf eines neuen Schiedsverfahrensrechts*, fn. 11 above, p. 92.

³⁸ OGH 23 July 2020, fn. 9 above, para. 11.2.4.

³⁹ *Ibid.*

From the normative perspective of Austrian law, the decisive question will be whether, in the circumstances of the individual case, a remote hearing can satisfy the purpose of an oral hearing as mandated by Austrian arbitration law, while granting both parties an adequate opportunity to present their respective cases. This will depend on the available technology; whether it is suitable for the particular case and the issues to be addressed; the availability of suitable technology to both sides; and the fairness for both parties of using these technological means. Put differently, once the normative possibility of remote hearings is accepted in principle, the exercise of ensuring fairness and equality between the parties is the same as in any other procedural matter in arbitration, guided by the parties' agreement and/or the arbitrators' discretion within the constraints of applicable mandatory 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: The right to a physical hearing is at present generally accepted in Austrian state court proceedings.

The right to an oral hearing before Austrian courts in civil proceedings is enshrined in Section 176 ZPO, which provides in relevant part: "The parties argue their case orally before the competent court".⁴⁰ This provision is generally understood to give parties a right to participate in the proceedings by appearing (or being represented) in a physical hearing.⁴¹

There are, however, provisions in the ZPO that do allow for the use of videoconferencing technology before Austrian courts in certain situations. For example,⁴² Section 277 ZPO allows evidence to be taken remotely that would otherwise have to be taken by way of judicial assistance (i.e., by another judge than the one that

⁴⁰ Free translation by the Authors.

⁴¹ Walter H. RECHBERGER and Thomas KLIČKA, "§ 277" in Walter H. RECHBERGER and Thomas KLIČKA, eds., *ZPO Kommentar*, 5th edn. (Verlag Österreich 2019) para. 2; Robert FUCIK, "§ 176" in Walter H. RECHBERGER and Thomas KLIČKA, eds., *ZPO Kommentar*, 5th edn. (Verlag Österreich 2019) para. 1; C. BRENN, "§ 176" in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze II/3*, fn. 25 above, para. 2; Alexander KLAUSER, "§ 176 ZPO" in Alexander KLAUSER and Georg KODEK, eds., *JN – ZPO*, 18th edn. (Manz'sche Verlags- und Universitätsbuchhandlung 2018).

⁴² Other examples include Sections 289a and 289b ZPO.

conducts the proceedings at hand and decides the case).⁴³ Indeed, the Austrian legislature has clarified that in these situations, taking evidence remotely is the preferred option and that taking evidence by way of judicial assistance should only be used in exceptional circumstances.⁴⁴ Even if such a remote taking of evidence does not constitute an “oral hearing” in the sense of the ZPO⁴⁵ and videoconferencing technology is “not generally permitted” as a substitute for a physical hearing before Austrian courts,⁴⁶ it is now a well-established and widely used feature of civil proceedings before Austrian courts.⁴⁷

In the context of the COVID-19 pandemic, the Austrian legislature has enacted provisions that even allow for complete remote hearings to ensure continued access to justice despite lockdowns, travel restrictions, and social distancing.⁴⁸ Even though these rules have only been enacted for a limited time (currently set to expire by 30 June 2021)⁴⁹ and, as a general rule, require the consent of both parties for a hearing to be held remotely (with consent being presumed if a party does not object within a time period set by the court),⁵⁰ these legislative measures do show that remote hearings are generally

⁴³ C. BRENN, “§ 176” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze II/3*, fn. 25 above, para. 2.

⁴⁴ Johann HÖLLWERTH and Helmut ZIEHENSACK, “§ 277” in *Taschenkommentar ZPO* (LexisNexis 2019) para. 2.

⁴⁵ C. BRENN, “§ 176” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze II/3*, fn. 25 above, para. 2; Walter H. RECHBERGER, “Zur Wandlung des Erscheinungsbildes des österreichischen Zivilprozesses durch seine Elektronisierung” in *FS M. SCHNEIDER* (Edn. Weblaws Bern 2013) p. 361 at pp. 380-381.

⁴⁶ W.H. RECHBERGER and T. KLICKA, “§ 277” in W.H. RECHBERGER and T. KLICKA, eds., *ZPO Kommentar*, fn. 41 above, para. 2. See also W.H. RECHBERGER, “Zur Wandlung des Erscheinungsbildes des österreichischen Zivilprozesses durch seine Elektronisierung”, fn. 45 above, p. 382.

⁴⁷ Walter H. RECHBERGER, “Die Anwendung moderner Informationstechnologien im österreichischen Zivilprozess” in Rudolf WELSER, ed., *Vorträge der Türkisch-österreichischen Juristenwoche 2012* (Manz’sche Verlags- und Universitätsbuchhandlung 2014) p. 129 at p. 138.

⁴⁸ See the discussion of these rules in sub-paragraph f.11 below. See Christian KOLLER, “Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht”, *JB1* (2020) p. 539 at pp. 539-541; Florian SCHOLZ-BERGER and Julius SCHUMANN, “Die Videokonferenz als Krisenlösung für das Zivilverfahren”, *ecolex* (2020) p. 469 at pp.469-470.

⁴⁹ See <https://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_10458/fnameorig_854842.html> (last accessed 16 March 2021).

⁵⁰ C. KOLLER, “Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht”, fn. 48 above, p. 541. Limited exceptions to the requirement of party consent are provided for in Section 3(1) of the First COVID-19-Statute (*Erstes Covid-19 Justizbegleitgesetz*, AB 139 BlgNR XXVII. GP 1).

compatible with the fundamental procedural principles governing state court proceedings – and may be preferable under certain circumstances.⁵¹

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: No.

To the extent a right to a physical hearing exists before state courts, this does not automatically extend to arbitration. Even though the provisions of the Austrian arbitration law are contained in the ZPO, their self-contained structure and the special character of arbitral proceedings require that they are interpreted autonomously.⁵²

Specifically, the issue of whether there is a right to a physical hearing under Austrian arbitration law must be assessed in light of the significant differences between state court proceedings and arbitration. These include the fundamental principle of party autonomy in arbitration and the broad discretion of the tribunal in conducting arbitral proceedings pursuant to Section 594(1) ZPO.⁵³ These also include the lack of a strict principle of full oral presentation of a party's case (*Mündlichkeitsgrundsatz*)⁵⁴ or a principle of immediacy (*Unmittelbarkeitsgrundsatz*)⁵⁵ in arbitration. These elements combine to create a much more flexible procedural framework that allows the tribunal to assess the need for a physical hearing in each individual case.

⁵¹ C. KOLLER, "Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht", fn. 48 above, p. 545, indicating that, even though remote hearings may not be considered to equivalent to physical hearings before state courts, they may serve as a useful "tool to ensure access to justice if a physical hearing, or a physical participation in a hearing, is not possible or faces significant obstacles" or maybe in cases in which holding a physical hearing "would require a disproportionate effort" (free translation by the Authors).

⁵² See also Alice FREMUTH-WOLF, "§ 579 ZPO" in Stefan RIEGLER, *et al.*, *Arbitration Law of Austria: Practice and Procedure* (Juris Publishing 2007) para. 20.

⁵³ Section 594(1) ZPO provides: "Subject to the mandatory provisions of this chapter, the parties are free to determine the rules of procedure. In doing so they may also refer to arbitration rules. Failing such agreement, the arbitral tribunal shall proceed in accordance with the provisions of this chapter and in other respects in its free discretion" (official translation, fn. 2 above). See also C. HAUSMANINGER, "§ 594" in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, para. 2; Barbara KLOIBER and Hartmut HALLER in Barbara KLOIBER, Walter H. RECHBERGER, Paul OBERHAMMER and Hartmut HALLER, eds., *Das neue Schiedsrecht* (Manz'sche Verlags- und Universitätsbuchhandlung 2006) p. 41.

⁵⁴ B. KLOIBER and H. HALLER in B. KLOIBER, W.H. RECHBERGER, P. OBERHAMMER and H. HALLER, eds., *Das neue Schiedsrecht*, fn. 53 above, p. 41.

⁵⁵ C. HAUSMANINGER, "§ 599" in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, para 5; F.T. SCHWARZ and C.W. KONRAD, *The Vienna Rules*, fn. 19 above, para. 20-201; Hans FASCHING (Manz'sche Verlags- und Universitätsbuchhandlung 1973) p. 104.

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

As discussed, in its recent decision of July 2020,⁵⁶ the OGH has emphasized that, to the extent that there is an influence of the procedural rules that govern state courts proceedings on Austrian arbitration law, these strengthen, rather than undermine, the case for the admissibility of remote hearings in arbitration.⁵⁷ In referencing to the rules of civil procedure before Austrian courts, the OGH focused on those provisions that expressly allow the remote taking of evidence under certain circumstances and drew the conclusion: “The pervasiveness of videoconferencing technology as accepted standard in conducting [state court] proceedings also bleeds into arbitral proceedings”.⁵⁸

Therefore, the OGH recognized that, as a general matter, the considerations underlying the wide-spread adoption of videoconferencing technology in proceedings before state courts (even if some of these, e.g., the possibility to conduct full remote hearings during the COVID-19 pandemic, are only of a temporary nature) speak in favor of accepting remote hearings more broadly in the legal ecosystem of Austrian arbitration law.

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. Even if Section 598 ZPO were to be interpreted as requiring a physical hearing, the parties are permitted to exclude a hearing altogether, or agree on any other fair mode of procedure, including by incorporating institutional rules that allow remote hearings.

As discussed,⁵⁹ Section 598 ZPO does not provide for a general right to a physical hearing in arbitrations seated in Austria. In any event, the provision expressly emphasizes that it is dispositive law, so that the parties can always establish by agreement their own framework for whether, and under what circumstances, a hearing should or must be held, and whether such a hearing should be conducted in person or remotely.⁶⁰

There are no restrictions as to when and how the parties can validly enter into such an agreement. Specifically, they may also do so in advance of, or during, the dispute and it is widely accepted that they can do so without having to comply with the form

⁵⁶ See sub-paragraph a.2 above.

⁵⁷ OGH 23 July 2020, fn. 9 above, para. 11.2.2.

⁵⁸ *Ibid.* (free translation by the Authors).

⁵⁹ See sub-paragraph a.2 above.

⁶⁰ See sub-paragraph a.2 above.

requirements for entering into a valid arbitration agreement under Austrian arbitration law (contained in Section 583 ZPO).⁶¹

In practice, an agreement not to insist on a physical hearing will merely amount to a confirmation of the authority of the tribunal to decide whether or not to hold a remote hearing in the particular circumstances of the case pursuant to Sections 594(1) and 598 ZPO. Such a confirmation may also result from the parties' agreement to arbitration rules that allow the tribunal to conduct an oral hearing remotely if it considers this appropriate in the circumstances. As discussed above, the VIAC has clarified in June 2020 that Article 30(1) of the Vienna Rules safeguards this discretionary authority of the tribunal.⁶²

The recent decision of the OGH of July 2020⁶³ indicates that such an agreement can also be made implicitly, including by not objecting to a proposed provision in a procedural order providing for the possibility of remote hearings that the tribunal has issued after consultation of the parties.⁶⁴

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: As a general rule, the tribunal is bound by the parties' agreement, but its contrary decision will typically not lead to a setting-aside of its award.

Section 594(1) ZPO provides:

“Subject to the mandatory provisions of this chapter, the parties are free to determine the rules of procedure. In doing so they may also refer to arbitration rules. Failing such agreement, the arbitral tribunal shall proceed in accordance with the provisions of this chapter, and in other respects in its free discretion”.⁶⁵

As discussed above, Section 598 ZPO is not mandatory and so vests the parties with the power to agree on the existence, form of, and framework for any hearing. Pursuant to Section 594(1) ZPO, the discretionary power of the tribunal ends where the parties have reached agreement on how to conduct the proceedings. The agreement to hold a physical hearing rather than a remote hearing is one such agreement that the parties may

⁶¹ Christian KOLLER, “Die Schiedsvereinbarung” in Christoph LIEBSCHER, Paul OBERHAMMER and Walter H. RECHBERGER, eds., *Schiedsverfahrensrecht I* (Verlag Österreich 2011) pp. 91, 224, at para. 3.210.

⁶² See sub-paragraph a.2 above. See also F.T. SCHWARZ and C.W. KONRAD, *The Vienna Rules*, fn. 19 above, para. 20-132; VIAC, “The Vienna Protocol”, fn. 4 above.

⁶³ See sub-paragraph a.2 above.

⁶⁴ OGH 23 July 2020, fn. 9 above, para. 11.1.1.

⁶⁵ Official translation, fn. 2 above.

enter into. If they do, they reduce the (residual) sphere of discretionary decision-making that would otherwise be allocated to the tribunal by Section 594(1) ZPO – and the tribunal will be bound by that agreement.⁶⁶

As a general rule, tribunals should take such a party agreement seriously, unless there are compelling reasons to deviate from such an agreement in a particular case. However, Austrian arbitration law generally does not provide for any specific legal consequences if a tribunal disregards such a procedural agreement of the parties. Specifically, if the tribunal violates an agreement by the parties to conduct the arbitral proceedings in a certain way, this does not *per se* constitute a ground for challenging (i.e., setting aside) the award.⁶⁷ Unlike Article 34(2)(a)(iv) Model Law and Section 1059(2) GZPO, the Austrian legislator decided against including violations of party agreements on procedural matters in the catalogue of grounds for challenging an award issued in Austria pursuant to Section 611 ZPO.⁶⁸

The legal consequences of a violation of Section 594(1) ZPO are thus very different from those of a violation of Section 598 ZPO above. The OGH has considered clear violations of Section 598 ZPO – i.e., conducting *no* hearing at all even though this is requested by at least one party – to constitute, in principle, a ground for setting aside the award.⁶⁹ This is because granting a party an oral hearing if it has requested one is viewed as a “particular concretization of the right to be heard,”⁷⁰ so that a violation of this provision will generally open up the award to a challenge pursuant to Section 611(1) No. 2 (violation of a right to be heard)⁷¹ and/or No. 5 (violation of Austria’s procedural *ordre public*).⁷²

However, the choice for a *remote* hearing over a *physical* one will not *per se* violate the right to be heard, or other fundamental procedural principles, as discussed above.⁷³

⁶⁶ C. HAUSMANINGER, “§577” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, paras. 33, 36, 38; P. OBERHAMMER, *Entwurf eines neuen Schiedsverfahrensrechts*, fn. 11 above, p. 101.

⁶⁷ C. HAUSMANINGER, “§ 598” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, para. 34; C. HAUSMANINGER, “§ 611 ZPO”, in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, paras. 111 ff.

⁶⁸ C. HAUSMANINGER, “§ 611” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, paras. 18, 32, 126; P. OBERHAMMER, *Entwurf eines neuen Schiedsverfahrensrechts*, fn. 11 above, p. 133.

⁶⁹ See Oberster Gerichtshof [OGH] [Supreme Court] 30 June 2010, 7 Ob 111/10i, available at

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2010_0630_OGH0002_0070OB00111_10I0000_000> (last accessed 16 March 2021) and OGH 15 January 2020, fn. 24 above, para. 3.2.b.

⁷⁰ See OGH 30 June 2010, fn. 69 above (free translation by the Authors).

⁷¹ *Ibid.*

⁷² See OGH 15 January 2020, fn. 24 above, para. 3.2.b.

⁷³ See sub-paragraph a.2 above.

Only if a tribunal's decision to conduct a remote hearing would *in the particular circumstances of the case* lead to a particular violation of fundamental procedural principles, will this decision potentially endanger the award.

A tribunal's disregard for the parties' agreement to conduct a physical (as opposed to remote) hearing will usually also not give rise to damages claims against the tribunal pursuant to Section 594(4) ZPO,⁷⁴ including because for such a claim to succeed under Austrian arbitration law, the award must have been set aside as a result of the arbitrator's violation.⁷⁵ As discussed, the decision to hold a remote hearing *per se* will generally not lead to such a result.

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: Generally, yes.

As discussed, Austrian arbitration law does not generally provide for a right to a physical hearing.⁷⁶ Section 598 ZPO only gives a party a right to an oral hearing and, as a general rule, it falls within the discretionary authority of the tribunal to determine whether the oral hearing shall be held as a physical or remote one.⁷⁷ However, as also discussed, the tribunal will have to hold a physical hearing and a party thus has a *de facto* right thereto where a remote hearing would be an inadequate alternative in the specific circumstances of the case, and so violate fundamental procedural rights.⁷⁸

Section 579 ZPO provides, as a general rule, and in line with Article 4 UNCITRAL Model Law:⁷⁹

⁷⁴ C. HAUSMANINGER, "§ 598" in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, paras. 34, 118; Walter H. RECHBERGER and Michael HOFSTÄTTER, "§ 594" in W.H. RECHBERGER and T. KLICKA, eds., *ZPO Kommentar*, fn. 41 above, para. 13.

⁷⁵ See Oberster Gerichtshof [OGH] [Supreme Court] 6 June 2005, 9 Ob 126/04a, available at

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2005_0606_OGH0002_00900B00126_04A0000_000> (last accessed 16 March 2021).

⁷⁶ See sub-paragraph a.2 above.

⁷⁷ See sub-paragraph a.2 above.

⁷⁸ See sub-paragraph a.2 above and sub-paragraph d.8 below.

⁷⁹ Article 4 UNCITRAL Model Law reads: "Waiver of right to object: 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

“If the tribunal has not complied with a procedural provision of [the Austrian arbitration law] from which the parties may derogate, or with an agreed procedural requirement of the arbitral proceedings, a party shall be deemed to have waived his right to object if it has not objected without delay after being informed thereof, or within the time limit provided”.⁸⁰

Unless the specific circumstances of the case create a particular unfairness impacting due process, the tribunal’s discretion to hold a remote hearing despite a request of one party to hold a physical hearing does not constitute any violation of the non-mandatory provision in Section 598 ZPO,⁸¹ because the party only had a right to an oral hearing, but not specifically to a physical hearing.

As also discussed, a decision by the tribunal, exercising its discretion to hold a remote hearing despite an agreement of the parties to hold a physical hearing, will generally not entail any legal consequences.⁸² Even if “the tribunal has not complied with [...] an agreed procedural requirement of the arbitral proceedings” in such a case, there are generally no remedies to be protected by raising an objection. Thus, to the extent that the parties do not have a remedy against the tribunal’s violation of their agreement, the waiver provision in Section 579 ZPO does not apply either.

Only in those rare cases in which holding a remote hearing instead of a physical hearing results in a violation of the right to be heard could there be a remedy (namely a claim for setting aside the award) that would be safeguarded by raising an objection pursuant to Section 579 ZPO. However, even in those cases, Section 579 ZPO does not apply. This is because the fundamental procedural principles that would be at issue in such a case are essential for any arbitral proceeding and are thus mandatory in Austrian arbitration law: the right to be heard, the principle of fair and equal treatment in connection with the procedural *ordre public*.⁸³

Consequently, in these cases, a party will generally be able to challenge the award if no physical hearing was held even if it did not object to the tribunal’s decision to hold a remote hearing at the time. The OGH has indicated, however, that it may still take into consideration a failure to raise an objection to an alleged infringement of the rights to be heard or treated fairly and equally as a possible indicator that the violation was, in fact,

is provided therefor, within such period of time, shall be deemed to have waived his right to object”.

⁸⁰ Official translation, fn. 2 above.

⁸¹ See sub-paragraphs a.1 and a.2 above.

⁸² See sub-paragraph c.6 above.

⁸³ C. HAUSMANINGER, “§ 594” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, para. 80; Andreas REINER, “§ 579 ZPO” in *Das neue österreichische Schiedsrecht* (LexisNexis ARD Orac 2006) para. 11; Martin PLATTE, “§594 ZPO” in S. RIEGLER, *et al.*, *Arbitration Law of Austria*, fn. 52 above, para. 3.

not that significant and/or detrimental to the party's position in the arbitration.⁸⁴ It may thus be advisable for a party considering to challenge an award due to a decision of the tribunal to hold a remote rather than a physical hearing to object to this decision "immediately", i.e., without undue delay, despite the language of Section 579 ZPO.⁸⁵

Finally, it is worth noting that the language and content of both Article 30(1) of the Vienna Rules ("Right to an oral hearing")⁸⁶ as well as Article 31 Vienna Rules⁸⁷ ("Waiver of right to object") are very similar to the provisions of Austrian arbitration law discussed above. Therefore, the application of these Articles of the Vienna Rules will lead to similar results in cases in which the parties have opted for a VIAC arbitration.

As an aside, pursuant to the New York Convention ("NYC"), parties will always have to raise an objection to any procedural violations of the tribunal in a timely fashion in order to assert these violations as grounds for refusing recognition and/or enforcement of the award.⁸⁸

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: Violations of the rights to be heard or of due process require a showing of prejudice.

⁸⁴ RIS-Justiz RS0045092 (T6); Oberster Gerichtshof [OGH] [Supreme Court] 1 April 2008, 5 Ob 272/07x, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2008_0401_OGH0002_0050OB00272_07X0000_000> (last accessed 16 March 2021).

⁸⁵ See C. HAUSMANINGER, "§ 579" in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, paras. 32-34, indicating that despite the statutory duty to object "immediately", the provision allows for a reasonable time to consider the seriousness of the violation and whether to raise an objection in the specific circumstances of the case. See also A. FREMUTH-WOLF, "§ 579 ZPO" in S. RIEGLER, *et al.*, *Arbitration Law of Austria*, fn. 52 above, para. 20; and A. REINER, "§ 579 ZPO" in *Das neue österreichische Schiedsrecht*, fn. 83 above, para. 12.

⁸⁶ For a quote of this provision see sub-paragraph a.1 above.

⁸⁷ VIAC, "The Vienna Protocol", fn. 4 above. Article 31 of the Vienna Rules provides: "Duty to object: If a party has knowledge of a violation by the arbitral tribunal of a provision of the Vienna Rules or other provisions applicable to the proceedings, it shall immediately file an objection with the arbitral tribunal, failing which the party shall be deemed to have waived its right to object."

⁸⁸ C. KOLLER, "Die Schiedsvereinbarung", fn. 61 above, para. 2.98.

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

A party could argue that, by denying a physical hearing, the tribunal violated its right to be heard in the specific circumstances of the case. The right to be heard is enshrined in Section 594(2) ZPO, which provides in relevant part: “Each party shall be afforded the right to be heard”.⁸⁹ The right to an oral hearing is considered a particular expression of the right to be heard, which, in particular circumstances, and as discussed above, can include the right to a physical hearing.

A violation of the right to be heard is sanctioned in Section 611(2) No. 2 ZPO, which provides for a setting aside of the award if “a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable for other reasons to present his means of attack or defence”.⁹⁰ Notably, the text of Section 611(2) No. 2 ZPO is narrower than just referring to a broad right to be heard, as Section 594(2) ZPO does. As a general rule, the OGH has therefore restricted setting-aside to cases where the violation of the right to be heard reached an equivalent level to a party not being able to present its case at all.⁹¹ In some decisions, the OGH also seems to reject an (unwritten) requirement that a violation of the right to be heard must have an impact on the tribunal’s decision in order to justify a challenge of the award (considering it sufficient, in one case, that it could not be ruled out that an opportunity to comment on certain documents may have had an impact on the tribunal’s assessment of relevant facts).⁹² Prominent commentators have agreed with such an approach, as it ensures that the integrity of the arbitral process is safeguarded.⁹³ Other commentators point to a recent decision of the OGH in which it seemed to take the view that the award cannot be set aside due to a violation of the right to be heard if this violation had no consequence for the result of the arbitration (rejecting a challenge of an award, *inter alia*, because there was an independent second justification for the decision that was based on an allegation that the party could actually present its arguments on).⁹⁴ The issue remains unsettled.

⁸⁹ Official translation, fn. 2 above.

⁹⁰ Official translation, fn. 2 above.

⁹¹ RIS-Justiz RS0045092, at https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Rechtssatznummer=RS0045092&SkipToDocumentPage=True&SucheNachRechtssatz=True&SucheNachText=False&ResultFunctionToken=6c61ab76-1d4d-4a42-8aac-c20c9ef9be1d&Dokumentnummer=JJR_19900906_OGH0002_0060OB00572_9000000_001 (last accessed 16 March 2021).

⁹² Oberster Gerichtshof [OGH] [Supreme Court] 24 September 1981, 7 Ob 623/81, EvBl 1982/77.

⁹³ See, e.g., Franz T. SCHWARZ, “Die Durchführung des Schiedsverfahrens” in C. LIEBSCHER, P. OBERHAMMER and W.H. RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, pp. 50, 51, at paras. 8/97-8/99; C. HAUSMANINGER, “§ 611” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, para. 107.

⁹⁴ Oberster Gerichtshof [OGH] [Supreme Court] 10 October 2014, 18 OCg 2/14i, at https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20141010_OGH0002_018OCG00002_14I0000_000 (last accessed 16 March 2021); W.H.

Separate from the right to be heard, Section 611(2) No. 5 ZPO sanctions violations of procedural public policy, i.e., fundamental values of procedural fairness. A party might therefore argue that the denial of a physical hearing violated fundamental principles of due process, including its rights to a fair trial under Article 6 ECHR, which forms part of the Austrian procedural *ordre public*. Prominent commentators consider that, in order to ensure an effective protection of these fundamental procedural principles, it should suffice for a challenge of the award to show a mere possibility that the violation affected the outcome of the arbitration.⁹⁵ In this context as well, others have taken a different view, arguing that some decisions of the OGH may indicate that an award can only be set aside due to a violation of procedural public policy if this violation had an impact on the outcome of the arbitration.⁹⁶

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: Yes, in a rare case in which the individual circumstances mean that not holding a physical hearing violates fundamental procedural principles and this impacts the outcome of the arbitration.

As discussed in detail above, Austrian arbitration law, and specifically Section 598 ZPO, does not provide for a right to a physical hearing as a general rule.⁹⁷ The protective purpose of Section 598 ZPO, providing that a party can demand an oral hearing (as opposed to a document-only arbitration), can in principle be achieved by holding either a remote or a physical hearing. The tribunal will decide, exercising its broad procedural

RECHBERGER and M. HOFSTÄDTER, “§ 611” in W.H. RECHBERGER and T. KLICKA, eds., *ZPO Kommentar*, fn. 41 above, para. 8.

⁹⁵ Christian KOLLER, “pre § 79” in Peter ANGST and Paul OBERHAMMER, eds., *Exekutionsordnung*, 3rd edn. (Manz’sche Verlags- und Universitätsbuchhandlung 2015) para. 624; F.T. SCHWARZ, “Die Durchführung des Schiedsverfahrens”, fn. 93 above, p. 50, at para. 8/98; Christoph LIEBSCHER, “Rechtsbehelfe gegen den Schiedsspruch” in C. LIEBSCHER, P. OBERHAMMER and W.H. RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, p 481 at para. 11/119.

⁹⁶ W.H. RECHBERGER and M. HOFSTÄDTER, “§ 611” in W.H. RECHBERGER and T. KLICKA, eds., *ZPO Kommentar*, fn. 41 above, para 23, with reference to RIS-Justiz RS0110743 (T6), Oberster Gerichtshof [OGH] [Supreme Court] 26 January 2005, 3 Ob 221/04b, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2005_0126_OGH0002_0030OB00221_04B0000_000> (last accessed 16 March 2021); Oberster Gerichtshof [OGH] [Supreme Court] 28 September 2016, 18 OCg 2/16t, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2016_0928_OGH0002_018OCG00002_16T0000_000> (last accessed 16 March 2021).

⁹⁷ See sub-paragraph a.2 above.

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discretion, whether holding a remote or a physical hearing is appropriate in the circumstances of the case.

For this reason, the decisions of the OGH that hold that a violation of a party's right to an *oral* hearing pursuant to Section 598 ZPO will generally lead to an award being set aside, are not applicable if the tribunal decides to hold the oral hearing remotely. Put differently, Section 598 ZPO implies a sanction for the violation of a party's right to an oral hearing but does not sanction the tribunal's decision on *how* to conduct that oral hearing, i.e., physically or remotely.

The first instructive OGH decision in this regard⁹⁸ was issued some three years after the new 2006 Austrian arbitration law was enacted. The OGH considered that, under the previous arbitration law, a tribunal had broad discretion to conduct a documents-only arbitration despite an application to hold an oral hearing. However, in 2006, the legislature introduced, for the first time, an express right to an oral hearing pursuant to Section 598 ZPO. The OGH held that this new provision would be entirely without purpose if there were still no consequences in case a tribunal ignored a party's application for an oral hearing:

“If a tribunal could comply with the legislator's intent to grant the parties their right to be heard simply by giving them an opportunity to submit written pleadings irrespective of the obligation to hold an oral hearing if requested pursuant to Section 598 ZPO, this would be identical to the legal situation under the old arbitration law. [...] If the amendment of the arbitration law concerning this specific issue is to have any practical relevance, a violation of a request for an oral hearing by the tribunal must, contrary to the previous legal situation, regularly constitute a ground for setting aside the award pursuant to Section 611(2) No 2 ZPO”.⁹⁹

It is important, however, that the OGH explicitly justified this conclusion on the basis that a *documents-only* arbitration cannot be considered sufficient to ensure the right to be heard if a party requested an opportunity to address the tribunal orally, i.e., in an *oral hearing*. As discussed,¹⁰⁰ as a general rule, a *remote hearing* also gives a party an opportunity to address the tribunal orally and not just in writing. Therefore, if a tribunal exercises its discretion to hold a remote hearing despite the application of a party or even the agreement of both parties to hold a physical hearing, such a situation is not captured by this decision of the OGH.

⁹⁸ OGH 30 June 2010, fn. 69 above, indicating that the right to an oral hearing in Section 589 ZPO is “a concretization of the right to be heard” (free translation by the Authors) and a violation of this right thus amounts to a ground for setting aside the award pursuant to Section 611(2) No. 2 ZPO.

⁹⁹ OGH 30 June 2010, fn. 69 above (free translation by the Authors).

¹⁰⁰ See sub-paragraph a.2 above.

As discussed above,¹⁰¹ the OGH has confirmed this conclusion in its recent decision of July 2020,¹⁰² holding that, as a matter of principle, holding a remote hearing instead of a physical hearing does not *per se* violate the party's right to be heard or his or her right to be treated fairly and equally.¹⁰³ Rather, only in circumstances in which conducting a remote hearing would violate fundamental procedural principles (including the right to be heard or the right to fair and equal treatment) in the specific circumstances of the case, may such a decision of the tribunal endanger the award.¹⁰⁴

Assuming there are no concerns about technical adequacy, the fact scenarios in which holding a remote hearing may indeed violate these fundamental principles will be rare, as discussed above.¹⁰⁵ In situations in which a party's access to justice pursuant to Article 6 ECHR (which is of constitutional weight in Austria) would be impaired by insisting on a physical hearing (as may be the case during the COVID-19 pandemic), the risk that holding a remote hearing would violate any fundamental procedural principles is even further reduced.¹⁰⁶

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: Generally, no.

Austria acceded to the NYC in 1961. Austrian arbitration law and the Enforcement Act declare the NYC to be directly applicable to the recognition and enforcement of foreign awards in Austria.¹⁰⁷ Austrian courts¹⁰⁸ have not yet rendered a decision

¹⁰¹ See sub-paragraph a.2 above.

¹⁰² See sub-paragraph a.2 above.

¹⁰³ OGH 23 July 2020, fn. 9 above, para. 11.2.4.

¹⁰⁴ OGH 15 January 2020, fn. 24 above.

¹⁰⁵ See sub-paragraph a.2 above.

¹⁰⁶ OGH 23 July 2020, fn. 9 above, paras. 10.2.7; 11.2.4.

¹⁰⁷ Section 614(1) ZPO; Sections 406, 416(1) Austrian Enforcement Act.

¹⁰⁸ A party seeking enforcement of a foreign award in Austria must file for a declaration of enforceability with the district court (*Bezirksgericht*) where the defendant has its domicile or place of business or the district court where the enforcement is to be carried out. The decision can be appealed to the regional court (*Landesgericht*) and, ultimately, the OGH, subject to Section 411 of the Austrian Enforcement Act. See Section 409 EO; Andreas REINER and Tamara MANASIJEVIC, "Enforcing arbitral awards in Austria", LexisNexis, available at

specifically addressing an alleged violation of a right to a physical hearing in the context of the NYC. Therefore, the answer to this question is based on the general standards applied to the recognition and enforcement of foreign awards in Austria.

As a general rule, Austrian courts adopt a distinctly enforcement-friendly approach in applying the NYC. First, they interpret the grounds for refusing recognition and enforcement in Article V of the NYC narrowly.¹⁰⁹ Second, a party cannot rely on a procedural violation in the enforcement stage if it has not raised an objection at the time the violation happened in the arbitration.¹¹⁰ Third, a violation of one of the fundamental principles in Article V NYC will generally only prevent enforcement if it had an impact on the award.¹¹¹

As discussed in this section, Austrian courts interpret the grounds for refusing recognition and enforcement of foreign awards at issue here in such a way that they only apply in the rare cases in which (due to the specific circumstances of the case) holding a remote rather than a physical hearing actually leads to a violation of Austria's procedural *ordre public*, specifically a party's right to be heard or to be treated fairly and equally.

Article V(2)(b) NYC. The assessment of whether holding a remote hearing rather than a physical one amounted to a violation of "the public policy of that country" pursuant to Article V(2)(b) NYC will be based on the procedural *ordre public* of Austria as the enforcement state.¹¹²

<[https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5NMP-J401-DXSN-64VC-00000-](https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5NMP-J401-DXSN-64VC-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=enforcing-arbitral-awards-in-austria)

[00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=enforcing-arbitral-awards-in-austria](https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5NMP-J401-DXSN-64VC-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=enforcing-arbitral-awards-in-austria)> (last accessed 27 November 2020).

¹⁰⁹ Christian KOLLER and Katharina PLAVEC, "60 Jahre NYÜ und der OGH eine Retrospektive", *ecolex* (2018) p. 882.

¹¹⁰ C. KOLLER, "Die Schiedsvereinbarung", fn. 61 above, para. 2.98.

¹¹¹ For violations of Article V(1)(d) NYC, see Oberster Gerichtshof [OGH] [Supreme Court] 13 April 2011, 3 Ob 154/10h, at <https://rdb.manz.at/document/ris.just.JJT_20110413_OGH0002_0030OB00154_10H0000_000> (last accessed 16 March 2021); Dietmar CZERNICH, *New Yorker Schiedsübereinkommen: UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche; Kurzkommentar* (LexisNexis ARD ORAC 2008). For violations of Article V(2)(b) NYC, see Christian KOLLER, "Anerkennung und Vollstreckung von Schiedssprüchen" in C. LIEBSCHER, P. OBERHAMMER and W.H RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, para. 12.84; Thomas EILMANNSBERGER, "Die Bedeutung der Art. 81 und 82 EG für Schiedsverfahren", *SchiedsVZ* (2006) p. 5 at p. 14.

¹¹² Formally, the difference remains that courts can rely on a violation of Austrian public policy pursuant to Article V(2) NYC *sua sponte* even if a party has not raised such a violation.

As discussed,¹¹³ such a decision of a tribunal will not *per se* amount to a violation of the Austrian procedural *ordre public*.¹¹⁴ Rather, only if the specific circumstances of the case are such that holding a remote hearing would actually violate the most “fundamental principles of an orderly procedure”¹¹⁵ in the Austrian legal system, like a party’s right to be heard or its right to fair and equal treatment, could recognition and enforcement of a foreign award be denied on the basis of Article V(2)(b) NYC. Also, any such violations would only trigger an application of this provision to the extent that they are internationally accepted to be of fundamental significance (i.e., form part of Austria’s international public policy).¹¹⁶

In practice, to make this determination, Austrian courts would use the same considerations as they do to assess whether a ground for setting aside pursuant to Section 611(2) No. 2 ZPO (violation of a right to be heard) or pursuant to Section 611(2) No. 5 ZPO (violation of Austria’s procedural *ordre public*, including the principle of fair and equal treatment) exists.¹¹⁷ As discussed in detail above,¹¹⁸ technical adequacy assumed, a decision by a tribunal holding a remote rather than a physical hearing will cross this high threshold only in rare cases.¹¹⁹

Article V(1)(b) NYC. The assessment of Austrian courts whether a party was “unable to present its case” in the sense of Article V(1)(b) NYC is performed on the basis of Austrian law; courts will not look at whether and to what extent a right to a physical hearing existed at the seat.¹²⁰ The right to be heard is considered to form part of and be specific expression of the Austrian procedural public policy¹²¹ and the considerations here are thus very similar to the ones discussed above.

¹¹³ See sub-paragraph c.6 above.

¹¹⁴ See sub-paragraph d.9 above.

¹¹⁵ Oberster Gerichtshof [OGH] [Supreme Court] 24 March 2013, 9 Ob 27/12d, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2013_0424_OGH0002_0090OB00027_12D0000_000> (last accessed 16 March 2021) (RdW (2013) p. 467). See also C. KOLLER, “Anerkennung und Vollstreckung von Schiedssprüchen” in C. LIEBSCHER, P. OBERHAMMER and W.H RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, para. 12.85.

¹¹⁶ Franz T. SCHWARZ and Helmut ORTNER, “The Arbitration Procedure – Procedural Ordre Public and the Internationalization of Public Policy in Arbitration” in Christian KLAUSEGGER, Peter KLEIN, *et al.*, eds., *Austrian Arbitration Yearbook 2008* (Manz’sche Verlags- und Universitätsbuchhandlung 2008) p. 133 at p. 143.

¹¹⁷ P. OBERHAMMER, *Entwurf eines neuen Schiedsverfahrensrechts*, fn. 11 above, p. 133; contrary to the NYC, the Austrian ZPO has a separate provision for violations of the substantive *ordre public* in Section 611(2) No. 8 ZPO.

¹¹⁸ See sub-paragraph a.2 above.

¹¹⁹ See sub-paragraph c.6 above.

¹²⁰ Oberster Gerichtshof [OGH] [Supreme Court] 17 February 2016, 3 Ob 208/15g, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2016_0217_OGH0002_0030OB00208_15G0000_000> (last accessed 16 March 2021); D. CZERNICH, “Art. V” in *New Yorker Schiedsübereinkommen*, fn. 111 above, para. 19.

¹²¹ See sub-paragraph d.7 above.

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Here too, and as discussed in detail above,¹²² a decision of a tribunal to hold a remote hearing rather than a physical hearing will not *per se* amount to a violation of the right to be heard. Rather, only if holding a remote hearing was not sufficient to ensure that a party had an adequate opportunity to present its case, due to the specific circumstances of the case, may the Austrian enforcement court use its discretion to deny recognition and enforcement of the award.¹²³

The legal standard that Austrian courts apply to determine whether there was a relevant violation of the right to be heard in enforcement proceedings is equivalent to the one applied in setting aside proceedings pursuant to Section 611(2) No. 2 ZPO.¹²⁴ In line with the *favor arbitri* applied in setting aside proceedings and the enforcement friendly approach of Austrian courts, this principle is interpreted narrowly and thus the threshold for establishing that the right to be heard was violated is high.¹²⁵ As discussed in detail above,¹²⁶ technical adequacy assumed, this high threshold will be met only rarely.

Article V(1)(d) NYC. On first blush, whereas the grounds for refusing recognition and enforcement discussed above mirror those for setting aside awards in Austria, things are different with regard to Article V(1)(d) NYC.

This provision allows Austrian courts to refuse recognition and enforcement of an award, *inter alia*, if “the arbitral procedure was not in accordance with the agreement of

¹²² See sub-paragraphs a.2 and d.9 above.

¹²³ Oberster Gerichtshof [OGH] [Supreme Court] 19 December 2018, 3 Ob 153/18y, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2018_1219_OGH0002_0030OB00153_18Y0000_000> (last accessed 16 March 2021).

¹²⁴ Oberster Gerichtshof [OGH] [Supreme Court] 18 April 2012, 3 Ob 38/12b, at <https://rdb.manz.at/document/ris.just.JJT_20120418_OGH0002_0030OB00038_12B0000_000> (last accessed 16 March 2021); Oberster Gerichtshof [OGH] [Supreme Court] 1 September 2010, 3 Ob 122/10b, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2010_0901_OGH0002_0030OB00122_10B0000_000> (last accessed 16 March 2021); Oberster Gerichtshof [OGH] [Supreme Court] 27 November 1991, 3 Ob 1091/91, at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_1991_1127_OGH0002_0030OB01091_9100000_000> (last accessed 16 March 2021) (IPRax (1992) p. 33). See also C. KOLLER, “Anerkennung und Vollstreckung von Schiedssprüchen” in C. LIEBSCHER, P. OBERHAMMER and W.H RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, para. 12.65; C. KOLLER, “§ 79” in P. ANGST and P. OBERHAMMER, eds., *Exekutionsordnung*, fn. 95 above, para. 622; C. HAUSMANINGER, “§ 611” in H. FASCHING and A. KONECNY, eds., *Zivilprozessgesetze IV/2*, fn. 19 above, paras. 102, 105.

¹²⁵ See also C. KOLLER, “Anerkennung und Vollstreckung von Schiedssprüchen” in C. LIEBSCHER, P. OBERHAMMER and W.H RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, para. 12.69; see also sub-paragraph c.6 above.

¹²⁶ See sub-paragraphs a.2, d.8, and d.9 above.

the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.” As discussed above,¹²⁷ however, the Austrian legislature has made a conscious decision, not to provide for mere violations of procedural agreement by the parties or of the procedural rules of the arbitration law *per se* to amount to a reason for setting aside an award.¹²⁸

However, in its practical application by Austrian courts, this ground for refusing recognition and enforcement, too, mirrors the same considerations discussed above. Specifically, Austrian courts interpret this ground extremely narrowly and, in fact, will only consider a violation of procedural agreements or rules serious enough if they amount to a violation of the procedural *ordre public* in the specific circumstances of the particular case.¹²⁹ Again, this approach of Austrian courts reflects a strong pro-enforcement bias.

In conclusion, only rarely will a party be able to resist recognition and enforcement of an award pursuant to Article V NYC because a tribunal decided to hold a remote hearing rather than a physical hearing – even if holding a physical hearing was requested by one party or agreed by both parties. Rather, only if this decision of the tribunal actually led to a violation of fundamental procedural principles, particularly the right to be heard and to fair and equal treatment, would Austrian courts deny recognition and enforcement of a foreign award on that basis. As in cases of challenges to an award, technical adequacy assumed, this high threshold would only be reached in extreme cases.

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 Austrian legislature has adopted temporary COVID-19-related measures allowing, *inter alia*, the use of full remote hearings in civil litigation; VIAC has also taken measures to clarify or adjust the Vienna Rules in light of the challenges of the pandemic.

¹²⁷ See sub-paragraph d.8 above.

¹²⁸ See also C. KOLLER, “Anerkennung und Vollstreckung von Schiedssprüchen” in C. LIEBSCHER, P. OBERHAMMER and W.H RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, para. 12.72; D. CZERNICH, “Art. V” in *New Yorker Schiedsübereinkommen*, fn. 111 above, para. 37.

¹²⁹ OGH 13 April 2011, fn. 111 above, para. 8. See also C. KOLLER, “Anerkennung und Vollstreckung von Schiedssprüchen” in C. LIEBSCHER, P. OBERHAMMER and W.H RECHBERGER, eds., *Schiedsverfahrensrecht II*, fn. 61 above, para. 12.74.

Among the legislative measures that Austria enacted as a response to the COVID-19 pandemic were “Accompanying Judicial Acts” (*Justizbegleitgesetze*), which addressed, among others, the challenges that the pandemic posed to the judiciary system.

As an initial measure, and until 6 May 2020, all non-essential civil proceedings were suspended.¹³⁰ Only proceedings that were “strictly necessary,” particularly to prevent a party from suffering grave and irreparable harm, were allowed to go forward and for these the legislature accepted that they be conducted remotely.¹³¹ After the severe lockdown restrictions imposed during the first wave were lifted, physical hearings were generally permitted again (if the necessary safety measures were implemented),¹³² but remote hearings remain possible (provisionally until 31 June 2021),¹³³ but – save for certain narrow exceptions¹³⁴ – require the consent of both parties.¹³⁵ Courts can set a time limit for parties to respond to a proposal to hold a remote hearing; if a party does not object within that specified time limit, their consent will be assumed. It is noteworthy that the original legislation even allowed for remote hearings to be conducted telephonically.¹³⁶ The updated rule requires a video conference system with the judge presiding over the hearing from the courtroom.¹³⁷

¹³⁰ First Accompanying Judicial Act, Sec. 3, BGBl I 16/2020. See C. KOLLER, “Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht”, fn. 48 above, p. 539. For criminal proceedings different legislative measures were enacted. According to these, e.g., remote hearings about the continuation of pre-trial detentions are now generally possible for the duration of the pandemic. See Martin STRICKER, “Aktuelle Änderungen durch COVID-19 im Strafrecht”, CuRe (2020) p. 13.

¹³¹ C. KOLLER, “Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht”, fn. 48 above, p. 540 ff.; Martin LUTSCHOUNIG, “COVID-19 und Tagsatzungen in Insolvenzverfahren”, 59 ZIK (2020) p. 3.

¹³² AB 139 BlgNR XXVII. GP 1. See also the instructions of the Ministry of Justice on “Conduct in Court Buildings, Public Prosecutor’s Offices and Hearings”, available at <[https://justiz.gv.at/file/2c94848a6ff6ffb20170de903c3a403a.de.0/sars-cov-2-_verhaltensregeln_\(infoblatt\).pdf](https://justiz.gv.at/file/2c94848a6ff6ffb20170de903c3a403a.de.0/sars-cov-2-_verhaltensregeln_(infoblatt).pdf)> (last accessed 8 December 2020).

¹³³ See <https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_00895/fnameorig_838217.html> (last accessed 16 March 2021).

¹³⁴ AB 139 BlgNR XXVII. GP 2.

¹³⁵ First Accompanying Judicial Act, Sec 3(1) No 1, BGBl I 30/2020.

¹³⁶ AB 112 BlgNR XXVII. GP 9; Ulrike FRAUENBERGER-PFEILER, “Zivilverfahrensrechtliche Aspekte der COVID-19-Gesetzgebung”, JAP (2019/2020) p. 231 at p. 234.

¹³⁷ C. KOLLER, “Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht”, fn. 48 above, p. 542; F. SCHOLZ-BERGER and J. SCHUMANN, “Die Videokonferenz als Krisenlösung für das Zivilverfahren”, fn. 48 above, p. 473.

The VIAC had already implemented an electronic case management system in 2019, which allowed it to remain fully operational throughout the COVID-19 pandemic.¹³⁸ Further, Article 12(2) Vienna Rules grants tribunals the discretionary authority to decide on the manner in which communications, including exhibits, shall be transmitted and states that “[t]he Secretariat shall receive all written communications between the arbitral tribunal and the parties in electronic form.” Based on this provision, the VIAC has encouraged parties during the COVID-19 pandemic “to submit all written submissions, and any supporting documentation, including witness statements and expert reports, preferably by electronic means”.¹³⁹

For all proceedings that commence after 31 March 2020, Article 36(5) of the Vienna Rules allows for awards to be served on the parties in electronic form “if it is not possible or feasible to serve the award in paper form within a reasonable time”.¹⁴⁰ In case of awards in electronic copies, the signature requirement is met by a “qualified electronic signature”.¹⁴¹ The new version of Article 36(5) further provides that a copy of the award in paper form may be served at a later stage.

As mentioned above,¹⁴² the VIAC has also expressly clarified in its Vienna Protocol of June 2020 that the term “oral hearing” in the Vienna Rules encompasses remote hearings.¹⁴³

¹³⁸ VIAC, “Measures re COVID-19”, available at <<https://www.viac.eu/en/arbitration/general-measures-covid-19>> (last accessed 24 November 2020).

¹³⁹ *Ibid.*, second bullet point. Similarly, Article 12(1) Vienna Rules requires the Statement of Claim and its accompanying exhibits to be submitted in electronic form (in addition to hardcopies in an appropriate number of copies).

¹⁴⁰ See also Alice FREMUTH-WOLF, “Auswirkungen der COVID-19-Krise auf VIAC-Schiedsverfahren”, *ecolex* (2020) p. 372 at p. 374.

¹⁴¹ *Ibid.* See also Section 4(1) of the Signature and Trust Service Act (*Signatur- und Vertrauensdienstgesetz*).

¹⁴² See sub-paragraph a.1 above.

¹⁴³ VIAC, “The Vienna Protocol”, fn. 4 above, p. 2: “The Vienna Rules are currently silent on the permissibility of conducting hearings remotely rather than in person. Article 30 (1) of the Vienna Rules only requires an ‘oral hearing’, if a party so requests, but not a hearing ‘in person’: a remote hearing that allows parties to orally present their case satisfies this provision in principle”.