



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA PROJECTS

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

FRANCE

Valentine Chessa
Nataliya Barysheva
Arianna Camillacci

FRANCE

[Valentine Chessa](#)*

[Nataliya Barysheva](#)**

[Arianna Camillacci](#)***

The French system has opted for a dualistic approach that differentiates domestic from international arbitration. The idea underlying this choice is that international arbitration is a “special kind of arbitration”, which deserves a separate and more liberal regime.¹ For the purpose of the present report, we will focus on international arbitration, except if otherwise indicated.

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.

Although it is generally accepted that hearings are an integral part of the arbitral proceedings,² the French *lex arbitri*, i.e., Book IV of the French Code of Civil Procedure (“FCCP”),³ does not expressly provide for a right to a physical hearing be it for domestic or international arbitration. In fact, the FCCP, as a whole, provides little guidance as to how hearings should be conducted.

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)?*

* Valentine Chessa is a partner of CastaldiPartners.

** Nataliya Barysheva is a senior associate of CastaldiPartners.

*** Arianna Camillacci is a junior associate of CastaldiPartners.

¹ See Eric SCHWARTZ, “The New French Arbitration Decree: The Arbitral Procedure”, *Cahiers de l’Arbitrage* (2011) p. 349. See also Emmanuel GAILLARD and Pierre DE LAPASSE, “Le nouveau droit français de l’arbitrage interne et international”, *Recueil Dalloz* (2011) p. 175.

² Christophe SERAGLINI, “Synthèse – Arbitrage international: instance arbitrale”, *J.C. Droit international* (2019) at p. 65: “While there is no requirement for oral submissions, it is rare that arbitration proceedings are exclusively in writing.” (free translation by the Author).

³ Articles 1442-1503 regulate domestic arbitration and 1504-1527 international arbitration.

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

Short answer: Likely not.

The French *lex arbitri* does not contain any element from which it is possible to infer that a right to a physical hearing exists. On the contrary, various provisions rather suggest that a right to a physical hearing can be excluded.

Both in domestic and international arbitration, the parties and the arbitral tribunal have broad discretion to regulate all the procedural aspects of the arbitration proceedings.

The parties are thus free to either determine the procedural rules applicable to their proceedings, either directly or by adopting institutional arbitration rules or domestic law, or to rely on the arbitral tribunal to do so.

Regarding, in particular, international arbitration, in the absence of rules specified by the arbitration agreement, Article 1509 of the FCCP, grants the arbitral tribunal wide power and discretion to determine the applicable procedural rules “as required”.

The only limitation to the arbitral tribunal’s discretionary power is set at Article 1510 of the FCCP, which provides the arbitral tribunal “shall ensure that the parties are treated equally and shall uphold the principle of due process”.

The principle of due process, under French law, essentially requires that (i) each party be given the opportunity to assert its claims in fact and in law, to know and to discuss those of its opponent, (ii) no submissions and no document be brought to the attention of the arbitrators without also being communicated to the other party, and (iii) no argument, in fact or in law, be raised *ex officio* by the arbitral tribunal without the parties having been previously invited to present their observations.⁴

This ample discretion and power granted by the French *lex arbitri* to the arbitrators in organizing the proceedings points to the possibility of holding hearings by any means they deem appropriate, including remotely. And, as long as they ensure a proper application of due process, arbitrators may even impose remote hearings over a party’s objection.

Other elements confirm that a right to a physical hearing would be at odds with the French approach to arbitration. In particular, the *lex arbitri* does not prevent the hearings from being held in a place other than the seat of the arbitration. Nothing prevents the place from being a remote one. In the same vein, the *lex arbitri* does not contain any type of restrictions as to the cross examination of fact and expert witnesses that would require them to appear at the hearing physically.⁵

⁴ Cour d’appel [CA] [regional court of appeal] Paris, July 2, 2013, Eric LOQUIN, Rev. Arb. (2014) p. 130.

⁵ It is interesting to note that the Rules of the International Arbitration Chamber of Paris (“CAIP”) provide that: “The International Arbitration Chamber of Paris reserves its right to organize hearings by video conference or audio conference” (CAIP, 2019 Rules, Article 1.6).

Finally, it is to be noted that the French Legislator recently enacted Act No. 2019-222,⁶ which entered into force on 1 January 2020, to regulate online arbitration. Even if this statute does not contain explicit provisions on remote hearings, it sets the legal framework for arbitration proceedings taking place entirely online.⁷ It is difficult to imagine how a right to a physical hearing could consistently coexist with this kind of mechanism.

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: There seems to be an inferred right to a physical hearing in litigation.

The French rules of civil procedure do not expressly establish a right to a physical hearing. The FCCP generically refers to “hearings”.⁸

Depending on the types of judicial proceedings, different provisions may apply.

In the section regarding proceedings before State courts in general, the FCCP indicates that witnesses may submit oral or written testimony.⁹ In the same section, it requires the “personal appearance” of the parties.¹⁰ It is not specified if “personal appearance” means “physical presence”. The term “personal” may have several connotations and does not necessarily stand for “in person”. The provision requiring personal appearance seems to focus on the participation of the parties rather than on their mandatory physical presence. Hence, it could be interpreted as a reference to “remote personal appearance”.

For certain types of summary proceedings, the FCCP requires the judge to fix the place and time of the hearing. It does not, however, specify the exact meaning of “place”,

⁶ The 2018-2022 programming and reform bill for Justice (*Loi de programmation et justice*) in Law No. 2019-222 of 23 March 2019, Article 4. See Antonio MUSELLA, “Arbitration, Open Data, Justice and Artificial Intelligence: a New Step Forward”, Kluwer Arbitration Blog (16 April 2020) at <<http://arbitrationblog.kluwerarbitration.com/2020/04/16/arbitration-open-data-justice-and-artificial-intelligence-a-new-step-forward/>> (last accessed 29 January 2021).

⁷ Regarding online arbitration platforms, the Decree No. 2019-1089 of 27 October 2019 specifies the modalities for such platforms to obtain a certification to legally host online arbitrations. The 2019-1089 Decree entered into force on 1 January 2021.

⁸ FCCP, Book 1, Title XIV, Chapter I, Section I. See also: FCCP, Articles 451, 485, 758, 778-779, 804.

⁹ FCCP, Article 199.

¹⁰ FCCP, Article 184.

which could possibly be interpreted as a remote place.¹¹ For certain interim measures, the FCCP even refers to the “usual place and hour”.¹² As in practice, hearings are generally held physically, the usual place can only refer to a “physical place” but evolutions are possible in case of generalization of the use of remote hearings. In the future, the “usual place” could well become a remote place.

Since 2007, Article L. 111-12¹³ of the French Judicial Organization Code (“FJOC”) allows the president of the tribunal to decide on the use of videoconferencing upon consent of all the parties.¹⁴ The president’s decision can either be *ex officio* or at the request of a party but in both cases, the parties’ consent is required.¹⁵

The 2018 Protocol regulating the new International Chamber of the Paris Court of Appeal, which also hears cases related to arbitration, does not specifically contemplate the way hearings are to be held. It provides generically for oral proceedings and oral testimonies. The Protocol also requires in several instances the “personal appearance of the parties”.¹⁶ As in the FCCP, it is not specified if “personal appearance” means “physical appearance”.

In 2019, a new law¹⁷ enabled judges to decide disputes submitted to them without holding a hearing unless the parties ask for one. Again, the law does not distinguish between physical and remote hearings.¹⁸

¹¹ FCCP, Article 758.

¹² FCCP, Article 485.

¹³ FJOC, Article L. 111-12: “Hearings before the judicial courts, without prejudice to the special provisions of the Public Health Code, the Code of Criminal Procedure and the Code on the Entry and Residence of Foreigners and the Right of Asylum, may, by decision of the president of the panel of judges, *ex officio* or at the request of a party, and with the consent of all parties, take place in several courtrooms directly linked by an audio-visual medium that ensures the confidentiality of the transmission [...]” (free translation by the Author).

¹⁴ This provision concerns the management of all judicial proceedings and has therefore a rather wide spectrum. However, in practice, the presidents of the tribunals rarely use it.

¹⁵ FJOC, Article R. 111-7. This being said, in case the judge decides to proceed *ex officio* without the consent of the parties, the parties have no recourse against such a decision, which is administrative in nature. The only remedy would be an appeal to the European Court of Human Rights for breach of Article 6 of the Convention by France. No such recourse has been made to date.

¹⁶ Article 4.2.1 provides that the pre-trial judge may invite the parties to appear in person at the hearing. See also Article 5.2.1.

¹⁷ Law No. 2019-222 of 23 March 2019, Article 26, and Decree No. 2019-1333 of 11 December 2019 reforming civil procedure.

¹⁸ For example, it is now possible for the parties to consent to a procedure without a hearing in the initial summons before the *Tribunal judiciaire* (French First Instance Court) even in ordinary proceedings. See FCCP, Articles 752, 757, 778, 828, 829 and FJOC, Article L. 212-5-1.

That same 2019 law has established a specific regime for small claim summary proceedings, that will be applicable as from 2022, pursuant to which the whole procedure will be conducted online. This specific regime does not contemplate any hearing but it provides that a party can specifically request one. In this case, the judge will determine whether a hearing is necessary to ensure due process. This mechanism seems to open the door to a system analogous to arbitration in which remote hearings can be imposed on the parties subject to due process.

It appears from the above that: (i) Despite several references to “personal appearance”, there is no explicit mandatory provision establishing that hearings must be physical or that parties have a right to it; (ii) However, in the only case expressly contemplating the possibility of remote hearings, the consent of the parties remains a requirement.¹⁹ This suggests the existence of an inferred right to a physical hearing; (iii) There is a clear intention of the French Legislator to encourage the use of remote hearings and the use of expedited mechanisms. However, in practice, courts are reluctant to hold remote hearings. As a result, those provisions are not commonly used and have not generated case law that could be relevant for the purposes of the present report.

In conclusion, there seems to be an inferred right to a physical hearing in today’s French civil procedure but the system is sufficiently flexible to rapidly evolve.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

One of the advantages of arbitration in France is that the parties and the arbitral tribunal are clearly not bound by the provisions governing the conduct of proceedings before State courts.

In the French system, the rules applicable to international arbitration are independent from the rules applicable to State court proceedings. The principle is that the rules of civil procedure are not transposable to arbitration proceedings.²⁰

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

¹⁹ FJOC, Article L. 111-12 which applies to all judicial jurisdictions.

²⁰ FCCP, Articles 1464 and 1509.

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

As no such right exists pursuant to the *lex arbitri*, the arbitrators can, in principle, freely decide to hold either remote or 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: Likely not.

It is generally accepted that the agreement of the parties is the pillar of international arbitration. As explained above, pursuant to Article 1509, the parties are free to determine the rules applicable to the proceedings. If the parties have done so, their choice is binding on the arbitral tribunal.²¹

In particular, if the parties have agreed to hold a hearing, the arbitral tribunal is bound by such agreement. If the parties have expressly agreed that this hearing shall be held physically, in principle, the arbitral tribunal can propose, but has not the power to impose, to hold a remote hearing.

While the answer is straightforward regarding the agreement of the parties in the arbitration clause, it is more uncertain when it comes to procedural agreements reached in the course of the proceedings.

The *lex arbitri* does not clearly distinguish between the scenarios in which the agreement of the parties occurs before or after the commencement of the arbitration but Article 1509 FCCP only refers to the agreement of the parties on the conduct of the proceedings which is contained in the arbitration clause.

As explained above (see sub-paragraph a.2 above), Article 1509 then provides that, failing such an agreement in the arbitration agreement, the arbitral tribunal has ample power to determine the applicable procedural rules.

The question, thus, is whether the parties have a last say, at any stage of the proceedings.²²

²¹ Cour de cassation [Cass.] [supreme court for judicial matters] civ. 2, October 15, 1980, Ernst MEZGER, Rev. Arb. (1985) p. 311.

²² See Cristophe SERAGLINI and Jérôme ORTSCHIEDT, *Droit de l'arbitrage interne et international*, 2nd edn. (L.G.D.J. 2009) pp. 801-802: "To the solution which consists in always leaving the last say to the parties in the conduct of the proceedings, one may prefer another solution limiting the arbitral tribunal's freedom to regulate the proceedings solely on the basis of the procedural provisions adopted by the parties, either before the start of the proceedings, in particular in the arbitration agreement, or at the very beginning of the proceedings, for example in a Terms of Reference. Apart from that, the arbitral tribunal's power of initiative should remain intact" (free translation by the Author). See also Alexis

In this perspective, it is questionable whether the arbitrators can be bound by an agreement of which they were unaware when accepting their assignment.²³

In practice, however, it is unlikely that arbitrators would circumvent the parties' agreement.

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: Probably yes.

As explained above, the French *lex arbitri* does not contemplate a right to a physical hearing.

Assuming, however, that such a right was recognized in a specific case, Article 1466 of the FCCP²⁴ provides that “[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity”.

MOURRE, “Arbitrage commercial international”, J.C. Droit international (2011) at p. 21: “The prevailing view, however, is that arbitrators must abide by the will of the parties [...]. This is the case if the agreement of the parties is included in their arbitration agreement. The arbitrators would then be aware of it when accepting their assignment. The answer is more uncertain when it comes to procedural agreements reached in the course of the proceedings. In practice, however, this type of problem is easily resolved by experienced arbitrators capable of using their powers of persuasion over the parties” (free translation by the Author). See also Matthieu DE BOISSÉSON, “Post-scriptum critique sur les principes de la procédure arbitrale en droit français”, Rev. Arb. (2018) p. 709 at p. 721: “[D]espite objections due to the concern to ensure the efficiency of the arbitration, the parties have a final say on the rules and organization of the procedure” (free translation by the Author).

²³ “Arbitral Proceedings: General Remarks on Arbitral Proceedings in French Law”, in Jean-Louis DELVOLVÉ, Gerald H. POINTON and Jean ROUCHE, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed. (2009) p. 11 at p. 218: “The arbitral tribunal is not obliged to accept every restriction which the parties may wish to impose on its powers. Indeed, the parties do not have the right to impose a total restriction on the exercise of an arbitral tribunal's powers, since if they were to do so, it would no longer have a jurisdictional function, and would therefore not be an arbitral tribunal. [...] The arbitral tribunal must remain in charge of the conduct of the case, [...]. Nevertheless, an arbitral tribunal would be wise to take account of the views of the parties, and should not issue procedural orders without prior discussion with the parties as to what decision would be most appropriate. Arbitral proceedings offer flexible opportunities for cooperation between arbitrators and parties for determination of the procedural rules that the case may require”.

²⁴ This Article applies to both domestic and international arbitration.

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

Article 1466 was introduced in 2011 but the principle of estoppel was already recognized and applied by French courts before, without however the limitation as to the “legitimate reason”.²⁵

A certain margin of uncertainty still remains regarding the interpretation of this provision. To date, the case law has not clarified the exact scope of the “legitimate reason” but it seems to refer to public policy matters.²⁶

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

French law does not recognize a right to a physical hearing in arbitration.

If we assume that a right to a physical hearing was recognized in a specific case, a breach of such right would constitute a ground to vacate the award only if considered as a breach of international public policy. Whether there is a breach of international public policy is highly fact-dependent.

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: Highly fact-dependent but, of itself, likely not.

²⁵ In the famous *Golshani* decision (Cour de cassation [Cass.] [supreme court for judicial matters] 1st civ., July 6, 2005), the *Cour de cassation* recognized the principle of estoppel in arbitration law. See also Cour d’appel [CA] [regional court of appeal] Paris, June 3, 2010, Rev. Arb. (2010) p.395.

²⁶ Cour d’appel [CA] [regional court of appeal] Paris, February 27, 2018, Rev. Arb. (2018) p. 299, in which the Court decided that Article 1466 FCCP could not apply in the context of insolvency proceedings to undermine the equality among the creditors. Such a principle of parties’ equality in insolvency proceedings is a matter of public policy and is not waivable.

Unlike other jurisdictions, such as Austria,²⁷ to date, the setting aside of an award based on a failure by the arbitral tribunal to hold a physical hearing, has not been considered by French courts.²⁸

For international arbitration, Article 1520 provides a limited number of grounds for annulment:

“An award may only be set aside where:

- (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
- (2) the arbitral tribunal was not properly constituted; or
- (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
- (4) due process was violated; or
- (5) recognition or enforcement of the award is contrary to international public policy” (emphasis added).

It is unlikely that, *per se*, the failure to conduct a physical hearing by the arbitral tribunal will constitute a breach of one of the above-mentioned grounds.

However, depending on the circumstances, grounds No. (3) and (4) could be used to seek the annulment of the award in case the arbitrators conducted the remote hearing in such a way as to deprive a party from a fair proceeding.

Regarding, in particular, ground No. (3), it is generally invoked when the arbitrators are considered to have acted *ultra petita*,²⁹ have unduly decided as *amiable compositeur*,³⁰ or have failed to properly reason their decisions on the basis of the applicable rules.³¹ The failure to conduct a physical hearing would have to be somehow related to one of these breaches.

With respect to ground No. (4), as mentioned above (see sub-paragraph a.2), the concept of due process essentially implies a breach of the parties’ right to be heard in an

²⁷ Oberster Gerichtshof [OGH] [Supreme Court] 23 July 2020, 18 ONc 3/20s.

²⁸ See Maxi SCHERER, “Remote Hearings in International Arbitration: An Analytical Framework”, 37 J. Int’l Arb. (2020), p. 407 at p. 438: “The ultimate test for any remote hearing is whether the resulting award withstands a challenge in recognition/enforcement or set aside proceedings. This test seems to have been positive so far: to the best knowledge of the author, there is no reported court decision which has refused an award’s recognition/enforcement or has set it aside on the basis that a hearing was conducted remotely”.

²⁹ Cour de cassation [Cass.] [supreme court for judicial matters] civ. 2, December 9, 1997, Laurence KIFFER, Rev. Arb. (1998) p. 417.

³⁰ Cour de cassation [Cass.] [supreme court for judicial matters] civ. 1, October 12, 2011, Eric LOQUIN, Rev. Arb. (2012) p. 91.

³¹ Cour d’appel [CA] [regional court of appeal] Paris, January 14, 1997, Philippe FOUCHARD, Rev. Arb. (1997) p. 395; Cour d’appel [CA] [regional court of appeal] Paris, pole 1 – ch. 1, April 2, 2019, No. 16/24358.

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

equitable and fair manner.³² Hence, in order to validly invoke this ground, the arbitrators' failure to hold a physical hearing must also involve a breach of the parties' equal treatment.

Pursuant to a well-established case law, the due process principle does not, *per se*, imply that the parties have to be heard orally by the arbitral tribunal.³³ The Paris Court of Appeal has confirmed that "there is no rule requiring oral hearings before the arbitral tribunal; the only requirement is compliance with the principle of due process".³⁴ In the absence of specific case law regarding remote hearings, it seems reasonable to consider that an analogous finding would be reached, i.e., that there is no rule requiring physical hearings as long as due process is ensured.

Given the broad discretion and power of the arbitrators in the *lex arbitri*, the standard of proof is particularly high. Hence, the cases of annulment based on procedural decisions are rare.³⁵

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: Highly fact-dependent but, of itself, likely not.

³² Cour d'appel [CA] [regional court of appeal] Paris, January 16, 2003, J.D.I. (2004) p. 161; Cour d'appel [CA] [regional court of appeal] Paris, April 25, 2017, Malik LAAZOUZI, Rev. Arb. (2017) p.767.

³³ See, e.g., Cour d'appel [CA] [regional court of appeal] Paris, civ., July 12, 1973, Philippe FOUCHARD, "Le principe de l'oralité des débats ne s'impose pas aux arbitres", Rev. Arb. (1973) p. 74: arbitrators may decide on the basis of written exchanges without an oral hearing. See also Catherine KESSEDJIAN, "Principe de la contradiction et arbitrage", Rev. Arb. (1995) p. 381: "In France, some authors have strongly argued in favour of the oral nature of the proceedings on the ground of the parties' right to present their case which implies the oral nature of the proceedings" [...]. However, these authors admit that the oral debate should only be conceived as ancillary to the written debate" (free translation by the Author).

³⁴ *Baste v. Coathalem*, Cour d'appel [CA] [regional court of appeal] Paris, January 25, 1991, Rev. Arb. (1991) p.651.

³⁵ See, e.g., Cour d'appel [CA] [regional court of appeal] Paris, February 7, 2017, No. 15/00496: "[T]he arbitrators, in exercising their power to organise the procedure, have not disregarded the adversarial principle, nor that of equality between the parties" (free translation by the Author).

France has adopted a regime applicable to the recognition and enforcement of foreign awards that is more favourable than the New York Convention.³⁶ Thus, French courts apply the FCCP provisions instead of Article V of the New York Convention.

Therefore, the same grounds as those provided for the setting aside of awards (see sub-paragraph d.9 above) are applicable to the recognition/enforcement of foreign arbitral awards.³⁷

Moreover, pursuant to the seminal cases *Hilmarton* and *Putrabali*, French courts adopt the same approach as for annulment proceedings irrespective of the positions of the courts of the seat.³⁸ Hence, French courts will not consider whether a right to a physical hearing existed at the seat.

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: No specific measures regarding international arbitration.

The French Government has taken a number of measures since March 2020 but none of them has a specific impact on international arbitration. Such measures tend to generalize remote hearings bypassing the agreement of the parties, which is particularly relevant for cases before State courts.

Orders No. 2020-304³⁹ of 25 March 2020 and No. 2020-595 of 20 May 2020 dealing with the spread of the COVID-19 pandemic, adopted pursuant to the emergency law No.

³⁶ See Caroline KLEINER, “Country Report: France” in Franco FERRARI, Friedrich ROSENFELD and Dietmar CZERNICH, eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020) p. 157.

³⁷ FCCP, Article 1525.4: “The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520” (free translation by the Author). See Jean-Baptiste RACINE, *Droit de l'arbitrage* (Puf 2016) p. 624: “There is no particular interpretation of the annulment grounds provided for by art. 1520 in the framework of an appeal against a recognition order under art. 1525” (free translation by the Author).

³⁸ Cour de cassation [Cass.] [supreme court for judicial matters] civ. 1re, March 23, 1994, No. 92-15.137, *Hilmarton*, Bull. civ. I, n° 104; June 10, 1997, Nos. 95-18.402 and 95-18.403, *Hilmarton*, Bull. civ. I, n° 195; June 29, 2007, No. 05-18.053, *Putrabali*, Bull. civ. I, Nos. 250 and 251, Cour d’appel [CA] [regional court of appeal] Paris, May 21, 2019, No. 17/19850.

³⁹ Order No. 2020-304 is applicable to civil proceedings. It is to be noted that the French government also extended the possibility of using videoconferencing for administrative

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

2020-290 of 23 March 2020, give the possibility of using videoconferencing without the prior consent of the parties, subject to the compliance with due process.⁴⁰

The aforementioned measures have been extended until 16 February 2021 and may be further extended.⁴¹

Notwithstanding these measures, at the moment, State courts still prefer holding physical hearings or rendering decisions without any oral hearing. As a result, the use of videoconferencing remains limited.

On 19 November 2020, the French Constitutional Court confirmed that such procedures without a hearing are compliant with the French Constitution.⁴²

proceedings (Order No. 2020-305) and criminal proceedings (Order No. 2020-3030). However, the *Conseil Constitutionnel* recently decided that, in criminal cases, conducting remote hearings without the parties' consent is not compliant with the French Constitution. The provision has therefore been declared null and void (French Constitutional Court, 15 January 2021, No. 872-2020).

⁴⁰ Order No. 2020-304 of 25 March 2020, Article 7 provides the judge with the possibility of holding all hearings in all disputes by videoconference and, if it is technically or materially impossible to do so, by any electronic means of communication, including by telephone. The decision to hold the hearing remotely must refer to Article 7 of the Order in the header of the decision rendered. It is not necessary that the judge motivate such a decision. It is not subject to the consent of the parties and to appeal. Article 8 of Order No. 2020-304 of 25 March 2020 allows the judge, in proceedings where representation by a lawyer is mandatory or in cases in which all parties are assisted or represented by a lawyer, to decide that the proceedings take place without a hearing, without the need to obtain the prior agreement of the parties. The parties have a period of 15 days to object to the decision taken by the court. In this case, the court may choose to maintain the hearing in one of the modalities provided for in Articles 5 and 6 of the Order (single judge, limited number of attendees). It may also decide to set a date for the hearing after the pandemic.

⁴¹ After the Act No.2020-1379 of 14 November 2020 authorizing the extension of the state of health emergency in France was enacted, three orders have been published on 19 November 2020. Further acts are under preparation to extend the state of health emergency at least until 1 June 2021.

⁴² French Constitutional Court, 19 November 2020, No. 2020-866 QPC.