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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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PROJECTS

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

REPUBLIC OF LITHUANIA

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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 Commercial Arbitration of the Republic of Lithuania (“LCA”) is silent on remote and (or) physical hearings.¹ The LCA is based on UNCITRAL Model Law and applies to both national and international 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: A right to a physical hearing in arbitration can neither be inferred nor excluded.

Article 34(1) of the LCA sets out the following general rules: (i) the form of the proceedings can be agreed between the parties; (ii) if the parties have not agreed on the form of the proceedings, the form of the proceedings shall be determined by the arbitral tribunal; and (iii) in all cases each party has the right to an oral proceeding (even if the parties had originally agreed on a written proceeding):

“An arbitral tribunal shall decide on the form of the arbitral proceedings, unless agreed by the parties. Arbitral proceedings may be conducted in the form of oral hearings or a written or any other procedure. Where the parties agree on proceedings *in absentia*, the arbitral tribunal must, at any time in the course of arbitral proceedings, switch to oral proceedings, if so required by any party to the dispute”.²

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¹ The new version of the Law on Commercial Arbitration of the Republic of Lithuania was adopted by the law No. XI-2089 of 21 June 2012 and entered into force on 30 June 2012.

² Here, “*in absentia*” describes written proceedings without the participation of the parties.

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

Since the LCA is silent on remote and (or) physical hearings, reference should be made to Article 28(3) which, in the absence of the parties' agreement on the conduct of the proceedings, provides the tribunal with a broad power to "conduct the proceedings in such a manner it considers appropriate". This power should be considered as encompassing also the authority to decide on the remote or physical form of the hearing. This power is of course limited by the parties' agreement, the parties' fundamental right to be heard and to be treated equally as well as other principles provided for in Article 8 of the LCA, including cost and time efficiency.

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: The general rules of civil procedure in Lithuania do not provide for a right to physical hearing.

As a general rule, under Article 153(1) of the Code of Civil Procedure, court hearings in civil proceedings before the court of first instance are held orally, in which the parties are invited to proceedings.³

Under Article 175-2(1) of the Code of Civil Procedure, participation of the parties in the court hearings and the examination of witness can be conducted using electronic communication technologies (via videoconferencing, teleconferencing, etc.).

The use of videoconferencing and teleconferencing technologies in civil (and administrative) proceedings is subject to the special rules adopted by the Minister of Justice (order No. 1R-309 dated 7 December 2012, with the latest amendments). Article 7 of these rules provides that the participation of the parties in the court hearing via video or teleconferencing technologies can be organized at the initiative of the court, having evaluated whether remote a hearing would be appropriate, whether the parties would be able to participate in a remote hearing and whether the court has the means necessary to arrange it.

Thus under Lithuanian laws, the right to a hearing in civil proceedings does not automatically mean a 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)?*

³ Adopted by the law No. IX-743 which entered into force on 1 January 2003.

Short answer: N/A

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: Not applicable because a right to a physical hearing does not exist in arbitration.

Please note however that under Article 28(2) of the LCA, the parties can agree on the procedural aspects of the proceedings, which may include reaching agreement regarding remote hearings, and they can do so in advance of the dispute. Article 28(2) provides: “Without prejudice to the mandatory provisions of this Law [the LCA], the parties to a dispute shall be free to agree on the procedure to be followed by an arbitral tribunal in conducting the proceedings”.

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

Short answer: No.

Pursuant to Article 28(3) of the LCA, the tribunal enjoys a broad power to “conduct proceedings in such a manner it considers appropriate” which is limited by the provisions of the LCA and parties’ agreement.

Thus a tribunal’s decision to hold a remote hearing whereas the parties had agreed to a physical meeting may lead to the set-aside of the arbitral award under Article 50.3(4) of the LCA, which provides that the Court of Appeal of Lithuania may annul an arbitral award if the arbitral proceedings did not conform to the agreement of the parties.

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.

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

A party's failure to raise a violation of its rights during the proceedings amounts to waiver of the right to later object to the same violation under Article 7(1) of the LCA, which provides:⁴ "If a party to a dispute knows that its rights have been violated and yet proceeds with the arbitration without stating their objection to such violation within a reasonable period of time, the party shall be deemed to have waived his right to object".

Lithuanian courts also recognize the waiver of the right to object. For instance, the Supreme Court has stated in its ruling issued on 17 November 2004 in civil case No. 3K-3-612/2004 that the party lost its right to challenge the tribunal's jurisdiction in set-aside proceedings if it had failed to challenge the tribunal's jurisdiction during the arbitration proceedings in which it actively participated.

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: Possibly.

The arbitrators' failure to conduct a physical hearing could constitute a basis for setting aside the award only if the complaining party is able to prove that a statutory ground to set aside the award exists.

The grounds for setting aside the award provided in Article 50 of the LCA mirror the grounds for non-recognition of foreign awards provided for in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Thus an award could be set aside if the award debtor proves that the tribunal's failure to conduct a physical hearing prevented it from presenting its case, the proceedings did not conform to the agreement of the parties or that public policy was violated. The issue whether holding a remote hearing instead of physical hearing may amount to a violation of due process or public policy has not yet been tested in Lithuanian courts.

⁴ Supreme Court of Lithuania's ruling of 17 November 2004 in civil case No. 3K-3-612/2004; Court of Appeal of Lithuania ruling of 21 January 2014 in a civil case No. 2A-72/2014.

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 would be assessed on a case-by-case basis.

Recognition of foreign arbitral awards in Lithuania is subject to the New York Convention pursuant to Article 51 of the LCA. Therefore, the recognition of the award can potentially be refused in case the party against whom it is invoked establishes that one of the grounds provided in Article V of the Convention exists, namely that the conduct of a remote hearing did not allow the parties to present their case, it was contrary to the procedure agreed between the parties or it was contrary to public policy. Whether remote hearings *per se* would constitute a ground to deny enforcement has not been tested before Lithuanian courts yet and developments of international practice on application of New York Convention in this respect will undoubtedly influence Lithuanian courts' position.

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: Courts are organizing more remote hearings than before.

The Judicial Council of the Republic of Lithuania has issued the following recommendations for organizing court activities during the COVID pandemic: (i) to organize remote court hearings; (ii) to organize all or part of the court proceedings in a written form, when the laws allow it; (iii) when remote hearings and written proceedings are not possible, to hold hearings in the largest courtrooms available to the court, where masks are mandatory and distances of 1 meter ensured; (iv) ensure publicity of the court hearing by providing the public and media reporters with a possibility to monitor proceedings; and (v) to organize court staff meetings remotely.