POLAND

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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 Polish lex arbitri, as regulated in Articles 1154-1217 of the Polish Code of Civil Procedure (hereinafter referred to as the “PCCP”), reflecting the Model Law of the United Nations Commission on International Trade Law (“UNCITRAL”) of 21 June 1985 on International Commercial Arbitration (hereinafter referred to as the “Model Law”), does not directly stipulate the right to a physical hearing.

According to Article 1189 § 1 of the PCCP, regulating a hearing in arbitration, which contains a regulation similar to Article 24 of the Model Law, “[u]nless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold a hearing for the parties to present their arguments and evidence in support thereof, or whether the proceedings shall be conducted on the basis of documents and other materials without holding a hearing. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold a hearing if so requested by a party”.¹ Consequently, this provision provides for the right of a party to request a hearing, either as a result of the joint request of both parties, or individually. The arbitral tribunal is then bound by this request.²

The PCCP is however silent as to how hearings should be conducted. The rules concerning the organization of arbitration hearings are set discretionarily by the parties jointly, or by the arbitral tribunal. Under Article 1184 § 2 of the PCCP, “[u]nless otherwise agreed by the parties, the arbitral tribunal may, subject to statutory provisions, conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal

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² The refusal of an arbitral tribunal to hold a hearing if at least one party has applied for a hearing can lead to the annulment of the arbitral tribunal’s award (see sub-paragraph c.6 below).
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

shall not be bound by the provisions on procedure before the court". Therefore, the PCCP provisions do not constitute an explicit basis on which the parties can request a hearing in a physical form.


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: Probably not.

The Polish law which governs arbitration proceedings does not directly refer to the right of a party to request a physical hearing. The provisions describing the settings and logistics of a hearing indicate that there is no implied right to a physical hearing.

The provisions of the PCCP also do not contain a description of how an arbitration hearing should be held. The provisions which may be helpful to determine how a hearing should be conducted and therefore whether a party has the right to request a physical one concern the right of the party to be heard by the arbitral tribunal, the place where the proceedings are held, and the taking of evidence during the course of the proceedings.

The fundamental principles of the Polish arbitration process are the equality of the parties and the right to be heard as expressed in Article 1183 of the PCCP: “In a proceeding before the arbitral tribunal the parties shall be treated equally. Each party shall have the right to be heard and to present its arguments and evidence in support thereof”.

The right to be heard is understood as the requirement to grant each party the opportunity to present its arguments, but also to familiarize itself with all aspects of the case which will be taken into account by the arbitral tribunal, and to respond to the

Statements and evidence presented by the opposing party. This right can be exercised in two ways, either orally or in writing. The oral form of the right to be heard can be exercised at the hearing, whereas the written form of the right to be heard can be exercised through a statement of claim, a statement of defence, or through further written submissions presenting the arguments of the parties. The right to be heard can be exercised through both these ways. Therefore, limiting the parties’ possibility of presenting arguments to only one of these avenues, e.g., only through written submissions, does not violate the principle of the equality of parties and the right to be heard. Therefore, if, as it appears from the above, the submission of written statements is sufficient to satisfy the party’s right to be heard, then even more so is the opportunity to be heard orally, including by means of distance communication devices.

According to certain scholars, the arbitral tribunal has specific duties towards the parties during a hearing. Firstly, the arbitral tribunal must make sure that the parties are equally familiar with the facts constituting the basis of the judgment. Secondly, the arbitral tribunal must ensure that the parties have the opportunity to express their views on all the elements of the factual background of the case and the legal basis that constitutes the grounds for the arbitral award. Thirdly, the arbitrators should analyse the arguments of the parties and consider them.

In the case of a properly conducted remote hearing, it would appear that each of the above requirements is met to the same extent as when the hearing is held physically. An exception is made for situations where a party has technical problems which make it impossible for them to join and participate in the whole or part of the hearing, and the arbitral tribunal proceeds with the hearing despite being aware of these problems. Consequently, the right of a party to be heard does not constitute grounds for inferring the right to hold a physical hearing, since it follows that this principle could also be fulfilled when a hearing is held remotely.

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Another potential index of the right to a physical hearing can be seen in the provisions regulating the place of arbitration. According to Article 1155 § 1 of the PCCP, the place of the arbitration is determined by the parties, or, if not decided by them, by the arbitral tribunal, taking into account the subject matter of the proceedings, the circumstances of the case, and the convenience of the parties. Unless otherwise agreed by the parties, the arbitral tribunal can, regardless of the agreed place of the arbitration, meet in any location it considers appropriate for consultation among its members or for the taking evidence (Article 1185 of the PCCP).

The provisions concerning the determination of the place of arbitration (and the place where the arbitral tribunal can act) do not indicate how the proceedings are to be conducted, whether physically or remotely. The designation of the place of arbitration as a specific geographical point does not yet determine the form of hearings’ attendance and cannot be interpreted as meaning that participants should be physically present there. Otherwise, the selection of the place of arbitration, in accordance with the rules of the PCCP, would completely exclude the possibility of conducting the proceedings remotely, even if the parties have mutually agreed to follow this path. It seems that the mere indication of the place of the arbitration does not determine the character of the proceedings and the modalities of the hearings.

Furthermore, the failure to determine the place of arbitration does not eliminate the possibility of conducting the proceedings and to issue an award. If the parties have not designated such a place, according to Article 1155 § 2 of the PCCP, the law presumes that it will be within the territory of Poland if the decision closing the proceedings in the case was issued there.

In light of the fact that the parties and the arbitral tribunal are not required to designate the place of the proceedings and that if they do designate it, this does not determine how they should conduct a hearing, it is possible to conclude that there is no relationship between the place of the arbitration and its actual form (physical or remote).  

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10 In addition, as commonly underlined by scholars, the place of arbitration as determined by the parties or the arbitral tribunal does not mean that all procedural activities must take place there. See Piotr PRUŚ, “Article 1155” in Małgorzata MANOWSKA, ed., Kodeks postępowania cywilnego. Komentarz [The Code of Civil Procedure. Commentary], 3rd edn. (Wolters Kluwer 2020) available at <https://sip.lex.pl/#commentary/587827697/625137/manowska-malgorzata-red-kodeks-postepowania-cywilnego-komentarz-tom-ii?cm=URELATIONS> (last accessed 8 December 2020).

11 The lack of a link between remote hearing and a geographical location is also discussed, in the different context of online arbitration, in Bartosz ZIEMBLICKI, Arbitraż online, [Online arbitration], 2nd edn. (Online Arbitration Press 2017) p. 133: “The determination of the place of arbitration is based solely on legal criteria rather than geographical. We are therefore facing a complete relocation of the place of arbitration online and full freedom for the parties in this regard”.

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An analysis of the right to a physical hearing could also look at the statutory provisions regulating the taking of evidence in arbitration (stipulated in Article 1191 of the PCCP). Unless the parties have agreed otherwise, the experts can, in addition to submitting their opinion orally or in writing, attend the hearing and the parties can ask them questions. The wording used in this provision does not, however, indicate that such a hearing must take place physically (the parties would also have the opportunity to ask questions whilst participating in a videoconference). Therefore, this provision cannot constitute an index of a party’s right to request a physical hearing.

Further, parties autonomy is crucial in determining the principles according to which the arbitration proceedings will be conducted, as stipulated in Article 1184 § 1 of the PCCP: “Unless otherwise provided by statute, the parties may agree upon the rules and procedure before the arbitral tribunal”. In accordance with this principle, the parties can stipulate in an agreement or in the rules of conduct of the arbitration tribunal that they exclude holding a hearing online or remotely, and require a physical hearing to take place. Moreover, the parties can modify the rules of permanent arbitral institutions, and in the event of a conflict between the rules of permanent arbitral institutions and the will of the parties, the will of the parties is binding. It seems that a request for a physical hearing raised by only one of the parties (unless the possibility to advance such a request has been provided for by the agreed rules of arbitration) will not be binding for the arbitral tribunal, since Article 1184 § 1 of the PCCP directly refers to the parties’ agreement.

If, however, the parties do not regulate how the proceedings are to be conducted, then it is up to the arbitral tribunal to decide, within the boundaries of the procedural


13 Article 1191 § 3 of the PCCP: “Unless otherwise agreed by the parties, upon request of a party, or if the arbitral tribunal deems it necessary, the expert shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and request explanations”. English translation available at <http://arbitration-poland.com/legal-acts/139,polish_civil_procedure_code_-_act_of_17_november_1964__valid_from_10_january_2017_.html> (last accessed 15 April 2021).

14 English translation available at <http://arbitration-poland.com/legal-acts/139,polish_civil_procedure_code_-_act_of_17_november_1964__valid_from_10_january_2017_.html> (last accessed 15 April 2021). See also: P. PRUŚ, “Article 1155”, fn. 10 above: “As in many other provisions of the PCCP concerning arbitration proceedings, the rules agreed upon by the parties have priority”.

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

discretion granted by the law. It therefore seems that, unless the parties decide otherwise, the arbitral tribunal has the right to determine that the hearing is to be held remotely.

Consequently, an analysis of the provisions of the Polish *lex arbitri* does not confirm that there is an implied right of the parties to a physical hearing.

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:** Probably not. It is, however, a typical way of conducting a hearing.

The right to a fair trial is stipulated in Article 45 of the Constitution: “[Sec. 1] Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. [Sec. 2] Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly”. 16

The principle directly derived from this provision is the transparency of the procedure. 17 The provision implementing this principle in civil proceedings is Article 9 of the PCCP, which states that “except as otherwise provided by a specific regulation, cases will be heard in court. […]”. Article 152 of the PCCP allows for public access to hearings held before courts in civil proceedings, including the press and other media (with certain exceptions, e.g., concerning family cases). There is no doubt that this principle can be fulfilled when a hearing is held physically. Remote hearings might be unconstitutional if public access were to be permanently, and as a rule, excluded.

Another principle that should be considered in relation to the issue of physical hearings is the principle of the presentation of the evidence in front of the court. This concerns the way in which the evidence is presented to the court during proceedings; the court deciding the case should have direct contact with the evidence (under Article 235 of the PCCP, “evidence must be presented before the adjudicating court [...]”). The PCCP allows for evidence to be presented remotely in Article 235 § 2 of the PCCP: “If the nature of the evidence does not contradict this form, the adjudicating court can decide

that it will be carried out using technical devices enabling it to be presented remotely”. Consequently, since evidence presented remotely satisfies the principle of the presentation of the evidence in front of the court, this principle cannot constitute the basis to suggest the existence of an implied right to a physical hearing.

To answer the question of whether there is a right to a physical hearing, it should firstly be considered whether cases in civil proceedings should inevitably be decided at the hearing.

One of the principles of Polish civil procedure is that the court decides the cases at the hearing. In accordance to Article 148 of the PCCP, “unless a specific regulation stipulates otherwise, court hearings must be conducted in public, and the court must adjudicate the cases at the hearing”.

In fact, there are, however, many exceptions to this general principle. Examples of such specific regulations which exclude the obligation to hold a hearing include: default judgments,[18] clearly frivolous claims,[19] simplified proceedings for payment orders,[20] and electronic payment order proceedings.[21] Furthermore, if the claimant does not apply for a hearing, the court can decide not to hold such hearing if the defendant accepted the claim, or if, after the parties have lodged their written submissions and documents, the court considers that a hearing is unnecessary.[22] The possibility of not holding a hearing also exists in appeal proceedings if a party does not request it.[23]

The broad scope and number of exceptions from the principle of deciding a case at a hearing, as well as the fairly wide discretionary power of the courts (both of first instance

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18 Article 339 § 1 of the PCCP: “The court will render a default judgment if the defendant fails to appear at trial, or if the defendant appears but takes no active part in the trial” (free translation by the Author).
19 Article 191 § 3 of the PCCP: “The court can dismiss an action at an ex parte session without serving the statement of claim on the person designated as the defendant or examining the applications submitted with the statement of claim” (free translation by the Author).
20 Article 480 § 1 of the PCCP.
21 Article 505 § 1 in conjunction with Article 480 § 1 of the PCCP.
22 Article 148 § 1 of the PCCP: “The court can decide to hear a case in camera if the defendant accepted the claim or if, after the parties have lodged the statements of the case and documents, including the statements of defence, or an opposition to the order for payment, or to the judgment by default, the court considers, having regard to all the submissions and requests for evidence, that a hearing is unnecessary” (free translation by the Author).
23 Article 374 of the PCCP: “The court of second instance can hear the case in an ex parte session if a hearing is unnecessary. The review of a case in an ex parte session must be inadmissible if a party in an appeal or the response to an appeal has applied for a hearing, unless the statement of claim or the appeal has been withdrawn, or the proceedings are invalid” (free translation by the Author).
and at the appellate level) as to whether or not to hold a hearing, imply that there is no right for a hearing, not to mention its physical form.

The question now is whether, to the extent that there is an obligation to hold a hearing, it must be held physically.

As a rule, in Polish civil proceedings, hearings are conducted physically, by default in the court building. All other ways of conducting a hearing are exceptions to this rule.

There are certain cases in which a court hearing will take place outside the court building. This situation occurs if part of the proceedings has to be conducted in a different location (for example it is necessary to examine a witness who, due to his/her health condition, is unable to appear before the court), or if holding the hearing outside the courthouse facilitates the conduct of the case, or significantly contributes to saving costs.

In addition, the presiding judge can order to hold a court session using technical equipment that enables to conduct the session remotely. Participants to the proceedings must be present in the building of another court, and the course of the hearing is transmitted from the courtroom of the court where the proceedings are conducted to the court where the participants are located, as well as in the opposite direction.

Furthermore, Polish law also establishes the possibility of hearing the parties or other persons by summoning the parties to make statements by means of distance communication, provided that these means give certainty as to the person making the statement.

Another example of conducting proceedings outside the court building is when assistance is provided by foreign authorities in legal matters. This allows for the testimonies of persons domiciled abroad to testify before foreign courts or authorities, without the online involvement of Polish courts.

The number of exceptions suggest that there is no right to a physical hearing in civil proceedings.

The tendency for the increased use of remote hearings has been significantly reinforced because of the COVID-19 pandemic. Under newly introduced amendments,

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24 Article 151 § 1 of the PCCP: “Judicial sessions will take place in the court building or outside the court building only if the court proceedings have to be performed elsewhere, or, if holding the session outside the court building facilitates the handling of the case or significantly contributes to saving costs” (free translation by the Author).
25 Ibid.
26 Article 151 § 2 of the PCCP.
27 Article 226 of the PCCP.
28 Article 1130 of the PCCP: “In matters concerning the taking of evidence and other actions and the service of court letters, the courts will communicate with the courts or other authorities of foreign countries and with Polish diplomatic missions and consular offices, unless a specific provision provides otherwise” (free translation by the Author).
at the time of the threat of the epidemic or during the state of the epidemic caused by COVID-19 and within a year after the end of the epidemic hearings will be conducted remotely (unless there is no excessive risk to the health of the participants of a hearing).

The restrictions concerning holding a hearing remotely have been relaxed.\textsuperscript{30} Compared to the existing regulation on the conduct of remote hearings, the COVID-19 regulation does not include the requirement for participants in the proceedings to be in a court building; they can be anywhere, provided they have an online connection to the court. Should it not be possible to hold a remote hearing, the presiding judge can decide to review the case \textit{in camera} if it is necessary to hear the case (unless both parties objected to this form of reviewing the case without a hearing). In addition, due to special circumstances, the president of the court can order that the judges, with the exception of the presiding judge, take part in the hearing by electronic means of communication, except for the final session held in the case. However, this possibility resulting from a state of epidemic is introduced exceptionally; the hearing must be held in the traditional manner (i.e., physically), if it does not cause an undue health risk to the participants.

As can be seen from the above, a physical hearing is the default way of conducting a hearing, but cannot be regarded as a party’s right.

\textbf{4. If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?}

\textbf{Short answer:} No, even if this right existed, it would not apply to arbitration proceedings.

The constitutional principle governing the right to a fair trial does not give rise to a request for a physical hearing. Neither do the provisions of the PCCP regulating proceedings before State courts provide such a basis.\textsuperscript{31}

Even if this right were stipulated in the PCCP, it would not apply to arbitration proceedings. As a rule, as stipulated in Article 1184 § 2 of the PCCP, an arbitral tribunal is not bound by the provisions on proceedings before a State court. Therefore, proceedings before an arbitral tribunal can be conducted in an entirely different manner than that required before a court.\textsuperscript{32}

c. \textbf{Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal}

\textsuperscript{30} Article 15zzs\textsuperscript{1} of the Act on Special Arrangements Act for the Prevention, Counteraction, and Control of COVID-19, other Infectious Diseases and Emergencies caused by them.

\textsuperscript{31} See sub-paragraph b.3 above. The conduct of a remote hearing complies with the PCCP and the Act on Special Arrangements Act for the Prevention, Counteraction and Control of COVID-19, other Infectious Diseases and Emergencies caused by them. It does not contradict the constitutional principle of transparency unless it excludes public access permanently and as a rule.

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 mentioned above, the right to a physical hearing in arbitration does not exist under Polish law. Under the general rule, the parties can decide on the procedural framework of the proceedings before the arbitral tribunal. Therefore, by agreement, they can introduce the provisions regulating the hearings, including requesting to only hold physical or remote hearings.

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

Short answer: No, the agreement of the parties prevails.

The agreement of the parties concerning the procedural framework of proceedings, as expressed in the arbitration agreement (or in any other arrangement made between them), is binding for the arbitral tribunal, even if the arbitral tribunal has already established its own rules.

The parties have broad powers to decide in what form the procedure should be conducted, including how the hearing should be held. If the arbitral tribunal acts contrary to the parties’ agreement, the award could be challenged in an annulment procedure before the State court. The State court could set aside a judgment if one of the conditions listed in Article 1206 of the PCCP has been met. One of them (indicated in Article 1206 § 1 point 4 of the PCCP) is the failure to comply with “the fundamental rules of procedure before [the arbitral] tribunal, arising under statute or specified by the parties”.³³ Importantly, the setting aside of an award due to a breach of the procedural rules established by the parties can only follow from a party expressly presenting this challenge. The State court would not examine or verify ex officio the accuracy and compliance of the arbitration proceedings with the applicable procedural rules.

The courts have applied a restrictive interpretation of the condition stipulated in Article 1206 § 1 point 4 of the PCCP. As can be seen from the case law, the “fundamental

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rules of procedure” should be narrowly understood. The courts have mentioned situations such as “when proceedings were not conducted at all or were conducted incompletely, or were conducted in an obviously incorrect manner, thereby violating the rules of logical reasoning or failing to link facts in a causal chain, e.g., through the unreasonably selective admission of evidence in a case, the allowing for only one party to present evidence, or the unjustified disregard of evidence”. In view of the abovementioned very restrictive approach of the courts to Article 1206 § 1 point 4 of the PCCP, it does not seem likely that a hearing properly conducted, but without meeting physically, could constitute grounds for setting aside an award. However, there is no case law addressing this particular issue.

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.

The right to a physical hearing during the arbitral proceedings might result from the parties’ agreement. If the proceedings are conducted contrary to such agreement, namely, when a remote hearing is conducted despite the parties’ agreement to hold physical hearings exclusively, the party must point out this breach during the proceedings.

In accordance with Article 1193 of the PCCP: “If […] any of the rules of procedure agreed by the parties are violated, a party who knew of such violation may not assert such violation before the arbitral tribunal or rely on such violation in a petition to set aside the arbitral award if the party failed to assert such violation promptly or within such time as set by the parties or by the provisions”. The violation must be raised without any undue delay (in the normal course of actions) after becoming aware thereof. It has been pointed out, for example, that in the case of an irregularity occurred in the course of a hearing at which a party was present, the objection should be raised before the end of that hearing.

34 Judgment of the Supreme Court of 15 March 2020, case no. I CSK 286/11.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

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

This question does not concern the legal situation in Poland since, as mentioned above, Polish law does not stipulate the right to a physical hearing. A failure to conduct a physical hearing would therefore not violate the public policy principle.

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:** Probably yes, if the parties to the arbitration excluded remote hearings.

As elaborated above, Polish law does not grant, in a direct or implied way, the right to request a physical hearing. The only case where this right could be recognized is where it is established among the procedural rules agreed upon by the parties. Therefore, it could happen that the agreed procedural rules stipulate that the hearings must take place physically, and yet the court conducts the hearing remotely.

As already discussed, Article 1206 § 1 point 4 of the PCCP might constitute the basis for setting aside an award in case of a breach of the fundamental rules of arbitral proceedings. The party challenging the award would, however, need to demonstrate that conducting a physical hearing was a “fundamental rule”. This could be done by referencing the emphasis the parties may have given to this rule in their agreement. Currently, there is no case law discussing this issue. It should be noted, however, that the courts typically understand the scope of the fundamental rules in a narrow way.

An example where the Supreme Court found the arbitral tribunal’s conduct to be in violation of a fundamental rule was when the case was heard in a one instance trial, although the agreement between the parties provided for a two-instance proceeding.

A different situation could occur where the parties do not agree on the way in which a hearing should be conducted. One of the parties might agree to hold the hearing remotely, whereas the other party might demand a physical hearing.

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38 See sub-paragraphs a.1 and a.2 above.
39 See sub-paragraph c.6 above.
40 Judgment of the Supreme Court of 15 March 2012, case no. I CSK 286/11.
41 Judgment of the Supreme Court of 20 March 2015, case no. II CSK 352/14.
There are divided views concerning the power of the arbitral tribunal to order a remote hearing in these situations. Some scholars say that the mutual agreement of the parties is necessary in order to hold a remote hearing, whereas others argue that it falls within the discretionary power of the tribunal to decide in what form the hearing should take place.  

If the first view is taken, namely, that in case one party does not agree to the remote hearing the arbitral tribunal does not have the power to conduct one, it could be argued that, in case the arbitral tribunal nevertheless proceeds to conduct it, the party objecting to the remote hearing could later challenge the award based on a violation of due process. The chances of such challenge seem to be closely connected with specific circumstances of the case. Article 1206 § 1 point 2 of the PCCP provides that a party may challenge the arbitral award if it was “deprived of the ability to defend its rights before the arbitral tribunal”. It appears, however, that unless the agreement explicitly excludes holding the hearing remotely, a party who does not agree to hold the hearing in this way must expressly object.  

The second view (i.e., that it falls within the discretionary power of the tribunal to decide in what form the hearing should take place) is based on Article 1184 PCCP. According to Article 1184 of the PCCP, the will of the arbitral tribunal as to the way of conducting the proceeding is subordinated to the will of the parties. In the absence of a parties’ agreement as to how the proceedings must be conducted, the tribunal shall conduct the proceedings in such way as it deems appropriate, without the need for the arbitral tribunal to receive confirmation by the parties.  

The arbitral procedural discretion is nonetheless limited by the fundamental party’s right to present its case. As it was stated by the Supreme Court: “Deprivation of the ability of a party to defend its rights in proceedings before the arbitral tribunal occurs when the principle of equality of the parties is violated, one of the parties is not heard, and it was not possible for it to respond to evidence and claims presented by the other party. Therefore, one cannot equate every case in which the arbitral tribunal refuses to accept evidence requested by a party with the party’s deprivation of its opportunity to defend itself. Such deprivation occurs only when the party has no opportunity to present and prove its own arguments”.  

When reviewing whether this ground for setting aside an award exists, the courts conduct a fact-specific analysis of each case taking into consideration the given circumstances and all other principles of arbitration, including the principles of efficiency of arbitration proceedings. Therefore, it is impossible to foresee which

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irregularities will be found as violations of the due process principle and therefore which will lead to setting aside the award.

In this second scenario, an arbitral tribunal shall be deemed allowed to hold the hearing remotely only if this is justified in the circumstances of the case, taking into account: the reason why the hearing should be held remotely, the subject and scope of matters to be discussed during the remote hearing, the technical requirements for holding a remote hearing, and the time and cost required to conduct such hearing, as compared to a hearing held in stationary mode.\textsuperscript{45}

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: Probably not.

The grounds for refusal of recognition and enforcement of foreign awards provided by Articles V(1) and V(2) of the New York Convention have been transposed into Articles 1215 § 2 and 1214 § 3 of the PCCP, respectively.

One of the bases for refusing the recognition and enforcement of a foreign award is the absence of the right of the party to present its case as indicated in Article V(1)(b) of the New York Convention.\textsuperscript{46} This occurs when a party is deprived of the opportunity to present its own legal and factual arguments, to invoke relevant evidence, to be given the opportunity to refer to the other party’s statements and evidence, or to be given the opportunity to respond to issues relevant to the arbitral tribunal’s assessment of the settlement of the dispute. What is more, this occurs when arbitrators do not take into account the parties’ arguments or when the parties are being treated unequally.\textsuperscript{47} The Supreme Court also emphasised that there are sufficient grounds to refuse the

\textsuperscript{45} S. KUBSIK and Z. DRZEWIECKI, “Rozprawy zdalne”, fn. 9 above, p. 107.
\textsuperscript{46} See Article 1215 § 2 Sec. 2 of the PCCP.
recognition of a foreign award when a hearing in the case was held despite the absence of the parties which duly justified the reasons of their absence.\footnote{Ruling of the Supreme Court of 12 September 2000, case no. III CKN 1139/00.}

None of the instances discussed above relates, even indirectly, to the need to hold the hearing physically, and not remotely. As long as the remote hearing does not constrain the party’s ability to present his or her case, there should be no sufficient grounds to refuse the recognition/enforcement of a foreign award.

Another basis for refusing the recognition and enforcement of a foreign award is Article V(1)(d) of the New York Convention which concerns procedural irregularities.\footnote{See Article 1215 § 2 Sec. 4 of the PCCP.}

In an arbitration agreement, the parties could potentially include a provision imposing on the tribunal the duty to hold a physical hearing and exclude the possibility of holding a remote one. Such a case has not appeared before a Polish court.

The other ground for refusal of recognition and enforcement of an arbitral award provided in this provision is the non-compliance with the procedure of the law of the country where the arbitration was seated. In the absence in the arbitration agreement of a procedural rule concerning the way in which the hearing shall be conducted, upon the motion of a party, Polish courts will examine whether the conduct of the remote hearing was inconsistent with the law of the country where the arbitration was seated.

An example of an irregularity in the arbitration procedure is a situation “where the parties’ agreement, the arbitration rules, or the law of the place where the arbitration took place required that the case be decided after a hearing, but the hearing did not take place”.\footnote{S. SOŁTYSIK, Podstawy odmowy uznania i wykonania zagranicznego orzeczenia arbitrażowego według Konwencji nowojorskiej, fn. 47 above, p. 216.} We cannot exclude that Polish courts would treat the failure to hold a hearing in a way stipulated by the law of the seat (e.g., physically) similarly to the failure to hold a hearing when the law of the seat expressly provides for such an obligation.

A potential reference could also be made concerning a violation of public policy on the grounds of Article V(2)(b) of the New York Convention.\footnote{See Article 1214 § 3 Sec. 2 of the PCCP.} The concept of “public order” has been included in numerous provisions of Polish law and refers to the “fundamental principles of the legal order”.\footnote{Article 1214 § 3 Sec. 2 of the PCCP, English translation available at <http://arbitration-poland.com/legal-acts/139.polish_civil_procedure_code_-_act_of_17_november_1964__valid_from_10_january_2017_.html> (last accessed 15 April 2021).} The fundamental principles of the legal order should be understood not only as constitutional rules, but also as the main rules in particular areas of law. The Supreme Court pointed out that it is insufficient for an arbitral tribunal to violate substantive law since this violation must be associated with a “decision which clearly violates the fundamental legal principles in Poland”.\footnote{Judgment of the Supreme Court of 28 April 2000, case no. II CKN 267/00; ruling of the Supreme Court of 9 March 2004, case no. I CK 412/03.}
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

In Polish law, there is no right for a party to have a physical hearing in either the *lex arbitri* or in the law governing civil proceedings. The right to a physical hearing could result from the arbitral agreement or the rules of arbitration applicable to a particular arbitration. This would not be considered as part of the Polish “public order”.

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: Standard amendments and practices were implemented.

The new rules regulating the conduct of online hearings during the COVID-19 epidemic were introduced in the Polish legal system through the Act of Special Arrangements Act for the Prevention, Counteraction and Control of COVID-19, other Infectious Diseases and Emergencies caused by them.\(^54\)

An online hearing is not an obligation in Poland, as long as the traditional, physical hearing does not pose an excessive health threat to the participants. In practice, many courts have decided to hold hearings remotely. The courts in Poland use the centrally-administrated Videoconferencing Platform of the Polish Ministry of Justice, managed by the Centre of Competence and Computerization of the Judiciary, both for hearings and for counsels’ preparatory meetings. The courts have been struggling with the obligation to provide public access to hearings.\(^55\)

The Polish arbitration institutions are also using the possibility of holding their proceedings remotely. The Court of Arbitration at the Polish Chamber of Commerce issued recommendations concerning the conduct of hearings as they should be in the form of videoconferences.\(^56\) According to the Polish Chamber of Commerce, in the period between mid-March and mid-November 2020, the arbitral tribunals conducted 34 video hearings, 23 teleconferences, and 13 hybrid hearings. There were also 58 hearings

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\(^{54}\) See sub-paragraph b.3 above.

\(^{55}\) An interesting solution has been introduced in this respect in the District Court in Łódź, where “electronic entry cards” have been issued to access remote hearings. See order No. 52/2020 of the President of the District Court for Łódź-Śródmieście in Łódź of 28 May 2020.

conducted traditionally. In the same period, the Court of Arbitration at the Confederation of Lewiatan conducted 10 video hearings, 2 teleconferences, 2 hybrid, and 3 traditional hearings. Another solution aimed at reducing the risks connected with the COVID-19 epidemic is the introduction of extended hours of work for the courts, and shift work. The Deputy Minister of Justice, in the letter of 6 November 2020 addressed to the presidents of all courts in Poland, recommended that the work be carried out in two shifts. The decisions as to whether to switch to a two-shift-mode are, however, vested with the courts’ presidents. A considerable obstacle to implementing this solution is connected with the shortages of administrative staff as employed by the courts (which was already an issue before the COVID-19 outbreak, but has significantly worsened since the epidemic-related restrictions were implemented).

57 “Arbitraż przeniósł się do wirtualnej rzeczywistości” [“Arbitration has moved to virtual reality”], Biznes (19 November 2020) at <https://biznes.newseria.pl/biuro-prasowe/arbitraz-przeniosl-sie,b450501728> (last accessed 8 December 2020).
58 Information obtained from Confederation of Lewiatan via e-mail of 9 December 2020.