ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

GREECE

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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, there is no express provision providing for a right to a physical hearing.

International commercial arbitration in Greece is primarily governed by Law 2735/1999, by way of which Greece has adopted the UNCITRAL Model Law 1996 on International Commercial Arbitration with minor alterations[1] as an international arbitration statute. With the enactment of Law 2735/1999, the Greek legislator followed a dualistic approach, according to which international commercial arbitration is mostly governed by the provisions of that Law, whereas domestic and international non-commercial arbitration are governed by Articles 867-903 of the Greek Code of Civil Procedure (Law 4335/2015, hereafter "CCP").[2]

Neither Law 2735/1999, nor the arbitration-related provisions contained in the CCP explicitly provide for a right to a physical hearing. Whether a right to a physical hearing can be inferred from statutory provisions and/or general principles of arbitration law is further discussed in the following sub-paragraph.

It should be noted at the outset that, at the time of the submission of the present report, there is an ongoing legislative process for the amendment of Law 2735/1999. Nonetheless, on the basis of the draft law that is currently under scrutiny and deliberation by the drafting committee, there appear to be no changes affecting the contents of the present report.

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*

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[1] Antonias DIMOLITSA, "Differences of Law 2735/1999 on International Arbitration compared to UNCITRAL's Model Law", Business & Company Law (1999) p. 1249.

[2] Konstantinos KERAMEUS, "The New Greek Law on International Commercial Arbitration", 52 RHDI (1999) p. 583; Stylianos STAMATOPOULOS, "Legal framework of arbitration in Greece: CPC – UNCITRAL Model Law interactions", Epitheorisi Politikēs Dikonomias (2008) p. 781.

allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: There is no strong argument in favor of the view that a hearing should take place physically.

Per the spirit of national procedural law and the historic context of its adoption, the notion of a "hearing" contemplates a hearing that is conducted with the physical presence of both parties. Relevant provisions of the CCP and of national institutional arbitration rules (e.g., the Arbitration Statute of the Chamber of Commerce and Industry of Athens, enacted with Presidential Decree No. 31 of 12th January 1979) are primarily drafted on the assumption that proceedings before the arbitral tribunal are in principle conducted physically.[3] The same approach is generally followed by legal theory, where it is admitted that "from a general point of view, the main arbitral procedure, has both externally and internally, at the beginning and during its course, the appearance of proceedings before courts".[4]

However, nothing in Law 2735/1999 (be it definitions or wording formulation of the relevant provisions) seems to suggest that a hearing is strictly physical. Quite the contrary, the procedural discretion enjoyed by the arbitral tribunal in shaping the procedure seems to confirm that arbitrators can opt for any type of hearing they deem appropriate, including but not limited to a remote one (see Article 20 of Law 2735/1999).

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[3] See, e.g., Art. 886, paras. 1-2, CCP: "The proceedings shall be carried out *before the arbitrators* and the chairman, who shall act in common. [...] the parties *must be invited to appear* during the hearings, to develop their contentions orally or in writing at the arbitrators' discretion and to adduce proof. [...]" (emphasis added); Art. 887, para. 1, CCP: "Subject to any different provision in the arbitration agreement, the case shall be tried even if the parties to the agreement or one of these have not appeared or have not developed their contentions or have not adduced proofs"; Art. 888, para. 1, CCP "Witnesses and experts may be questioned without oath or under oath [...]"; Art. 15 Presidential Decree No. 31 of 12 January 1979: "*The hearings of the arbitral tribunal take place at the premises of the ACCI, in a suitable hall, and they are not public.* Parties may *either be personally present, or be represented*, or appear with or through a lawyer, or to be assisted by counselors. […] The parties *must be summoned to be present during the hearings and develop their arguments*, as it is provided for in the following articles" (emphasis added); Art. 16, para. 1, Presidential Decree No. 31 of 12 January 1979: "If the party asking for arbitration, or if both parties do not appear, although they were regularly summoned *to be present during the hearing*, the arbitration is suspended" (emphasis added); Art. 22, para. 4, Presidential Decree No. 31 of 12 January 1979: "Witnesses and experts are heard, either by the arbitral tribunal during one of its hearings, or, upon a duly recorded decision of the arbitral tribunal, by one of the arbitrators" (free translations by the Author).

[4] Georgios RAMMOS, *Manual of Civil Procedural Law*, Vol. IV (Sakkoulas Publications 1985) pp. 2166-2167 (free translation by the Author).

Evidently, and as has been rightly pointed out in legal theory, prior to determining the oral or written form of procedure or the type of hearing to be conducted, it is advisable for the tribunal to take into account the parties' positions,[5] since party autonomy is the cornerstone of arbitration and the main guiding principle in determining the way proceedings are to be conducted.[6] Although it is considered self-evident, the above rule stems *de lege lata* from the provision of Article 19, para. 1, Law 2735/1999 ("Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings"; free translation by the Author), which implements what has been rightfully characterized as the "*Magna Carta*" of the UNCITRAL Model Law[7] (see also Article 886, para. 1, subpara. 2, CCP for domestic arbitration). Parties are therefore free to agree on the procedure to be followed, as long as their agreement does not derogate from mandatory provisions of Law 2735/1999,[8] in particular with regards to the application of the principle of equality and the right to be heard (Article 18 Law 2735/1999, Article 886, para. 2, CPC).[9] The above agreement, express or implied, by which the parties determine the arbitration procedure, is separate and independent from the arbitration agreement,[10] since the agreement on the procedure does not belong to the necessary content of the arbitration agreement. In any case, the agreement of the parties on the arbitral procedure must be as clear and definite as possible for reasons of procedural certainty.

Absent any agreement by the parties on procedural issues,[11] the arbitral tribunal shall decide it at its discretion, taking into account the particularities of the dispute (Article

[5] Konstantinos KALAVROS, *International Commercial Arbitration*, Vol. I (Sakkoulas Publications 2019) p. 351; see also "Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3-21 June 1985) (A/40/17)" in UNCITRAL *Yearbook XVI* (1985) p. 3 at para. 203.

[6] Stelios KOUSOULIS, *Arbitration. Commentary* (Sakkoulas Publications 2004) p. 231; G. RAMMOS, *Manual of Civil Procedural Law*, fn. 4 above, p. 2167.

[7] "Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN.9/264)" in UNCITRAL *Yearbook XVI* (1985) p. 104 at p. 124.

[8] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 308; S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 216; G. RAMMOS, *Manual of Civil Procedural Law*, fn. 4 above, p. 2167.

[9] S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 213: "An arbitration procedure not governed by the principle of equal treatment shall have its judicial nature abandoned and shall lead to an arbitral award that can be annulled […]" (free translation by the Author).

[10] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 308; S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 311. In practice, parties may embody the agreement in the relevant arbitration clause: see Andreas ZAGKLIS, *Determination of the procedure on the taking of evidence in International Commercial Arbitration* (Dike 2005) p. 1341.

[11] It is rather controversial whether the parties' power to regulate the procedure extends to every stage of the arbitral proceedings or whether it should be exercised before an issue of procedure arises. According to the prevailing view in Greek legal theory, parties are

19, para. 2, Law 2735/1999; Article 886, para. 1, subpara. 2, CCP). It is common practice in international arbitrations that, after their appointment, the arbitrators undertake to organize the arbitration process in cooperation with the parties, but as "masters of their own procedure".[12] The arbitral tribunal is not, however, bound to choose a procedure similar to that followed by the state courts of the seat of arbitration. Rather, the tribunal is free and flexible to adopt the procedural rules that meet the demands of the international character and the particularities of the dispute, taking into account the different legal backgrounds of the various stakeholders involved in the arbitral proceedings (parties, counsel and arbitrators), and, in any case, stick to a procedure free of formalities.[13]

It should be noted, however, that, while the parties' only restriction is not to deviate from mandatory rules of the *lex loci arbitri*, it has been argued that this is not the case for arbitrators, who are obliged to follow the rules of the applicable (procedural) law when they determine the procedural framework, irrespective of whether they are of mandatory or dispositive nature.[14]

Ultimately, the matter whether an oral hearing will actually take place or whether an award will be rendered based solely on documents produced by the parties is regulated by Article 24 of Law 2735/1999, which specifies the general provision of Article 19 by establishing the framework within which the parties or the tribunal can exercise their power with regards to the organization of the procedure.[15]

According to Article 24, in the absence of an agreement between the parties (opting-in or opting-out of a hearing due to considerations of time and/or cost or otherwise), the arbitral tribunal can decide, at its discretion, whether an oral hearing (*ακροαματική διαδικασία*, *akroamatikē diadikasia*) will be held. The validity of the parties' agreement

predominantly free to agree on procedural issues. However, if they fail to do so in a timely manner, then the arbitral tribunal has the power to determine at its sole discretion the fashion according to which the procedure will evolve. See, e.g., K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 308-309; Konstantinos KALAVROS, *Das UNCITRAL-Modelgesetz über die internationale Handelsschiedsgerichtsbarkeit* (Gieseking 1988), p. 105-106; S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 217, noting that "[…] provided that the arbitrators have determined, under the above conditions, the arbitration procedure, the relevant power of the parties ceases to exist" (free translation by the Author).

[12] S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 218 (free translation by the Author).

[13] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 310. From the case law see, e.g., Supreme Court (hereafter, also "Areios Pagos"; *Άρειος Πάγος*) 1422/2012 NOMOS; Areios Pagos 102/2012 NOMOS.

[14] S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 218; *contra* K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 310, noting that "[t]he view according to which arbitrators should abide by dispositive rules of Law 2735/1999 contradicts the very essence of dispositive law provisions and can therefore not be accepted" (free translation by the Author).

[15] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 350.

is uncontested, since Article 24 of Law 2735/1999 is of dispositive nature, and, therefore, the tribunal is bound by its content.[16] Nonetheless, the tribunal's discretion may be superseded, and the tribunal will be bound to conduct a hearing, when one of the parties objects to the decision not to hold a hearing (Article 24, para. 1, subpara. 2, Law 2735/1999).[17]

Subject to any agreement of the parties, the arbitral tribunal shall fix the hearing at the appropriate time (Article 24, para. 1, subpara. b, Law 2735/1999). Moreover, according to Article 20, paras. 1-2, Law 2735/1999, the place of the hearing (or of the tribunal's deliberations) does not have to coincide with the seat of arbitration. It could be any venue that is deemed appropriate for the parties and the arbitrators. This wide formulation of the relevant provision ("at any place it considers appropriate") seems to reinforce the view that a remote hearing is acceptable.

In light of the above, the minimum external boundary to the parties' contractual stipulations on procedure and/or to the wide discretion granted to the arbitral tribunal is ultimately the principle of due process. Considering that arbitration is a genuine judicial mechanism leading to the issuance of a final and binding arbitral award that has a *res iudicata* effect on both parties (in the sense that it will be enforceable or even constitutive/altering the parties' substantial rights), the procedure must always comply with the minimum requirements inherent to every judicial mechanism, i.e., due process, equal treatment between the parties, and the opportunity for the parties to present their case (Article 18 Law 2735/1999).[18]

With the above considerations in mind, it follows that, in light of the practical and technical challenges or limitations a remote hearing might entail, the tribunal's main task would be to ensure a fair balance between an efficient and expedite way of conducting the arbitral proceedings and the parties' right to present their case and be treated equally. These fundamental rules of procedure (procedural due process) would in principle be safeguarded in cases where both parties are heard in terms of pleading facts and arguments, commenting on the tribunal's legal or factual opinions and presenting relevant evidence, even if this is done remotely and without any physical presence.

To conclude, like most procedural aspects of the arbitral proceedings, the conduct of a hearing is primarily determined by the parties. In the absence of a parties' agreement, the arbitral tribunal enjoys wide discretion in shaping the procedure, unless one of the parties is in favor of an oral hearing and the other one is against it; in such a case, although the arbitral tribunal is bound to hold a hearing, there is no strong argument in favor of the view that such a hearing should take place physically.

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[16] "Report of the United Nations Commission on International Trade Law", fn. 5 above, at para. 205.

[17] S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 232; K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, p. 351.

[18] Areios Pagos, Plenary Session, 13/1995, Ellinikē Dikaiosyne (1995) p. 1524=Nomiko Vima (1996) p. 404; Areios Pagos 821/2017 NOMOS; Areios Pagos 1668/2005 NOMOS; Areios Pagos 102/2012, Chronika Idiotikou Dikaiou (2012) p. 516=Nomiko Vima (2012) p. 1760; S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 214.

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: Even though the Greek Constitution and the CCP provide for a compulsory public hearing before any decision on the merits, a remote hearing through the use of technology is possible when so requested or deemed appropriate.

According to Article 93, para. 2, of the Greek Constitution (*Sýntagma tēs Ellādos*): "The sittings of all courts shall be public, except when the court decides that publicity would be detrimental to the good usages or special reasons call for the protection of the private or family life of the litigants". The above constitutional rule is further reiterated in paras. 1-2 of Article 115 CCP, according to which: "1. All acts during preliminary stages of the proceedings prior to and outside of the public hearing of the case, are conducted in writing. 2. Subject to articles 237, 238 applicable at first instance trials proceedings before the Courts including proceedings of the non-contentious jurisdiction are, in any case, mandatorily oral" (free translations by the Author).

The exception pertaining to Articles 237 and 238 CCP, as envisaged by Article 115 CCP above, was mandated by the recent modifications brought forth by Law 4335/2015, which introduced a new system of ordinary proceedings in civil cases based on written submissions only. Per these new procedural rules, both the plaintiff and the defendant plead their cases through written submissions (*προτάσεις*), while the hearing of the dispute is a mere formality (*τυπική συζήτηση*). More specifically, the ruling court is not obliged to even summon the parties or their attorneys (Article 237, para. 4, CCP – "principle of written form"), while, even if the parties appear before the court, no oral pleadings take place. Only if the court deems that the case has not been sufficiently clarified – thus preventing the rendering of a decision on the merits – may it decide, at its sole discretion, to order the conduct of a hearing in order to examine witnesses ("principle of orality").

The rationale behind such reform has been to accelerate the conclusion of the cases adjudicated by the courts of first instance, by allowing them to reduce the time interval between the filing of the lawsuit and the issuance of a decision on the merits on the basis of the documents submitted.[19] In line with the aforementioned core-amendment, the

[19] See, e.g., N. VOKAS, "Recommendation for the application of Law 4335/2015 in ordinary proceedings", Armenopoulos 2016, p. 15, also in Ellinike Dikaiosyne (2016), p. 59; S. GEORGOULEAS, "The trial before the courts of first instance in the ordinary proceedings:

Legislator also upgraded the probative value of sworn affidavits (Articles 421 ff. CPC) by including them among the means of evidence (Article 339 CPC), allowing for the examination of witnesses only when it is deemed absolutely necessary.[20]

The above system has been widely criticized.[21] It is questionable whether the "hearing" of Article 237, para. 4, CCP (as described above) is in any way compatible with the constitutional principle of the publicity of court hearings (Article 93, para. 2, of the Greek Constitution), a requirement that serves the democratic character of the State and ultimately the rule of law.[22] As the explanatory memorandum of Law 4335/2015 admits, this so-called "hearing" of Articles 237-238 CCP was provided for with the sole purpose of formally abiding by the requirements of Article 93, para. 2, of the Greek Constitution, which guarantees the publicity of court hearings. However, it remains questionable whether these norms actually abide by the relevant constitutional provision, considering that Article 93, para. 2, of the Greek Constitution does not only enshrine the principle of publicity but also the principle of orality. As has been rightly pointed out, the mere attendance of the public at formal hearings does not meet the institutional purpose of publicity, which is none other than bolstering citizens' trust in justice.[23]

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legal issues, practical problems of implementation and proposed solutions", Ellinike Dikaiosyne (2016) p. 41; Konstantinos KALAVROS, *Civil Procedure*, 4th edn. (Sakkoulas Publications 2016) pp. 352 ff.; Nikolaos NIKAS, *Textbook on Civil Procedure*, 3rd edn. (Sakkoulas Publications 2018) pp. 397 ff.; Georgios ORFANIDES, "Ordinary proceedings in first instance procedures" in Charoula APALAGAKI, Paris ARVANITAKIS and Georgios DIAMANTOPOULOS, eds., *Civil proceedings at a critical juncture* (Sakkoulas Publications 2016) p. 15; Stefanos-Spyridon PANTAZOPOULOS, "The provisions of art. 237§6 and 254 CCP for the order and decision to motion a retrial, in light of the procedural principles of art. 107 and 116§2 CCP", Ellinike Dikaiosyne (2017) p. 1626.

[20] See, e.g., Georgios DIAMANTOPOULOS, *Civil Procedure and case law developments* (Sakkoulas Publications 2019) pp. 128 ff.; K. KALAVROS, *Civil Procedure*, fn. 19 above, pp. 408 ff.; Konstantinos KERAMEUS, Donysios KONDYLIS and Nikolaos NIKAS, "Article 559.11" in *CCP Commentary – Methods of review*, 2nd ed. (Sakkoulas Publications 2020) at para. 142; Nikolaos KLAMARIS, Stelios KOUSOULIS and Stefanos-Spyridon PANTAZOPOULOS, *Civil Procedure*, 3rd edn. (2016) p. 753 ff.; Kalliopi MAKRIDOU, *Particular proceedings* (Sakkoulas Publications 2017) pp. 95 ff.; Kalliopi MAKRIDOU, Charoula APALAGAKI and Georgios DIAMANTOPOULOS, *Civil Procedure*, 2nd edn. (Sakkoulas Publications 2018) pp. 57 ff.; Ioannis MANTZOURANIS, *Fundamental procedural principles under review* (Sakkoulas Publications 2019) pp. 178 ff.; Panagis CHRISTODOULOU, *Means of evidence not in full compliance with legal prerequisites* (Sakkoulas Publications 2017) pp. 144 ff.

[21] K. KALAVROS, *Civil Procedure*, fn. 19 above, p. 348; K. MAKRIDOU, Ch. APALAGAKI and G. DIAMANTOPOULOS, *Civil Procedure*, fn. 20 above, p. 17; N. NIKAS, *Textbook*, fn. 19 above, p. 398.

[22] Explanatory memorandum of Art. 1 Law 4335/2015, B IV 3.3 and C II 11.

[23] Ioannis MANTZOURANIS, "Issues related to the application of the CCP upon enactment of Laws 4335/2015 and 4512/2018 (Ordinary procedure – Special procedures –

Similar criticism has been brought forth by legal theory based on Article 6, para. 1, of the European Convention on Human Rights ("ECHR"), which elevates the publicity of hearings to a fundamental procedural right (and not just an institutional guarantee). More specifically, as the case law from the European Court of Human Rights indicates, the right to a fair trial includes the right of every person to an oral hearing, at least before one instance.[24] The principle of orality, however, may be limited in case of exceptional circumstances, such as a highly technical or purely legal nature of the issues raised before the court.[25] Therefore, the principle of orality constitutes the default rule and cannot be derogated, unless it is proven that the lack thereof is not likely to imply an impairment of the parties' procedural rights. In this context, the European Court of Human Rights does not hesitate to find that a violation of Article 6 ECHR has occurred, when it finds that the request of a party for the conduct of an oral hearing has been unjustifiably rejected by the national court.[26]

Ex parte proceedings based solely on written evidence can be nonetheless found in Articles 623 ff. CCP with regards to court orders for payment (*διαταγή πληρωμής*) and Articles 637 ff. with regards to court orders for restitution of leased premises (*διαταγή απόδοσης μισθίου*). In both proceedings the ruling judge should proceed with the assessment of the application for granting the requested court order without summoning the parties and with no prior oral hearing. However, it is worth mentioning that the above procedures have not raised similar concerns as the ones related to the application of Articles 237, 238 CCP, as these proceedings do not lead to the issuance of a court's decision but rather on an executable order (Article 904 CPC).

On the contrary, pursuant to the specific sets of rules applicable thereto, all particular proceedings (i.e., proceedings for matrimonial disputes, Articles 592 ff. CCP; proceedings for financial disputes, labor cases, performance of independent services, car accidents, disputes between landlords and tenants etc., Articles 614 ff. CCP) remain oral. The same applies for procedures in the context of interim measures (Articles 682 ff. CCP), non-contentious jurisdiction (Articles 739 ff. CCP), appellate (Article 524 CCP) and cassation proceedings (Article 574 CCP).

Enforcement/Diachronic law)", Educational seminar for the National School of Judges, Thessaloniki (11-12 April 2019) p. 6.

[24] *Håkansson and Sturesson v. Sweden*, 21 February 1990, §64, Series A no. 171-A; *Helmers v. Sweden*, 29 October 1991, §36, Series A no. 212-A; *Fredin v. Sweden (no. 2)*, 23 February 1994, §21, Series A no. 283-A; *Döry v. Sweden*, no. 28394/95, §39, 12 November 2002.

[25] *Helmers v. Sweden*, fn. 24 above, §36; *Döry v. Sweden*, fn. 24 above, §41; *Lundevall v. Sweden*, no. 38629/97, §38, 12 November 2002; *Speil v. Austria*, no. 42057/98, §2a, 5 September 2002; *Valová, Slezák and Slezák v. Slovakia*, no. 44925/98, §64, 1 June 2004; *Martinie v. France*, no. 58675/00, §41, ECHR 2006-VI.

[26] *Stallinger and Kuso v. Austria*, 23 April 1997, §51, *Reports* 1997-II; *Alge v. Austria*, no. 38185/97, §30, 22 January 2004; *Gabriel v. Austria*, no. 34821/06, §31, 1 April 2004; *Becker v. Austria*, no. 19844/08, §41, 11 June 2015.

Over the past few years, the idea of holding remote hearings and promoting the use of technology in civil proceedings has been widely fostered by Greek legal theory.[27] In this respect, the Legislator enacted Law 3994/2011 ("Rationalization and improvement in the administration of civil justice and other provisions"), which amended certain provisions of the CCP, introducing, *inter alia*, for the first time regulation of the electronic conduct of civil proceedings. The CCP thus followed the model of most European procedural codes (especially the German *Zivilprozessordnung*, "ZZP") in order to allow for the use of modern information technology.

Among others, Law 3994/2011 constitutes the legal basis for conducting remote hearings (including examination of witnesses, experts and parties) by means of modern technology ("televised hearings"). More specifically, for the convenience of the parties and their attorneys, the court may decide upon a party's request or on its own motion that the hearing will be conducted solely by electronic means of communication and that it will be broadcasted simultaneously with audio and video in the courtroom and at the place where the parties and their attorneys are present.[28] However, in practice, remote hearings rarely take place.

Moreover, according to case law, video conferences are also suitable for the deliberations of the court (*διάσκεψη*). In a decision dating back to 2008, the Multi-Member Court of First Instance of Athens held that, in exceptional cases (temporary inability to attend physical deliberations due to illness or other causes of force majeure), the use of teleconferencing devices is a suitable and acceptable means for conducting deliberations among judges. [29] The court further clarified that conducting deliberations through video conference equipment does not constitute *per se* a violation of due process, as long as judges command an in-depth knowledge of the case file and can freely express their opinion on factual and legal issues pertinent to the dispute at hand.

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[27] See, e.g., Apostol ANTHIMOS, "The penetration of digital technology in civil litigation", Synigoros (2011) p. 70; Apostol ANTHIMOS, "Teleconferencing applications in civil litigation", Synigoros (2013), p. 2; Athanasios KAISSIS, "The impact of information technology on civil proceedings", Armenopoulos (2007), p. 1025.

[28] N. NIKAS, *Textbook*, fn. 19 above, pp. 399 ff.; see also Art. 237, paras. 10-11, CCP after the enactment of Law 4335/2015: "10. The court, upon a request submitted by parties or on its own motion, may decide that parties and their attorneys during the hearing be present in a different place and carry out procedural acts there. This hearing is broadcasted simultaneously with sound and video image to the courtroom and to the place where parties and their attorneys attend. 11. The court, upon a request submitted by parties or on its own motion, may decide the examination of witnesses, experts and parties without them attending the courtroom, this decision being not subject to methods of review. This examination is broadcasted simultaneously with sound and video image to the courtroom and to the place where the examination of witnesses, experts and parties occurs. This examination, which is deemed to be conducted before the court, has the same probative value as the examination conducted orally" (free translation by the Author).

[29] Multi-Member Court of First Instance of Athens 7809/2008 NOMOS.

Last but not least, ADR institutions are inclined to follow the same approach by encouraging the use of technological means. Both Law 4640/2019 on Mediation and the Mediation Regulation of the Athens Mediation & Arbitration Organization ("EODID") explicitly provide for the possibility of conducting the mediation session remotely. Specifically, Article 5, para. 3, subpara. b, of Law 4640/2019 stipulates that: "If it is not possible for both parties and the mediator to be physically present at the same place and time, the mediation can be carried out through teleconferencing via a computer or other teleconferencing system, that other parties to the dispute have access to". Similarly, Article 9, para. 2, subpara. a, of the Mediation Regulation of the Athens Mediation & Arbitration Organization ("EODID") provides that: "The mediator's meetings with the parties and their legal representatives may be shared with all parties or individually with each party and may be conducted in person, by telephone, electronically, by video call or by any other means deemed appropriate by the mediator in consultation with the parties" (free translations by the Author).

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, rules applicable to proceedings before state courts are not applicable *per se* to arbitral proceedings.

Arbitration is certainly characterized by the legal concept of procedure, meaning an organized succession of stages leading to the issuance of a legally binding arbitral award. However, the main difference between arbitration and state court proceedings is that in the former case, main and ancillary procedural acts are contractual in nature and rooted in legal relationships of private law, whereas in the latter case, the system of dispute settlement organized and administered by state courts is rooted in legal relationships of a public law nature.[30] In light of the above, the concept of procedural acts *stricto sensu* is hardly compatible with arbitration and, therefore, the provisions of civil procedure are not directly applicable to arbitral proceedings.

However, the finality and binding force of both court decisions and arbitral awards point to the fact that an analogous application of the rules of civil procedure cannot be excluded. After all, an arbitral procedure is still a judicial procedure and, therefore, a common denominator of every such process requires the adherence to the principle of

[30] Konstantinos KALAVROS, *Arbitration Law I*, Vol. I (Sakkoulas Publications 1993) p. 88, fn. 1; Athanasios KAISSIS, "Reference to the EC Court of Justice for a preliminary ruling from ad hoc arbitral tribunal" in *In memoriam of K. Vavouskos*, Vol. II (1990) p. 151; Stelios KOUSOULIS, *Arbitration Law* (Sakkoulas Publications 2006) pp. 8-9.

equality and the right to be heard, which can by no means be excluded or waived by the parties.[31]

Nonetheless, for an analogous application of state procedural rules to arbitration, it is always essential to assess whether the procedural purposes of those rules also find a ground for application in arbitral proceedings.[32] In any case, the inherent characteristics of arbitration proceedings (speed and flexibility) usually pave the way for tailor-made solutions.

In light of the above, rules of procedure followed in ordinary court proceedings are not directly applicable to arbitration. Although the procedural *lex fori* contained in the CCP provides for remote hearings and examination of witnesses, experts and parties, these provisions do not apply *mutandis mutandis* to 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: Since a right to a physical hearing as such does not exist, parties have the right to agree to a remote hearing or even no hearing at all.

As already stated above, according to Article 24, para. 1, subparas. 1-2, Law 2735/1999, parties can agree that the arbitral proceedings may proceed with a physical or remote hearing or even without any hearing at all. Evidently, parties may opt for the adoption of institutional arbitration rules that allow arbitrators to order a remote hearing or issue an award on the basis of documents and other materials of written form (see, e.g., Article 15, paras. 3-4, Arbitration Rules of the Athens Mediation & Arbitration Organization).

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: If an agreement between the parties exists stipulating the conduct of a physical hearing and this is not respected by the tribunal, the award may be annulled.

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[31] Areios Pagos, Plenary Session, 13/1995, Ellinike Dikaiosyne (1995) p. 1524 =Nomiko Vima (1996) p. 404; Areios Pagos 404/2000, Ellinike Dikaiosyne (2000) pp. 1312-1313.

[32] Panagiotis KARGADOS, "Third party notice in arbitration", Nomiko Vima (1977) p. 1421 at pp. 1428-1429; K. KALAVROS, *Arbitration Law I*, fn. 30 above, pp. 88-89; S. KOUSOULIS, *Arbitration Law*, fn. 30 above, pp. 8-9.

In case the arbitration agreement or a subsequent agreement of the parties provide for a physical hearing, the arbitral tribunal is bound by the parties' agreement and may not impose a remote hearing (Articles 19 and 24 Law 2735/1999).

In other words, a request for a physical hearing submitted by the parties outcasts the wide procedural discretion enjoyed by the arbitral tribunal in terms of arranging the proceedings. In this case, holding a remote hearing contrary to the parties' agreement could lead to the annulment of the award for irregularities of the arbitral procedure amounting to excess of authority (Article 34, para. 2, subpara. dd, Law 2735/1999; Article 897, para. 4, CCP; see sub-paragraph d.9 below). However, the arbitral tribunal can assess the parties' agreement to hold a physical hearing, and in case the latter is ambiguous or untimely, it may proceed with a remote hearing. In this case, the exercise of the discretion enjoyed by the tribunal in shaping the procedure cannot lead to the vacatur of the arbitral award, unless a fundamental violation of the principle of due process can be attributed to the exercise of the above discretion.[33]

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: In principle no. However, if the preconditions specified in Article 281 of the Greek Civil Code (abuse of right) are deemed fulfilled, then the party is likely to be estopped from raising the relevant objection as a ground for annulment.

Law 2735/1999 requires parties to raise any procedural objection in the course of the arbitral proceedings. More specifically, according to Article 4 Law 2735/1999, which is a *verbatim* adoption of Article 4 of the UNCITRAL Model Law, a party who knows that either a provision of this Law – from which the parties may derogate – or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without raising any objection timely (if a time-limit is provided), then it shall be deemed to have waived the right to object.

From the wording of Article 4 Law 2735/1999, it directly follows that parties' rights stemming from mandatory provisions of the Law cannot be waived, even if they were not complied with and neither party raised an objection in the arbitration proceedings.[34]

[33] Areios Pagos 1779/1999, Ellinike Dikaiosyne (2000) p. 988; Court of Appeal of Athens 2061/2002, Ellinike Dikaiosyne (2002) p. 1970.

[34] The only exceptions to this rule are explicitly stipulated in Article 7, para. 7, and Article 16, para. 2, subparas. c-d, Law 2735/1999. Art. 7, para. 7, provides that: "Lack of the in-writing requirement is waived if parties participate unconditionally in the arbitration procedure". Art. 16, para. 2, subparas c-d, provides that: "A plea that the arbitral tribunal

Furthermore, objections that state courts may examine *ex officio* during the enforcement or annulment proceedings (e.g., arbitrability of the dispute, violations of public policy) cannot be waived either, irrespective of whether parties failed to raise an objection in a timely manner during the arbitral proceedings. That is because such objections relate to serious irregularities that state courts should always have the power to examine. A different approach would contradict the bedrock upon which the system of controlling the free circulation of international arbitral awards is premised.[35]

Greek case law has repeatedly considered that a contractual or normative exclusion of the parties' right to challenge an arbitral award is effective and binding on parties, and in any case, compatible with Article 20 of the Greek Constitution and Article 6 of the ECHR. That is mainly due to the fact that an action for annulment concerns a possible vacatur of judicial and not out-of-court acts, and if a different approach was to be followed, legislative restrictions on methods of review would be utterly invalid.[36]

Notwithstanding the above, court decisions consistently associate the right to challenge an award with the procedural conduct held by the party requesting the annulment in the course of the arbitral proceedings. In this respect, a failure to timely raise an objection may, under the preconditions of Article 281 of the Greek Civil Code, exclude that party's right to seek annulment of the award due to its contradictory behavior (*venire contra factum proprium*).[37] That is because, according to case law, the right to seek annulment is of substantive and not of procedural nature, therefore its exercise should comply with basic notions of good faith and accepted principles of morality.[38] A different approach, leading however to the same result, notes that the right to seek the annulment of the arbitral award is of procedural nature and its admissibility

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does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified" (free translations by the Author).

[35] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, pp. 619 ff.

[36] See, e.g., Areios Pagos 738/2019 NOMOS; Areios Pagos 760/2019 NOMOS; Areios Pagos 1264/2018 NOMOS; Areios Pagos 1185/2017 NOMOS; Areios Pagos 61/2016 NOMOS; Areios Pagos 1790/2014 NOMOS; Areios Pagos 1684/1986, Nomiko Vima (1987) p. 1054; Areios Pagos 314/1968, Nomiko Vima, p. 843.

[37] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, pp. 622 ff.; S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 268.

[38] Areios Pagos, Plenary Session, 25/1990, Dike 21, p. 2001; Areios Pagos, Plenary Session, 702/1979 NOMOS; Areios Pagos 301/1992, Dike 23, p. 1081; Areios Pagos 1067/1989 NOMOS; Areios Pagos 1345/1989, Efimerēs Ellinon Nomikon (1990) p. 554=Ellinike Dikaiosyne 33, p. 302.

may be assessed under Article 116 CCP, a provision prohibiting the abuse of procedural rights by safeguarding parties from vexatious litigation.[39]

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 clarified above, a right to a physical hearing in arbitration does not exist. Therefore, it is not possible to answer to this question.

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: If the tribunal fails to comply with the parties' agreement on the conduct of a physical hearing, the award can be annulled, provided that this procedural deviation is likely to have had an impact on the outcome of the case.

The grounds for annulment of an arbitral award are exhaustively listed in Article 34, para. 1, of Law 2735/1999 and are slightly different from those listed in the CCP with regards to annulment proceedings for domestic arbitration awards.[40] More specifically, the provision of Article 34, para. 2, subpara. d, of Law 2735/1999 sanctions the tribunal's departure from the parties' agreement on the procedure (see sub-paragraph c.6 above), providing for a ground for annulment of the award similar to that for refusing recognition and enforcement stipulated in Article V(1)(d) of the New York Convention. In the event that the tribunal follows a procedure which deviates from the agreement of the parties or, absent such agreement, is incompatible with mandatory provisions of Law 2735/1999, the award rendered is highly likely to be annulled under the ground for annulment set forth in Article 34, para. 2, subpara. d, of Law 2735/1999. Considering that this ground is interrelated with the ground stipulated in Article 34, para. 2, subpara. b, lit. bb, of Law 2735/1999 with regards to procedural public policy, the ruling court may, on its own motion, examine whether a violation of public policy has also occurred.

[39] Areios Pagos 933/1988, Efimeres Ellinon Nomikon (1989) p. 497. See Nikolaos KLAMARIS, *The abusive exercise of rights in civil procedural law*, Vols. I-II (1980).
[40] S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 267.

However, given the narrow interpretation of the relevant ground for annulment by the case law,[41] the chances of a successful application for the annulment of the award are rather minimal.

Despite the clear and unconditional wording of Article 34, para. 2, subpara. d, it is argued that the tribunal's violation of the parties' agreement must have had a material impact on the operative part of the arbitral award.[42] However, considering the evidentiary challenges that this threshold entails, legal theory suggests that it is sufficient for the party seeking to annul the award to prove the likelihood (and not certainty) that this procedural deviation has had an impact on the determination of the case. A different approach adopted by legal theory promotes the relinquishment of the causality criterion mentioned above, and the establishment of a qualitative criterion, according to which only serious procedural irregularities or irregularities causing serious (procedural) harm to one party should be taken into account (*de minimis* considerations).[43] To the best of the Author's knowledge, there is no case law affirming the one or the other position.

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: Depending on the facts of the case, it is possible that recognition and enforcement of the award may be denied on the grounds mentioned above.

Consistent with the New York Convention's pro-enforcement spirit, it is well established in Greek case law that Article V of the Convention is of exceptional nature, in the sense that the grounds listed therein are exhaustive and, in any case, should be construed narrowly.[44] Moreover, state courts have ruled in a number of cases that

[41] See, e.g., Areios Pagos 1779/1999, Ellinike Dikaiosyne (2000) p. 988; Areios Pagos 686/1999, Ellinike Dikaiosyne (2000) p. 373; Areios Pagos 1777/1994, Ellinike Dikaiosyne (1995) p. 1077.

[42] K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, pp. 693 ff.

[43] For the criteria suggested see, e.g., *ibid.*, pp. 693-694.

[44] Single Member Court of Appeals of Piraeus 30/2012, Armenopoulos (2013) p. 771; Single Member Court of Appeals of Thessaloniki 871/1998, Archeio Nomologias (1999) p. 44 with note by Ch. NIKOLAIDES=Business & Company Law (1999) p. 735; Single Member Court of First Instance of Heraklion 375/2018 NOMOS; Single Member Court of First Instance of Piraeus 2150/2017 NOMOS; Single Member Court of First Instance of Athens 229/2015, Ellinike Dikaiosyne (2015) p. 204; Single Member Court of First Instance of Thessaloniki

recognition and enforcement proceedings prohibit a *de novo* review of the merits of the case (*révision au fond*).[45] To date, there is no case law dealing with the issue of physical hearings. Therefore, the analysis provided below will attempt to make a critical assessment by drawing conclusions from the existing case law on the application of the New York Convention by the Greek courts.

Violation of the right to be heard (Article V(1)(b) New York Convention). A party's right to present its case[46] is associated with that party's right to be informed of the constitution of the arbitral tribunal and of the arbitral procedure, thus enabling it to fully enjoy all the procedural rights provided for by the *lex loci arbitri*. More precisely, the right to present one's case refers to the summoning of the parties to attend the hearing timely and in a lawful fashion. Furthermore, it ensures that the parties have had the possibility to plead their case (including both legal and factual allegations of a substantive or procedural nature), as well as to be informed of the other party's position. It also includes the parties' right to be informed of factual allegations taken into account by the tribunal *ex officio*, as well as legal assessments made by the tribunal that the parties could not foresee. Finally, the right to present one's case includes the right to provide evidence in support of that party's position capable of determining the outcome of the case, as well as the right to evaluate the evidence adduced by the other party and to be present at all stages of the collection of evidence.

Moreover, in light of Article 6 ECHR and of the fundamental constitutional rules (see Article 20, para. 1, of the Greek Constitution), an infringement of the right to present one's case would be found in case the procedural conduct of the arbitral tribunal fails to ensure, *inter alia*, an equal procedural treatment between the parties (e.g., in cases where the arbitral tribunal grants procedural advantages to one of the parties to the substantial detriment of the other).

24637/2013, Armenopoulos (2015) p. 85 with note by A. ANTHIMOS; Single Member Court of First Instance of Thessaloniki 22340/2012, Business & Company Law (2012) p. 118=Review of Commercial Law (2014) p. 192 with note by A. ANTHIMOS; Single Member Court of First Instance of Thessaloniki 1292/2002, Chronica Idiotikou Dikaiou (2002) p. 261.

[45] Areios Pagos 1657/2014 NOMOS; Areios Pagos 1066/2007, Nomiko Vima (2007) p. 2439=Nomiko Vima (2008) p. 1236; Areios Pagos 537/2007 NOMOS; Areios Pagos 65/1997, Ellinike Dikaiosyne (1998) p. 103=Nomiko Vima (1998) p. 776; Areios Pagos 954/1984 NOMOS; Single Member Court of Appeals of Athens 1008/2018, Business & Company Law (2018) p. 891; Single Member Court of Appeals of Thessaloniki 1357/2017, Review of Commercial Law (2018) p. 518; Single Member Court of Appeals of Thessaloniki 2903/2017, Armenopoulos (2018) p. 1315; Single Member Court of Appeals of Lamia 81/2017, Ellinike Dikaiosyne (2017) p. 1743; Single Member Court of Appeals of Athens 29/2010, Applications of Civil Law (2010) p. 725 with note by K. KOMNIOS.

[46] See, e.g., Areios Pagos, Plenary Session, 13/1995, Ellinike Dikaiosyne (1995) p. 1524; Areios Pagos 2111/2017, Ellinike Dikaiosyne (2018) p. 407; Areios Pagos 511/2007, Ellinike Dikaiosyne (2008) p. 1012.

In light of the above, it seems rather unlikely that a remote hearing could be deemed *per se* as a violation of Article V(1)(b) of the New York Convention. However, if the factual premises of the case reveal that the rejection of a request for a physical hearing (made jointly or by one of the parties) amounted to an unfair procedural advantage in favor of one of the parties, then it is likely that a violation of the Convention could be established on these grounds.[47] For instance, the court would probably weigh and balance the factual premises of the case to make sure that the remote hearing did not intentionally place one of the parties in a disadvantageous position (e.g., that both parties had access to and were familiar with the technological means necessary for the conduct of the hearing, allowing them to properly present their case).

In any case, according to the prevailing view, an infringement of the right to present one's case only constitutes a ground for refusing recognition/enforcement of the award if the tribunal's conduct had an *in concreto* impact on the outcome of the case. More specifically, the procedural infringement committed by the arbitral tribunal should be in (internal) causal relation to the (erroneous) operative part of the arbitral award. In other words, the arbitral tribunal's procedural error should have a substantial influence on the outcome of the case, meaning that due to the abovementioned judicial error one of the parties failed to substantiate its claims or produce relevant evidence. In this regard, it should be examined by the court whether the outcome of the case would be any different, had the tribunal had the chance to take into account allegations pleaded and evidence produced.

Procedural irregularities (Article V(1)(d) New York Convention). With respect to the ground for refusing recognition and enforcement provided for by Article V(1)(d) of the New York Convention, Greek courts can refuse recognition and enforcement of international arbitral awards in cases where the conduct of the arbitral procedure does not comply with the parties' agreement, and, absent such agreement, with the provisions of the *lex loci arbitri*.[48]

It is generally accepted that the arbitral tribunal can freely regulate the procedure to be followed, as long as its discretion is exercised in accordance with the parties' agreement or the procedural rules applicable to the proceedings.[49] In any case, universally fundamental procedural principles such as the equal treatment of the parties and the protection of their right to be heard must be respected by all means and at all times. Consequently, it is likely that, due to its broad scope and depending on the factual premises of the case, this ground could significantly overlap with other grounds stipulated by the Convention, such as Articles V(1)(b) and V(2)(b).

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[47] Greek legal theory has already endorsed this position: see Charis PAMBOUKIS, *Recognition and Enforcement of Foreign Arbitral Awards pursuant to the New York Convention (1958)* (Nomiki Bibliothiki 2020), p. 67, para. 82.

[48] S. KOUSOULIS, *Arbitration*, fn. 6 above, p. 305; N. MASOURIDES, "Recognition and Enforcement of Foreign Arbitral Awards", in *Essays in honor of S. Andreadis*, Vol. II (1973), p. 323 at pp. 368-369.

[49] Ch. PAMBOUKIS, *Recognition and Enforcement of Foreign Arbitral Awards*, fn. 47 above, p. 84.

According to Greek case law,[50] the above ground cannot be established in cases where the arbitrators arranged the procedure according to the parties' agreement, the provisions of which contradict mandatory laws of *lex loci arbitri*. In these cases, the party opposing recognition and enforcement of the award may only resort to the grounds enumerated in Articles V(1)(b) and V(2)(b), as long as their preconditions are fulfilled.[51]

It is questionable, however, whether the arbitral tribunal's infringement of the parties' agreement on the procedure or derogation from the provisions of the applicable *lex loci arbitri* ought to be causally linked to or, in other words, have a material effect on the operative part of the arbitral award to the detriment of one of the parties. Greek legal theory has followed a restrictive approach, taking into account the object and purpose of the Convection to facilitate the free circulation of international arbitral awards. It is thus accepted that the procedural defect should have had a substantial effect on the outcome of the dispute.[52] The party resisting enforcement bears the burden of proving that there is a casual link between the procedural irregularity that has occurred and the detrimental effect to its interests.

(Procedural) public policy (Article V(2)(b) New York Convention). The public policy exception is deemed as a safeguard that allows Contracting States to refuse the (principal) legal consequences of a foreign arbitral award, if they are considered incompatible with the fundamental legal, economic, social and political norms of the country where recognition/enforcement is sought. According to the prevailing view in Greek legal theory and case law, the public policy of Article V(2)(b) does not relate to the domestic public policy of Article 3 of the Greek Civil Code, but, rather, to the international public policy of Article 33 of the Greek Civil Code. The concept of international public policy includes the uncompromising rules of national law which constitute the legal, social, cultural and economic foundations of the domestic legal order, as well as the generally recognized principles referring to the notion of justice.[53]

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[50] Areios Pagos 350/1979, Dike (1979) p. 278; Single Member Court of Appeal of Piraeus 1199/1995, Review of Commercial Law (1995) p. 1092.

[51] Areios Pagos, Plenary Session ,1572/1981, Nomiko Vima (1982) p. 1053.

[52] Ch. PAMBOUKIS, *Recognition and Enforcement of Foreign Arbitral Awards*, fn. 47 above, p. 84.

[53] Areios Pagos, Plenary Session, 6/1990, Ellinike Dikaiosyne (1990) p. 552=Dike (1990) p. 1005=Nomiko Vima (1990) p. 1321; Areios Pagos 1066/2007, Nomiko Vima (2007) p. 2439=Nomiko Vima (2008) p. 1236; Areios Pagos 1618/2007, Chronika Idiotikou Dikaiou (2008) p. 540; Areios Pagos 1665/2009, Ellinike Dikaiosyne (2010) p. 708=Chronika Idiotikou Dikaiou (2010) p. 635; Single Member Court of First Instance of Piraeus 1974/2019 ISOKRATIS; Single Member Court of First Instance of Athens 1267/2018, Arbitration (2018) p. 284 with note by K. KALAVROS; Georgios VERVENIOTIS, *International Commercial Arbitration I. The New York Convention. Bilateral Conventions* (Sakkoulas Publications 1990) pp. 212 ff.; S. KOUSOULIS, *Arbitration*, fn. 6 above, pp. 308 ff.; S. KOUSOULIS, *Arbitration Law*, fn. 30 above, pp. 163 ff.; Ch. PAMBOUKIS, *Recognition and Enforcement of Foreign Arbitral Awards*, fn. 47 above, pp. 139 ff.

Case law has repeatedly upheld for reasons of uniformity the view that the public policy exception relates to the notion of international public policy of Article 33 of the Greek Civil Code both in annulment proceedings of domestic (Article 897, no. 6, CCP) or international awards (Article 34, para. 2, subpara. b, lit. bb, Law 2735/1999) and recognition and enforcement proceedings of international arbitral awards (Articles 905, 906 CCP)[54]. It is however argued by legal theory that the above approach, albeit correct in principle, should be in line with the objectives pursued by the New York Convention of 1958 and the pro-enforcement attitude underlying the interpretation and application of its provisions. According to that position by legal theory, international public policy as a bar to recognition and enforcement (Article V(2)(b) of the Convention) should be construed in a much narrower sense than public policy as a ground for annulment of an international arbitral award (see Article 34, para. 2, subpara. b, lit. bb, Law 2735/1999).[55] In other words, reasons justifying the annulment of an award do not necessarily fall within the conceptual threshold of public policy as a ground for refusing enforcement of an award ("attenuated public policy"; *effet atténnué de l'ordre public*).

As the Plenary Session of the Supreme Court ("Areios Pagos") rightly noted in a recent decision:[56] "However, the question whether arbitrators comply with the basic judicial guarantees is left to the state, acting as a guardian through its state courts". State courts are therefore entrusted with assessing whether the main legal consequences of an international arbitral award contravene the most fundamental principles of justice as identified in the context of constitutional provisions, such as Articles 4 (principle of equality), 17 (protection of private property), 20 (right to be heard), 22 (labor protection), 25 (principle of the rule of law, abuse of rights, principle of proportionality).[57]

However, the relevant threshold for determining whether a violation of public policy has occurred remains rather unclear under Greek case law. In a decision rendered by the Athens Single Member Court of Appeal[58] (which, however, concerns an action for annulment), the court implied that a public policy violation shall be "obvious, actual and specific" ("*πρόδηλη, πραγματική και συγκεκριμένη*"). The Supreme Court's subsequent decision which annulled such decision[59] did not examine the legal issue raised therein. In any case, the Convention's basic trust in favor of arbitration justifies the recognition

[54] See, e.g., Areios Pagos, Plenary Session, 14/2015 NOMOS.

[55] Ch. PAMBOUKIS, *Recognition and Enforcement of Foreign Arbitral Awards*, fn. 47 above, p. 134; Charis PAMBOUKIS, *Private International Law. General Part* (Nomiki Bibliothiki 2018) pp. 244-245; Athanasios SKONTZOS, *Pro-enforcement bias in favour of recognition and enforcement of foreign arbitral awards according to the New York Convention of 1958* (Nomiki Bibliothiki 2021) pp. 180 ff.

[56] Areios Pagos, Plenary Session, 14/2005 NOMOS (free translation by the Author).

[57] Konstantinos KALAVROS, *Annulment of arbitral awards* (Sakkoulas Publications 2017), p. 344; Konstantinos KALAVROS, Epitheorisi Politikes Dikonomias (2015) p. 320.

[58] Athens Court of Appeals 3690/2014, Epitheorisi Politikes Dikonomias (2014) p. 331 with note by K. KALAVROS.

[59] Areios Pagos 517/2016, Nomiko Vima (2017) p. 108=Epitheorisi Politikes Dikonomias (2016) p. 402 with note by K. KALAVROS.

and enforcement of the award, unless it can be proven that the award's contradiction to the notion of public policy is obvious and flagrant.

Another controversial issue is whether Article V(1)(b) excludes the application of Article V(2)(b) of the Convention (in the sense that an award infringing the party's right to present his case can be examined solely under the standard of V(1)(b)) or whether the factual background of the dispute can also lead to an application of Article V(2)(b) (*συρροή κωλυμάτων αναγνώρισης*). This distinction can have serious practical consequences: while the ground of Article V(1)(b) has to be invoked and proved by the party resisting recognition and enforcement through the production of relevant evidence, the public policy exception can be identified by the state court of the place where recognition/enforcement is sought on its own motion (*ex officio*). According to the prevailing view, the ruling court may examine the pleaded facts under both grounds for refusal, taking into account the fact that the procedural equality of the parties and the right to present one's case fall within the notion of international procedural public policy.[60]

In this context, the way that arbitral proceedings are conducted does not *per se* fall within the purview of the public policy exception, unless it can be established that the tribunal's conduct in relation to procedural matters resulted in a violation of universally established fundamental principles, such as the parties' right to present their case and procedural equal treatment. In this case, the party resisting enforcement has the burden to plead and provide evidence on the existence of a causal link between the procedural fault of the tribunal and the outcome of the case.

The analysis provided above has been confirmed by Greek case law. The Single Member Court of First Instance of Trikala, in a decision rendered in 2013,[61] assessed whether the rejection of a request by one of the parties for an oral hearing amounts to a violation of procedural public policy. According to the factual background of the case, the plaintiff requested the recognition and enforcement of an arbitral award issued by the Technical Appeal Committee of International Cotton Association of Liverpool. The arbitral award had ruled in favor of the party seeking the recognition and enforcement proceedings, awarding an amount of 4.695.798 USD as compensation for breach of a sales contract, as well as 5.298 USD as arbitration costs and expenses. The party resisting the enforcement alleged that the award was unenforceable, claiming that the procedure followed by the tribunal had violated his right to present his case on the ground that the tribunal had rejected his request for an oral hearing.

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[60] Ch. PAMBOUKIS, *Recognition and Enforcement of Foreign Arbitral Awards*, fn. 47 above, p. 146; *contra* G. VERVENIOTIS, *International Commercial Arbitration I*, fn. 53 above, pp. 207, 215; K. KALAVROS, *International Commercial Arbitration*, fn. 5 above, pp. 754-755.

[61] Single Member First Instance Court of Trikala 43/2013, Business & Company Law (2013) p. 363.

The Single Member Court of First Instance of Trikala, after reiterating the narrow approach followed by case law in the interpretation of the public policy exception, based its decision on Article 307, para. 1, of the Bylaws and Rules of the International Cotton Association Limited. As stated therein:

> "Where either party or both parties require an oral hearing, they shall apply in writing to the tribunal. The tribunal may grant or decline the request without giving reasons. Their decision shall be final. If a request is granted, the Chairman, having consulted his fellow arbitrators, shall decide the date, time and place of the hearing and the procedure to be adopted at the hearing" (free translation by the Author).

On this basis, the court ruled in favor of the applicant, thus granting recognition and enforcement of the award. As can be inferred from the state court's opinion, the rejection of the request for an oral hearing during the arbitral proceedings falls within the procedural discretion enjoyed by the arbitral tribunal, which had been exercised in accordance with the applicable procedural rules (i.e., Article 307, para. 1, of the Bylaws and Rules of the International Cotton Association Limited). Furthermore, the court noted that a judicial procedure based solely on documents (with no oral hearings) is not unknown to Greek procedural law. In any case, the applicable procedural rules explicitly stated that there was no right to an oral hearing and, therefore, no infringement of the party's right to present his case could be established. The court also noted that a mere absence of an oral procedure does not amount to a violation of the right to be heard or to a breach of procedural public policy.

In light of the above considerations, even if a right to a physical hearing exists in the *lex loci arbitri*, the rejection of a request to conduct one during the proceedings would not qualify *per se* as a ground for refusing recognition and enforcement in Greece under the public policy exception. Greek courts will, however, examine whether the refusal to conduct a physical hearing results in a violation of the minimum legal guarantees inherent to any adversarial proceeding leading to a final and binding decision, and in particular the principle of fair trial, equality of arms and the right to be heard, as these values form the core of procedural public policy and an autonomous standard of international due process.

Overall, Greek state courts generally tend to adopt an arbitration-friendly approach. In light of this, in case the issue of remote hearings arises in an annulment or recognition/enforcement proceedings, judges will most likely draw from relevant experience gained from domestic court proceedings where, in light of the relevant provisions of the CCP, the use of modern technology with regards to remote hearings and the remote examination of witnesses, experts and parties is expected to gradually replace the traditional approach of physical hearings.

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: Post COVID-19 legislation and internal acts of State courts try to promote the use of technology with regards to procedures and parties' representation, in cases where hearings are mandatory by law.

According to the Joint Ministerial Decision issued on 6 November 2020 (Government Gazette 4899/06.11.2020 B'), all civil trials entailing physical hearings (examination of witnesses, experts and/or parties) have currently been suspended.

This is in part attributable to the very scarce use of remote hearings and other remote procedural acts in the everyday judicial practice. As aforementioned, although the relevant legal framework is in place, its implementation has proved challenging and is still far from being implemented on a regular – let alone exclusive – basis.

However, as of January 1st, 2021, the Council of the State (*Συμβούλιο της Επικρατείας*; *Symvoūlio tēs Epikrateīas*) and ordinary administrative courts will implement a digitalization program enabling judges and parties to access administrative justice through electronic means. The relevant proposal, prepared by the Council of the State as the competent management body of the Integrated Judicial Case Management System of the Administrative Courts of Justice, incorporates pioneering actions and aims at accelerating the administration of justice, monitoring the work of all administrative courts in real time, and dealing with current emergencies in a post COVID-19 era.