

ITALY

[Giacomo Rojas Elgueta](#)*

[Benedetta Mauro](#)**

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 Italian *lex arbitri* – namely, Articles 806-840 of the Italian Code of Civil Procedure (hereinafter, also “ICCP”), which equally apply to domestic and international arbitration proceedings seated in Italy – does not expressly provide for the 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 excluded.

As the Italian law governing arbitration (Articles 806-840 ICCP) does not expressly provide for the parties' right to a physical hearing, it is then necessary to assess whether such right can be inferred or excluded from the provisions provided therein.

As a starting point of this analysis, it must be noted that Articles 806-840 ICCP do not encompass any regulation of the arbitration hearing nor clarify how the arbitration hearing should take place.

In the Italian arbitration law there are, however, few indexes to look at in order to establish whether a right to a physical hearing can be inferred or excluded.

* Giacomo Rojas Elgueta is Founding Partner at D|R Arbitration & Litigation and Professor of Private Law at Roma Tre University School of Law. He is the Co-editor of the “Does a Right to a Physical Hearing Exist in International Arbitration?” ICCA project.

** Benedetta Mauro is a Junior Associate at D|R Arbitration & Litigation.

The first index is Article 816 ICCP where, at paragraph 3, it is stated that, unless differently agreed by the parties in the arbitration agreement, the arbitral tribunal can hold a hearing in a different place (including abroad) than the seat of the arbitration.¹

While this provision does not specify whether the place chosen by the arbitral tribunal to conduct the hearing must translate into holding a physical meeting, the broad degree of discretion assigned to the arbitrators seems to suggest the contrary (i.e., that they are allowed to order a remote hearing).

A second index to look at is Article 816-*bis*, paragraph 1, ICCP, which deals in general with the conduct of (and the rules governing) the arbitration proceedings.²

In particular, Article 816-*bis* ICCP provides that, in the first place, the parties are free to determine the rules that the arbitral tribunal shall observe in the course of the proceedings.³ To the extent that the parties do not specify the procedural rules applicable to the proceedings, it is then provided that the arbitral tribunal may regulate the conduct thereof as it deems appropriate, within the sole mandatory limit represented by the observance of the due process principle.⁴

In light of Article 816-*bis* ICCP, it is undisputed that the management and organization of the proceedings fall within the default procedural discretion that is granted to the arbitral tribunal.⁵

¹ Art. 816, paragraph 3, ICCP provides that: “Unless the arbitration agreement provides otherwise, the arbitrators may hold hearings, collect evidence, deliberate and sign the award even in locations other than the seat of the arbitration, including abroad” (free translation by the Author).

² Art. 816-*bis*, paragraph 1, ICCP provides that: “The parties may stipulate in the arbitration agreement, or in a separate written document, provided that it precedes the commencement of the arbitration, the rules that the arbitrators shall observe in the course of the proceedings [...]. In the absence of such rules, the arbitrators may regulate the conduct of the proceedings [...] as they deem appropriate. In any case, they must implement the due process principle, granting to the parties reasonable and equal opportunities to present their case. [...]” (free translation by the Author).

³ Pursuant to Art. 816-*bis* ICCP, in order for party autonomy to be binding upon the arbitral tribunal it must be exercised before the commencement of the arbitration proceedings, as it will be further illustrated under sub-paragraph c.6.

⁴ This limit stems not only from the express provision of Article 816-*bis*, paragraph 1, ICCP, but also from the due process principle’s constitutional status in the Italian hierarchy of norms, pursuant to the provisions of Arts. 24, paragraph 2, and 111, paragraph 2, of the Italian Constitution and of Arts. 6 of the European Convention on Human Rights (hereinafter, “ECHR”) and 14 of the International Covenant on Civil and Political Rights. The due process principle is therefore an overriding mandatory principle of Italian procedural law.

⁵ See Laura SALVANESCHI, “Art. 816-*bis*” in *Arbitrato* (Zanichelli 2014) p. 398 at p. 406.

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This broad, default procedural discretion seems to confirm that the arbitrators are allowed to order that a hearing be held by any means they deem appropriate, including remotely.⁶

The third and last index relevant for this analysis is Article 816-*ter* ICCP, which, at paragraph 2, encompasses a specific regulation of the taking of witness evidence in arbitration proceedings.⁷

The first part of Article 816-*ter* ICCP – providing that the arbitrators may examine the witness where the arbitral tribunal is located or, provided that the witness agrees, at her dwelling or her office – has been criticized by Italian scholarship for being redundant.⁸

This criticism is based on the idea that the modalities of the taking of evidence, including the location where witnesses are examined, certainly fall within the broad discretion conferred upon the arbitral tribunal by Article 816-*bis* ICCP.

On the other hand, the second part of Article 816-*ter* ICCP expressly allows the arbitral tribunal to take witness evidence in writing, despite some commentators had opposed this provision arguing that this could hamper the testimony's genuineness and immediacy.⁹

Being the taking of witness evidence allowed in writing, it is then possible to infer that examining witnesses remotely is all the more permitted – given that, as opposed to written testimony, it allows an immediate exchange between counsel, arbitrators and witnesses.¹⁰

The three indexes analyzed so far lead to the reasonable conclusion that the Italian arbitration law, while not containing any element from which it is possible to infer that a right to a physical hearing exists, encompasses various provisions that rather point to the contrary.

Such conclusion is supported by the provisions of the Arbitration Rules of the main Italian arbitral institution (namely, the Milan Chamber of Arbitration or "CAM"). Article 27, paragraph 2, as amended in 2019, indeed provides that: "The Arbitral Tribunal may

⁶ See Stefano A. CERRATO and Francesco DE SANTIS, "L'arbitrato fra *lockdown* e fase due: una proposta di intervento normativo", Giust. civ. (18 May 2020) at <<http://giustiziacivile.com/arbitrato-e-processo-civile/editoriali/larbitrato-fra-lockdown-e-fase-due-una-proposta-di-intervento>> (last accessed 30 October 2020) at p. 6.

⁷ Art. 816-*ter*, paragraph 2, ICCP provides that: "The arbitrators may examine the witness directly where they are located, or they may decide to examine the witness, provided that she agrees, at her dwellings or her office. They may equally decide to take witness evidence by requesting the witness to provide her answers to the questions in writing, within the time limit that they shall fix" (free translation by the Author).

⁸ See Laura SALVANESCHI, "Art. 816-*ter*" in *Arbitrato*, fn. 5 above, p. 423 at p. 440.

⁹ See, among others, Filippo DANOVI, "L'istruzione probatoria nella nuova disciplina dell'arbitrato rituale", Riv. dir. proc. (2008) p. 21 at p. 32.

¹⁰ See Giorgio DE NOVA, "Towards virtual arbitration?", Riv. dir. arb. (2020) p. 203 at p. 205.

grant the attendance [of the parties at the hearing] *by any appropriate means*” (emphasis added), thus certainly including by virtual means.¹¹

If it was not accepted that under Italian law holding an arbitration hearing remotely is permitted, the paradoxical consequence would be that the Arbitration Rules of the main Italian arbitral institution would include a provision that could not be applied to any arbitration seated in Italy.¹²

To sum up, it is not possible to infer from any provision of the Italian *lex arbitri* that a right to a physical hearing exists. Unless the parties agree otherwise,¹³ the regulation of how and where hearings shall be held falls within the broad discretion of the arbitral tribunal. Therefore, the existence in Italy of the right to a physical hearing in arbitration can be excluded as a result of the analysis of the relevant indexes found in the Italian arbitration law.

For the sake of completeness and in order to corroborate the above conclusion, it can further be assessed whether the due process principle, as the sole limit to the arbitral tribunal’s discretion, demands any threshold requirements for an arbitration hearing and, if so, whether these include that a hearing must be physical.

Since the Italian arbitration law does not set out any specific regulation of the arbitration hearings, it is then necessary to make reference to the requirements of hearings in litigation, which are provided by the Italian general rules of civil procedure analyzed in the following paragraph.

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?*

¹¹ Milan Chamber of Arbitration, *Arbitration Rules*, Art. 27, paragraph 2, available in English at <https://www.camera-arbitrale.it/upload/documenti/arbitrato/ARBITRATION%20RULES%202020.pdf> (last accessed 20 October 2020). This interpretation is consistent with CAM’s statement, issued in the wake of the Covid-19 emergency, inviting arbitral tribunals to “make any possible effort, in cooperation with the parties and the Secretariat, in order to h[o]ld hearing by way of video or audio conference”: see Milan Chamber of Arbitration Press Release, 14 April 2020, at <https://www.camera-arbitrale.it/en/news/arbitral-proceedings-deadlines.php?id=930> (last accessed 20 October 2020).

¹² See Milan Chamber of Arbitration, *Arbitration Rules*, Art. 2, paragraph 2, providing that: “In any case, mandatory provisions that are applicable to the arbitral proceedings shall apply”.

¹³ As it will be further illustrated below at sub-paragraph c.6, in order for parties’ procedural instructions to be binding upon the arbitral tribunal, they must be issued before the commencement of the arbitration proceedings.

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Short answer: Yes.

While the Italian general rules of civil procedure do not expressly provide for a right to a physical hearing, having the Italian Code of Civil Procedure been enacted in 1940 it is commonly understood that, in civil proceedings, hearings are held physically and that remote hearings are not contemplated among the hearings' modes.¹⁴

If, as a matter of fact, hearings in litigation are physical, the next question is whether this must be construed as a legacy of the past and the result of how civil proceedings are currently administered or, on the contrary, as an index that only physical hearings are deemed compatible with the fundamental principle of due process.

That a hearing must not necessarily be physical to satisfy the due process principle seems to be confirmed by the following considerations, prompted by the legislation passed in Italy in response to the Covid pandemic.¹⁵

In particular, in order to contain the virus outbreak and to limit its negative impact on the administration of justice, the Italian legislator expressly provided for the possibility to hold remote hearings in litigation (with the exclusion of hearings aimed at the taking of witness evidence).¹⁶

¹⁴ This is confirmed by some provisions of the Italian Code of Civil Procedure which would make no sense if applied to a remote hearing. See, for instance, Art. 129 ICCP, which provides that: "Participants and attendees at the hearing shall not carry weapons nor sticks [...]" (free translation by the Author).

¹⁵ An earlier confirm may be found in the decision of the President of the first instance Tribunal of Vicenza, "Provisions concerning the taking of witness evidence through videoconferencing systems", 8 May 2017, at <<http://www.tribunale.vicenza.giustizia.it/FileTribunali/93/Sito/COVID/PROVVEDIMENTI%20DEL%20TRIBUNALE%20-%20SETTORE%20CIVILE/09%20-%20Videoconferenza%20procedimenti%20civili%20presso%20ex%20Tribunale%20Bassano%20del%20Grappa.pdf>> (last accessed 12 December 2020), where it was stated that: "The Code of Civil Procedure does not contemplate [videoconferencing] (dating back to 1940) nor prohibits it, and the regulation provided does not seem incompatible with the use of videoconferencing. [...] The fundamental principle of orality is not hampered by videoconferencing, nor is the physical presence of the participants to the proceedings expressly required" (free translation by the Author).

¹⁶ Art. 83, paragraph 7, letter f), of Law-Decree No. 18 of 17 March 2020, as last amended by Art. 3, paragraph 2, letter c), of Law-Decree No. 28 of 30 April 2020, provided that, from May 12 to June 30, 2020, "[...] the administrative heads of the courts may adopt the following measures: f) providing for the conduct of civil hearings *that do not require the presence of subjects other than the attorneys, the parties and the judge's auxiliaries* [...] via video conference [...]. In any case, the hearing must be conducted through modalities capable of safeguarding the due process principle and the actual parties' participation. [...]" (free

Notably, the emergency legislation enacted to temporarily allow remote hearings in civil proceedings, by stating that “the [remote] hearing must be conducted through modalities capable of safeguarding the due process and the actual parties’ participation”, clearly shows that remote hearings are not *per se* contrary to the due process principle.

It is further worth noting that according to Italian scholarship it is now time to permanently introduce in the Italian legal system remote hearings as one of the available hearings’ modes offered by the general rules of civil procedure, instead of treating them as an emergency and temporary measure.¹⁷

This proposal would not be submitted by Italian scholars, were remote hearings not compatible with the due process principle.

If, under Italian law, being physically together at the same time is not an indispensable requisite for a hearing to be compatible with the due process principle, what are a hearing’s threshold requirements in litigation?

As a starting point of this analysis, it should be observed that the Italian Code of Civil Procedure of 1940 is rooted in the principle of “orality” of litigation.¹⁸

The relevant provisions in this regard are Articles 180¹⁹ and 275, paragraph 2, ICCP,²⁰ setting out that both the first hearing and the hearing concluding the proceedings shall be conducted “orally”. At a minimum, hearings must then be conceived as meetings where participants are allowed to exchange arguments by word of mouth.²¹

The principle of orality is therefore intimately linked with the principle of immediacy, which requires that the judge deciding the case must have a simultaneous interaction with the parties and their attorneys.²² This simultaneous interaction may only

translation by the Author, emphasis added). This provision was reproduced (with the addition of the requirement of the parties’ prior consent to the hearing being held remotely) in Art. 221, paragraph 7, Law-Decree No. 34 of 19 May 2020, as amended by Law No. 77 of 17 July 2020, which will be applicable until December 31, 2020. Covid-specific initiatives in Italy will be further illustrated below under sub-paragraph f.11.

¹⁷ See Lotario DITTRICH, “Le udienze civili in videoconferenza: un modello permanente?” in Gian Paolo DOLSO, Maria Dolores FERRARA and Davide ROSSI, eds., *Virus in fabula. Diritti e Istituzioni ai tempi del covid-19* (EUT Edizioni Università di Trieste 2020) p. 183 at p. 191 and Carmelo BARBIERI, “Stop alle udienze civili in videoconferenza: un’occasione persa”, *Il Foglio* (18 June 2020) at <<https://www.ilfoglio.it/giustizia/2020/06/18/news/stop-alle-udienze-civili-in-videoconferenza-unoccasione-persa-321126/>> (last accessed 31 October 2020).

¹⁸ See Giuseppe CHIOVENDA, *Saggi di diritto processuale civile*, I (Giuffrè 1930) p. 413; G. CHIOVENDA, *Principii di diritto processuale civile* (Jovene 1928) p. 681.

¹⁹ Art. 180 ICCP provides that: “The presentation of the case shall be oral. Minutes shall be taken of the presentation of the case” (free translation by the Author).

²⁰ Art. 275, paragraph 2, ICCP provides that: “Each party [...] may request that the case is discussed orally in front of the court. [...]” (free translation by the Author).

²¹ See Corrado VOCINO, “Oralità nel processo (dir. proc. civ.)”, in *Enc. dir.*, XXX (Giuffrè 1990) p. 592 at p. 593.

²² See Aldo M. SANDULLI, “Procedimento civile”, in *Noviss. Dig. it.* (UTET 1957) p. 1026 at p. 1028.

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occur when hearings take place live, through a simultaneous or synchronous exchange of arguments (and taking of witness evidence).²³

It is then possible to establish two distinctive fundamental requirements for a hearing in litigation: (i) it must be oral (principle of orality) and (ii) it should take place synchronously (principle of immediacy).²⁴

If it is accepted that, pursuant to Italian rules of civil procedure, a hearing must satisfy these two threshold requirements (orality and immediacy), the next question is whether a remote setting is compatible with such requirements.²⁵

By definition, videoconferencing systems allow for the simultaneous interaction of participants by two-way audio and video transmission.²⁶ There is therefore no reasonable doubt as to whether hearings held using videoconferencing links allow participants to exchange arguments both orally and synchronously.²⁷

It is thus apparent that, insofar as it is accepted that the two constituent elements of hearings in civil proceedings are orality and immediacy, both can be found in remote hearings.

That, under Italian law, the threshold requirements for hearings in litigation are met by remote hearings may serve as a further confirmation that remote hearings are not *per se* incompatible with the due process principle in general and, in particular, with due process as a limit to the arbitral tribunal's discretion.

As a matter of fact, it would be unreasonable if the requisites that suffice for a hearing to be considered compatible with the due process principle in litigation (as shown by the recent Covid legislation) were not sufficient to constitute a valid hearing in arbitration.

²³ The regulation of evidentiary hearings in litigation will not be analyzed in-depth, considering that, unlike hearings, the taking of witness evidence in arbitration is specifically regulated by Art. 816-ter ICCP, analyzed under sub-paragraph a.2 above.

²⁴ On whether the parties' right to a hearing is satisfied when these two requirements are met see Maxi SCHERER, "Remote Hearings in International Arbitration: An Analytical Framework", 37 J. Int'l Arb. (2020) p. 408 at pp. 416-417.

²⁵ For an answer to the affirmative, see the decision of the President of the Tribunal of Vicenza, fn. 15 above, where it was stated that: "The fundamental principle of orality is not hampered by videoconferencing, nor is the physical presence of the participants to the proceedings expressly required" (free translation by the Author).

²⁶ For a definition of "videoconferencing" (or "video-link"), see Hague Conference on Private International Law, "Guide to Good Practice on the Use of Video-Link under the Evidence Convention" (2020) at <<https://www.hcch.net/en/publications-and-studies/details4/?pid=6744&dtid=3>> (last accessed 22 October 2020) at p. 15.

²⁷ For the proposition that remote hearings allow participants to "hear and be heard" by each other, thus fully safeguarding the due process principle, see Andrea PANZAROLA and Marco FARINA, "Il diritto processuale civile e la emergenza covid-19 (le garanzie individuali nello stato di eccezione)", *Judicium* (29 May 2020) at <<http://www.judicium.it/wp-content/uploads/2020/05/Panzarola-Farina-2.pdf>> (last accessed 1 November 2020) at pp. 15-16.

This is so if one considers that arbitration is by definition a less formal procedure than litigation.

The conclusion reached in this sub-paragraph then serves as a further confirmation of what has been stated above under paragraph a (i.e., arbitration proceedings seated in Italy do not contemplate the parties' right to a physical hearing).

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.

For the sake of clarity, it is worth noticing that it is a well-established principle of Italian law that Italian general rules of civil procedure are not applicable or transposable as such to arbitration proceedings.²⁸

Accordingly, the Italian general rules of civil procedure have been described above only as a way to corroborate the proposition that remote hearings do not violate any fundamental requirements set by the Italian legal system for hearings in general and are therefore fully compatible with Italian arbitration law in particular.

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 clarified above, a right to a physical hearing in arbitration does not exist in Italy.²⁹ Consequently, the parties would certainly be free to agree that hearings may (or shall) take place remotely, or to adopt institutional rules that allow arbitrators to order a remote hearing (such as the Arbitration Rules of the CAM, i.e., the main arbitral institution in Italy).³⁰

²⁸ As a consequence of the role attributed by Art. 816-bis ICCP to party autonomy and to the discretion of the arbitral tribunal, absent an express agreement of the parties to the contrary, the general rules of the Italian Code of Civil Procedure do not apply to arbitration proceedings in Italy (which are instead regulated by a special section of the same code: Arts. 806-840). See, among others, Cass., sez. I, 21 Feb. 2019, n.5243, in *De Jure*.

²⁹ See paragraphs a and b above.

³⁰ See Milan Chamber of Arbitration, *Arbitration Rules*, Art. 27, paragraph 2, providing that: "The parties may attend at the hearing either in person or through duly empowered representatives and may be assisted by counsel. The Arbitral Tribunal may grant the attendance by any appropriate means".

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6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: It depends.

As described above,³¹ Italian law does not prescribe that arbitration hearings shall be physical. Nonetheless, parties are certainly free to agree that hearings shall be physical.

As to the question whether the arbitral tribunal can decide to hold a remote hearing, despite the parties' agreement to the contrary, the answer is: it depends.

This is so if one considers that, pursuant to Article 816-*bis*, paragraph 1, ICCP, in order for parties' procedural instructions to be binding upon the arbitral tribunal, they must be issued before the commencement of the arbitration proceedings.³²

The rationale of this rule is to let the appointed arbitrators know «the rules of the game» before they accept the appointment. As a consequence, the time limit for the parties to determine the applicable procedural rules is generally identified with the constitution of the arbitral tribunal.³³

Accordingly, under Italian law, in order to fully understand the interplay between party autonomy and arbitrators' default procedural discretion it is fundamental to distinguish between two different scenarios: (i) parties, prior to the commencement of the arbitration, agree in writing (e.g., in the arbitration agreement) that the arbitral tribunal shall hold physical hearings; (ii) parties agree on physical hearings after the commencement of the arbitration proceedings.

(i) *In the first scenario*, where parties have agreed (in writing) on physical hearings prior to the appointment of the arbitral tribunal, the arbitrators cannot depart from such procedural rule adopted by the parties and, for that reason, cannot decide to hold a remote hearing.

As to the legal consequences in case, in this first scenario, the arbitral tribunal orders a remote hearing in spite of the parties' agreement to the contrary, a further clarification is necessary.

³¹ See paragraphs a and b above.

³² In particular, Art. 816-*bis*, paragraph 1, ICCP provides that: "The parties may stipulate in the arbitration agreement, or in a separate written document, *provided that it precedes the commencement of the arbitration*, the rules that the arbitrators shall observe in the course of the proceedings [...]. In the absence of such rules, the arbitrators may regulate the conduct of the proceedings [...] as they deem appropriate. In any case, they must implement the due process principle, granting to the parties reasonable and equal opportunities to present their case. [...]" (free translation by the Author, emphasis added).

³³ In the Italian case law see, among others, Cass, sez. I, 4 May 2011, n.9761, in *De Jure*.

Under Italian arbitration law, not only the parties can establish (prior to the commencement of the arbitration) the procedural rules to be followed by the arbitral tribunal,³⁴ but (pursuant to Article 829, paragraph 1, No. 7, ICCP) they can also determine which procedural rules lead to the annulment of the arbitral award if violated by the arbitral tribunal.³⁵

In other words, Article 829, paragraph 1, No. 7, ICCP allows the parties, prior to the commencement of the arbitration proceedings, to jointly and expressly elevate certain procedural rules (if violated) to a ground for setting aside the award.

As a result, in case the arbitral tribunal orders a remote hearing against the parties' instruction to hold physical hearings – and provided that the parties have expressly and jointly established that this instruction (if violated) represents a ground for setting aside the award – the legal consequences would be the possible annulment of the award and the resulting arbitrators' liability for damages (which, pursuant to Article 813-*ter*, paragraph 4, ICCP, can be established only after the court's decision to annul the award has become *res judicata*).³⁶

On the other hand, in case the parties have not expressly contemplated that the violation of their instruction to hold physical hearings could result in the annulment of the arbitral award, the legal consequence deriving from the arbitral tribunal's order to hold a remote hearing would be limited – in an *ad hoc* arbitration not subject to institutional rules regulating the arbitrators' replacement – to the possibility for the parties to jointly terminate the contractual relationship with the arbitrators and to replace them.³⁷

³⁴ As established by Art. 816-*bis*, paragraph 1, ICCP.

³⁵ Art. 829, paragraph 1, No. 7, ICCP provides that: “The award may be set aside, notwithstanding any prior waiver, in the following cases: [...] if in the proceedings there has been a breach of the rules established by the parties under the express sanction of nullity, and such breach has not been remedied for” (free translation by the Author).

³⁶ Art. 813-*ter*, paragraph 4, ICCP provides that: “If an award has been rendered, the claim for damages can be filed only after the setting aside of the award, with a decision that has become *res judicata*, and based on the same grounds on which the award has been set aside” (free translation by the Author).

³⁷ Pursuant to Art. 813-*bis* ICCP: “Unless the parties agreed otherwise, the arbitrator who fails to perform or delays performing an act required by her mandate can be removed with the agreement of the parties or by a third person so authorized in the arbitration agreement. [...]” (free translation by the Author). In Italian scholarship, it is a well-established principle that the contract entered into by the arbitrators and the parties can be jointly terminated by the parties in case of an arbitrators' breach. See, among others, L. SALVANESCHI, “Art. 813-*ter*” in *Arbitrato*, fn. 5 above, p. 285 at p. 287; Federica PORCELLI, “Equivalenze e divergenze normative tra ricasazione e responsabilità degli arbitri e dei giudici statali”, *Giur. it.* (2017) p. 168 at p. 172; Mauro BOVE, “Responsabilità degli arbitri”, *Judicium* (24 March 2014) at <http://www.judicium.it/wp-content/uploads/saggi/561/Bove_819-ter.pdf> (last accessed 30 October 2020) at p. 3.

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(ii) *In the second scenario*, where parties agree on physical hearings after the commencement of the arbitration proceedings, pursuant to the above-mentioned Article 816-*bis*, paragraph 1, ICCP arbitrators are not bound by such procedural instruction issued by the parties after their appointment.

Contrary to the approach followed in other jurisdictions, Italian arbitration law does not require the arbitral tribunal to act in accordance with a procedural rule agreed upon by the parties if this procedural rule was not recognizable at the time of their appointment.³⁸

Therefore, if the parties reach an agreement on procedural rules (e.g., that hearings shall be physical) after the commencement of the arbitration, the arbitral tribunal will only be bound to it insofar as it agrees to.³⁹

As a consequence, even though this possibility seems to be implausible in practice, in this second scenario an arbitral tribunal is empowered to order a remote hearing notwithstanding the parties' agreement to the contrary.

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Yes.

As clarified above, arbitration proceedings seated in Italy do not contemplate the parties' right to a physical hearing.

³⁸ This approach is also followed by the Milan Chamber of Arbitration, *Arbitration Rules*, Art. 2, paragraph 1, which provides that: "The arbitral proceedings shall be governed by the Rules, by the rules agreed upon by the parties *up to the constitution of the Arbitral Tribunal* if consistent with the Rules and by those set by the Arbitral Tribunal" (emphasis added). See Charles JARROSSON, "Art. 2 – Rules applicable to the proceedings" in Ugo DRAETTA and Riccardo LUZZATTO, eds., *The Chamber of Arbitration of Milan Rules: A Commentary* (Juris 2012) p. 63 at pp. 65-66.

³⁹ See fn. 33 above. See also L. SALVANESCHI, "Art. 816-*bis*" in *Arbitrato*, fn. 5 above, p. 398 at p. 394 and Emilio FAZZALARI, "Ancora in tema di svolgimento del processo arbitrale", *Riv. arb.* (2004) p. 661 at p. 665. Some Italian scholars, departing from a strict interpretation of Article 816-*bis*, paragraph 1, ICCP, argue that later agreements between the parties are also binding for the arbitrators who are nonetheless free to terminate the contractual relationship with the parties in case of their unwillingness to comply with these later instructions: see Alessandro FABBI, "Art. 816-*bis*" in Massimo V. BENEDETTELLI, Claudio CONSOLO and Luca G. RADICATI DI BROZOLO, eds., *Commentario breve al diritto dell'arbitrato nazionale ed internazionale*, 2nd edn. (CEDAM 2017) p. 225 at p. 229.

Assuming, however, that such a right was recognized in a specific case,⁴⁰ the next question under Italian law would be whether, in case the arbitral tribunal denies a physical hearing notwithstanding such right, the party wishing to challenge the award is required to raise such violation in the course of the proceedings.

The answer to this question is not controversial under Italian law.

Pursuant to Article 829, paragraph 2, ICCP the party who has failed to raise the breach of a procedural rule governing the conduct of the arbitration proceedings in the first occasion available thereafter may not challenge the award based on such ground.⁴¹

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

It is not possible to answer this question, considering that Italian law does not recognize a right to a physical hearing in arbitration, as it has been shown above under paragraphs a and b.

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.

As it has been explained above,⁴² the Italian arbitration law does not provide for a right to a physical hearing in arbitration. The question still arises whether the arbitrators' order to hold a remote hearing may nevertheless constitute a basis for setting aside the award.

A first scenario where the answer could be yes arises where the parties establish (prior to the commencement of the arbitration, pursuant to Article 816-*bis* ICCP) that a physical hearing must take place in case either of them requests it, and that (pursuant to

⁴⁰ In particular, the cases where there may be a juxtaposition between the failure to conduct a physical hearing and some of the grounds for setting aside the award will be analyzed below under sub-paragraph d.9.

⁴¹ Article 829, paragraph 2, ICCP provides that: "The party who [...] failed to raise the breach of a procedural rule governing the conduct of the arbitration proceedings in the first statement of claim or reply thereafter is prevented from challenging the award on such ground".

⁴² See paragraphs a and b above.

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Article 829, paragraph 1, No. 7, ICCP) the violation of such rule forms a ground to set aside the award.⁴³

A second scenario where it is likely that the above-mentioned question will arise is where, in the exercise of its default procedural discretion, the arbitral tribunal orders a remote hearing over one party's objection. This is so if one considers that the arbitral tribunal's discretion in procedural matters is not limitless, as it must be exercised within the boundaries set by the observance of the due process principle.⁴⁴

This limit to the arbitrators' powers is particularly relevant to this analysis, considering that (pursuant to Article 829, paragraph 1, No. 9 ICCP) any violation of the due process principle in the course of the arbitration proceedings may constitute a ground for setting aside the award.⁴⁵

Therefore, the arbitral tribunal's decision to hold a remote hearing over one party's objection may lead to the setting aside of the award, in case it is deemed to violate the due process principle.

Considering that, as it was concluded above in sub-paragraph b.3, remote hearings are not *per se* incompatible with the due process principle, the following analysis must therefore focus on the concrete circumstances under which ordering a remote hearing over one party's objection constitutes a breach of the due process principle.

In Italy, no case law has formed on this specific subject matter yet. It is thus relevant to look at the standards that have been applied by Italian courts vested with setting aside proceedings grounded on alleged violations of the due process principle.

Pursuant to the well-established case law of the Italian Court of Cassation, violations of the due process principle in arbitration must be assessed against the broad procedural discretion enjoyed by arbitrators in the absence of a timely agreement of the parties.⁴⁶

As a consequence, a party seeking to set aside an award on this basis cannot simply rely on formal allegations, but must substantiate her case by specifying the material and actual prejudice that she suffered as a result of the relevant procedural decision.⁴⁷

⁴³ On the parties' prerogative (pursuant to Art. 829, paragraph 1, No. 7, ICCP) to jointly and expressly elevate certain procedural rules (if violated) to a ground for setting aside the award, see sub-paragraph c.6 above.

⁴⁴ See sub-paragraph a.2 and, in particular, fn. 4 above.

⁴⁵ Art. 829, paragraph 1, No. 9, ICCP provides that: "The award may be set aside, notwithstanding any prior waiver, in the following cases: [...] if in the proceedings there has been a breach of the due process principle" (free translation by the Author).

⁴⁶ See, among others, Cass., sez. I, 21 Feb. 2019, n.5243, in *De Jure*; Cass., sez. I, 4 Apr. 2018, n.8333, in *De Jure*; Cass., sez. I, 26 May 2015, n.10809.

⁴⁷ See, among others, Cass., sez. I, 7 Sep. 2020, n.18600, in *De Jure*; Cass., sez. I, 23 Feb. 2016, n.3481, in *De Jure*; Cass., sez. I, 8 Jan. 2014, n.131, in *De Jure*; Cass., sez. I, 21 Jan. 2007, n.2021, in *De Jure*.

In particular, such party must establish that the way the proceedings were conducted materially impinged on her ability to: (i) adequately present her case;⁴⁸ (ii) examine and comment on the evidence collected and on the findings made over the course of the proceedings (including after the conclusion of the evidentiary phase and until the decision is taken);⁴⁹ or (iii) submit her claims and replies and be made aware in good time of her counterparty's claims and requests.⁵⁰

Therefore, an Italian court in the position to decide whether to set aside an award, based on a party's allegation that the arbitral tribunal's decision to order a remote hearing violated the due process principle, will most likely assess whether such an order materially impinged on that party's ability to present her case, and, if so, whether that party was given the chance to do so otherwise before the end of the proceedings.

Notably, the court's decision on the legitimacy of remote hearings may further involve a balancing activity between two different corollaries of the due process principle.

The due process principle, indeed, not only entails that the parties must be given a chance to present their case, but also that the case must be decided without undue delay. This is both a matter of interpretation of the general overriding due process principle⁵¹ and of the relevant provision in the Italian *lex arbitri*, i.e., Article 816-bis ICCP, which

⁴⁸ For instance, the award was set aside in a case where the arbitral tribunal refused to take into account any submissions made by one party due to her failure to timely join the arbitral proceedings, even though no cut-off dates had been set forth (App. L'Aquila, 18 May 2020, in *De Jure*; Cass., sez. I, 21 Jan. 2016, n.1099, in *De Jure*), or where the arbitral tribunal decided the case solely on the basis of the request for arbitration and the answer to the request, without granting to the parties any time limit to file their submissions (App. Firenze, 5 Oct. 2007, in *De Jure*).

⁴⁹ For instance, a violation of the due process was found where the arbitral tribunal decided the case right after the conclusion of the evidentiary phase, without giving the parties the opportunity to comment on the ensuing findings and to specify their closing arguments (Cass., sez. I, 27 Oct. 2004, n. 20828, in *De Jure*; Cass., sez. I, 23 Jun. 2000, n.8540, in *De Jure*); conversely, it was excluded where the arbitral tribunal did not fix an extra hearing after the conclusion of the evidentiary phase, but both parties had already had the chance to fully present and specify their respective cases (Cass., sez. I, 16 Nov. 2015, n.23402, in *De Jure*; Cass., sez. I, 1 Feb. 2005, n.1988, in *De Jure*).

⁵⁰ For instance, a violation of the due process principle was found where one party, who was exempted from attending a hearing (due to a public transport strike), received by mail the notice of the time limits for post-hearing briefs granted by the arbitral tribunal at the hearing, which entailed a significant delay that materially curtailed the time limit by 2/3 for that party (Cass., sez. I, 22 Jan. 1996, n.464, in *De Jure*).

⁵¹ As a matter of fact, the latter aspect is the one most frequently addressed by the European Court of Human Rights with regards to violations of Art. 6, paragraph 1, ECHR: see Claudio CONSOLO, "L'equo processo arbitrale nel quadro dell'art. 6, § 1, della Convenzione Europea sui Diritti dell'Uomo", Riv. dir. civ. (1994) p. 453.

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provides that the due process principle translates into “granting to the parties *reasonable* and equal opportunities to present their case” (emphasis added).⁵²

Therefore, if the alternative to a remote hearing was an indefinite postponement of the hearing (for instance, due to the prolonged travel restrictions or social distancing measures put in place amidst the Covid crisis), it is likely that a court would take this element into account in its evaluation of the arbitral tribunal’s decision to hold a remote hearing.

To sum up, despite the absence of a right to a physical hearing in Italian arbitration law, the arbitral tribunal’s decision to hold a remote hearing may nonetheless constitute a ground for setting aside the award in the following two scenarios: (i) if the parties have agreed that they have a right to request a physical hearing and that the violation of such procedural rule amounts to a ground for setting aside the award; and (ii) if the arbitral tribunal orders a remote hearing over one party’s objection, in case the party challenging the award proves a material breach of the due process principle.

Finally, it must be noted that both the breach of a procedural rule elevated by the parties to a ground for setting aside the award⁵³ and violations of due process that proceed from procedural decisions of the arbitral tribunal⁵⁴ must be invoked in the first occasion available after the relevant violation has occurred, pursuant to the provision of Article 829, paragraph 2, ICCP.⁵⁵

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.

⁵² See L. SALVANESCHI, “Art. 816-bis” in *Arbitrato*, fn. 5 above, at pp. 401-402.

⁵³ See Giuseppe RUFFINI, Salvatore BOCCAGNA and Luigi DE PROPRI, “Art. 829” in M.V. BENEDETTELLI, C. CONSOLO and L.G. RADICATI DI BROZOLO, eds., *Commentario breve*, fn. 39 above, p. 412 at p. 427; L. SALVANESCHI, “Art. 829” in *Arbitrato*, fn. 5 above, p. 873 at pp. 900 and 911-912; Sergio MENCHINI, “Impugnazioni del lodo ‘rituale’”, *Riv. arb.* (2005) p. 843 at p. 855.

⁵⁴ See L. SALVANESCHI, “Art. 829” in *Arbitrato*, fn. 5 above, p. 912; Giulia GARGIULO, “Libertà delle forme e (in)derogabilità del principio del contraddittorio nel giudizio arbitrale”, *Giur. it.* (2016) p. 1186 at pp. 1190-1191.

⁵⁵ See sub-paragraph d.7 above.

In Italy, no case law has formed on this specific subject matter yet. For that reason, the following analysis – which will address the relevant grounds of the New York Convention separately – will offer conclusions that have a rather speculative character and that might be reconsidered in the future.

Article V(1)(b) of the New York Convention has been literally transposed into Article 840, paragraph 3, No. 2, of the Italian Code of Civil Procedure, which is therefore the relevant provision to look at for challenges of a foreign award in case the party against whom the award is invoked was unable to present her case.⁵⁶

In the first place, it must be noted that, according to the majority of Italian scholars, the violation of the parties’ right to present their case (as a ground to refuse in Italy recognition and enforcement of a foreign award) must be assessed against the *lex arbitri* (and not against the Italian arbitration law).⁵⁷

Therefore, this ground for refusal may be invoked in case the arbitrators’ order to hold a remote hearing over a party’s objection allegedly violated a provision of the *lex arbitri* that, unlike Italian arbitration law, grants the parties a right to a physical hearing.

In this scenario, it is relevant to consider that, pursuant to a well-established Italian case law, the refusal of the recognition and enforcement of a foreign award pursuant to Article 840, paragraph 3, No. 2, ICCP cannot be based on the simple violation of a procedural rule of the *lex arbitri* (e.g., a procedural rule providing for the right to a physical hearing), being also necessary the actual prejudice of the party’s right to be heard.⁵⁸

In other words, while the lamented breach of the right to a physical hearing does not translate *per se* into a violation of Article 840, paragraph 3, No. 2, ICCP, an Italian court

⁵⁶ Art. 840, paragraph 3, No. 2, ICCP provides that: “Recognition and enforcement of the foreign award shall be refused by the Court of Appeal if, in the objection proceedings, the party against whom the award is invoked furnishes the proof of one of the following circumstances: 2) the party against whom the award is invoked has not been informed of the appointment of the arbitrator or of the arbitration proceedings, or was in any case unable to present her case in such proceedings” (free translation by the Author).

⁵⁷ See L. SALVANESCHI, “Art. 840” in *Arbitrato*, fn. 5 above, p. 1011 at pp. 1026-1027; Antonio BRIGUGLIO, “Art. 840” in Antonio BRIGUGLIO, Elio FAZZALARI and Roberto MARENCO, eds., *La nuova disciplina dell’arbitrato. Commentario* (Giuffrè 1994) at p. 295. According to Laura BERGAMINI, “L’arbitrato estero (La ricezione dei lodi esteri)” in Claudio CECHELLA and Davide AMADEI, eds., *L’arbitrato* (UTET 2005) p. 339 at p. 372, Article V(1)(b) of the New York Convention provides for a uniform international standard of procedural fairness, instead of calling for the application of national law standards. For the same argument see Gary B. BORN, *International Commercial Arbitration*, III, 2nd edn. (Kluwer Law International 2014) at p. 3504.

⁵⁸ See Cass., sez. I, 11 Dec. 2013, n.27734, in *De Jure*; Cass., sez. I, 30 May 2006, n.12873, in *De Jure*.

will assess whether the denial of a physical hearing by the arbitral tribunal translated into an actual inability of the party to present her case.⁵⁹

The question may arise whether the denial of a physical hearing translating into the inability of a party to present her case may also constitute a violation of public policy pursuant to *Article V(2)(b) of the New York Convention* (which has been transposed into Article 840, paragraph 5, No. 2, of the Italian Code of Civil Procedure).⁶⁰ In this case, being the violation of public policy a ground that can be applied by the judge *ex officio*, the recognition and enforcement of the award may be refused even in the absence of a specific request of the party against whom the award is invoked.

Under this ground for refusal, an Italian court would disregard the *lex arbitri* and look at the notion of public policy that is applied in Italy.

In particular, when deciding whether to refuse recognition and enforcement of a foreign award under Article 840, paragraph 5, No. 2, ICCP, Italian courts generally apply the so-called “international domestic public policy” standard, which comprises those rules and principles that are so fundamental to the Italian legal system, that they may not be derogated even in cross-border relationships.⁶¹

In practice, there are two reasons why it is reasonable to expect that an Italian court will not accept the argument that an award, resulting from a proceedings where no physical hearing has been held, should be considered *per se* contrary to the party’s right to be heard and, thus, to public policy.

First, provided that a right to a physical hearing is not existent under Italian arbitration law, the arbitral tribunal’s decision to hold a remote hearing over a party’s

⁵⁹ See Tiziana TAMPIERI, Ferdinando EMANUELE and Carlo SANTORO, “Il riconoscimento e l’esecuzione dei lodi arbitrali stranieri” in M.V. BENEDETTELLI, C. CONSOLO and L.G. RADICATI DI BROZOLO, eds., *Commentario breve*, fn. 39 above, p. 1253 at p. 1293; Andrea ATTERITANO, *L’enforcement delle sentenze arbitrali del commercio internazionale* (Giuffrè 2009) p. 228. As a matter of example, the Court of Appeal of Naples has refused the recognition and enforcement of a foreign award in a case where the arbitral tribunal had summoned the hearing with only thirty days of notice, notwithstanding an earthquake had seriously affected the area where the respondent had his residence (this Italian case is reported in T. TAMPIERI, F. EMANUELE and C. SANTORO, *ibid.*, p. 1294).

⁶⁰ Article 840, paragraph 5, No. 2, ICCP provides that: “Recognition and enforcement of the foreign award shall be equally refused in case the Court of Appeal establishes that: 2) the award contains provisions that are contrary to public policy” (free translation by the Author).

⁶¹ See T. TAMPIERI, F. EMANUELE and C. SANTORO, “Il riconoscimento e l’esecuzione” in M.V. BENEDETTELLI, C. CONSOLO and L.G. RADICATI DI BROZOLO, eds., *Commentario breve*, fn. 39 above, p. 1305; L. SALVANESCHI, “Art. 839” in *Arbitrato*, fn. 5 above, p. 984 at p. 1001; Mauro BOVE, “Il riconoscimento del lodo straniero tra Convenzione di New York e codice di procedura civile”, *Riv. arb.* (2006) p. 21 at p. 30.

objection cannot translate *per se* into a violation of a rule pertaining to the Italian public policy.

Secondly, it must be noted that, in determining whether recognition or enforcement of a foreign award should be refused pursuant to Article 840, paragraph 5, No. 2, ICCP, relevance is given only to the outcome of the arbitration (and, therefore, to violations of *substantive public policy*), and not to whether the conduct of the arbitral proceedings was consistent with the fundamental principles of Italian procedural law⁶² (e.g., the right to be heard, which is included in the different notion of *procedural public policy*).⁶³

Finally, *Article V(1)(d) of the New York Convention* – according to which recognition and enforcement of the award may be refused in case the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, with the *lex arbitri* – is also relevant for the specific subject matter of this question.

In the first place, it must be noted that, according to Italian case law, procedural irregularities raised pursuant to Article V(1)(d) of the New York Convention cannot be examined by Italian courts in case they have already been the object of a setting aside proceedings at the place of the arbitration.⁶⁴

Keeping this limitation in mind, three different scenarios may be envisioned where the party against whom the award is invoked may decide to resort to Article V(1)(d) of the New York Convention (which has been literally transposed into Article 840, paragraph 3, No. 4, of the Italian Code of Civil Procedure).⁶⁵

⁶² See Cass., sez. I, 8 Apr. 2004, n.6947, in *De Jure*. Some scholars agree with attributing relevance only to substantive public policy: see Francesca RAGNO, “Country Report: Italy” in Franco FERRARI, Friedrich J. ROSENFELD and Dietmar CZERNICH, eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020) p. 237 at p. 250. Others disagree with this distinction: see T. TAMPIERI, F. EMANUELE and C. SANTORO, “Il riconoscimento e l’esecuzione” in M.V. BENEDETTELLI, C. CONSOLO and L.G. RADICATI DI BROZOLO, eds., *Commentario breve*, fn. 39 above, p. 1306; L. SALVANESCHI, “Art. 839” in *Arbitrato*, fn. 5 above, p. 1001. For the view that there is a juxtaposition between due process requirements and the public policy exception, see also Bernard HANOTIAU and Olivier CAPRASSE, “Public Policy in International Commercial Arbitration” in Emmanuel GAILLARD and Domenico DI PIETRO, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice* (Cameron May 2008) p. 787 at p. 789

⁶³ See fn. 4 above.

⁶⁴ See F. RAGNO, “Country Report”, fn. 62 above, p. 249, citing App. Milano, 21 Jul. 1998.

⁶⁵ Art. 840, paragraph 3, No. 4, ICCP provides that: “Recognition and enforcement of the foreign award shall be refused by the Court of Appeal if, in the objection proceedings, the party against whom the award is invoked furnishes the proof of one of the following circumstances: 3) the award deals with a difference not contemplated by the submission to arbitration or arbitration agreement, or falling outside the scope of the submission to arbitration or arbitration agreement; in any case, if the provisions of the award that deal with issues submitted to arbitration can be separated from those that deal with issues not submitted to arbitration, the former can be recognized and enforced” (free translation by the Author).

First, it might be the case that the arbitral tribunal did not accord a physical hearing in violation of a procedural rule of the *lex arbitri*.

According to Italian scholarship, in order to refuse recognition and enforcement of the award, the violation of the *lex arbitri* must result in an actual prejudice of the party opposing the recognition.⁶⁶

In light of the broad consensus over this interpretation of Article 840, paragraph 3, No. 4, ICCP, it is then reasonable to argue that an Italian court would not find that the denial of a physical hearing by the arbitral tribunal in violation of the *lex arbitri* constitutes *per se* a breach of Article V(1)(d) of the New York Convention.

Second, it might be the case that the parties agree on holding a remote hearing notwithstanding a contrary provision of the *lex arbitri*.

Given the fundamental role played by party autonomy in arbitration, Italian scholarship submits that a breach of the *lex arbitri* cannot translate into a ground to refuse recognition and enforcement of the award pursuant to Article 840, paragraph 3, No. 4, ICCP when the arbitral procedure was nonetheless consistent with the agreement of the parties.⁶⁷

Applying this reasoning to the above second scenario, it is possible to suggest that in case the parties have agreed (either expressly or by reference to the rules of an arbitral institution) on remote hearings, they cannot later oppose the recognition and enforcement of the award on the basis of an alleged breach of the *lex arbitri* providing for the right to a physical hearing.

Third, it might be the case that the arbitral tribunal decides to hold a remote hearing despite the parties' agreement to the contrary.

According to Italian scholarship, in order for a departure from the procedural rules agreed by the parties to justify the non-recognition of the award, this procedural irregularity must either be considered by the *lex arbitri* as a ground for setting aside the award⁶⁸ or, in any case, be sufficiently serious.⁶⁹

If one applies this strict interpretation of Article 840, paragraph 3, No. 4, ICCP to the above third scenario, one may argue that an Italian court would not automatically refuse the recognition of the award, but it will look at whether the arbitral tribunal decision to hold a remote hearing despite the parties' agreement to the contrary affected or not the outcome of the proceedings.

f. COVID-Specific Initiatives

⁶⁶ See T. TAMPIERI, F. EMANUELE and C. SANTORO, "Il riconoscimento e l'esecuzione" in M.V. BENEDETTELLI, C. CONSOLO and L.G. RADICATI DI BROZOLO, eds., *Commentario breve*, fn. 39 above, p. 1296.

⁶⁷ See L. SALVANESCHI, "Art. 840" in *Arbitrato*, fn. 5 above, p. 1030.

⁶⁸ See Elena D'ALESSANDRO, "Art. 840" in Sergio MENCHINI, ed., *La nuova disciplina dell'arbitrato* (CEDAM 2010) p. 514 at pp. 527-528.

⁶⁹ See L. BERGAMINI, "L'arbitrato estero", fn. 57 above, p. 375.

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: N/A

As of October 29, 2020, the Italian Government has extended to arbitration the scope of application of the latest emergency provisions adopted to cope with the impact of the Covid pandemic on the conduct of civil proceedings in Italy.⁷⁰

Therefore, it is now applicable to arbitration the provision of Article 221, paragraph 7, of Law-Decree No. 34/2020, which provides that the judge may order that a hearing is conducted via videoconferencing link, provided that both parties have given their prior consent to the hearing being held remotely, and to the exclusion of hearings for the taking of witness evidence.⁷¹ In civil proceedings, it is thus ruled out the possibility to hold remote hearings (i) where one party objects or (ii) for the taking of witness evidence.

In light of these two exclusions, the paradoxical consequence of such extension is that, instead of increasing the procedural tools available to the arbitral tribunal to mitigate the delays caused by the pandemic (consistently with the finalities of the emergency legislation), it rather possibly limits them.

This is so if one considers that, under the Italian arbitration law, arbitrators already had the power to order a remote hearing in the two circumstances mentioned above: (i) when one party objects (provided that they observe the fundamental due process principle) and (ii) when witnesses are to be examined (in light of the provision of Article 816-ter ICCP).⁷²

This statement is confirmed in practice, with arbitral hearings having largely been conducted remotely for months now. Significantly, from February 24 to November 25, 2020, the Milan Chamber of Arbitration (the main Italian arbitral institution) held 159

⁷⁰ Art. 23, paragraph 10, of Law-Decree No. 137 of 28 October 2020 provides that: “The provisions set forth in this Article, as well as those set forth in Article 221 of Law-Decree No. 34 of 19 May 2020, as amended by Law No. 77 of 17 July 2020, also apply to arbitration proceedings [...], insofar as they are compatible” (free translation by the Author).

⁷¹ Art. 221, paragraph 7, Law-Decree No. 34 of 19 May 2020, as amended by Law No. 77 of 17 July 2020, provides that: “The judge, with the parties’ prior consent, may order that the hearing that does not require the presence of subjects other than the attorneys, the parties and the judge’s assistants [...] is conducted through a videoconferencing link [...]. The hearing must be conducted [...] through modalities capable of safeguarding the due process principle and the actual parties’ participation. [...] At the hearing, the judge must acknowledge the modalities used to verify the participants’ identities and, if these include the parties, their free consent. This activity, like all others, is acknowledged in the minutes of the hearing” (free translation by the Author).

⁷² See sub-paragraph a.2 above.

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hearings remotely, while only 13 hearings were hybrid (i.e., with some participants physically present at CAM's premises and others connected remotely) and even lesser (12) were physical.

Therefore, if one considers that the original rationale of the above provision was to limit the negative impact of the Covid pandemic on the administration of justice and to facilitate the management of civil proceedings, the extension thereof to arbitration appears to be a clear example of a governmental initiative potentially bringing to unintended results.

It must be noted here that, in any event, the application of Article 221, paragraph 7, to arbitration is going to be limited in time. First, such provision is only remaining in force until the state of emergency is in place in Italy (i.e., until January 31, 2021,⁷³ though this deadline will probably be postponed as the Covid pandemic persists into 2021). Second, the Government's act extending the application of Article 221 to arbitration is to be reviewed by the Parliament within sixty days of its entry into force (i.e., by December 28, 2020). In light of the abovementioned paradoxical potential effects produced by this extension, it is possible that the Italian Parliament will correct what seems to be an unreasonable provision.

Nonetheless, even while this provision is in force, its impact on arbitration is likely to be also limited in scope due to the following two considerations.

On one hand, the circumstance that the provisions of Article 221, paragraph 7, have only been made applicable to arbitration "insofar as they are compatible" allows to exclude that the inadmissibility of the remote taking of witness evidence applies to arbitration proceedings. Such inadmissibility would, indeed, be incompatible with Article 816-ter ICCP, which allows the arbitral tribunal to take witness evidence by any means and in any location it deems more appropriate.⁷⁴

On the other hand, it can be argued that the "prior parties' consent" to a hearing being held remotely may be found in the parties' adoption of institutional rules that allow remote hearings.⁷⁵ This is so even in case such possibility was provided for by a version of the institutional rules that entered into force after the conclusion of the relevant arbitration agreement.⁷⁶ As a matter of fact, pursuant to Article 832, paragraph 3, ICCP,

⁷³ Last update 13 December 2020.

⁷⁴ See sub-paragraph a.2 above.

⁷⁵ See sub-paragraph c.5 above.

⁷⁶ For instance, this would be the case of a CAM-administered arbitration proceeding initiated after March 1, 2019 (i.e., the date of entry into force of the 2019 Milan Chamber of Arbitration, *Arbitration Rules*, introducing the new Article 27, paragraph 2: see fn. 11 above), relying on an arbitration agreement concluded prior to such date.

the institutional rules applicable to an arbitration proceeding are those in force at the time when the latter is commenced.⁷⁷

Therefore, as long as the provision extending the scope of application of Article 221, paragraph 7, to arbitration proceedings is in force, it seems that the only hearings that an arbitral tribunal will not be able to conduct remotely over one party's objection are those, in *ad hoc* arbitration proceedings, that are not aimed at the taking of witness evidence (being otherwise specifically regulated by Article 816-ter ICCP).

⁷⁷ Art. 832, paragraph 3, ICCP provides that: "Unless the parties have agreed otherwise, the arbitral rules in force at the time when the arbitral proceeding is commenced shall apply" (free translation by the Author).