REPUBLIC OF CROATIA

Nikola Božić
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.

Article 23, paragraphs 1 and 2, of the Croatian arbitration act, i.e., *Zakon o arbitraži* (hereinafter “ZA”), which are a verbatim adaptation of article 24, paragraph 1, of the UNCITRAL Model Law on International Commercial Arbitration 1985 (hereinafter “Model Law”), confer an express right to an oral hearing on the parties. However, Article 23, paragraphs 1 and 2, of the ZA do not confer on the parties an express right to a physical oral hearing. This holds true for the remainder of the ZA provisions. Therefore, the ZA does not expressly provide for a right to a physical hearing in arbitration.

It should be noted that the ZA, pursuant to its article 1, paragraph 1, point 1, read together with its article 2, paragraph 1, point 2, governs all arbitration proceedings seated in the territory of the Republic of Croatia, whether they do or do not have an international element.

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 more likely excluded than not.

The procedural rules of the ZA focus on due process. In that regard, article 17, paragraph 2, of the ZA states that the parties need to be provided with an opportunity to respond to the opposing parties’ statements and/or claims. Therefore, it is irrelevant whether the parties are provided with an opportunity to respond to the opposing parties’

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*Nikola Božić is an attorney at Gugić, Kovačić & Krivić – law firm Ltd. in Zagreb and a doctoral candidate at the Friedrich-Alexander University Erlangen-Nürnberg.

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statements and/or claims on a physical oral hearing. The due process requirement of article 17, paragraph 2, of the ZA will be met if the parties are provided with an opportunity to respond to the opposing parties’ statements and/or claims in any appropriate way, be it on a physical or remote oral hearing, through written submissions or otherwise. This holds true upon the examination of the ZA provisions dealing with oral hearings and written proceedings (article 23 of the ZA), party default (article 24 of the ZA), witnesses (article 25 of the ZA), experts (article 26 of the ZA), and claims regarding the setting aside (and, pursuant to article 40, paragraph 1, of the ZA, in connection with article 36, paragraph 2, point 1 only, of the ZA, the refusal of recognition and/or enforcement of a foreign award) of a (Croatian) arbitration award (article 36 of the ZA).

Firstly, and as mentioned above, article 23, paragraphs 1 and 2, of the ZA (see sub-paragraph a.1 above) confer on the parties an express right to an oral hearing, without conferring on them an express right to a physical oral hearing. In that regard, article 23, paragraph 1, of the ZA confers a discretionary right on the arbitral tribunal in the sense that the arbitral tribunal can, subject to the absence of a contrary agreement by the parties, decide whether to hold an oral hearing for the presentation of evidence or for oral arguments, or whether the arbitration proceedings shall be conducted on the basis of documents and other materials. On the other hand, article 23, paragraph 2, of the ZA, imposes a duty on the arbitral tribunal to hold an oral hearing at an appropriate stage of the arbitration proceeding if one party files a request to that end, and if the parties did not agree that no oral hearings shall be held. Therefore, article 23, paragraphs 1 and 2, of the ZA regulate situations in which an oral hearing can and/or needs to be held, but they do not regulate whether such a hearing needs to be physical. The due process requirement of article 17, paragraph 2, of the ZA will be met pursuant to article 23, paragraphs 1 and 2, of the ZA if an oral hearing, if one is to be held at all, is held in any appropriate way, be it physically or remotely.

Secondly, if the arbitral tribunal decides to hold an oral hearing for the purposes of inspecting goods, other property, or documents, it needs to, pursuant to article 23, paragraph 3, of the ZA, give the parties sufficient advance notice of any such hearing. As one may see, article 23, paragraph 3, of the ZA, which is a verbatim adaptation of article 24, paragraph 2, of the Model Law, puts an emphasis on due process in the sense that parties need to be given sufficient advance notice of any hearing for the purposes of inspecting goods, other property, or documents. However, article 23, paragraph 3, of the ZA, like article 23, paragraphs 1 and 2, of the ZA, does not regulate whether such a hearing needs to be physical. Therefore, the due process requirement of article 17, paragraph 2, of the ZA will be met pursuant to article 23, paragraph 3, of the ZA if an oral hearing for the purposes of inspecting goods, other property, or documents, is held in any appropriate way, be it physically or remotely, and when the parties are sufficiently notified in advance.

Thirdly, if the arbitral tribunal decides to hold an oral hearing, and if any party fails to appear at such oral hearing, the arbitral tribunal may, pursuant to article 24, paragraph
1, point 3, of the ZA, continue the arbitration proceeding and render an award based on the (present) procedural findings and on the (already) produced evidence. Therefore, article 24, paragraph 1, point 3, of the ZA, which is a slightly modified adaptation of article 25, paragraph 1, point c, of the Model Law, does not regulate whether an oral hearing needs to be physical, but it rather merely confers on the arbitral tribunal the discretionary right to continue the proceedings and render an award based on the (present) procedural findings and on the (already) produced evidence if any party fails to appear at an oral hearing. Whether a party fails to appear on a physical or remote oral hearing is, for the application of the arbitral tribunal’s discretionary right under article 24, paragraph 1, point 3, of the ZA, irrelevant. What matters is that the arbitral tribunal uses its discretionary right under article 24, paragraph 1, point 3, of the ZA pursuant to article 17, paragraph 2, of the ZA, i.e., that the arbitral tribunal provides the parties with an opportunity to respond to the opposing parties’ statements and/or claims in any appropriate way, be it on a physical or remote oral hearing, through written submissions, or otherwise.

Fourthly, witnesses are, pursuant to article 25, paragraph 1, of the ZA, usually heard at the main oral hearing. However, pursuant to article 25, paragraph 2, of the ZA, witnesses can be heard outside the main oral hearing, provided that they agree. Moreover, the arbitral tribunal may, also pursuant to article 25, paragraph 2, of the ZA, request the witnesses to submit a written response to the submitted questions within a fixed time. Therefore, article 25, paragraph 2, of the ZA confers on the arbitral tribunal the discretionary power to choose the way in which it wants to hear the witnesses, subject to the witnesses’ consent thereto. If the witnesses agree to be heard outside the main oral hearing, the arbitral tribunal can, but is not obliged to, request them to provide a written response to the submitted questions within a fixed time. The due process requirement of article 17, paragraph 2, of the ZA will be met pursuant to article 25, paragraphs 1 and 2, of the ZA if the witnesses are heard anywhere, at any appropriate time, and in any appropriate way, be it on a physical or remote (preliminary or main) oral hearing, through written submissions, or otherwise.

Further, pursuant to article 26, paragraph 2, of the ZA, unless otherwise agreed by the parties and if a party so requests, or the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties will have an opportunity to put questions to him and to present other expert witnesses on the points at issue. Therefore, article 26, paragraph 2, of the ZA, which is a verbatim adoption of article 26, paragraph 2, of the Model Law, regulates the parties’ right to put questions to the expert, and situations in which party-appointed experts need to participate in an oral hearing. However, article 26, paragraph 2, of the ZA, does not oblige the parties to put questions to the expert on a physical oral hearing, nor does it

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2 In Croatia, the arbitration proceeding is generally divided into two parts, i.e., the preliminary hearing and the main hearing. This is based on Croatian civil litigation. On the preliminary hearing, in essence, the parties can propose evidence. On the main hearing, in essence, the evidence is examined. The parties cannot, as a general rule, propose or produce new evidence on the main hearing.
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oblige the expert to participate in a physical oral hearing. The due process requirement of article 17, paragraph 2, of the ZA will be met pursuant to article 26, paragraph 2, of the ZA, if the parties are provided with an opportunity to put questions to the expert in any appropriate way, be it on a physical or remote oral hearing, through written submissions, or otherwise.

Finally, an arbitration award can, pursuant to article 36, paragraph 2, point 1, subpoint c, of the ZA, be set aside (or, pursuant to article 40, paragraph 1, of the ZA, in connection with article 36, paragraph 2, point 1, subpoint c, of the ZA, be denied recognition and/or enforcement) if the party that filed a claim for setting aside (or for the refusal of recognition and/or enforcement) of an arbitration award was not duly notified about the commencement of the arbitral proceedings, or if the aforementioned party was, in any unlawful way, deprived of the right to argue in front of the arbitral tribunal. Therefore, article 36, paragraph 2, point 1, subpoint c, of the ZA confers on the parties the right to plead their case to the arbitral tribunal, i.e., the right to an adversarial hearing, in the sense that a party needs to be provided with an opportunity to present its case. Article 36, paragraph 2, point 1, subpoint c, of the ZA does not accord a right to a physical hearing. The due process requirement of article 17, paragraph 2, of the ZA will be met pursuant to article 36, paragraph 2, point 1, subpoint c, of the ZA if the parties are provided with an opportunity to present their case in front of an arbitral tribunal in any appropriate way, be it on a physical or remote oral hearing, through written submissions, or otherwise.

The analysed articles (17, 23, 24, 25, 26 and 36) of the ZA confer a right to an oral hearing on the parties. Whether an oral, or in-person, hearing is held at all is however irrelevant for the due process requirement. The due process requirement of the ZA will be met if the parties have been provided with an adequate opportunity to respond to the opposing parties’ statements and/or claims in any appropriate way, be it on a physical or remote oral hearing, through written submissions, or otherwise. Therefore, the right to a physical hearing in arbitration, pursuant to the ZA, can, through the interpretation of the analysed procedural rules of the ZA, be more likely excluded than not.

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

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

Short answer: No.
On 17 July 2019, the Croatian president proclaimed the Croatian Parliament’s decision from 12 July 2019, to amend the Croatian civil procedure act. This amendment of the Croatian civil procedure act had the following effect on hearings. Pursuant to article 114, paragraph 1, first sentence (which was not amended), of the currently applicable Croatian civil procedure act, i.e., *Zakon o parničnom postupku* (hereinafter “ZPP”), the court will schedule a hearing when it is prescribed by law, or when it would be required for the purposes of the proceeding. Pursuant to article 114, paragraph 1, second sentence, of the ZPP, such court decision cannot be appealed.

If the court (notably, not the parties) decides, or needs to, schedule a hearing pursuant to article 114, paragraph 1, first sentence, of the ZPP, it will usually schedule it inside the court building (article 115, paragraph 1, of the ZPP, as amended). Pursuant to article 114, paragraph 2, first sentence, of the ZPP, a hearing scheduled by the court inside the court building will need to be attended by anyone whose presence is deemed necessary, i.e., the parties, experts, and/or witnesses. Article 114, paragraph 2, first sentence, of the ZPP does not expressly state that physical presence is needed. However, the need for the physical attendance at hearings scheduled inside the court building is inferred from article 114, paragraph 2, second sentence, and paragraph 3, of the ZPP. Namely, pursuant to these provisions, the written summons need to indicate the place, room, and time, of the hearing (article 114, paragraph 2, second sentence, of the ZPP), as well as a warning

3 The decision to amend the Croatian civil procedure act was published in the Croatian official gazette, i.e., “NARODNE NOVINE”, number 70/2019.

4 Published in the Croatian official gazette, i.e., “NARODNE NOVINE”, number 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019. An English version of the ZPP is available at <http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Civil-Procedure-Act.doc> (last accessed 2 May 2021). However, please note that this is not a translation of the currently applicable ZPP, i.e., of the Croatian civil procedure act as it was recently amended (see fn. 3 above). Article 114 of the ZPP provides that: “(1) Hearings shall be scheduled by the court when prescribed by law or when it would be required for the purpose of the proceedings. No appeal shall be permitted against the ruling by which a hearing was scheduled. (2) The court shall timely summon to the hearing the parties and such other persons whose presence is deemed necessary. The summons to be served on the party shall be accompanied by the submission which gave cause for the scheduling of the hearing. The summons shall indicate the place, room and time of the hearing. (3) If the summons is not accompanied by the submission, they shall indicate the names of the parties, matter of controversy and the action that should be taken at the hearing. (4) The court shall specifically warn the parties in the summons about legal consequences of their failure to appear at a hearing” (not amended). Article 115 of the ZPP provides that: “(1) Hearings are, generally, held in the building of a court. (2) The court can decide to hold a hearing outside the building of the court if it establishes that it is indispensable, or if such a hearing will conserve time or procedural costs. (3) The court can decide to hold the hearings, or to adduce evidence, remotely, with the use of appropriate audio-visual devices. (4) An appeal is not permitted against a court decision from paragraph 2. and 3. of this article” (as amended; free translation offered by the Author).
about the legal consequences of the failure to appear at a hearing (article 114, paragraph 3, of the ZPP).

However, pursuant to article 115, paragraph 3, of the ZPP, the court may decide for the hearing, or the taking of evidence, to be held remotely, with the use of appropriate audio-visual devices. Pursuant to article 115, paragraph 4, of the ZPP, such court decision cannot be appealed.

The decision on how to conduct the hearing, i.e., physically or remotely, falls within the court’s discreitional right. This is derived from the court’s (notably, not the parties’) right prescribed in the aforementioned article 114, paragraph 1, first sentence, of the ZPP, and article 115, paragraph 3, of the ZPP.

As the analysis of articles 114 and 115 of the ZPP show, whether a physical or remote hearing will be held falls within the court’s (notably, not the parties’) discretionary powers. Therefore, the ZPP does not provide for a right to a physical hearing, although it provides for a right to a hearing in general.

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: As a general rule, no.

As mentioned above, the ZPP does not provide for a right to a physical hearing, although it provides for a right to a hearing in general. However, the following considerations need to be pointed out.

In Croatia, arbitration is regulated by a special law, i.e., the ZA. In that regard, article 1 of the ZA prescribes that: “This Law [i.e., the ZA] governs: (1) domestic arbitration [i.e., pursuant to article 2, paragraph 1, point 2, of the ZA, “arbitration that has place in the territory of the Republic of Croatia”], (2) recognition and enforcement of [foreign] arbitral awards, and (3) court jurisdiction and procedure regarding arbitration from subparagraph 1 of this Article [i.e., article 1, paragraph 1, point 1], of the ZA] and in other cases provided by this Law [i.e., the ZA]”. Likewise, the Croatian civil procedure is regulated by a special law as well, i.e., the ZPP. In that regard, article 1 of the ZPP prescribes that: “This Law [i.e., the ZPP] regulates the procedural rules under which [State] courts [as opposed to arbitral tribunals] shall hear and decide disputes over the basic rights and obligations of people and citizens, over personal and family relations and in labour, commercial, property, and other civil law disputes, if the law [i.e. any Croatian law], for some of these disputes, does not prescribe that the court shall resolve them subject to the rules of some other procedure”.5 In that regard, the provisions of the ZPP, including its articles 114 and 115, do not apply to arbitration. To the contrary, the provisions of the ZA concerning court proceedings related to arbitration (i.e., Part Four, articles 41 to 49, of the ZA), e.g., the granting of interim measures (article 44 of the ZA),

5 See the English translation of article 1 of the ZPP, fn. 4 above.
legal assistance in the taking of evidence (article 45 of the ZA), claims regarding recognition and enforcement of foreign arbitral awards (article 49 of the ZA), etc., do apply to (Croatian) State courts pursuant to article 1 of the ZPP.

However, an arbitral tribunal could, pursuant to article 18, paragraph 2, of the ZA, apply articles 114 and 115 of the ZPP. Namely, article 18, paragraph 2, of the ZA states that:

“Failing such agreement [of the parties on the procedural rules of the arbitration], the arbitral tribunal may, subject to the provisions of this Law [i.e., the ZA], conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the rules of procedure either directly or by reference to […] a law […] and the power to determine the admissibility, relevance and weight of any evidence”.

As the language of article 18, paragraph 2, of the ZA shows, the arbitral tribunal could apply the provisions of any law, including articles 114 and 115 of the ZPP, if the parties fail to agree on procedural rules for their arbitration, and if the arbitral tribunal considers it to be appropriate, and if such application is not contrary to other provisions of the ZA.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?

Short answer: N/A

As stated above, a right to a physical hearing in arbitration does not exist in the Croatian arbitration law, i.e., in the ZA (see sub-paragraphs a.1 and a.2). In that regard, parties cannot waive the right to a physical hearing since it is not guaranteed by the ZA. However, the parties need to be aware that, if they fail to agree on any procedural rules for their arbitration, the arbitral tribunal could, pursuant to article 18, paragraph 2, of the ZA, order a physical hearing (see sub-paragraph b.4 above). If the parties want to exclude physical hearings, they should do so in their arbitration agreement, or by choosing a set of procedural rules (to govern their arbitration) that exclude physical hearings.

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: It depends.

Whether an arbitral tribunal could decide to hold a remote hearing instead of the party-agreed physical hearing depends on the circumstances that could occur during the arbitration proceeding.

Pursuant to article 18, paragraph 1, of the ZA, the parties can agree to any procedural rules for the arbitration. Such a party agreement must not be contrary to the provisions of the ZA, and can be made in any appropriate manner, i.e., directly or by reference to any established set of rules or any law. At any rate, the arbitral tribunal needs to, as a general rule, conduct the arbitration proceeding in accordance with the parties’ agreement. Therefore, if the parties agreed to a physical hearing in arbitration, the arbitral tribunal will, as a general rule, need to order a physical hearing.

On the other hand, the arbitral tribunal is, pursuant to article 11, paragraph 2, of the ZA, obliged to: (i) conduct the arbitration with due expeditiousness; (ii) duly undertake procedural steps on time; and (iii) ensure the avoidance of any delays in the proceedings. This provision is directly influenced by article 10, paragraph 1, of the ZPP, which states that: “The court and other participants are obliged to conduct the proceedings without causing any delays, within a reasonable time, and with the minimum of costs. The court is obliged to prevent any form of abuse of rights in the proceedings”. This provision aims at prohibiting any party conduct and/or agreement that represents an abuse of procedural rights. Therefore, even if the parties agree on a physical oral hearing (either directly or by reference to a specific set of procedural rules), the arbitral tribunal can disregard such agreement if the latter is contrary to its duties under article 11, paragraph 2, of the ZA. In particular, the arbitral tribunal could disregard the parties’ agreement to a physical hearing if such a party agreement would contribute to: (i) an unduly slow arbitration proceeding; (ii) the failure to duly undertake procedural steps on time; and/or (iii) delays in the arbitration proceeding.

However, such a decision of the arbitral tribunal also needs to meet the due process requirements of the ZA explained in sub-paragraph a.2 above. That is to say, the arbitral tribunal’s decision to disregard the parties’ agreement to hold a physical hearing by ordering a remote hearing on the grounds of article 11, paragraph 2, of the ZA could be valid if such a decision would be served to the parties with sufficient advanced notice and if such a decision would not deprive the parties of their right to respond to the opposing parties’ statements and/or claims in an appropriate way.

As the analysis of article 18, paragraph 1, of the ZA, from the perspective of article 11, paragraph 2, of the ZA, and of the due process requirement explained in sub-paragraph a.2 above show, the arbitral tribunal could order a remote hearing instead of a physical hearing if: (i) such a decision would be served to the parties with sufficient advanced notice; (ii) such a decision does not violate the parties’ right to respond to the opposing party’s statements and/or claims in an appropriate way; and if (iii) the holding

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6 See the English translation of article 10, paragraph 1, of the ZPP, fn. 4 above.
of the party agreed physical hearing would violate the arbitrators duty to: (i) conduct the arbitration with due expeditiousness; (ii) duly undertake procedural steps; and/or (iii) ensure the avoidance of any delays in the arbitration proceedings.

The legal consequences of an arbitral tribunal’s decision to hold a remote hearing instead of the party agreed physical hearing depend on the decision’s possible influence on the content of the arbitration award.

Namely, the parties can, pursuant to article 36, paragraph 2, point 1, subpoint e, of the ZA, try to set aside (or seek the refusal of recognition and/or enforcement) the arbitration award if the arbitration proceeding was not in accordance with their permissible agreement (i.e., their agreement to have a physical hearing). However, pursuant to article 36, paragraph 2, point 1, subpoint e, of the ZA, the parties need to also prove that the decision of the arbitral tribunal to hold a remote hearing, instead of the agreed physical hearing, could have influenced the content of the award.

Therefore, the mere fact that the arbitral tribunal decided to hold a remote hearing, instead of the agreed physical hearing, would not per se be sufficient to set aside (or refuse recognition and/or enforcement of) an arbitration award. In order for the arbitral tribunal’s decision to hold a remote hearing, instead of the party-agreed physical hearing, to lead to a setting aside of (or refusal to recognize and/or enforce) an arbitration award, the parties would need to prove that such a decision could have influenced the content of the arbitration award.

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: N/A

As explained above, the ZA does not prescribe a right to a physical hearing (see sub-paragraphs a.1 and a.2 above). However, as clarified above, if the parties agreed to a physical oral hearing, and if that hearing was unlawfully denied to them by the arbitral tribunal (see sub-paragraph c.6 above), the parties could seek the setting aside of the award pursuant to article 36, paragraph 2, point 1, subpoint e, of the ZA, provided that the decision of the arbitral tribunal, i.e., the decision to hold a remote hearing, could have influenced the content of the arbitration award.

In Croatia there is no clear answer to the question of whether a party needs to raise the objection from article 36, paragraph 2, point 1, subpoint e, of the ZA during the arbitration proceeding in order to preserve that right to later apply for the setting aside (or non-recognition and/or non-enforcement) of the arbitration award based on the same issue.
Guidance could perhaps be found in a case adjudicated in 2019 by the Croatian Supreme Court, i.e., Vrhovni sud Republike Hrvatske (hereinafter “VSHR”). The case regarded the recognition of a foreign arbitration award pursuant to article 36, paragraph 2, point 1, subpoint c (i.e., not subpoint e), of the ZA in connection with article 40, paragraph 1, of the ZA. In that case, the party raised the objection under article 36, paragraph 2, point 1, subpoint c (i.e., not subpoint e), of the ZA in an appeal against a decision that had recognized a foreign arbitration award. The text of the decision does not state if such an objection was also raised during the arbitration proceeding. However, the VSHR stated in its decision that other objections raised by the appealing party in the appeal, e.g., the competence of the arbitral tribunal and the non-existence of an arbitration clause in the (main) agreement, could not be raised in the appeal procedure, given that such objections can only be raised in front of the arbitral tribunal.

Given the aforementioned VSHR decision, and the fact that article 36, paragraph 2, point 1, subpoint c (right to present the case before an arbitral tribunal) and subpoint e (arbitration proceeding in accordance with a permissible party agreement), of the ZA are both grounds for setting aside (or for refusing recognition and/or enforcement), it could be argued that in Croatia a party does not need to raise the objection under article 36, paragraph 2, point 1, subpoint e, of the ZA during the arbitration proceeding in order to preserve that right to later apply for the setting aside (or non-recognition and/or non-enforcement) of the arbitration award based on the same issue.

However, the aforementioned conclusion could go against article 5 of the ZA. Namely, article 5 of the ZA states that: “A party who knew or should have known that any provision of this Law [i.e., the ZA] from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeded with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived his right to object”.

In that regard, one could make the argument that article 5 of the ZA requires a party to raise the objection from article 36, paragraph 2, point 1, subpoint e (arbitration proceeding in accordance with a permissible party agreement), of the ZA during the arbitration proceeding in order to preserve that right to later apply for the setting aside (or non-recognition and/or non-enforcement) of the arbitration award based on the same issue.

Whether this holds true for article 36, paragraph 2, point 1, subpoint c (right to present the case before an arbitral tribunal) of the ZA would depend on the answer to the following question: Is the right from article 36, paragraph 2, point 1, subpoint c (right to present the case before an arbitral tribunal), of the ZA a right from which the parties may derogate? According to the aforementioned VSHR case, it would seem that the right from article 36, paragraph 2, point 1, subpoint c (right to present the case before an arbitral tribunal) of the ZA is a right from which the parties may derogate.

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arbitral tribunal) of the ZA is a right form which the parties cannot derogate, hence, the parties do not need to raise the objection from article 36, paragraph 2, point 1, subpoint c (right to present the case before an arbitral tribunal), of the ZA during the arbitration proceeding in order to preserve that right to later apply for the setting aside (or non-recognition and/or non-enforcement) of the arbitration award based on the same issue.

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

It is not possible to answer this question, considering that the ZA does not recognize a right to a physical hearing in arbitration (see sub-paragraphs a.1 and a.2 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.

The failure of the arbitral tribunal to conduct a physical hearing will not per se constitute a basis for the setting aside of the award. This is because the ZA does not prescribe a right to a physical hearing in arbitration (see sub-paragraphs a.1 and a.2 above).

However, if the parties agreed to have a physical hearing in their arbitration, and if the arbitral tribunal disregards such party agreement, then the parties could, pursuant to article 36, paragraph 2, point 1, subpoint e, of the ZA, successfully challenge, i.e., seek to set aside, the award if they prove that the decision of the arbitral tribunal to hold a remote hearing, instead of the party-agreed physical hearing, could have influenced the content of the award (see sub-paragraph c.6 above).

If the parties did not agree to hold a physical hearing, and if the arbitral tribunal did not hold one, then the parties could challenge, i.e., seek to set aside, the award if, pursuant to article 36, paragraph 2, point 1, subpoint c, of the ZA, they prove that they were unable to present their case.

In that regard, a violation of article 17, paragraph 2, of the ZA, could meet the standard of proof set forth in article 36, paragraph 2, point c, of the ZA (see sub-paragraph a.2 above). This effectively means that the parties would need to prove that the arbitral tribunal’s decision not to hold a physical hearing violated their right to be provided with an adequate opportunity to respond to the opposing parties’ statements and/or claims. The parties could prove a violation of article 17, paragraph 2, of the ZA
if they would manage to prove that the only way in which they could have responded to the opposing parties’ statements and/or claims was on a physical hearing.

In essence, the parties’ possibility to rely on article 36 of the ZA to have an award set aside, based on the failure to conduct a physical hearing, requires them to prove that the arbitral tribunal’s decision not to hold a physical hearing violated their due process rights, i.e., their right to present their case (article 36, paragraph 2, point 1, subpoint c, of the ZA), or that it violated their permissible agreement (article 36, paragraph 2, point 1, subpoint e, of the ZA). In the first case, the mere fact that no physical hearing was held will not suffice to establish a due process violation. The parties will need to establish a causal link between the non-holding of a physical hearing and the violation of the right to a due process.

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: It depends.

The recognition and enforcement of foreign awards is regulated by article 40 of the ZA. The grounds for refusal provided by Article V, paragraph 1, of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”) are incorporated into article 40, paragraph 1, of the ZA through reference to the setting aside grounds under article 36, paragraph 2, point 1, of the ZA. The grounds for refusal provided by Article V, paragraph 2, of the New York Convention are incorporated into article 40, paragraph 2, of the ZA.

Article V, paragraph 1, point b, of the New York Convention is partially transposed into the ZA through its article 36, paragraph 2, point 1, subpoint c. Namely, pursuant to article 36, paragraph 2, point 1, subpoint c, of the ZA, an arbitral award may be denied recognition and/or enforcement by the (competent Croatian) court if the party objecting to its recognition and/or enforcement furnishes proof that it was not duly noticed about the commencement of the arbitration, or if it was, in any unlawful manner, unable to present the case before the arbitral tribunal. The party’s right to present its case will also be examined by the competent (Croation) court from the perspective of Croatian public policy, pursuant to article 40, paragraph 2, point b, of the ZA. This part of the court examination will be done ex officio.
If the parties raise such issue, the party’s right to present its case will also be assessed from the perspective of the law where the arbitration was seated. However, the examination will centre around the violation of international public police, i.e., truly fundamental principles of the law, moral, and/or equity, of the place where the arbitration was seated.\(^8\)

In that regard, from the perspective of Croatian public policy, the failure to hold a physical hearing will likely (see sub-paragraphs a.2 and c.6 above) not be deemed a *per se* violation of the party’s right to present its case. Hence, there will be no grounds for refusing recognition and/or enforcement of a foreign award from the perspective of Croatian public policy to the extent that the parties were provided with an adequate opportunity to respond to the opposing parties’ statements and/or claims. To the contrary, whether the failure to hold a physical hearing represents a violation of the party’s right to present its case under the law of the place where the arbitration was seated will depend on whether the right to a physical hearing (if such a right is recognized there) represents a truly fundamental principle of the law, moral, and/or equity, of the place where the arbitration was seated. If so, then the failure to hold a physical hearing may be successfully raised by a party as a ground for refusing recognition and/or enforcement of a foreign award based on the violation of public policy from the perspective of the place where the arbitration was seated.

Therefore, when a party objects to the recognition and/or enforcement of an award based on a violation of due process, Croatian courts will, *ex officio*, examine the arbitration award with regards to its compliance, first, with Croatian public policy. Secondly, a violation of a party’s right to a physical hearing, where such a right was recognized at the seat of the arbitration, would be also relevant if a party raises such an objection, and if the violation of such a right would indeed represent a violation of the public policy of the State where the arbitration was seated. In other words, if a violation of a party’s right to a physical hearing represents (only) a violation of a substantive legal provision of the State where the arbitration was seated, even if such a provision represents a peremptory norm of the State where the arbitration was seated, such violation would not be a ground for non-recognition and/or non-enforcement in Croatia.\(^9\)

Article V, paragraph 1, point d, of the New York Convention is partially incorporated into article 36, paragraph 2, point 1, subpoint e, of the ZA. In that regard, article 36, paragraph 2, point 1, subpoint e, of the ZA states that an arbitral award may be denied recognition and/or enforcement by the court, if the party objecting to the recognition and/or enforcement furnishes proof that: (i) the composition of the arbitral tribunal was not in accordance with the ZA; or that (ii) the composition of the arbitral tribunal was not in accordance with a permissible agreement of the parties; or that (iii) the arbitral procedure was not in accordance with the ZA; or that (iv) the arbitral procedure was not in accordance a permissible agreement of the parties; and (v) that those facts could have

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influenced the content of the award. As one may see, article 36, paragraph 2, point 1, subpoint e, of the ZA differs from article V, paragraph 1, point d, of the New York convention in that irregularities in the arbitration procedure will be assessed on the basis of the ZA, rather than in accordance with the law of the country where the arbitration took place.

In that regard, if the parties did not agree on a physical hearing (or even if they did agree on a physical hearing, provided that the violation of their agreement could not have influenced the content of the award), the failure to hold a physical hearing will, from the perspective of Croatian law, likely (see sub-paragraphs a.2 and c.6 above) not be a ground for refusing recognition and enforcement of a foreign award on the basis of procedural irregularities. On the other hand, whether the failure to hold a physical hearing represents a procedural irregularity from the perspective of the law of the place where the arbitration was seated may only be relevant under article 36, paragraph 2, point 1, subpoint c, of the ZA, provided that such failure represents a violation of the public policy of the State where the arbitration was seated, and only if a party raises an objection to that end.

Article V, paragraph 2, point b, of the New York Convention is incorporated through article 40, paragraph 2, point b, of the ZA. In that regard, article 40, paragraph 2, point b, of the ZA states that recognition and enforcement of a foreign award will be refused if the court finds (i.e., ex officio) that the recognition and/or enforcement of that award would be contrary to the public policy of Croatia. Therefore, the failure to conduct a physical hearing would, from the perspective of Croatian public policy, likely (see sub-paragraphs a.2 and c.6 above) not be a violation of the parties’ right to present their case.

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: N/A

There were no changes to the ZA since its proclamation in 2001. In that regard, no changes were made to the ZA in order to address the COVID pandemic.

However, the COVID pandemic somewhat accelerated the implementation of electronic communication with courts, i.e., the electronic filing of submission to courts. Namely, on 20 April 2020, the Croatian Minister of Justice decided that the technical conditions for the application of the Electronic Communication Regulation\(^\text{10}\) were to be met on all county and municipal courts, as well as on the Supreme Court of Croatia. The

\(^{10}\) Published in the Croatian official gazette, i.e., “NARODNE NOVINE”, number 5/2020.
electronic communication with commercial courts was possible since 10 October 2018. In matters related to arbitration, the relevant courts are the Zagreb Commercial Court, the Zagreb County Court, the High Commercial Court, and the Supreme Court of Croatia.

Another factor to mention is the Zagreb earthquake from 22 March 2020, that severely damaged the buildings in which the Zagreb Commercial Court and the High Commercial Court are seated. After the earthquake, the judges of the aforementioned courts were supposed to work from home, which none of them actually did since they (still) solely relied on physical, i.e., printed, documents. The Supreme Court of Croatia was also severely damaged by the earthquake. Due to the earthquake, the judges of the aforementioned court were also supposed to work from home. However, they too did not actually do so because of their sole reliance on physical, i.e., printed, documents.

On the other hand, the Croatia Bar Association, i.e., Hrvatska odvjetnička komora (hereinafter “HOK”) had an extremely proactive approach to the COVID pandemic. Namely, the HOK addressed various letters and legal proposals to the Croatian Minister of Justice and to the presidents of the aforementioned courts. Such HOK indications mainly addressed the fact the COVID pandemic led to a de facto legal stand still during March, April, and May of 2020. During those months, the courts did not hold any hearings, be it physical or remote, nor did they bring any decisions. However, attorneys remained active due to the nature of their deadline dependant work.

Given the COVID pandemic, the current situation of the Croatian legal system could be described as functional but not effective. However, it could be drastically improved through an actual implementation of remote hearings and digitalization in general.