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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the* lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Hungarian *lex arbitri*, the Act LX of 2017 on Arbitration (the "Arbitration Act"), which is applicable both in domestic and international arbitration proceedings seated in Hungary, does not expressly provide for a right to a physical hearing in arbitration.

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

Short answer: It can be likely excluded.

At the outset, it shall be emphasized that the provisions of the Arbitration Act relative to arbitral proceedings entered into force on 1st January 2018, therefore no specific case law could have formed yet during this relatively short time.[1] However, in the light of the historic, systemic, grammatic and teleological interpretation of the *lex arbitri*, and its legal environment, the right to a physical hearing can be likely excluded.

Starting the analysis from the historic perspective, it is worth to shortly examine the former arbitration law, namely Act LXXI of 1994 on Arbitration (the "Former Arbitration Act"), by which Hungary harmonized its *lex arbitri* with the UNCITRAL

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[1] The provisions of the Hungarian Arbitration Act have entered into force gradually, from 16 June 2017. The provisions governing arbitral proceedings entered into force with effect from 1st January 2018, and they are applicable for arbitral proceedings that have been commenced after this date.

Model Law (the "Model Law") in 1994, since it served as a legal framework for arbitral proceedings seated in Hungary for more than two decades.[2]

Mirroring the principle of wide party autonomy enshrined in the Model Law, the Former Arbitration Act gave broad freedom to the parties in determining the rules relative to arbitral proceedings.[3] At the same time, the Former Arbitration Act provided expressly for an oral hearing in arbitral proceedings, under the title "Oral hearing and documentary procedure", by making it to the arbitrators' obligation to hear the parties orally, unless they agreed otherwise.[4] Even if the term "physical hearing" was not expressly mentioned by the text, taking into consideration the time of adoption, namely the mid-90s, and the state of technical development at that time in Hungary, it can be argued that the objective of the Legislator was that parties shall be given the right to be present physically at hearings of arbitral proceedings.

This interpretation is supported by the institutional law of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry ("Arbitration Court of the HCCI"), the main arbitration institution in Hungary.

If we take a closer look at the last version of the Rules of Proceedings of the Arbitration Court of the HCCI ("Former Rules of Proceedings"), effective at the time of the Former Arbitration Act, it is clear that it was designed for arbitral proceedings, in which the parties were physically present at hearings.[5] The Former Rules of Proceedings expressly mentioned the meeting rooms of the Arbitration Court of the HCCI as the default place of proceedings,[6] and according to one of its provisions, in case the nature of the case allowed, the arbitral tribunal closed the hearing, and announced the award

[2] The Former Arbitration Act entered into force in Hungary on 13 December 1994. Hungary was not only the first country from the so-called Eastern Bloc to import the Model Law into its legal system, but also a pioneer among the Model Law jurisdictions by making the Model Law applicable to both international and purely domestic arbitral proceedings.

[3] Article 19 of the Model Law was reflected in Section 28 of the Former Arbitration Act.

[4] Section 34(1) of the Former Arbitration Act provided that: "Unless otherwise agreed by the parties, the arbitral tribunal shall hear the parties, and shall make them possible to submit written submissions. The arbitral tribunal shall hear the witnesses and experts being present, but it shall not impose penalty or other coercive measures" (free translation by the Author).

[5] Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry effective as of March 1, 2011, available at <https://mkik.hu/index.php/en/rules-of-proceedings-2011> (last accessed 25 November 2020).

[6] Article 7(2) of the Former Rules of Proceedings of the Arbitration Court of the HCCI provided that: "The place of the hearings is in Budapest, at the courtrooms of the Arbitration Court. If necessary, or at the parties' request, the arbitral tribunal may conduct hearings at another place as well".

orally to the parties being present.[7] The Former Rules of Proceedings also set forth that parties could jointly request the tribunal to decide the case without oral hearing, on the basis of documents.[8]

After more than two decades, in 2017, parallel with a major legislative change affecting civil procedure and international private law of Hungary,[9] the legislator decided to modify the *lex arbitri* by adopting the Arbitration Act. Besides reforming the institutional framework by making the Arbitration Court of the HCCI the only permanent arbitration court in Hungary for commercial matters, the Arbitration Act harmonized the *lex arbitri* with the changes of the Model Law adopted in 2006, as well.

The objective of the legislator with the adoption of the Arbitration Act was twofold: (i) first, to provide business actors with a real alternative to state court litigation to resolve their disputes in faster procedure on high level of proficiency, and (ii) second, to increase the competitiveness of Hungarian arbitration on international level.[10]

Coming now to the provisions of the Arbitration Act relative to the arbitral procedure, it can be established that it still maintains the wide autonomy of parties in determining the rules of the arbitral proceedings.[11]

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[7] Article 41(2) of the Former Rules of Proceedings of the Arbitration Court of the HCCI provided that: "If the nature of the case allows, the arbitral tribunal shall announce its award orally immediately after the close of the oral hearings to the parties present and shall communicate the award to the parties absent in writing. In such case, the arbitral tribunal also has the option to announce only the operative provisions of the award and to communicate to the parties the grounds for the award within thirty days from the closure of the proceedings or within sixty days if the arbitral tribunal includes an arbitrator residing abroad.

[8] Article 33(1) of the Former Rules of Proceedings of the Arbitration Court of the HCCI provided that: "By submitting a joint petition, the parties may request that the arbitral tribunal pass its decision without conducting an oral hearing merely on the strength of the material on file. Nevertheless, the arbitral tribunal may order oral hearings when such hearings are considered to be necessary."

[9] Act CXXX of 2016 on the Civil Procedure Code and Act XXVIII on International Private Law entered into force on 1st January 2018, as well.

[10] The general justification of Draft Act No. T/15361. on arbitration provides that: "[...] For business actors, Hungarian arbitration can be a real alternative to state court litigation and to foreign arbitration particularly, if the regulatory framework makes it possible that impartial and independent persons, enjoying the trust of the parties can resolve the dispute faster and on high level. It can be also beneficial for Hungarian undertakings, if they manage to agree on arbitration proceedings seated in Hungary, because their dispute can be resolved in a more cost-effective manner [...]" (free translation by the Author).

[11] Section 30 of the Arbitration Act provides that: "(1) The parties may – within the frameworks of this Act – freely agree on the Rules of Proceedings to be followed by the arbitral tribunal. (2) When no such agreement is made, the arbitral tribunal shall determine the Rules of Proceedings – within the frameworks of this Act – at its discretion. The competence of the arbitral tribunal includes determination of the admissibility, relevance and weight of the evidence" (free translation by the Author).

However, when it comes to hearings, the difference with the former regime is noticeable, since the term "oral" as a qualifier disappeared from the title of the text, which simply provides "The hearing and the written procedure". Section 36(1) of the Arbitration Act provides that, in case the parties failed to agree otherwise, the tribunal shall decide whether to hold a hearing, or not, during the arbitral proceedings.

At the same time, Section 36(2) introduces an exception, according to which in case any of the parties requests for a hearing, then the arbitral tribunal shall hold a hearing at a proper stage of the proceedings, even if the parties prior agreed to exclude hearings.[12] It must be mentioned that the latter provision received critical remarks in the legal literature for departing from the Model Law in the wrong direction.[13] However, even if Section 36(2) can be interpreted as an amplification of the parties' right to a hearing, the right to a physical hearing cannot be inferred from the grammatic and systemic construction of the above provision.

By comparing the provisions of the Arbitration Act with the pre-2018 era, the paradigm shift is clear: while in the old times the default rule was that the arbitral tribunal held an oral hearing, save the parties jointly requested otherwise, according to the current regime, the arbitral tribunal has broad discretion to hold a hearing or not, save any of the parties expressly requests the hearing.

When it comes to the renewed Rules of Proceedings of the Arbitration Court of the HCCI, effective from 1st January 2018 ("Rules of Proceedings"), the earlier provisions quoted above, making direct or indirect reference to physical hearings, have been eliminated from the text.[14] However, unlike the rules of proceedings of certain other foreign arbitral institutions, the remote hearings are not mentioned explicitly.[15]

Yet, two provisions of the Rules of Proceedings merit attention. At first, Article 36 of the Rules of Proceedings governing the so-called case management conference, which is a new instrument in the law of arbitral institutions in Hungary, provides that the

[12] Section 36 of the Arbitration Act provides that: "(1) Unless otherwise agreed by the parties, – with the exception as stipulated in Subsection (2) – the arbitral tribunal shall decide whether it holds a hearing for the purposes of presenting the positions and evidence or conducts the proceedings without holding a hearing. (2) At the request of any of the parties, in the proper phase of the proceedings, the arbitral tribunal shall also hold a hearing when otherwise the parties agreed that the legal dispute shall be adjudged without holding a hearing" (free translation by the Author).

[13] See István VARGA, *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja*, III/III (HVG-ORAC 2018) pp. 2932-2933.

[14] Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry Effective as of 1 September 2019, available at <https://mkik.hu/index.php/en/rules-of-proceedings-01092019> (last accessed 25 November 2020).

[15] E.g., Article 19 of the Arbitration Rules of the London Court of International Arbitration, effective from 1st October 2020; Article 26(1) of the Arbitration Rules of the Arbitration Court of the International Chamber of Commerce, effective from 1st January 2021.

arbitral tribunal shall ask the parties, if they wish to hold a hearing.[16] This Article also empowers the arbitral tribunal to decide on the case without a case management conference and a hearing, subject to prior notification to the parties. The arbitral tribunal shall notify the parties of this in advance and shall provide the parties with an opportunity to file a request that a hearing be held. Another provision that is worth to be mentioned is the one, which empowers the arbitral tribunal to regulate the rules relating to written witness testimonies, and the method of taking oral testimonies by a procedural order issued at the end of the case management conference.[17] The above two provisions of the Rules of Proceedings indicate the shift from oral-based proceedings towards document-based arbitration in Hungary, in line with the paradigm shift of the *lex arbitri*, mentioned above.

It must be also noted that the Rules of Proceedings of the Arbitration Court of the HCCI provide for a so-called expedited procedure ("Expedited Procedure"). According to these Rules, the parties can agree to conduct the arbitration in Expedited Procedure, in which a sole arbitrator makes the decision without holding an oral hearing, on the basis of documents submitted by the parties. The sole arbitrator shall hold a hearing, in case any of the parties requests it within a given deadline, or he considers it necessary.[18] These provisions were essentially the same in the pre-2018 era.[19]

Besides the Expedited Procedure, the non-mandatory character of the right to a hearing is also confirmed by the case law of the Hungarian Supreme Court, which will be discussed in more detail under sub-paragraph d.7.[20]

Last, but not least, it shall be mentioned that, as it will be argued in a more detailed manner under sub-paragraph b.3, the right to a physical hearing does not exist in civil procedure in Hungary.[21]

Based on the above analysis, the following conclusions can be inferred.

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[16] Article 36(2) of the Rules of Proceedings of the Arbitration Court of the HCCI provides that: "During the case management conference the arbitral tribunal […] shall also invite the parties to declare if they request that a hearing be held. In light of these the arbitral tribunal shall establish the procedural timetable and set time limits for each procedural act". Article 36(4) of the Rules of Proceedings of the Arbitration Court of the HCCI provides that: "In light of the circumstances and complexity of the case the arbitral tribunal may decide to […] c) decide on the case without a case management conference and a hearing. The arbitral tribunal shall notify the parties of this in advance and shall provide the parties with an opportunity to file a request that a hearing be held".

[17] Article 40(4) of the Rules of Proceedings of the Arbitration Court of the HCCI provides that: "The details of the method of taking witness testimony, with specific regard to written witness statements possibly to be filed in advance and the taking of oral testimony at a hearing, shall be established during the case management conference and in the procedural order recording the outcome thereof".

[18] Article 52 of the Rules of Proceedings of the Arbitration Court of the HCCI.

[19] Article 45 of the Former Rules of Proceedings of the Arbitration Court of the HCCI.

[20] See sub-paragraph d.7 below.

[21] See sub-paragraph b.3 below.

The right to a hearing in arbitral proceedings is essential under both the former and the new *lex arbitri.* In addition, the Arbitration Act even strengthened the right to a hearing over party autonomy, by giving an option to any of the parties to unilaterally derogate from their earlier agreement and request a hearing until the closing of the arbitral proceedings.

At the same time, the provisions of the Expedited Procedure indicate that the right to a hearing is waivable in advance, in addition, the case law confirms the non-mandatory nature of this right.

When it comes to the right to a physical hearing, neither the grammatic and systemic interpretation, nor the historic construction of the *lex arbitri* supports the existence of this right in Hungarian law.

In addition, on the basis of the teleological interpretation of the Arbitration Act, we can come to a definitive conclusion in this respect. As we pointed out above, the right to a physical hearing does not exist in civil procedure. If the right to a physical hearing existed in arbitral proceedings, it would be doubtful, how arbitration could be a real alternative to state court litigation, and how the intents of the legislator in respect of the Arbitration Act could be fulfilled.[22]

In other words, the existence of the right to a physical hearing in arbitration would call into question the rationale of the legislative change to repeal the old regime and adopt a new *lex arbitri*, with a view to provide a real alternative to litigation, and to enhance competitiveness of arbitration seated in Hungary.

Therefore, the existence of the right to a physical hearing can be likely excluded in Hungary.

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

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

Short answer: No.

Even if Hungarian legal literature considers the principle of orality and immediacy as cornerstones of civil procedure,[23] these principles cannot be found in normative texts. In addition, scholars admit that the principle of immediacy, according to which the judge shall base its decisions on facts and evidence that he perceived directly, is not absolute,

[22] See fn. 10 above.
[23] See Miklós KENGYEL, *Magyar polgári eljárásjog* (Osiris 2008) p. 86.

and certain circumstances (like distance, physical nature, inability to move, etc.) can support exceptions to the main rule.[24]

Based on the above, and being inspired by the good-practice that had been developed in criminal proceedings after the adoption of the Criminal Procedure Act,[25] the legislator has decided to modify the former Code of Civil Procedure ("Former Civil Procedure Code") with effect from 4th December 2015, by introducing a new chapter, governing the use of so-called "closed telecommunication networks" in civil proceedings.[26] Under the Former Civil Procedure Code, there was a theoretical possibility, to take evidence *indirectly*, with the aid of another court, in front of which witnesses could give testimony, or other evidentiary procedures could be conducted. By introducing the "closed telecommunication networks" in civil proceedings, the legislator emphasized the importance of making possible the remote hearing of parties, witnesses, and experts, *directly*, without the intervention of another court, in cases when these persons could not be present at the place of the court hearing otherwise, or their physical presence would have involved unreasonable costs.[27] The legislator also expressed its will to speed-up civil proceedings by the use of remote hearings through the "closed telecommunications networks".

The spirit of the above rules has been taken over by the Civil Procedure Code, entering into force on 1st January 2018 ("Civil Procedure Code"), introducing the remote hearing of parties, witnesses and other participants of the civil procedure through "electronic communications network".[28] The Civil Procedure Code sets forth that the synchronous communication (i.e., the joint transmission of motion image and sound) shall be ensured by the "electronic communications network" between the different locations involved in the remote hearings. In addition to the cost-efficiency and speed, the law expressly mentions the protection of witnesses, as a third objective of this new procedural method.

In comparison with the relatively short regulation of the former law, the Civil Procedure Code regulates deeply the various details of the remote hearings (under what conditions can the judge order remote hearings, how publicity shall be ensured, who can be present at the locations concerned by the remote hearing, how the persons are identified by the judge, etc.). In addition, similarly to physical hearings, the judge shall set up written minutes of the remote hearing, including the circumstance of the hearing and the participants at the locations concerned.

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[24] See Írisz E. HORVÁTH, "Az e-tárgyalás a polgári perben. Az e-tárgyalás és a polgári eljárásjog alapelvei", Infokummunikáció és Jog. (2009) pp. 229-230; M. KENGYEL, *Magyar polgári eljárásjog* fn 23 above, p. 86.

[25] Act XIX of 1998 on Criminal Procedure.

[26] Act III of 1952 on Civil Procedure, which was supplemented by Chapter XXVIII/A. (Articles 394/N-P).

[27] Draft Act No. T/6980 on the amendment of Act III of 1952 on the Civil Procedure and other procedural acts.

[28] Sections 622-627 of the new Civil Procedure Code.

The remote hearing can be ordered by the court by a non-appealable order, issued by the judge *motu proprio*, i.e., of its own motion, or upon the request of any of the parties. It must be highlighted that the judge is not obliged to state any reasons when ordering remote hearings.[29] In line with the general principle of Hungarian procedural law, given that there is no obligation to state reasons, the decision of the judge ordering remote hearings cannot be appealed.[30] In case the party believes that the remote hearing was ordered unlawfully, he can challenge this decision only indirectly, by raising an objection against the decision,[31] or by lodging an appeal against the first instance judgment.

However, in the appeal procedure, even if the procedural violation committed by the first instance court amounted to a substantial procedural breach, which seems to require a high threshold based on the case law available so far,[32] it would entail the quashing of the first instance judgment only among very limited circumstances.[33]

When it comes to the daily court practice, it must be highlighted that the National Council of Justice ("NCJ"), a self-governing body of the Hungarian Judiciary, has launched a so-called Via Video Project to provide the technical background of remote hearings by setting up the "electronic communications network" set forth by the Civil Procedure Code. In the framework of the Via Video Project, 72 (seventy-two) end-points had already been installed until the fall of 2018 at Hungarian courts countrywide.[34] These end-points are capable of supporting remote hearings in civil and criminal procedures, and according to statistics, between May 2018 and August 2019 more than 3.100 remote hearings were held in domestic and cross-border disputes.[35]

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[29] Section 349(3) of the Civil Procedure Code.

[30] Section 365(3) of the Civile Procedure Code.

[31] Section 156 of the Civil Procedure Code. However, in case the judge rejects the objection of the party, the rejection can be challenged only in the appeal submitted against the first instance judgment.

[32] Based on earlier case law, among others, the following procedural breaches amounted to a substantial procedural breach: the party or its representative has not been properly summoned to the hearing; the court fails to make a decision in the matter of intervention of a third party; the court failed to inform the defendant on the modification of the claim of the claimant; See: I. VARGA, *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja*, fn. 13. above, pp.1615-1616.

[33] Section 381 of the new Civil Procedure Code provides that in case of a substantial procedural breach, the court of second instance may quash the first instance judgment and order a new procedure, in case the procedural breach had an impact on the merits of the decision, and the breach cannot be rectified by the court of second instance in the appeal procedure.

[34] Main information about the Via Video Project is available at the site of the National Council of Justice at <https://birosag.hu/video-projekt> (last accessed 25 November 2020).

[35] See Anna CSORBA, "Hatékony eszköz a bírósági eljárásokban – a távmeghallgatás", Munkajog (2020), p. 52.

Based on the above, the following conclusions can be drawn.

In Hungarian civil proceedings remote hearings can be ordered on relatively wide grounds (cost-efficiency, speed, witness-protection) either on the request of any of the parties, or of the judge *motu proprio*. The above provisions, the non-appealable, and directly unchallengeable nature of the decision ordering a remote hearing, together with the very limited control of the second instance court in respect of the first instance decision on the remote hearing, support the view that the right to a physical hearing does not exist under Hungarian civil procedural law.

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.

It is well-settled case law in Hungary that unless the parties expressly provided otherwise, the rules of the civil procedure do not apply in arbitral proceedings, and the Civil Procedure Code cannot be used for a gap-filling function in arbitral proceedings.[36]

However, even if the rules of civil procedure cannot be extended to arbitration directly, the existence of remote hearings in civil procedure indirectly supports the view that remote hearings can be validly held in arbitral proceedings in Hungary, since, as we highlighted above, one of the main objective of the legislator with the adoption of the new Arbitration Act was to create a real alternative to litigation in front of state courts, so that business actors can resolve their disputes faster, and on high level of proficiency.[37] In case remote hearings, which are cost-effective and can speed-up the procedure, were permitted in state court proceedings, but they were excluded in arbitration, the purpose of the legislator would be jeopardized.

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

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

Short answer: N/A

As it was argued under sub-paragraph a.2 above, it can be likely excluded that the right to a physical hearing exists in Hungary.

The non-mandatory character of the right to a hearing is indirectly confirmed by the case law of the Hungarian Supreme Court,[38] and the waivable nature of the right to a

[36] Supreme Court decision No. 1999/9 VBH I (Legf. Bír. Gfv. VI. 30.111/1999. sz).
[37] See sub-paragraph a.2 above.
[38] See sub-paragraph d.7 below.

hearing is also confirmed by the Expedited Procedure of the Arbitration Court of the HCCI.

It means that the parties are free to agree on remote hearings in arbitration, or they can opt for institutional rules which allow remote 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: No.

As mentioned above, the Arbitration Act ensures wide autonomy for the parties in determining the rules of the arbitral proceedings.[39] Further, it must be highlighted that case law of Hungarian courts shows a high degree of deference when it comes to upholding the parties' agreement on procedural issues.

For example, an award has been set aside because the arbitral tribunal failed to hold deliberation in a "closed session" enabling the arbitrators to debate with each other directly, despite the outdated provision set forth by the Former Rules of Proceedings of the Arbitration Court of the HCCI.[40] The Supreme Court[41] highlighted that the Rules of Proceedings of an arbitral institution shall form the integral part of the parties' agreement to arbitrate, and in case the arbitral tribunal fails to respect the procedural rules included therein, then the arbitration is not in line with the parties' agreement, and the award shall be annulled.

In another case the award has been annulled, because the arbitral tribunal sent the request for arbitration not directly to the defendant, but to his alleged legal representative, in breach of the rules of proceedings applicable in an ad hoc arbitration. The Supreme Court again emphasized, that the breach of the rules of proceedings amounted to the breach of the parties' agreement, leading to the setting aside of the award.[42]

Based on the above, such an order of an arbitral tribunal, breaching the parties' agreement to hold a physical hearing, would most probably entail the setting aside of the arbitral award in Hungary.

d. Setting Aside Proceedings

[39] See fn. 11 above.

[40] Supreme Court decision No. BH2017.126 (Kúria Gfv. VII. 30.089/2016).

[41] The Fundamental Law of Hungary, entered into force on 1st January 2012, has changed the name of the Supreme Court to Curia (in Hungarian *Kúria*). Given that majority of the case law analyzed here is earlier than this legislative change, we use the term "Supreme Court".

[42] Supreme Court decision No. BH2016.122 (Kúria Gfv. VII. 30.282/2015).

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: Yes.

The Arbitration Act mirrors Article 4 of the Model Law ("Waiver of right to object").[43]

It must be emphasized that according to the case law of Hungarian courts, the above rule extends only to the breach of non-mandatory rules of the Arbitration Act or to the breach of the parties' arbitration agreements, while the breach of mandatory rules of the Arbitration Act cannot be waived by the lack of objection raised by the party immediately.[44]

As highlighted under sub-paragraph a.2 above, it cannot be inferred from the Arbitration Act that the right to a physical hearing exists. Assuming, however, that such a right was recognized in a specific case, the failure of the party to raise the breach of this right during the arbitral proceedings would prevent him to invoke this ground for challenging the award in setting aside procedure.

This is confirmed by a recent judgment of the Supreme Court, where the award debtor complained in the setting aside procedure that he could not present his case, because he stepped into the arbitral proceedings at the last hearing, by reason of a legal succession. The Supreme Court emphasized that the arbitral tribunal had held 3 (three) oral hearings before the legal succession, and the award debtor should have requested an additional oral hearing in the arbitral proceedings to present his oral pleadings. The Supreme Court concluded that given that he failed to do so in the arbitral proceedings, he waived its right to make an objection against the conduct of the arbitral proceedings in the setting aside procedure.[45]

Reading together the above judgments of the Supreme Court, it can be inferred that the right to a hearing is non-mandatory under Hungarian arbitration law, otherwise the waiver of the right to object could not cover the situations, where the right to a hearing is not respected in the arbitral proceedings.

Consequently, the failure to raise the breach of the right to a physical hearing immediately, would amount to a waiver to raise this issue later, in setting aside proceedings.

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[43] Section 5 of the Arbitration Act provides that: "A party that has knowledge of the fact that any provision of this Act allowing the parties different agreement or any terms of the arbitration agreement has not been satisfied and continues to take part in the proceedings without notifying his objection owing to such omission immediately, or if a deadline for this purpose has been set, within such deadline, then such party shall be considered as having waived the right of objection" (free translation by the Author).

[44] Supreme Court decision No. BH+2006.12.562 (Legf. Bír. Gfv.XI.30.369/2005. sz).

[45] Supreme Court decision No. BH2017.9.304 (Kúria Gfv. VII. 30.301/2016).

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 it was argued under sub-paragraph a.2 above, it can be likely excluded that the right to a physical hearing exists in Hungary.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: It depends.

In case the parties had expressly agreed to hold a physical hearing, the non-respect of this agreement would be presumably a sufficient basis for the court, *per se*, to set aside the award.[46]

However, in case the parties have not expressly agreed to hold a physical hearing, the mere failure of the arbitral tribunal to hold such a hearing would not lead to the setting aside of the award, and the party should prove that he requested a physical hearing, and the lack of such a physical hearing amounted to a breach of the due process principle.[47]

It must be noted, that the case law of Hungarian courts indicates that parties could often successfully argue in the setting aside procedure that they have been unable to present their case, when the breach of the due process principle caused an actual prejudice to them.

Examples of this situation are cases where the tribunal reclassified factual or legal issues like the invalidity of a commercial contract,[48] or the method of calculation of the

[46] See sub-paragraph c.6 above.

[47] Section 47(2) ab) of the Arbitration Act provides that: "The arbitral award may be set aside on the basis of the claim submitted by the other party […] only in the event that […] ab) the party was not properly notified of the appointment of the arbitrator and of the procedure of the arbitral tribunal, or otherwise he was not able to present his case" (free translation by the Author). This provision was literally the same in Section 55(1) c) of the Former Arbitration Act.

[48] Supreme Court decision No. EH2011.2421 (Legf. Bír. Gfv. X. 30.188/2011).

purchase price in a post-merger dispute,[49] but it failed to inform the parties of such developments, making them unable to present their standpoints and make their motions for evidence.

The logic underlying the above consideration is that, in case the arbitral tribunal reclassifies factual or legal issues without informing the parties thereof, the decision of the tribunal becomes a so-called "surprise award" to one, or to both parties, breaching the parties' right to be heard, which is a fundamental procedural right.[50]

To summarize the abovementioned, in case the party could show that the lack of a physical hearing has led to the situation that he was unable to present his case, then it could possibly be a ground for the setting aside of the award.

e. Recognition/Enforcement

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

Short answer: It depends.

At the outset, it must be highlighted that in Hungary there is no case law disclosed yet on this subject matter. Based on decisions delivered by Hungarian courts in New York Convention-related recognition and enforcement cases and in setting aside procedures, in which similar issues were at stake, we can draw certain general conclusions.

[49] Supreme Court decision No. EH2008.1794 (Legf. Bír. Gfv. XI. 30.520/2007).

[50] The strong will of the Hungarian legislator to eliminate the risks of surprise awards in civil litigation has been manifested in numerous provisions of the new Code of Civil Procedure. By not allowing the judge to requalify the substantive right invoked by the party, the legislator made a decisive step towards this direction. See I. VARGA, *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja*, fn. 13 above, pp.1465-1466.

At first, it must be highlighted that with the exception of formal requirements like copies, certifications,[51] or translations,[52] where the case law shows strong formalism, Hungarian courts generally adopt a "pro-enforcement" approach when applying the New York Convention.

As a starting point, it was laid down by the Supreme Court in several decisions that the recognition and enforcement procedure cannot serve as a "remedy" against the arbitral award, so the *révision au fond* is not allowed.[53] It is also well-settled case law that Article V of the Convention sets forth an "exhaustive list" on the basis of which recognition and enforcement may be refused, and therefore other defences cannot be invoked.[54]

In addition, another decision highlighted that the "burden of proof" regarding the violation of due process under Article V(1)(b) lies on the shoulders of the award debtor,[55] which principle was applied by other Hungarian courts in respect of the other grounds for refusal set forth in Article V(1).

Article V(1)(b) of the New York Convention. When it comes to "due process violations" in the context of Article V(1)(b) of the New York Convention, in a notable case the award debtor complained that he could not present his case, since he had not received the summons to the hearing. The court yet granted the recognition of the award because it had established that based on the documents of the case, it could be established that the party was properly summoned to the hearing, since even if he returned the mail to the arbitral tribunal with the indication "refused", later he acknowledged in the arbitral proceedings that the summons was duly received by him.[56]

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[51] Hungarian courts did not grant the recognition where the arbitration agreement was missing, or in cases where it was submitted as a simple photocopy, without legalization by a notary public. See Supreme Court decision No. BH1999.270 (Legf. Bír. Gpkf.VI.31.405/1998); Supreme Court decision No. BH2004.19 (Legf. Bír. Pf. I. 25.011/2002) and Case BH2002.582 (Legf. Bír. Gpkf.VI.32.073/2001. sz). In one particular case, the Supreme Court even stressed that in the recognition procedure the arbitration agreement shall be submitted, and its existence cannot be established on the basis of other evidence, e.g., on the grounds that the award debtor acknowledged the existence of the arbitration clause in its request for arbitration. See Supreme Court decision No. BH2004.285 (Legf. Bír. Gpkf. VI. 32.457/2002. sz).

[52] The recognition was not granted in cases where the arbitral award was submitted in a simple translation, or without an attestation clause from the translator. Supreme Court decision No. BH2004.19 (Legf. Bír. Pf. I. 25.011/2002) and No. BH1999.223 (Legf. Bír. Gpkf.VI.31.384/1998. sz).

[53] Supreme Court decisions No. BH+2015.209 (Kúria Pfv. I. 21.361/2014) and BH+2013.31 (Legf. Bír. Gfv. X. 30.027/2011).

[54] Supreme Court decisions No. BH2007.130 (Legf. Bír. Pfv. XI. 22.270/2006) and No.1996.375 (Legf. Bír. Pf. I. 23.182/1995. sz).

[55] Court decision No. BDT2006.1315 (Debreceni Ítélőtábla Pkf. III. 20.503/2005/2).

[56] Supreme Court decision No. BH2004.416 (Legf. Bír. Pf. I. 26.788/2002. sz).

In another case, the Hungarian courts were reluctant to refuse recognition of the award, when the award debtor referred to the failure of the arbitral tribunal to postpone the hearing despite his request. The Supreme Court emphasized that mere reference to the rejection of the request for the hearing did not amount to a due process violation, because the award debtor failed to invoke any real obstacles, which prevented him from presenting his defence in the arbitral proceedings.[57]

The above cases clearly indicate that Hungarian courts are sensible for due process violations, and they conduct a *de novo* factual and legal review of the arbitral proceedings in the recognition and enforcement procedures. In addition, as we mentioned above, the Hungarian Supreme Court often annulled "surprise awards" in setting aside procedure because the parties could not present their case, therefore their right to be heard was breached.[58]

Based on the above approach of Hungarian courts, in case the award debtor could prove that the absence of a physical hearing led to a "surprise award", this could be a potential ground to refuse the recognition and enforcement of the given arbitral award, based on Article V(1)(b) of the New York Convention, because of a "due process violation".

Article V(1)(d) of the New York Convention. Regarding the "irregularity in the procedure" set forth in Article V(1)(d) of the New York Convention, no specific case law has been disclosed yet. At the same time, given that the Arbitration Act contains essentially the same provision as a ground for setting aside of the arbitral award,[59] the case law relative to the latter provision can be relevant for the purposes of recognition and enforcement procedures.

In this respect, it must be highlighted, that as we noted above,[60] Hungarian courts consider the rules of proceedings of arbitral institutions as forming an integral part of the parties' arbitration agreement. It is well-settled case law that the breach of the rules of proceedings by the arbitral tribunal as a procedural irregularity amounts to the breach of the arbitration agreement.

Based on the above, in case the parties had expressly stipulated the physical hearing in the arbitration agreement, and the arbitral tribunal would not respect their will, this "irregularity of the procedure" could lead to the refusal of the recognition and enforcement of the foreign arbitral award based on Article V(1)(d) of the New York Convention.

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[57] Supreme Court decision No. BH2003.505 (Legf. Bír. Pf. I. 26.724/2001).

[58] See sub-paragraph d.9 above.

[59] Section 47(2) ad) of the Arbitration Act provides that: "The arbitral award may be set aside on the basis of the claim submitted by the other party […] only in the event that […] ad) the composition of the arbitral tribunal or the arbitration proceedings did not comply with the parties' agreement – except when the agreement is contrary to an obligatorily applicable rule of this Act – or in the absence of such an agreement did not comply with the provisions of this Act" (free translation by the Author). This provision was literally the same in Section 55(1) e) of the Former Arbitration Act.

[60] See sub-paragraph c.6 above.

Article V(2)(b) of the New York Convention. Finally, when it comes to the "violation of public policy", set forth in Article V(2)(b) of the New York Convention, it is well-settled case law that this ground for refusal shall be interpreted narrowly, and the recognition may be refused on this ground only if the recognition of the foreign award would have consequences beyond the legal relationship of the parties and it would manifestly or severely violate the fundamental rights, domestic social values and socio-economic order in Hungary.[61]

Given that based on the Arbitration Act, the violation of public policy is a ground for annulment of the arbitral award, too, and court decisions rendered in the context of Article V(2)(b) of the New York Convention often echo the reasoning of judgments delivered by courts in setting aside procedures, it is worth to review the case law of Hungarian courts formed in respect of the public policy violation in annulment cases.[62]

In this respect, it must be stressed, that the Supreme Court was reluctant to set aside arbitral awards on the basis of the violation of public policy in case of a minor breach of procedural or substantive law, or when the award failed to clarify the contradictions of the expert opinion.[63] Similarly, the request for annulment was dismissed in a case in which the arbitral tribunal disregarded the motions for evidence submitted by one of the parties[64] or when the arbitral award suffered from an error in calculation, and also when the limitation period of a claim was wrongly calculated.[65]

Based on the above, given the exceptional nature of the "violation of public policy" in the light of the case law of Hungarian courts, it is unlikely that the breach of the right to a physical hearing would be a ground for refusing the recognition and enforcement of foreign arbitral award based on Article V(2)(b) of the New York Convention.

f. COVID-Specific Initiatives

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

[61] Supreme Court decision No. BH2007.130 (Legf. Bír. Pfv. XI. 22.270/2006); Supreme Court decision No. BH+2015.209 (Kúria Pfv. I.21.361/2014).

[62] Section 47(2) bb) of the Arbitration Act contains the violation of public order, as a ground for setting aside the arbitral award. This provision was literally the same in Section 55(2) b) of the Former Arbitration Act.

[63] Supreme Court decisions No. BH+2006.84 (Legf. Bír. Gfv.XI.30.254/2005.sz) and No. BH2006.257 (Legf. Bír. Gfv. XI. 30.226/2005. sz).

[64] Supreme Court decision No. BH+2015.220 (Kúria Gfv. VII. 30.289/2014).

[65] Supreme Court decisions No. BH+2006.460 (Legf. Bír. Gfv.XI.30.202/2006.sz) and No. BH2017.411 (Kúria Gfv. VII. 30.059/2017).

Short answer: Yes.

Due to the first wave of COVID-19 pandemic, the Hungarian Government announced the state of emergency ("State of Emergency") on 11th March 2020.[66] During the State of Emergency the government passed a decree to modify certain rules of the court and other procedures, which concerned civil litigations as well ("Procedural Decree").[67]

One of the main innovations of the Procedural Decree is that it makes possible in civil proceedings to hold remote hearings during the State of Emergency through "other means suitable to transmit image and sound electronically" besides the "electronic communications network", already available at several end-points countrywide.[68]

Based on the above, on 30th April 2020 the civil section of the Hungarian Supreme Court issued an opinion ("E-hearings Opinion") to address some practical issues of the "e-hearings", meaning those remote hearings in civil procedure which are held through "other means suitable to transmit image and sound electronically".[69] It must be noted that even if the opinions of the Supreme Court are not binding precedents, in practice they are followed by lower courts.

The E-hearings Opinion provides that courts should use "Skype for Business" to hold e-hearings, which can be organized in a litigation, in case all parties and other participants have previously declared that they possess the necessary technology to join the e-hearing. Judges shall examine *motu proprio* that participants possess the necessary technology to participate in e-hearings, and in case the conditions are met, judges are obliged to hold e-hearings.[70] The courts can avoid holding e-hearings only in case the necessary technological background is not ensured for any of the participants, or in case personal presence during the hearing cannot be dispensed with.[71] However, the E-hearings Opinion clarifies that the confrontation of parties or witnesses is not falling within the latter category, so based on the standpoint of the Supreme Court, confrontation can be executed during e-hearings, if participants possess the technological background.[72]

[66] Government Decree No. 40/2020 (III. 11) on the announcement of state of emergency.
[67] Government Decree No. 74/2020 (III. 31) on certain procedural measures during the state of emergency.
[68] Article 21(3) of the Procedural Decree.
[69] Opinion No. PKv.2020.2. Opinion of the Civil Section of the Curia 2/2020 (IV. 30) PK.
[70] Point 1 of the E-hearings Opinion.
[71] Point 2 of the E-hearings Opinion.
[72] Point 6 of the E-hearings Opinion.

It must be highlighted that the State of Emergency was terminated on 18th June 2020,[73] however, the provision in relation to e-hearings remained in effect.[74]

When evaluating the above provisions, it must be highlighted that in addition to the Via Video Project, mentioned above,[75] another significant step has been taken to facilitate remote hearings in civil procedures in Hungary. The innovative measures of the Procedural Decree make it possible for participants in civil proceedings to take part in the litigation from any location (e.g., from home, from workplace, etc.), where the technological background can be ensured.

Parallel with the above initiatives of the legislator in the field of civil procedure, the Presidium of the Arbitration Court of the HCCI has also rapidly reacted to the challenges of the COVID-19 pandemic in the field of commercial arbitration.

With effect from 8th April 2020, the Rules of Proceedings have been modified, by introducing interim derogations of the ordinary provisions of the Rules of Proceedings during the State of Emergency, in order to adapt to the new situation ("Interim Provisions").[76]

While the sending of submissions via e-mail was only a practicable option earlier, according to the Interim Provisions, it has become obligatory for the claimant to send the statement of claim to the arbitration court via e-mail and hardcopy. When it comes to the communication between the parties, the arbitral tribunal and the institution during the arbitral proceedings, the electronic communication via e-mail has become the general rule.

By the same token, the Interim Provisions also set forth that the arbitral tribunal shall perform any procedural acts requiring personal presence (e.g., hearings, etc.) by means of telecommunication only, provided that all the necessary technical conditions can be ensured mutually by the institution, the arbitral tribunal and the parties.

In line with the above measures, the Presidium issued a short information sheet about the organization of remote hearings, by suggesting the use of Microsoft Teams, and by precising the role of the Secretariat in the preparation and holding of remote hearings, in order to facilitate the work of the tribunals.[77]

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[73] Government Decree No. 282/2020 (VI.17) on the termination of the state of emergency announced on 11 March 2020.

[74] Section 138(1) of Act LVIII of 2020 on the transitional rules relating to the termination of the state of emergency and on the pandemic preparedness provides that: "In case it is reasonable because of the pandemic measures, the court hearing can be hold through electronic communications network or through other means suitable to transmit image and sound electronically" (free translation by the Author).

[75] See sub-paragraph b.3 above.

[76] The English text of the Derogations is available at <https://mkik.hu/index.php/en/covid-19> (last accessed 25 November 2020).

[77] Based on information provided by Mr. János Burai-Kovács, President of the Arbitration Court of the HCCI, on 23 November 2020.

To summarize the above, by adopting the Procedural Order, issuing the E-hearings Opinion, and the Interim Provisions, the Hungarian Legislature, the Judicature and the main Hungarian arbitration institution quickly and effectively reacted to the challenges of the COVID pandemic.