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CZECH REPUBLIC

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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 Czech *lex arbitri* does not expressly provide for a right to a physical hearing in arbitration, nor does it forbid hearings that are not physical.

The arbitration procedure is governed mainly by Act No. 216/1994 Coll., on Arbitration Proceeding and Enforcement of Arbitral Awards (the "Arbitration Act"), which applies equally to domestic and international arbitrations. Several issues specific to international arbitration are further provided in Act No. 91/2012 Coll., on Private International Law. However, neither of these acts explicitly provides for the right to a physical hearing in arbitration.

Specific to Czech arbitration law is the fact that issues which are not expressly addressed in the Arbitration Act are resolved by "appropriate" application of the Act No. 99/1963 Coll., Code of Civil Procedure ("Code of Civil Procedure").[1] Appropriate application means that singular provisions of the Code of Civil Procedure cannot be applied mechanically, but instead when applying such provisions, one should take into account the general principles Czech arbitration law is based on.[2] The Code of Civil Procedure does not provide for a right to a physical hearing, instead it expressly provides a framework for the use of videoconferencing during proceedings.[3]

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

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[1] Section 30 of the Arbitration Act provides that: "Unless stipulated otherwise by law, the provisions of the Code of Civil Procedure shall apply appropriately to the arbitral proceedings" (free translation by the Author).

[2] Rozsudek Nejvyššího soudu ze dne 28.4.2011 (NS) [Decision of the Supreme Court of Apr. 28, 2011], sp.zn. 32 Cdo 3299/2009 (Czech).

[3] Section 102a and Section 122 of the Code of Civil Procedure. See sub-paragraph b.3 below.

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: The right to a physical hearing cannot be completely excluded.

Pursuant to Section 19(3) of the Arbitration Act, proceedings before arbitrators should be oral, subject to an agreement between the parties to the proceedings to the contrary.

Absent any explicit agreement of the parties to the contrary, oral hearings are obligatory. The *lex arbitri* is however silent regarding any interpretation as to what the "oral" form of the hearings means. Given the fact that the provision was enacted in 1994, it obviously originally concerned physical hearings. The law is however flexible in order to be able to accommodate to new technologies and developments. We are of the opinion that a remote hearing, conducted in real time, whereby parties are able to react immediately, can be considered as oral, albeit all participants are not physically present in the same place.

The arbitrators have rather wide discretionary powers regarding the conducting of the arbitration proceedings and must proceed without unnecessary formalities. The discretionary power of the arbitrators in conjunction with the absence of an explicit prohibition on conducting oral hearings in the form of remote hearings, seems to suggest that remote hearings are allowed in principle. However, either oral-physical or oral-remote hearings need to satisfy the requirement of providing equal opportunity to the parties to present their case and enabling the arbitrators to ascertain the facts necessary to decide on the claim.[4]

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.

[4] Section 19(2) of the Arbitration Act provides that: "If there is no agreement according to Sub-section (1), or a procedure according to Sub-section (4) is not determined, the arbitrators shall conduct the proceedings in an appropriate way. The proceedings shall be conducted with no unnecessary formalities while providing the parties with an equal opportunity to exercise their rights in order to reveal factual issues pertinent to deciding the case" (free translation by the Author).

Pursuant to Section 102a(1)[5] of the Code of Civil Procedure, following a proposal from a party or at its own discretion, a court can perform judiciary activities using a videoconferencing facility, especially to arrange for a party's or translator's presence or to hear a witness, expert or party to the proceedings. The court must however examine if the use of a videoconferencing device is expedient.

The Code of Civil Procedure thus does not provide for a remote hearing as such but rather for the use of videoconferencing for several procedural activities. The following seem to be suitable for videoconferencing: taking of evidence (examination of witnesses, experts, parties, remote inspection of a place, ensuring the right to react to the evidence submitted), and other procedural activities (translating, remote contact between a party and his legal representative, submitting procedural objections and requests, making proposals of settlement, withdrawing proposals etc.).[6]

Conducting some procedural activities through a videoconferencing facility can be reasonable once it is taken into account the age and health condition of the person being heard, the time aspect, etc.[7]

Czech academics have already opined (referring to the decision of the European Court of Human Rights case no. 45106/04, *Marcello Viola v. Italy*) that using a videoconference is not incompatible with the right to fair proceedings as long as the right to participate in the proceedings is duly ensured with no technical problems during the transfer of sound and images.[8]

The Supreme Court has however stated that taking evidence without the physical presence of the person to be examined by means of a videoconferencing facility enabling the transmission of images and sound is an exceptional measure to be applied only if reasonable, where the criterion of reasonability is connected with costs, complications and the impossibility for the court to take the relevant evidence otherwise.[9]

Czech academics point out that using a videoconference may not always be reasonable, for example when examining a key witness, as the court may need to see the witness in person (not remotely) to assess his/her credibility and manner of behaviour.[10]

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[5] Section 102a ("Use of videoconferencing device"), paragraph 1, of the Code of Civil Procedure provides that: "Upon a proposal from a party or if it is expedient, a court can perform judiciary activities using a videoconferencing device, especially to arrange for a party's or translator's presence or to hear a witness, expert or party to the proceedings" (free translation by the Author).

[6] See Jaromír JIRSA, *Občanský soudní řád, 1. část: Soudcovský komentář*, 3rd edn. (Wolters Kluwer 2019) commentary on Section 102a.

[7] *Ibid*.

[8] See Karel SVOBODA, Petr SMOLÍK, Jiří LEVÝ, Renáta ŠÍNOVÁ *et al.*, *Občanský soudní řád. Komentář*, 2nd edn. (C.H. Beck 2017) p. 433.

[9] Rozsudek Nejvyššího soudu ze dne 31.1.2019 (NS) [Decision of the Supreme Court of Jan. 31, 2019], sp.zn. 21 Cdo 4132/2018 (Czech).

[10] K. SVOBODA, P. SMOLÍK, J. LEVÝ, R. ŠÍNOVÁ *et al.*, *Občanský soudní řád. Komentář*, fn. 8 above, p. 433.

Psychologically, a remote hearing may be easier for a witness to control, as the witness is not confronted by the physical presence of the other parties and the presiding judge in the official setting of a courtroom (which naturally impresses upon the witness the gravity of the occasion). In a remote hearing the witness is afforded a better opportunity to modify its behaviour and expressions to suit its own needs, thus making it harder for a judge to assess the witness's credibility based on the witness's words and behaviour. A remote hearing is also not suitable for examining a person who is totally or partially unable to hear.[11]

Civil proceedings are based on four main principles – oral hearings, taking minutes, immediacy and openness to the public. The principle of orality means that decisions can be based only on materials which were presented orally in a court hearing. The principle of immediacy means that the court is in direct contact with the parties to the proceedings. The principle of taking minutes requires the court to write down all actions taken into its records. Openness to the public means that, subject to several exceptions, oral hearings are open to the public. It is possible to ensure all of these requirements through remote hearings. We therefore agree with the opinion that remote hearings are capable of satisfying these principles.[12]

The Constitutional Court has expressed its support of the usage of videoconferencing. It has stated (though in the context of criminal proceedings) that in cases provided by the law, using videoconferencing enables the combination of efficiency and economy of the court proceedings, while maintaining the right of each party to the proceedings to stand before the court, to communicate with it and to personally defend itself.[13] It has shared the opinion of the European Court of Human Rights that videoconferencing is compatible with the right to a fair hearing.[14]

To conclude, the general rules of Czech civil procedure neither expressly, nor by inference, provide a general right to a physical hearing. However, we believe that ensuring a physical hearing as a right could come into the proceedings through a back door by applying the cornerstone right of civil procedure, i.e., the right to a fair trial, including the right to enjoy equal procedural rights and duties in arbitration proceedings, in the particular circumstances of the case.

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[11] *Ibid*.

[12] Stanislav FINDEJS (judge of the district court in Rychnov nad Kněžnou), "Vzdálený přístup k soudním jednáním a principy civilního procesu" [Remote hearings and the principles of civil proceedings] (20 April 2020) at <https://www.pravniprostor.cz/nazory/glosa-stanislava-findejse/vzdaleny-pristup-k-soudnim-jednanim-a-principy-civilniho-procesu> (last accessed 24 January 2021).

[13] Nález Ústavního soudu ze dne 14.4.2015 (ÚS) [Decision of the Constitutional Court of Apr. 14, 2015], sp.zn. I. ÚS 983/15 (Czech).

[14] Nález Ústavního soudu ze dne 30.9.2019 (ÚS) [Decision of the Constitutional Court of Sept. 30, 2019], sp.zn. III. ÚS 733/19 (Czech).

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: There is no such explicit right in the general rules of civil procedure. However, the rules of civil procedure can be "appropriately" applied to arbitration if some conditions are met.

Pursuant to Section 30 of the Arbitration Act, matters that are not expressly addressed in the Arbitration Act shall be resolved by "appropriate" application of the Code of Civil Procedure. The Supreme Court clarified the scope of this provision, stating that appropriate application means that single provisions of the Code of Civil Procedure cannot be applied mechanically, but instead when applying such provisions, one should take into account the general principles on which Czech arbitration law is based.[15] This provision has been the subject of massive criticism both from academics and arbitrators, as the concept of "appropriate application" is not very clear and has led to a practice of excessive application of the Code of Civil Procedure in arbitration proceedings.

Applied to oral hearings, this means that the rules of oral hearings in litigation can be applied to arbitration proceedings given that no specific regulation on the right to a physical hearing exists in the Czech *lex arbitri*, but only appropriately, i.e., with necessary modifications to comply with the main principles of arbitration.

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, parties can agree in advance or during the dispute not to hold a physical hearing.

As stated above, Czech *lex arbitri* does not expressly provide for the right to a physical hearing in arbitration. It is important to emphasize that arbitration proceedings are conducted in accordance with the principle of party autonomy. According to Section 19(1) of the Arbitration Act, the parties can agree on procedural rules by which the arbitrators shall conduct the proceedings. Further, pursuant to Section 19(3) of the Arbitration Act, proceedings before arbitrators are oral, subject to agreement between the parties to the proceedings to the contrary. This means that the parties are free to agree not to have oral proceedings at all (neither physical nor remote ones). They can do so either by agreeing so explicitly in an arbitration agreement (prior to the dispute) or by agreeing to submit the proceedings to the rules of procedure of a permanent arbitration

[15] Rozsudek Nejvyššího soudu ze dne 28.4.2011 (NS) [Decision of the Supreme Court of Apr. 28, 2011], sp.zn. 32 Cdo 3299/2009 (Czech).

court, which exclude oral hearings, or the parties can modify the existing rules of procedure or even agree on this procedural issue later during the proceedings.

The Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, as the most frequently used permanent arbitration court in the Czech Republic, has adopted various sets of arbitration rules that parties can choose from. One of these provides for on-line arbitration (available since 2004), which is wholly conducted by means of written electronic communication, to the exclusion of oral hearings.

Since 1 December 2020, the permanent Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic modified its Rules[16] and introduced detailed provisions regarding the conduct of remote hearings. The Rules explicitly call remote hearings "remote oral hearings", underlining that remote hearings are still oral. The arbitral tribunal can decide to conduct remote hearings anytime during the proceedings.[17] The Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic has opted to make the conduct of remote hearings subject to the consent of each of the parties to the proceedings. Once given, the consent is valid for the whole proceedings and can be withdrawn only with the permission of the arbitral tribunal if serious grounds exist.[18]

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.

The issue whether the arbitral tribunal could decide to hold a remote hearing even if the parties had agreed to a physical hearing and what the legal consequences would be, is neither provided by law, nor has it so far been dealt with by the Czech courts. Absent a specific provision in applicable procedural rules of permanent arbitration courts, this thus becomes a question of the mutual interplay between the obligation of the arbitral

[16] Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, available at <https://www.soud.cz/rady/rad-rozhodciho-soudu-01-07-2012-uz-01-12-2020> (last accessed 24 January 2021).

[17] Special Supplement to the Rules on Conducting Remote Oral Hearings of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, Section 2(1), available at <https://www.soud.cz/rady/zvlastni-dodatek-radu-o-konani-distancnich-ustnich-jednani-2020> (last accessed 24 January 2021).

[18] *Ibid.*, Section 2.

tribunal to ascertain the facts of the case in a manner sufficient to decide it and the principle of party autonomy.

We have already explained that the parties can agree not to hold oral hearings at all pursuant to Section 19(3) of the Arbitration Act (see sub-paragraphs a.2 and c.5 above). However, even if such an agreement exists, the arbitrators can still decide to hold an oral hearing despite the existing agreement of the parties to the contrary.[19]

This power of the arbitrators is commonly derived from Section 19(2) of the Arbitration Act, enshrining the general principle that the arbitrators shall hear the case in the manner that they consider most appropriate in order to ascertain the facts necessary to decide on the claim.[20] It is considered that this principle is one of those in arbitration which cannot be derogated.[21]

This principle is reflected for example in several rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic.

Its On-line Rules expressly provide that the arbitrators can decide that the arbitral proceedings shall not be conducted under the On-line Rules where a party is obviously not capable of participating in the arbitration in accordance with the On-line Rules (especially in consideration of the technical terms and conditions), or where the arbitrators otherwise find, at their discretion, that an arbitration should not be conducted under the On-line Rules.[22] This means that the dispute would be decided by the (ordinary) Rules, with oral hearings included.

Its (ordinary) Rules also provide that even if the parties agreed to decide the dispute based on documentary evidence without oral hearings, the arbitrators can still decide to hold oral hearings if the documents submitted are not sufficient to decide the dispute.

The situation described above indicates a general acknowledgement of the application of the general rule that the arbitrators are considered to have the power to conduct the proceedings in a manner contrary to the agreement of the parties if it is absolutely necessary in order to ascertain the facts of the case in a manner sufficient to decide the case. Therefore, the answer to the question is that it depends: we believe that the arbitrators can decide to hold a remote hearing even if the parties had agreed to a physical hearing, however subject to several conditions.

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[19] Alexander J. BĚLOHLÁVEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář*, 2nd edn. (C.H. Beck 2012) pp. 691-692.

[20] See Miloš OLÍK, Martin MAISNER, Radek POKORNÝ, Petr MÁLEK and Martin JANOUŠEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: Komentář*, 2nd edn. (Wolters Kluwer 2019) commentary on Section 19; A.J. BĚLOHLÁVEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*, fn. 19 above, pp. 691-692.

[21] A.J. BĚLOHLÁVEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*, fn. 19 above, pp. 691-692.

[22] Rules for on-line arbitration ("On-line Rules") of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, Section 3(4), available at <https://www.soud.cz/rady/zvlastni-dodatek-radu-pro-rozhodci-rizeni-online-2017> (last accessed 24 January 2021).

First of all, overriding the existing agreement of the parties on a physical hearing should only be used as a last resort. It could be used especially in situations when serious reasons exist for doing so. And secondly, it should be ensured that the remote hearing provides parties equal opportunities to claim their rights and present their case.

However, we should add that the permanent Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic has chosen a cautious approach and made remote hearings subject to the consent of the parties. If any of the parties disagrees with the remote hearing, the hearing will be conducted as a physical one.[23]

In connection with the acknowledgement of the power of the arbitral tribunal to override the agreement of the parties not to have (any) oral hearings, a related issue also arises, namely, what should the arbitral tribunal do if the parties, who have previously agreed not to hold oral hearings, refuse to participate in the oral hearing ordered by the arbitral tribunal. The answer will depend on the particular circumstances of each case and should be measured against the fact whether the arbitrators can ascertain the facts necessary to decide the dispute. Therefore, the arbitrators can take into account such attitude of the parties when assessing whether the party has borne the burden of statement and proof. The second option for an arbitrator(s) is to resign.[24]Similarly, the consequences might be the same for the case where the parties refuse to attend a remote hearing that was ordered by the arbitral tribunal, contrary to their agreement to hold a physical one. This assumption is however still to be confirmed by the Czech courts.

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: No.

Assuming that there could be a right to a physical hearing in a specific case, which was then breached, the breach could be subsumed under the ground for annulment related to the failure to provide a party with the possibility to present its case before the arbitral tribunal pursuant to Section 31(e) of the Arbitration Act. The *lex arbitri*, however, does not require parties to raise this type of breach during the arbitral

[23] Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, Section 28a(2), available at <https://www.soud.cz/rady/rad-rozhodciho-soudu-01-07-2012-uz-01-12-2020> (last accessed 24 January 2021).

[24] Also supported by A.J. BĚLOHLÁVEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*, fn. 19 above, pp. 691-692.

proceedings in order to be eligible to raise it at all. For a successful challenge of the award (i.e., to set it aside) based on Section 31(e) of the Arbitration Act, a party needs to prove that depriving it of a physical hearing meant that it was deprived of the opportunity to present its case.

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

As mentioned above, Czech law does not expressly provide for the right to a physical hearing. Assuming that there could be a right to a physical hearing in a specific case, which was then breached, the party needs to prove that such breach resulted in depriving it of the possibility to present its case before the arbitral tribunal pursuant to Section 31(e) of the Arbitration Act. This ground for setting aside the arbitration award stems from the basic right of the parties to enjoy equal procedural rights and duties in arbitration proceedings.[25]

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.

A failure to conduct a physical hearing could in some cases constitute a basis for setting aside the award. However, not every failure to conduct a physical hearing would constitute such a basis. The aggrieved party needs to prove that in its particular situation the conducting of a remote hearing resulted in depriving it of the possibility to present its case before the arbitral tribunal pursuant to Section 31(e) of the Arbitration Act. This means that the breach of procedural principles needs to be fundamental in order to constitute a ground to set the award aside.[26] The Supreme Court has held that pursuant to Section 31(e) of the Arbitration Act, the court must examine whether in particular arbitration proceedings, taking into account all the circumstances of the case, the party was provided with sufficient opportunity to exercise its procedural rights and also

[25] M. OLÍK, M. MAISNER, R. POKORNÝ, P. MÁLEK and M. JANOUŠEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*, fn. 20 above, commentary on Section 31.
[26] A.J. BĚLOHLÁVEK, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*, fn. 19 above, p. 1095.

whether one of the parties was put into an unequal position towards the other party to the proceedings by the activity of the arbitral tribunal.[27]

The motion to set the award aside needs to be filed not later than three months after the arbitration award was served on the party who wants to file the motion.Furthermore, even if a party has not requested that the award be set aside, it can still file a motion to discontinue the execution of the arbitration award pursuant to Section 35 of the Arbitration Act. Though none of the reasons listed in Section 35 of the Arbitration Act address the failure to ensure the possibility to present one's case (including to conduct a physical hearing, if applicable), Section 35 also refers to the Code of Civil Procedure. The Code of Civil Procedure in its Section 268(1)(h) enables the discontinuance of execution of a decision if the execution is not permissible due to some other reason. This provision is very general and broad. It is thus a question whether it can be used to raise the objection that a remote hearing deprived the party of the possibility to present its case.

As we have stated in this section above, "depriving one of the possibility to present one's case" is a reason for setting the award aside and it needs to be raised during the short period of three months after the award is served on the party. On the contrary, filing a motion to discontinue the execution of the arbitration award is not limited to such period.

In the past this broad provision in Section 268(1)(h) has been used to discontinue the execution of an arbitration award for the same reason which, when used for setting arbitration awards aside, had to be raised during the arbitration proceedings first (but was not raised in that case). In the particular case, it was the objection that the arbitration clause was null and void.[28] To explain, the objection that the arbitration clause is null and void needs to be raised in the arbitration proceedings first (before the hearing), otherwise the motion to set the award aside would not be successful. In other words there is a precedent, that through this very general provision the courts have a back door to allow in a ground which (i) is not expressly written in the Arbitration Act as a ground to discontinue the execution of an arbitration award, and (ii) would otherwise be a reason for setting the arbitration award aside if raised during the three-month period after the arbitration award was served on the party and only if the party had raised this objection before the hearing of the case had started.

For now, there are no other reported cases which could provide any other examples of the usage of the broad provision in Section 268(1)(h) of the Code of Civil Procedure. This thus leaves the question open whether the same provision can be used to address a failure to hold a physical hearing.

[27] Rozsudek Nejvyššího soudu ze dne 11.6.2008, (NS) [Decision of the Supreme Court of Jun 11, 2008], sp. zn. 32 Cdo 1201/2007 (Czech).

[28] Nález Ústavního soudu ze dne 4.6.2019 (ÚS) [Decision of the Constitutional Court of Jun. 4, 2019], sp.zn. II. ÚS 996/18 (Czech).

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.

First of all, it shall be noted that distinguishing remote hearings from physical hearings is a relatively new concept. For the present moment, civil hearings are not conducted through purely remote hearings, though there are remote elements in the physical hearings before the courts. This is the reason why no decisions either of the higher courts or the Constitutional Court, which could shed some light on this matter, exist in this regard yet. Therefore, while the answer provided here is based on the knowledge of existing similar case law, case law on the issue of the right to a physical hearing is yet to be established.

Pursuant to the Constitution of the Czech Republic, promulgated international agreements, the ratification of which has been approved by the Czech Parliament and which are binding on the Czech Republic, shall constitute a part of the Czech legal order; should an international agreement make a provision contrary to Czech law, the international agreement shall prevail.[29] With regards to the grounds for refusing the recognition and enforcement of foreign awards pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), this means that such grounds apply directly.

Out of 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, pursuant to the case law of the Czech Supreme Court (which is in accordance with the text of the New York Convention), a court deciding on the recognition and enforcement of a foreign arbitration award shall examine *ex officio* only the grounds pursuant to Article V(2).

Article V(2)(b) of the New York Convention provides for the denial of recognition and enforcement of a foreign arbitral award if the recognition or enforcement of the award would be contrary to the public policy of the country where the enforcement is sought.

The right to a physical hearing is not enshrined within the Czech legal order. On the contrary, various elements of remote hearings are being introduced. Therefore, it is unlikely that the failure to conduct a physical hearing *per se* can be contrary to the public policy of the Czech Republic. However, we cannot exclude the possibility that in some

[29] Article 10 of the Constitution of the Czech Republic.

cases such failure may impact the possibility of a party to present its case so seriously that it constitutes a breach of that party's fundamental rights,[30] so that a court finds it contrary to public policy.

A breach of public policy can be found if the effects of recognition and enforcement of the arbitration award would be contrary to the fundamental principles of the constitutional and legal order, social order and public order in general, and would establish a breach of interests which must be unequivocally and definitely upheld. A breach of public policy relates to cases where the fundamental rights of a party to the proceedings, where the relevant decision was made, have been infringed.[31]

Therefore, if the failure to conduct a physical hearing breaches some fundamental rights of a party to the proceedings (for example, the right to a fair trial pursuant to Article 36 of the Czech Charter of Fundamental Rights and Freedoms, or the right to make statements on all pieces of evidence presented pursuant to Article 38 of the Czech Charter of Fundamental Rights and Freedoms), it will constitute a breach of public policy.

Interestingly, in one case the Supreme Court had to address the issue whether it is contrary to the public policy to recognize and enforce a foreign award which, if it were a national award, would be subject to setting aside.[32]

The courts of lower instances denied the recognition and enforcement of a foreign award which was issued by a foreign arbitration court which was not a permanent arbitration court pursuant to Czech law, where the arbitrator had been appointed from the list of arbitrators of that arbitration court. The courts of lower instances applied to the foreign award the Czech case law for national arbitration under which if such arbitration agreement failed to contain a direct designation of the *ad hoc* arbitrator or a specific method for his or her designation, and merely referred to the procedural rules of an institution which was not itself a permanent court of arbitration based on a law, such arbitration agreement is not valid.[33] This meant that this fact constituted a ground for setting the award aside according to Czech case law. The Supreme Court, however, did not support the conclusions of the lower courts and went deeper into the reasoning of the Czech case law, finding that behind the interpretation of the case law there was first of all the requirement of transparency in the selection of an arbitrator. The Supreme Court admitted that simply because some other institution is not a permanent arbitration court

[30] Naděžda ROZEHNALOVÁ, *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*, 3rd edn. (Wolters Kluwer 2013), chapter IX.2.

[31] Rozsudek Nejvyššího soudu ze dne 13.12.2016 (NS) [Decision of the Supreme Court of Dec. 13, 2016], sp.zn. 20 Cdo 676/2016 (Czech).

[32] *Ibid*.

[33] Rozsudek Nejvyššího soudu ze dne 11.5.2011 (NS) [Decision of the Supreme Court of May 11, 2011], sp.zn. 31 Cdo 1945/2010 (Czech). See also OLÍK "National Report Czech Republic" in ICCA *International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 13.

pursuant to Czech law does not mean the requirement of transparency was not met.[34] This decision suggests that even if there are local procedural rules different from foreign rules, it is important not to apply them blindly but to find the rationale behind the rule.

The grounds in Article V(1)(b) and V(1)(d) of the New York Convention are assessed from the point of view of a legal order other than that of the place of recognition and enforcement of the award.[35] This is the reason why the existence of such grounds of the New York Convention needs to be proved by the party against whom the award is invoked.[36] The Czech Supreme Court has repeatedly stated that if a party states that it has been deprived of the opportunity to defend itself (to present its case) pursuant to Article V(1)(b) of the New York Convention, the court can recognize and enforce the arbitral award only if it addresses the argument and finds it groundless.[37] Articles V(1)(b) and V(1)(d) thus enable a Czech court to potentially deny recognition and enforcement of an arbitral award if there were serious irregularities in the proceedings according to the (foreign) law of the place of arbitration. Thus, if there is a right to a physical hearing in some legal order, the failure to conduct one may potentially be a reason for refusing recognition and enforcement of the arbitral award by the Czech courts if such failure led to the inability of the party to present its case or if the arbitral procedure was not in accordance with the law of the country where the arbitration took place.

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?

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[34] Rozsudek Nejvyššího soudu ze dne 13.12.2016 (NS) [Decision of the Supreme Court of Dec. 13, 2016], sp.zn. 20 Cdo 676/2016 (Czech).

[35] N. ROZEHNALOVÁ, *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku,* fn. 30 above, chapter IX.2.

[36] Rozsudek Nejvyššího soudu ze dne 18.10.2016 (NS) [Decision of the Supreme Court of Oct. 18., 2016], sp.zn. 20 Cdo 4663/2015 (Czech); Rozsudek Nejvyššího soudu ze dne 28.1.2004 (NS) [Decision of the Supreme Court of Jan. 28, 2004], sp.zn. 20 Cdo 456/2003 (Czech); Rozsudek Nejvyššího soudu ze dne 31.5.2011 (NS) [Decision of the Supreme Court of May 31, 2011], sp.zn. 29 Cdo 265/2010 (Czech). See also Petr BŘÍZA, Tomáš BŘICHÁČEK, Zuzana FIŠEROVÁ, Pavel HORÁK, Lubomír PTÁČEK and Jiří SVOBODA, *Zákon o mezinárodním právu soukromém. Komentář*, 1st edn. (C.H. Beck 2014) p. 706, and N. ROZEHNALOVÁ, *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku,* fn. 30 above, chapter IX.2.

[37] Rozsudek Nejvyššího soudu ze dne 31.5.2011 (NS) [Decision of the Supreme Court of May 31, 2011], sp.zn. 29 Cdo 265/2010 (Czech); Rozsudek Nejvyššího soudu ze dne 21.3.2013 (NS) [Decision of the Supreme Court of Mar. 21, 2013], sp.zn. 29 Cdo 1579/2011 (Czech).

Short answer: Yes.

Remote hearings or the use of videoconferencing in general is not a topic which emerged in connection with the COVID-19 pandemic, though the pandemic accelerated its development.

Back in 2014, the Ministry of Justice launched a project on digitalization of governmental administration and justice. The aim was to introduce videoconferencing into the justice system and to make the work of the courts, state prosecutors and prison services more efficient. Videoconferencing facilities were installed in courts of all instances. The Ministry of Justice admitted that in the beginning, judges were rather reluctant to use videoconferencing facilities and they were only used around 300 times per month. However, due to the numerous training sessions conducted by the Ministry of Justice at the beginning of 2020, the number of usages of remote facilities increased to 2500 per month.[38]

The legal basis for using videoconferencing was introduced in criminal proceedings in January 2012 already, but it was not until 30 September 2017 that the Code of Civil Procedure was amended and explicit provisions on videoconferencing were added.[39] For the first time in its history, the Supreme Administrative Court used a videoconference in May 2018 in order to hear a witness. The reason for using the remote hearing of the witness was the workload of the witness, who was a judge.[40]

The COVID pandemic was a strong incentive for the permanent Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic to introduce detailed provisions on conducting remote hearings from 1 December 2020. This is the first permanent arbitration court in the Czech Republic to introduce remote hearings and to set out a detailed framework for conducting them, including technical specifications.[41]

The COVID pandemic also sped up the development and launch of a project entitled "Skype-defence", which enables Skype communication between prisoners and their advocates. The project became operational in the middle of April 2020 and was prepared

[38] "Introducing of videoconferencing in the justice system" (17 January 2020) at <https://www.eeagrants.cz/cs/priklady-dobre-praxe/2020/zavedeni-videokonferenci-v-resortu-justi-3018> (last accessed 24 January 2021).

[39] Jaromír JIRSA, *Občanský soudní řád, 1. část: Soudcovský komentář*, fn. 6 above, commentary on Section 39.

[40] Press-release of the Supreme Administrative Court dated 31 May 2018, "Nejvyšší správní soud využil poprvé ve své historii pro účely soudního řízení videokonferenci", available at <http://www.nssoud.cz/Nejvyssi-spravni-soud-vyuzil-poprve-ve-sve-historii-pro-ucely-soudniho-rizeni-videokonferenci/art/21573?tre_id=205> (last accessed 24 January 2021).

[41] Special Supplement to the Rules on Conducting Remote Oral Hearings of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, fn. 17 above.

by the Czech Bar Association and the prison services.[42] Afterwards, the Probation and Mediation Services started using Skype when communicating with clients in prisons.[43]

The Ministry of the Interior has recently proposed incorporating into the legal regulations rules for remote sessions of municipalities and city councils. The Ministry says that the proposed amendment would reflect the already existing practice, which currently functions without legal regulation.[44]

In general, the COVID pandemic has had a major impact on accelerating the development of remote communication throughout the entire judiciary, administration and ADR.

[42] Petra KUČEROVÁ and Iva CHALOUPKOVÁ, "V ČR se zavádějí Skype obhajoby, urychlil je nouzový stav" (17 April 2020) at <https://www.epravo.cz/top/aktualne/v-cr-se-zavadeji-skype-obhajoby-urychlil-je-nouzovy-stav-111004.html> (last accessed 24 January 2021).

[43] ČTK, "Probační úředníci pracují s vězni na dálku přes videokonference" (2 November 2020) at <https://www.ceska-justice.cz/2020/11/probacni-urednici-pracuji-vezni-dalku-pres-videokonference/> (last accessed 24 January 2021).

[44] ČTK, "Vnitro navrhuje zakotvit distanční formu zasedání zastupitelstev" (4 November 2020) at <https://www.pravniprostor.cz/aktuality/vnitro-navrhuje-zakotvit-distancni-formu-zasedani-zastupitelstev> (last accessed 24 January 2021).