



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: No.

The Belgian *lex arbitri*, namely Part VI of the Belgian Judicial Code (hereinafter, “BJC”), which equally applies to domestic and international arbitration proceedings seated in Belgium, does not provide for the right to a physical hearing in arbitration.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: It can be excluded.

Part VI of the BJC only sets out general rules in relation to arbitration hearings and does not specify how the arbitration hearings should be conducted. The parties and/or the arbitral tribunal enjoy a very broad discretion in this respect.

Pursuant to Article 1700 BJC, parties are free to determine the procedural rules that will apply to the arbitration proceedings, provided these rules do not deviate from certain mandatory principles (including due process). Therefore, the parties to the arbitration proceedings may decide to organize hearings either physically or remotely. To the extent that the parties have not specifically agreed on a procedure, Article 1700 BJC allows the arbitral tribunal to take any appropriate decision on the conduct of the hearings.¹ This

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¹ Article 1700, para. 2, BJC provides that: “In the absence of such an agreement, the arbitral tribunal may, subject to the provisions of Part 6 of this Code, determine the rules of procedure applicable to the arbitration it deems appropriate” (free translation by the Authors).

broad procedural discretion confirms that the arbitrators may decide on the conduct of a hearing, including to do so remotely.

In addition, paragraph 2 of Article 1701 BJC provides that an arbitral tribunal may, after consulting the parties, hold the hearings and meetings “at any place it considers appropriate”, regardless of the seat of the arbitration.² While this provision does not specify whether the place chosen by the arbitral tribunal to conduct the hearing must be a physical location, the broad degree of discretion granted to the arbitrators suggests that they can convene a remote hearing.

This is further confirmed by paragraph 4 of Article 1700 BJC,³ which states that the arbitral tribunal may hear any person it deems appropriate, without the witness having to take an oath. Physical presence is not required.

Finally, Article 1705 BJC provides that, unless the parties have agreed that there shall be no hearing, the arbitral tribunal shall hold a hearing at an appropriate stage of the arbitral proceedings if at least one party so requests.⁴ This means that arbitral proceedings may be held without hearing at all and that the tribunal can rule solely on the basis of documents only if the parties agree. This also confirms that a physical hearing is not legally required.

Tellingly, the last version of the Arbitration Rules of the CEPANI, the Belgian Centre for Arbitration and Mediation, in force since 1 July 2020 expressly provides that the arbitrators shall decide whether the hearing will be held “physically, by videoconference, teleconference, any other appropriate means of communication or by a combination of the foregoing methods”.⁵

b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

² Article 1701 BJC provides that: “Para. 1. The parties may decide on the place of arbitration. Failing such a decision, the place of arbitration shall be determined by the arbitral tribunal, considering the circumstances of the case, including the convenience of the parties. If the place of arbitration has not been determined by the parties or the arbitrators, the place where the award is made shall be deemed to be the place of arbitration. Para. 2. Notwithstanding the provisions of § 1 and unless otherwise agreed by the parties, the arbitral tribunal may, after consultation with the parties, hold its hearings and meetings at any other place it considers appropriate” (free translation by the Authors).

³ Article 1700, para. 4, sub-paragraph 2, BJC provides that: “[The arbitral tribunal] can hear any person. This hearing takes place without taking the oath” (free translation by the Authors).

⁴ Article 1705, para. 1, BJC provides that: “Unless the parties have agreed that no oral proceedings shall be held, the arbitral tribunal shall hold such proceedings at an appropriate stage of the arbitration if a party so requests” (free translation by the Authors).

⁵ Article 24.3 of the CEPANI Arbitration Rules 2020, in force as from 1 July 2020.

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: No.

No legal provision prohibits remote hearings before Belgian judicial courts. Some Belgian authors consider that a remote hearing is in line with Belgian procedural law.⁶ They mostly rely on the case law of the European Court of Human Rights which has confirmed that remote hearings are compatible with the requirements enshrined in Article 6 of the European Convention on Human Rights (hereinafter, “ECHR”).⁷

The main issue of remote hearings before judicial courts concerns the publicity requirement imposed by Article 148 of the Belgian Constitution and Article 6 of the ECHR. Under Article 148 of the Belgian Constitution, a court can only order the proceedings to be held *in camera* when it is justified by “public policy or ethics”. According to some Belgian authors, the COVID-19 pandemic may be regarded as a danger to public safety, which may justify remote hearings, not accessible to the public.⁸ The decision to hold a remote hearing not accessible to the public must be reasoned.

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

Save for some exceptions and unless otherwise agreed by the parties, the Belgian general rules of civil procedure (applicable before State courts) do not apply to arbitrations held in Belgium.⁹ There is no right to or requirement for a public hearing in arbitration.

⁶ Dominique MOUGENOT, Jean-François VAN DROOGHENBROECK, Damien CHEVALIER, Bénédicte INGHELS, Arnaud HOC, Bertrand DE CONINCK and Florence REUSENS, “La procédure civile en période de Covid-19 – Commentaires et analyses de l’arrêt royal no 2 du 9 avril 2020”, J.T., 2020, no. 6814, pp. 330-338.

⁷ *Marcello Viola v. Italy*, no. 45106/04, §§63 ff., ECHR 2006-XI, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, ECHR 2009.

⁸ D. MOUGENOT, J.F. VAN DROOGHENBROECK, D. CHEVALIER, B. INGHELS, A. HOC, B. DE CONINCK and F. REUSENS, “La procédure civile en période de Covid-19”, fn. 6 above; Dominique MOUGENOT, Jean-François VAN DROOGHENBROECK and Arnaud HOC, “Divers – Les ressources de la procédure écrite dans la crise COVID 19 – Faire pour un mieux en 10 questions”, J.T., 2020, no. 6809, pp. 250-252.

⁹ Article 1710 BJC provides that: “The Arbitral Tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute” (free translation by the Authors).

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For the surplus, see sub-paragraph a.2 above.

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

A right to a physical hearing in arbitration does not exist in Belgium (see sub-paragraphs a.2 and b.4 above). As a result, the parties can agree, and the Tribunal can order that hearings take place remotely.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: Uncertain.

As explained above, Belgian law does not provide for a right to a physical hearing in arbitration. Because of the importance of party autonomy, the parties can in principle agree that hearings shall only be held physically, and, in such circumstances, the tribunal will in principle have to respect the parties' agreement.

This being said, if the parties' agreement to hold hearings exclusively physically was included in their arbitration clause but if, subsequently, one of the parties takes the view that this agreement must be amended based on circumstances that were unknown at the time the arbitration clause was agreed upon (COVID-19 for instance), we believe the arbitral tribunal would then be authorized to hold remote hearings instead of physical ones, after having heard both parties and based on a reasoned decision.

The opposing party could possibly challenge the award on the ground that the arbitral proceedings were not held in accordance with the parties' agreement (which is a ground for annulment under Belgian law).¹⁰ However, to validly invoke this ground, the

¹⁰ Article 1717, para. 3, v), BJC provides that: "The arbitral award may be set aside only if [...] (v) the constitution of the arbitral tribunal, or the arbitral proceedings, have not been in accordance with the agreement of the parties, provided that such agreement is not contrary to a provision of Part VI of this Code from which the parties may not derogate, or, in the absence of such an agreement, have not been in accordance with Part VI of this Code; except for irregularities in the constitution of the arbitral tribunal, *such irregularities may not,*

unsatisfied party must demonstrate that (i) it has objected to the irregularity as soon as it became aware of it,¹¹ and (ii) the decision to hold the hearing(s) remotely has affected the award (i.e., influenced the outcome of the case), which in our view will be difficult to establish.

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: Possibly, under strict conditions.

In the scenario (see sub-paragraph c.6 above) where the parties had specifically agreed that the hearings shall take place exclusively physically and the arbitral tribunal nevertheless decided, in breach of their agreement, to hold the hearing remotely, the parties (or one of them) must have raised this irregularity as soon as they became aware of it during the arbitral proceeding to be in a position to invoke it subsequently as a ground for setting aside the award.¹² In addition, such irregularity can only lead to the setting aside of the award if it is established that the decision to hold the hearing(s) remotely has affected the award (i.e., influenced the outcome of the case), which in our view will be difficult to establish.

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

however, give rise to the setting aside of the arbitral award if it is established that they did not affect the award" (emphasis added; free translation by the Authors).

¹¹ Article 1717, para. 5, BJC provides that: "The grounds provided for in para. 3, a), i., ii., iii. and v. shall not be considered grounds for setting aside the arbitral award *if the party availing itself of those grounds became aware of them in the course of the arbitral proceedings and did not invoke them at that time*" (emphasis added; free translation by the Authors).

¹² Article 1717, para. 5, BJC provides that if a party becomes aware of a ground for setting aside an award resulting from a breach of the procedural rules agreed between the parties in the course of the arbitral proceedings, and has failed to invoke this breach when it became aware of it, such ground may not be successfully invoked at the annulment stage.

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Belgian law does not recognize a right to a physical hearing in arbitration (see sub-paragraphs. a.2 and b.4 above).

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: It depends on the agreement of the parties.

If it is established that the parties' intent was to have a physical hearing, and if none of the parties agrees to deviate from this based on the circumstances, the breach of such agreement by the arbitral tribunal could constitute a basis for setting aside the award under certain strict conditions (see above, sub-paragraphs c.6 and d.7).

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, under strict conditions.

A party seeking recognition and enforcement of a foreign award in Belgium may base its request either on the New York Convention (supplemented by Belgian procedural rules in accordance with Article III of the New York Convention) or Belgian law (Articles 1719 ff. BJC). The application of Belgian substantive law on recognition and enforcement of foreign awards may be justified by reference to Article VII(1) of the New York Convention (most-favorable law provision).

If Belgian law applies, Article 1721, para. 1, a), v) BJC allows Belgian courts to refuse recognition and enforcement of an award if it is established that the arbitral proceedings were not conducted in accordance with the agreement of the parties or, absent such agreement, with the *lex arbitri*. Yet, Article 1721, para. 1, a), v) BJC adds that recognition and enforcement may only be refused on that basis if it is proven that the irregularity at issue had an influence on the award.

It is otherwise doubtful in our view that Belgian courts would consider that the organization of remote hearings, even in breach of the parties' agreement, breached the parties' right to present their case (Article 1721, para. 1, a), ii) BJC) or breached (Belgian

international) public policy (Article 1721, para. 1, b), ii) BJC) – the other bases to deny enforcement of a foreign award under Belgian law.

If the party seeking recognition and enforcement of a foreign award in Belgium opts for the application of the New York Convention and not Belgian substantive law, a Belgian court may possibly refuse recognition and enforcement on the basis of Article V(1)(d) of the New York Convention (irregularity in the procedure), if it is established that the organization of remote hearings breached the parties’ agreement (interpreted in line with the law applicable to that agreement) or the *lex arbitri* (the law of the country where the arbitration took place). While the New York Convention does not expressly require national courts to determine if such an irregularity had an influence on the award, it is generally accepted by Belgian courts that the New York Convention may be interpreted such as to allow national courts to apply this additional requirement. Again, it is doubtful in our view that the organization of remote hearings, even in breach of the parties’ agreement, would be considered by Belgian courts as a ground for refusal of recognition and enforcement under Articles V(1)(b) (right of a party to present its case) or V(2)(b) (violation of public policy) of the New York Convention.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: Yes.

In order to contain the negative effects of the pandemic, the Belgian Legislator adopted Royal Decree No. 2 of 9 April 2020 concerning the extension of limitation periods and other time limits for bringing legal proceedings, the extension of procedural time limits and the possibility to resort to procedures solely in writing before State courts.¹³

Based on this Royal Decree, in force during the first lockdown in Belgium (in April and May 2020), many physical hearings before State courts were postponed. The Royal Decree allowed State courts to cancel hearings to decide cases exclusively based on the parties’ written submissions, provided at least one of the parties did not oppose it. This rule is no longer in force today, meaning that recourse to the purely written procedure is only allowed if all the parties agree to it.

In relation to arbitration, the CEPANI, the Belgian Centre for Arbitration and Mediation, amended its Arbitration Rules on 1 July 2020 to expressly provide that hearings in CEPANI arbitrations may be held “physically, by videoconference,

¹³ Free translation of “Arrêté royal n°2 du 9 avril 2020 concernant la prorogation des délais de prescription et les autres délais pour ester en justice ainsi que la prorogation des délais de procédure et la procédure écrite devant les tribunaux”.

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teleconference, any other appropriate means of communication or by a combination of the foregoing methods”.¹⁴ Even under the previous version of the Rules, remote hearings were allowed in CEPANI arbitrations, as well as in *ad hoc* arbitrations governed by Belgian law.

¹⁴ Article 24.3 of the CEPANI Arbitration Rules 2020, in force as from 1 July 2020.