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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 Law on International Commercial Arbitration (“LICA”) does not contain specific provisions regarding physical hearings,¹ nor does it contain provisions explicitly addressing hearings by video conference or other electronic means as alternatives to physical hearings. Iran has adopted a dualist arbitration regime, whereby international arbitration² is governed by the LICA, which entered into force in 1997, and domestic arbitration is regulated by Chapter 7 (Articles 454 to 501) of the Iranian Civil Procedure Code (“CPC”).³

The difference between domestic and international arbitration is based upon the nationalities of the parties to the dispute. If both parties to the arbitration agreement are Iranian nationals, then the arbitration is regarded as “domestic”. In turn, if one of the parties to the arbitration agreement is of another nationality, then arbitration is considered “international” and will be governed by the LICA. Prior to the enactment of the LICA, both international and domestic arbitration were governed by the CPC. Chapter 7 of CPC sets out rules concerning independence of arbitrators and the freedom of the parties to choose the governing law of the arbitration, however, overtime it became evident that CPC provisions did not adequately address the varying nuances of international arbitration. Therefore, the LICA was later introduced to deliver a modernized arbitration framework which reflects international best practice.⁴

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² Pursuant to Article 1, letter (b), LICA: “International arbitration means that one party is not Iranian national under Iranian law at the time of conclusion of the arbitration agreement”.
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To a substantial extent, the provisions of the LICA were modelled after the UNCITRAL Model Law.\(^5\) To this end, there are several points of convergence between the LICA and the Model Law. However, the notion of physical hearings did not find an echo in the final articulation of the LICA.

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:* Likely excluded.

From the standpoint of the *lex arbitri*, the LICA, which exclusively deals with international arbitration, does not contain provisions specifically addressing the organization and conduct of arbitration proceedings. To this end, arbitrators enjoy wide discretion to determine whether or not they will hold depositions or hearings, and how these procedures ought to be conducted, while trying to conclude the proceedings efficiently and expeditiously. However, Article 23 of the LICA contemplates that “the arbitrator has the authority to decide whether to hold hearing for oral argument, however […] the arbitrator shall hold a hearing if a party requests in an appropriate stage of the proceedings”. A party has the right to request a hearing, but this does not necessarily mean a physical hearing.

The LICA dedicated a single chapter to the method of arbitral investigation in which Article 19 of this chapter affords broad discretion to the arbitral tribunal to determine the appropriate “Rules of Investigation” in the absence of any parties’ agreement.\(^6\) Similarly, Article 18 stipulates the notion of equal treatment, based on which adequate opportunity shall be given to each party to “defend against a counterclaim and offer arguments”.\(^7\) The literal reading of these provisions suggests that the tribunal is not obligated to hold a physical hearing.

In addition, the contour of domestic arbitration is exclusively governed by the CPC provisions, which, similarly to those of the LICA, do not contain any provisions concerning physical hearings.

This is reflective of the inquisitorial nature of Iran’s civil procedural framework,\(^8\) which leads the courts to engage in extensive pre-trial investigations with the objective

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\(^6\) Article 19 LICA.

\(^7\) Article 18 LICA.

of avoiding bringing an innocent person to trial while determining the facts surrounding the case.\textsuperscript{9} In particular, judges will take a much more active role in deciding what matters to investigate and how to do so, which helps them, in turn, steer the collection and preparation of evidence to resolve the dispute.\textsuperscript{10} Accordingly, this approach vastly contrasts with the adversarial system commonly found in common law countries (e.g., England and Canada), in which representatives from each party take opposing positions to debate and argue their case, whilst judges serve as an arbiter between claims.\textsuperscript{11} To this end, oral pleadings are often viewed as a salient feature of this adversarial system, which requires the parties to conduct synchronous submissions, simultaneous pleadings, and cross examinations.\textsuperscript{12} However, oral pleadings do not have the same relevance for an inquisitorial system, in which judges take a proactive role in fact-finding by questioning the defence, seeking witness statements, and endorsing expert opinions.\textsuperscript{13} Therefore, the principles of confrontation, orality, and immediacy never had a strong foothold in the Iranian legal system, and instead, most disputes are resolved in an inquisitorial fashion.\textsuperscript{14} To this end, the right to an oral (and even more so, to a physical) hearing has never been regarded as a recognized and operative principle within either the litigation and arbitration landscape.

Within the construct of Iranian civil procedure, legal and factual arguments are commonly examined by documentary evidence, which is usually submitted by the involved parties with the written pleadings during the early stages of the proceedings.\textsuperscript{15} In turn, judges are equipped to extract the key facts from these written documents instead of from lengthy oral statements or witness examinations.\textsuperscript{16} There also exists a more liberal approach to case management. Under the CPC rules of civil procedure, written pleadings that contain a detailed description of facts, legal arguments, and attached documentary evidence are utilized, as a couple of rounds of written submissions are

\textsuperscript{9} Ibid. pp. 120-140.
\textsuperscript{13} J.R. SPENCER, “Adversarial vs Inquisitorial Systems”, fn. 11 above, p. 610. See Article 97, paragraph 1, CPC (“Appointment of expert examination by court”): “Court shall, for the purpose of clarification of matters emerging in course of hearing and requiring special knowledge, upon application of a person participating in the case or further to its own initiative, appoint an expert examination” (free translation by the Author).
\textsuperscript{14} M.V. KARIMI and G.A. SEDGHI, \textit{Analysis of the Litigation System in the Jurisdiction of the General Court of Law}, fn. 10 above, pp. 110-120.
\textsuperscript{15} A. SHAMS, \textit{Civil Procedure Book}, fn. 8 above, pp. 124-156.
\textsuperscript{16} Ibid. pp. 213-245.
exchanged between the parties prior to the hearing. To this end, hearings are not a central part of the proceedings.17

From the perspective of institutional rules, the arbitration rules of two leading arbitration centres in Iran, namely the Arbitration Centre of the Iran Chamber of Commerce ("ACIC")18 and the Tehran Regional Arbitration Center ("TRAC")19, do not encompass provisions explicitly referring to physical hearings.

A few provisions in the ACIC Rules have established how hearings ought to be conducted. Article 37 of the ACIC Rules provides arbitrators with a wide discretion to ascertain and institute the necessary conduct of arbitration proceedings.20 However, Article 43, which deals specifically with hearings, does not require a physical hearing to take place. In fact, the first section of this Article has explicitly authorized arbitrators to solely decide on the basis of existing pleadings, documents, and evidence. Article 43(A) notes that "if the Arbitrator determines that, considering the subject matter of the case, there is no need for further exchange of pleadings, then he may decide on the basis of the pleading, documents, and evidence already existing in the file".21 Such permissive language and the use of "may" illustrate the considerable degree of discretion that arbitrators generally enjoy when deciding the merit of a dispute (either based on oral pleadings or solely on the basis of written submissions and documentary evidence). Further, the literal reading of this Article suggests that the default rule is based on examining and reviewing documents and, in essence, pleadings are comprised of lengthy documents encompassing claims or

20 Article 37 of the ACIC Rules of Arbitration.
a defence and description of the facts and legal arguments.\textsuperscript{22} This view is reinforced by a subsequent provision, which reads: “If in view of the subject matter of the case, the Arbitrator finds it necessary to hear the parties or examine the veracity of the document and evidence, he may order a hearing and notify the same to the parties. […]”.\textsuperscript{23} This provision, however, provides an exception for a hearing if a party makes such a request: “[…] if a party requests a hearing in due course, the Arbitrator shall convene a hearing” (emphasis added). The use of strong language in the form of the word “shall” demonstrates the importance of safeguarding the principle of party autonomy in Iran’s arbitration landscape.\textsuperscript{24}

Furthermore, the new iteration of the TRAC Rules has adopted a favourable stance towards alternative means of conducting hearings.\textsuperscript{25} Under the conditions set forth by Article 4, tribunals may direct witnesses, including expert witnesses, to be examined through means of telecommunication. In this same provision, video conferences are regarded as a viable means to conduct cross examination. It can be argued that the application and validity of remote hearings can be inferred from these provisions.

It is worth noting that the TRAC Rules are fairly recent and only came into force in 2018. These new Rules are based on the new iteration of UNCITRAL Arbitration Rules, which attempt to embody new trends in the field of international commercial arbitration and meet the growing demands of this new era.\textsuperscript{26} To this end, this set of rules is considered to be a departure from previous rules as it accommodates procedural innovations in international arbitration. For instance, the 2018 TRAC Rules authorize arbitrators to issue emergency interim measures and, in doing so, opt to avail themselves to proceedings “by telephone, or video conference, or written submission as alternatives to an in-person hearing”.\textsuperscript{27}

With this background in mind, it can be argued that remote hearings are not only permissible under Iran’s arbitration and institutional rules, but tribunals are encouraged to conduct and organize hearings through alternative means or solely based on

\textsuperscript{23} Article 43(B) of the ACIC Rules of Arbitration (emphasis added).
\textsuperscript{26} TRAC Arbitration Rules, fn. 19 above.\textsuperscript{27} TRAC Arbitration Rules, Appendix 1 (“Emergency Arbitrators”). \textsuperscript{27} TRAC Arbitration Rules, Appendix 1 (“Emergency Arbitrators”).
documents. In addition, based on the normative underpinning of Iran’s legal structure, it is highly unlikely that courts and tribunals would consider that parties have been given an inherent right to a physical hearing. Coupled with this notion, it can be argued that arbitral tribunals may be entitled to order a remote hearing, if this order is consistent with due process.

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.

As discussed earlier, Iran’s Civil Procedure Code has established that an oral hearing is not an essential requisite to commence both arbitration and litigation proceedings.

The inquisitorial normative nature of Iran’s procedural rules lends broad power to judges and arbitrators over the format and contour of hearings. This power focuses on the active roles of the judge and arbitrator with respect to case management, allowing them to investigate the case by seeking expert advice, as well as examining witnesses and counsels. According to this view, the judges/arbitrators are well-trained and capable of correctly assessing the case and evidence. Thus, more significance has been attributed to written evidence and documents. In turn, the need for an oral explanation of the evidence to the judge during the hearing has been substantially diminished. To this end, written documents under Iran’s framework are elicited to support the claims and perspectives of the party. Therefore, the evidence should be identified and presented as soon as possible and there is no need to separate the stages of proceedings into the pre-hearing and hearing phases.

By the same token, the judge, who serves the role of fact finder and fact interpreter, is expected to quickly assess the case based on the produced documentary evidence and conduct his own enquiries into issues related to the facts and law. Judges, on their own initiative, may seek and appoint experts to verify the underlying facts. This role falls

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31 Ahmad MATIN-DAFTARI, Civil and Commercial Procedure, 2nd edn. (Mizan Press 2001) p. 34.
within the judge’s authority to act *ex officio*. The powers of the judges have been crystalized in Articles 262 and 263 of the CPC and Article 19 of the Law on Association of the Official Expert of the Judiciary 2002, respectively. According to these Articles, the judges may refer the matters in hand to forensic experts, particularly in cases involving technical or highly complex issues. In particular, if the judge cannot draw from his legal and jurisprudence knowledge to render a conclusive ruling, then that judge ought to refer to the relevant experts to gain the necessary information and render a conclusive ruling.\(^{33}\)

Therefore, as an effort to conduct official inquiries, expert opinions play an important, if not decisive role, in assisting judges to arrive at conclusive decisions. If the expert opinions are deemed to be too narrow when related to the issue at hand, the judges will normally attribute less weight to oral depositions or examinations. It is worth noting that, when an expert issues a report on a matter requested by the court, the rules of civil procedure do not stipulate that either party must question or make written comments on the report. In fact, neither party has the right to examine the expert, which contrasts with the cross-examination process conducted by the counsel in common law countries. Such extensive use and reliance on expert opinions by the judges will alleviate the need for oral examination.

It has been remarked by notable legal scholar, Katouzian, that the overriding objective of presenting documentary evidence rather than oral evidence, such as deposition testimony instead of oral witness examination at a hearing, is for the parties to save time and for the judges to come to a decision on their own accord.\(^{34}\) This objective is also supported by the greater role of document production under Iran’s Civil Procedure Code. Based on the language enshrined in Articles 194 to 294 of the CPC, document production serves an elucidating function in assisting judges to verify the facts and determine the truth. Article 64 of the CPC explicitly provides judges with the discretion to hold a public hearing on the final verdict.\(^{35}\) Similarly, Articles 93, 94 and

\(^{32}\) Ali MOHAJERI, *Civil Jurisdiction in Courts of Iran*, 1st edn. (Fekrsazan 2001) p. 78.

\(^{33}\) In this regard, the Judiciary will hold the list of experts in various fields and the experts is chosen from the list. The qualifications required are included in Article 257 to 269 of the CPC. According to Article 19 of the Law on Association of the Official Expert of the Judiciary, the judges may select an expert from the Supreme Council of the official experts of the centers in each field. The Supreme Council comprises of experts of scientific and technical advisory commissions of experts in that field to cooperate in preparing test questions, reviewing and screening facts stipulated in each disputed matter. The judges may seek an official expert’s opinion at any time during the hearing, or they may ask the Supreme Council to delegate an expert appropriate for an underlying dispute.


\(^{35}\) See Article 64 CPC: “The Registrar must provide the case to the court immediately upon completion. The court then will consider and review the case and, if it is deemed necessary by the judge, the court will return the case to the office of the Registrar by issuing an appointment order to determine the time of the hearing (hour, day, month and year) and issue
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97 of the CPC, respectively, grant judges with a wide discretion to determine whether a physical hearing is essential to progress with the case. In that case, the judges are entrusted to compel parties to conduct a physical hearing.

That being said, the customary approach is exchanging pleadings remotely. That is why written pleadings contain many case details and are accompanied by officiated evidence. The language of these provisions also suggests that that the fair standard requirements shall be met by a remote hearing. There is no rule or statutory provision that requires the witness testimony to be taken in open court and judges normally do not need to verify the truth by examining the demeanour of witnesses face-to-face.

In addition, there is no need for both parties to be present at the same time to argue or debate the case in order for the case to progress. In other words, in the search for factual, objective truth, exchanging written arguments and official evidence in each party’s brief meets the necessary standard for a fair hearing. Thereby, less weight has been attributed to oral submissions and the presentation of evidence and hearings are not regarded as crucial part of the proceedings. To this end, a synchronous exchange of arguments (physically or remotely) was never a cardinal part of hearing. As such, the principles of orality and immediacy, which require a simultaneous exchange of arguments or evidence, are not recognized principles within the construct of Iran’s procedural framework.

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: N/A

As clarified in sub-paragraph a.1 above, the law applicable to international arbitration is the LICA, which, to a substantial extent, was modelled on the UNCITRAL Model Law. The LICA was formulated to conform with domestic laws and regulations, departing slightly from the UNCITRAL Model Law. After its enactment, all aspects of international arbitration are governed by the LICA, leaving Chapter 7 of the CPC to only apply to domestic proceedings. These two sets of rules operate in parallel with limited overlaps. Specifically, Articles 454-501 of the CPC do not contain any overriding mandatory rules that circumvent provisions enshrined in the LICA. Conversely, the LICA does not apply to any arbitration proceeding that is deemed domestic. In light of

the order to notify the petition and the hearing to the parties. The time of the hearing ought to be determined in such a way that the interval between the time of notifying the litigants and the day of the meeting is not less than five days. In cases where the address of the litigants (parties) is outside of the country, the interval between the announcement of the time and date of the meeting shall not be less than two months” (free translation by the Author).

36 A. MOHAJERI, Civil Jurisdiction in Courts of Iran, fn. 32 above, p. 156.
the above, the rules of the CPC, Chapter 7, will apply to domestic arbitration proceedings in Iran, but these rules have no application over international arbitration. Conversely, other provisions of the CPC, regulating civil proceedings before State courts, do not apply either to domestic or to international arbitration proceedings seated in Iran.

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 could they do so in advance of the dispute?*

Short answer: N/A

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: In certain circumstances, yes.

As both the CPC and LICA do not contain any particular provisions on physical hearings, the fallback solution is to refer to the tribunal’s broad power to organize procedural matters. Under the provision set forth in Article 19 of the LICA, absent any parties’ arrangement, the arbitral tribunals have the power to organize procedural and evidentiary matters as deemed appropriate.\(^{38}\) Accordingly, the question as to whether a hearing should be held physically or remotely is reserved for the arbitral tribunal to decide, absent any agreement of the parties to the contrary. However, the power to order a remote hearing is not absolute and must be exercised against considerations of due process and, where present, the arbitral tribunal should follow the parties’ agreement.\(^{39}\)

The principle that the tribunal should abide by the parties’ agreement on procedural issues is only outlined in Article 19 of the LICA. This must be read in connection with the principle of due process as crystalized in Article 18, which deals exclusively with the equal treatment of parties.\(^ {40}\) While some scholars have viewed this principle as the pinnacle of the due process principle, which parties cannot

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\(^{38}\) Article 19, paragraph 2, LICA.


\(^{40}\) Article 18 LICA: “Treatment of the parties shall be equal. Adequate opportunity shall be given to each party to initiate proceedings, defend against a counterclaim and offer arguments”.

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derogate from in their agreement, the scope of application of due process during arbitration proceedings has remained imprecise.\textsuperscript{41}

Therefore, even though the open nature of the language stipulated in Articles 33 and 34 of the LICA, providing that the arbitral award shall be set aside if the arbitral procedure was not in accordance with the parties’ agreement,\textsuperscript{42} may be viewed as an incentive for unreasonable procedural demands from the parties, the broad power of the arbitral tribunal and the overarching principle of due process may be viewed as a way to delineate the scope of application of these provisions.\textsuperscript{43}

To this end, it can be argued that while ignoring the party’s agreement to hold the hearing physically in-person might be possible, arbitrators ought to establish that the party’s insistence on a physical hearing might significantly delay the arbitration, which contrasts the direct conflict of the arbitral tribunal’s mandate to conduct the proceeding expeditiously and efficiently.\textsuperscript{44} Therefore, arbitral tribunals are incumbent to engage in a balancing exercise, considering all circumstances of the case including: the reason for the hearing, the factual elements, the designated technical framework to the remote hearing and the timing and costs.

Thus, in holding a remote hearing in the presence of a parties’ agreement to hold a physical one, tribunals must seek to strike a balance between upholding party autonomy and meeting their mandate, on one hand, and resolving the dispute efficiently and expeditiously, on the other.

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?

\textbf{Short answer:} It is highly likely.


\textsuperscript{42} Article 33, paragraph 1, letter (f), LICA provides that the award may be set aside “[i]f the […] procedural law is not in accordance with the arbitration agreement”. Further, Article 34, number (2), LICA provides that an award “shall be nullified and inexecutable […] [i]n case the content of the judgment is incompatible with […] the imperative regulations of this Law”.

\textsuperscript{43} Article 33 LICA.

Generally, Iranian courts apply the grounds for challenging the proceeding very narrowly. Articles 33 and 34 of the LICA enumerate the grounds upon which a party may request the competent court to set aside an award. These grounds are inspired by the two sets of grounds for setting aside, as laid down in Article 34(2)(a) and (b) of the Model Law. Article 33 contemplates the possibility of revising the merits of the case by the reviewing court in certain instances. The grounds enunciated in Article 33(1), letters (a) to (f), with slight insignificant variations are, in effect, identical to the annulment grounds set out in Article 34(1)(a) of the Model Law. These are invariably related to the procedural integrity of the award, as contemplated by the Model Law. They cover the disregard for basic procedural fairness and excess of jurisdiction. Whilst the introduction of these instances as possible grounds for setting aside an arbitral award allows the possibility of judicial scrutiny of the award by national courts, however, a party may be precluded from relying on a ground in the setting aside proceedings if it failed to bring the same defense during the arbitral proceedings, as contemplated in Article 5 of the LICA. According to this Article, a party who knows that any provision of the LICA 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 stating his objection to such non-compliance immediately or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object. The waiver is closely linked to the principle of party autonomy, as it may not only bring freedom to customize the arbitral proceedings, but also the responsibility to secure the party’s right during the arbitration proceedings. Therefore, based on the literal reading of this Article, parties have to be clear and object without undue delay to secure that the right to challenge an award is not consequently waived.

Such stance is also consistent with the prevailing view widely endorsed by leading arbitration practitioners and scholars in Iran. This view posits that the parties are normally barred from invoking annulment defenses in the reviewing court if they failed to bring the relevant objection during the arbitration or, at the recognition and enforcement stage, before the courts of the arbitral seat. Such stance is reinforced by

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45 Under Article 426 CPC, these are among the exceptional grounds under which a judgment having res judicata effect may still be judicially reviewed.
47 The reference to incapacity in Article 33(1)(a) of the LICA is of a general nature, unlike the similar provision in Article 34 of the Model Law, which refers only to incapacity of a party to the arbitration agreement. The difference may gain significance in cases of assignment and succession. The party to an arbitration agreement, at the time such an agreement is made, may be under some kind of incapacity to enter into an arbitration agreement under the relevant applicable law.
48 This was the view expressed by Mohsen Mohebi, Secretary General of the ACIC, in an interview with the Author. See also Laya JONEIDI, Enforcement of Foreign Commercial Arbitration Awards (Shahre Danesh 2013) p. 356 and Alireza IRANSHAHRI, Objection to the arbitration award in international commercial arbitrations (2014) p. 283
the view that the arbitral tribunal should remain the central authority to adjudicate over objections in relation to the dispute and to limit the judicial scrutiny of the arbitral award. To this end, if a party considers that the failure to conduct a physical hearing is fundamentally unfair, the party ought to raise such objection either at the outset of the arbitral proceedings or during the proceedings, to preserve the ability to invoke it as a ground to vacate the final award.49

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

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

Short answer: Yes, although very unlikely.

The LICA, which is regarded as the general law governing international arbitration, does not explicitly refer to the breach of physical hearing as a separate ground for setting aside an award. However, the law recognizes the lack of due process or violation of public policy as grounds for setting aside an award.50

As mentioned above, Articles 33 and 34 of the LICA enumerate the grounds upon which a party may request the competent court to set aside an award. These Articles contemplate the judicial scrutiny of arbitral awards for procedural irregularities and violations of public policy.51 To this end, Article 33, paragraph 1, letter (d), states that a party may successfully challenge the final award “[i]f the annulment applicant fails to present his reasons out of his control”. In addition, Article 33, paragraph 1, letter (f), allows parties to challenge the final award “[i]f […] the procedural law is not in accordance with the arbitration agreement”. In addition, Article 34, number (2), recognizes grounds for nullification of the award if the final award appears to be

51 Ibid.
incompatible with the public policy, public order, or regulations that are considered to be imperative and fundamental to Iran’s legal framework.

Article 33 is formulated in a way to limit the scope of judicial review. To this effect, Article 33, paragraph 2, sets out that in the instances under paragraph 1, letters (h) and (i) (dealing with cases where the party has suffered a loss due to serious procedural irregularities such as forgery or concealed documents) the party may, before making a request for annulment, request the arbitrator to rehear the case. Such provision provides for a possibility of revision by the arbitral tribunal itself, which may further prevent the overzealous scrutiny of the final award by Iran’s national courts. It has been stated that it was within the drafters’ objective to limit the scope of judicial review and prevent the potential misuse and misapplication of the judicial authority of national courts. In other words, since the LICA has adopted a discernibly liberal stance towards international arbitration, any procedural questions (irregularities) that bear on the final award will be solely addressed by the arbitral tribunal rather than a court. In fact, the wording of Article 33 suggests that the competent authority to determine any procedural irregularities is primarily the arbitral tribunal.

Nevertheless, the law proceeds to contemplate instances where the arbitral award is essentially void and non-enforceable. These grounds of annulment are laid down in Article 34, which includes the cases where the subject-matter of the dispute is either non-arbitrable under Iranian law or contrary to the public policy or good morals of Iran and/or to the mandatory provisions of the LICA.

Although national scholars have noted that both substantive and procedural public policy issues incorporate a wide variety of procedural deficiencies in the award, the exact contour of public policy is imprecise, and it is not clear whether procedural deficiencies will amount to a public policy violation.

In addition, the principle of due process, which has been hailed as a fundamental principle within the archetype of Iran’s dispute resolution mechanism framework, does not encompass a right to a physical hearing as a main constituent of it. While Article 33, paragraph 1, letter (d), contemplates the failure to give a party the opportunity to present its case as a viable ground to challenge the final award, the due process principle also has an independent stance and may be applied by courts resorting to Article 34, instead. The leading scholar, Katouzian, opined that due process forms a fundamental component of Iran’s public policy, overriding any rules or considerations set out by parties. That being said, similar to the notion of public policy, the right to due process is not clearly

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52 Ibid. p. 569.
53 Ibid.
54 Such an approach is in line with the objective to prevent the courts from intervening based on their understanding of fundamental moral, social, and economic considerations in Iran. The fundamental feature of fair hearing has been interpreted and applied very narrowly. See Mohsen MOHEBI, “Iranian Committee of the International Chamber of Commerce: The Enforcement of Foreign Arbitration Awards in the New York Convention (1958)”, Letter of the Chamber of Commerce J. (1998).
defined under Iran’s legal framework. In a broad sense, due process is interpreted as the right to be treated fairly and equally. In effect, Article 18 of the LICA sets forth the principle of equal treatment. According to this Article, fundamental fairness requires both parties to be given a full and fair opportunity to present evidence. Some scholars have remarked that it is extremely difficult to argue that the principle of equal treatment encapsulated in Article 18 has been violated in the absence of specific circumstances. Such specific circumstances may emerge if one party is affected by technical issues that severely undermine the integrity of the arbitral tribunal and causing substantial injustice. Under Iran’s legal framework, the arbitrators (like judges) have been granted a wide discretion with regard to case management (e.g., ordering pleadings, granting postponements, fixing dates for hearings, ordering inspection of documents). In exercising this power, the arbitrators would engage in a balancing exercise between finality and fairness, comparing the potential benefits that result from a remote hearing with the potential prejudice to any party which results thereafter.

Although arbitration follows its own procedural rules, which may be different from national rules of civil procedure, in general, arbitral proceedings are governed by the mandatory rules, and to some substantial extent, they are influenced by the procedural culture of the parties’ home jurisdiction and their counsel. In this regard, under Iran’s legal framework, oral and synchronous exchange of arguments or evidence typically meet the required test for a right to be heard and a fair proceeding, as the courts have frequently issued a decision on documents only, without the need for an evidentiary hearing. Therefore, in general, the vacatur will not be granted if a party cannot attend a hearing or a witness is not examined physically, especially if alternative means, such as a video conference or call, are available. In particular, if the arbitrators argue that

56 Some of the Articles that directly or indirectly promote due process principle include: 24, 27, 34 to 38, 156, 159, 165, and 166 of the Islamic Republic Constitution. For instance, Article 35 grants the right to a lawyer; Article 156 underlines the independence of the judiciary, stating: “The Judiciary shall be an independent power that protects individual and social rights and is responsible for actualizing justice. […]” (free translation by the Author). The Constitution also contains two other material rights, i.e., the right of access to a court or fair tribunal, which is considered as an inherent component of the right to a fair trial. However, the notion of full opportunity to present material evidence, a common notion in other jurisdictions, is not a fully recognized principle under Iran’s legal framework.

57 The principal requirement is for the parties to be treated equally but not identically. See M. MOHEBI, Iranian Arbitration Review, fn. 55 above, p. 140.


holding the hearing physically in-person might significantly delay the arbitration, undermining its mandate to conduct the proceeding efficiently and expeditiously.

To this effect, a failure to conduct a physical hearing will only amount to a basis for setting aside an award if arbitrators conducting the proceeding act in bad faith or commit an error so gross that it amounts to affirmative misconduct, and in turn, deprives the party from a fair proceeding. Due to this circumstance, a party might argue that remote hearing significantly circumscribes their ability to present their arguments, and the remote submissions or testimony were not as effective as in a physical hearing. However, it is worth noting that there has not been a specific arbitration decision that has been challenged due to a hearing being conducted remotely.

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: Most likely not.

In light of the analysis under sub-paragraph d.9 above, it is largely unlikely that the absence of a physical hearing could be regarded in and of itself a ground for denying recognition and enforcement of a foreign arbitral 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. Iran ratified the New York Convention in 2001. It is worth noting that Iran acceded to the Convention on Recognition and Enforcement of Arbitral Awards in New York on two reservations regarding the scope of application of the convention. To this end, Iran will apply the Convention only with regard to disputes arising out of legal relationships whether contractual or non-contractual which are considered as commercial by the laws of Iran.

In addition, it is provided in Iran’s Act of Accession that the provisions of Article 139 of the Constitution in relation to submission to arbitration must be complied with. According to this Article, conciliation or referral to arbitration of disputes between the state of Iran and foreign nations, including disputes between the state or a state entity of

Iran and foreign investors, must be approved by both the Board of Ministers and the Parliament of Iran. There has been no reported case where a foreign award has been refused recognition and enforcement on the basis that a hearing was conducted remotely.

With specific regard to violations of the parties’ right to be heard under Article V(1)(b) of the New York Convention, whether these should be assessed in reference to national law or the law of the seat of arbitration is still subject to burgeoning speculations. Some scholars have recognized that the refusal to recognition and enforcement of foreign awards must be evaluated in accordance with Iran’s domestic mandatory law, and some have taken a stance that is not consistent with this position.63 The ongoing debate regarding this issue is compounded by the lack of clear guidance and jurisprudence in this area. Also, there are no provisions specifying what would constitute a violation of public policy, except what has been stipulated in Article 139 of Iran’s Constitution. Little guidance is provided by case law or other secondary sources in this area, as well.

In any event, it can be argued that the enforcement process of foreign awards is contemplated in a way that there is no need to recognize the award.64 The process which is called the “enforcement of the awards” regulates the enforcement procedure of foreign awards as below. The procedure for the enforcement of foreign awards in Iran is the same as for the enforcement of court decisions before so-called “Enforcement Branches”. This means that the court will not even engage in recognizing the final award and the foreign award, once issued, will go straight to enforcement branches, removing any possibility of courts inquiring into the merit of the award. This is done in a bid to make Iran competitiveness towards arbitration.65

In the recent case Mr. FF v Mr. VM & S.M,66 a party submitted a request to refuse recognition and enforcement of a foreign award, claiming the violation of its right to be heard. The party contended that the arbitral tribunal did not allow it a motion to hold an oral hearing. In addition, the party claimed, among other things, that during the arbitral procedure, it had presented important allegations concerning the damage it had suffered. The party asserted that part of its submission concerned the issue of late fee and its incompatibility with Iran’s existing arc of financial regulations. In the arbitration, the party claimed that the other party had applied an exorbitant late fee, which could be conceived as punitive damages rather than contractual damages. The party contended that the arbitral tribunal did not sufficiently take into consideration this defense and failed to hold an oral hearing to examine its allegations (or lack thereof), and as such did

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63 Mohammed R. ZANDI, Davari, 1st edn. (Forest publishing 2010) p. 211.
65 Ibid.
not provide parties with sufficient opportunities to present their case and had completely disregarded its submission relevant to the case.

The Iranian court refused recognition and enforcement of the award, stating that the damages for late payment are not recoverable under Iran’s Commercial Code and Trade Bill. The court also observed that the amount of damages determined by the arbitral tribunal was not consistent with the express terms of the contract and trade usages. Subsequently, the court ruled that issues concerning the period for which interest can be awarded, the rate, and whether interest is to be simple or compounded, ought to be consistent with the Iranian legal framework of interests in order to be recoverable. Further, and what is more important for the purposes of this report, the court made some references to the notion of right to be heard and how it ought to be interpreted and applied, when one party requests an oral hearing.

The court held that the arbitral tribunal can reject the party’s request if an oral hearing “cannot contribute to the clarification of disputed points” or help the arbitral tribunal to form a compelling and conclusive opinion, however, the court iterated that the extent to which an oral hearing can be helpful in a specific case is at the discretion of the arbitral tribunal (free translation by the Author).

In refusing recognition and enforcement of this award, the court did not base its decision on the alleged procedural error. It relied on the insufficiency of the reasoning put forth by the arbitral tribunal concerning the viability of the late fee. It appears that the court did not view the lack of further oral submissions as a viable ground for refusing recognition and enforcement of a foreign award. In its analysis, the court considered whether parties were able to present and submit what was deemed necessary to reasonable present their case. Furthermore, the court noted that the discretion to conduct a further hearing is left to the arbitral tribunals.

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: Yes, there have been some interesting initiatives.

In April, the Chief Justice of Iran (i.e., the Head of the Judiciary) announced the implementation of a new initiative called “e-litigation”. Recognizing the importance of keeping the judicial system accessible, relevant and flexible to meet the growing demand of the new era, the Judiciary has taken necessary steps to harness modern technologies with the implementation of e-litigation. The Iran judiciary hopes that by implementing

e-litigation, it will help reduce unnecessary costs of traditional (physical) litigation and increase convenient and secure access to the web-based service.\textsuperscript{68} E-litigation (also called “Sana system”) was launched in May 2020 in Markazi province.\textsuperscript{69} Based on the new introduced system, the entire proceeding from filing, payment, electronic summons, submission of the documents, till the final readings of the judges’ verdict is carried out electronically. In effect, the entire case administration including the receipt of claims, petitions, objections, or interventions are conducted electronically without needing to go to court or make a physical appearance. The Chief Justice of Markazi province, Abdol Mahdi Moosavi. has remarked that e-litigation has already garnered prominence in proceedings that predominately deal with disputes regarding inheritance, the request for interim measures, and the request for preservation of evidence.\textsuperscript{70} He also added that the new generation of electronic proceeding has already allowed for greater flexibility in the selection of hearing dates.\textsuperscript{71}

In addition, it is important to reiterate that remote hearing are not a new phenomenon, to the extent that case management conferences and some procedural hearings have been frequently conducted remotely within Iran legal framework.

With regard to developments in Iran’s arbitration landscape, while the two arbitral institutes in Iran, TRAC and ACIC, have yet to issue guidelines or protocols supporting the adoption of procedures for facilitating remote hearings, the Iranian Committee of the ICC has recently translated the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic.\textsuperscript{72} In interviews with the Author, the heads of both TRAC and ACIC have recognized the important role that these institutions play in ensuring that disputes will continue to be resolved on a fair, expeditious and cost-effective manner, and have made concentrated efforts to facilitate remote hearings.

\textsuperscript{69} “Sana Adliran”, available at <https://sana.adliran.ir/Sana/Index> (last accessed 10 May 2021).
\textsuperscript{71} Ibid.