

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

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

ROMANIA

Mihaela Apostol

ROMANIA

[Mihaela Apostol](#)*

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 Romanian *lex arbitri* does not expressly provide for a right to a physical hearing. The relevant provisions from the Code of Civil Procedure (“CCP”),¹ namely Book IV (Articles 541-621) applicable to domestic arbitration and Book VII, Title IV (Articles 1111-1133) applicable to international arbitration² do not expressly contain any reference to physical hearings.

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

Short answer: Likely excluded.

Romanian *lex arbitri* likely excludes a right to a physical hearing. The following points support this conclusion: (i) the parties and the arbitral tribunal have the

* Mihaela Apostol is a Romanian qualified lawyer, member of the Bucharest Bar since 2012, who practices international arbitration.

¹ Law 134 of 1 July 2010 on the Code of Civil Procedure, republished on 10 April 2015 in the Romanian Official Gazette No. 247 of 10 April 2015. Please note that all the excerpts from the CCP quoted below are to be used for informative purposes only and they do not represent an official translation.

² Article 1111 of the CCP provides, in relevant part: “(1) For the purposes of this Title, an arbitration dispute that takes place in Romania is considered international if it has arisen from a private law relationship with a cross-border dimension. (2) The provisions of this Chapter apply to any international arbitration if the seat of the arbitration is in Romania and at least one of the parties did not have at the date of the conclusion of the arbitration agreement their domicile, habitual residence, or their headquarters in Romania. The provisions of this Chapter apply only if the parties have not excluded their application when concluding the arbitration agreement, or afterwards by concluding a written agreement to that effect”.

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

autonomy to tailor the rules applicable to the arbitration proceedings; and (ii) the CCP allows for flexibility in interviewing the witnesses of fact and experts.

Before addressing the above aspects in further detail, it is important to note two key points about the application of the Romanian *lex arbitri*.

Firstly, the CCP provisions have a subsidiary effect. According to Articles 544³ and 576⁴ of the CCP, the arbitral proceedings are governed primarily by the parties' agreement and, once constituted, by the arbitral tribunal's directions (provided that public policy and mandatory laws are observed), and, when needed, the procedural rules will be supplemented by the provisions of the CCP.

Secondly, the rules applicable to domestic arbitration can apply by analogy to international arbitration. Although the *lex arbitri* has different rules for domestic (Book IV – Articles 541-621 CCP) and international (Book VII, Title IV – Articles 1111-1133 CCP) arbitration, if a specific issue is not covered by the arbitration agreement or the special CCP rules for international arbitration, then the provisions for domestic arbitration shall be applied by analogy to international arbitration proceedings. According to Article 1123⁵ of the CCP all the provisions of domestic arbitration from Book IV with regard to the constitution of the arbitral tribunal, the rules of procedure,

³ Article 544 of the CCP provides, in relevant part: “(1) The arbitration proceedings shall take place and be conducted based on the arbitration agreement concluded in accordance with the provisions of Title II of this Chapter. (2) Subject to the observance of public policy and moral standards, as well as the mandatory provisions of the law, the parties may decide the arbitration rules applicable to the proceedings either by reference to certain arbitration rules or by setting them out in the arbitration agreement, or by concluding a subsequent written agreement, by the latest when the arbitral tribunal has been formed. The arbitration rules will govern: the constitution of the arbitral tribunal, the appointment, removal and replacement of arbitrators; the duration and the seat of the arbitration; the rules of procedure to be followed by the arbitral tribunal in deciding the dispute, including any preliminary ruling; the allocation of arbitration costs between the parties and; in general, any other rules regarding how the arbitration procedure shall be conducted. (3) In the absence of an agreement of the parties as referred to in paragraph (2) above, the arbitral tribunal may set the procedure to be followed, as it deems most appropriate. (4) If the arbitral tribunal does not set these rules either, the following provisions shall apply”.

⁴ Article 576 of the CCP provides, in relevant part: “(1) The parties may provide in the arbitration agreement the rules of procedure applicable to arbitration or may empower the arbitrators to set such rules. These rules shall be supplemented, where appropriate, by the provisions of this Book”.

⁵ Article 1123 of the CCP provides the following: “Any issues concerning the constitution of the arbitral tribunal, the rules of procedure, the arbitral award, its amendment, communication and its effects, not covered by the parties in the arbitration agreement and not entrusted to the arbitral tribunal's discretion, shall be addressed by reference to the provisions of Book IV”.

the arbitral award, its amendment, communication and its effects, shall be applied to international arbitration, if the parties or the arbitral tribunal did not decide otherwise.

A further analysis of the CCP provisions supports the conclusion that Romanian *lex arbitri* likely excludes a right to a physical hearing.

Firstly, in domestic arbitration, according to Articles 544 (2)⁶ and 576⁷ of the CCP, the parties have the autonomy to lay down the procedural rules applicable to the arbitral proceedings, either at the moment of the conclusion of the arbitration agreement or later, before the constitution of the arbitral tribunal, by concluding an agreement in writing. The arbitral tribunal, once constituted, decides how the arbitration will take place. Thus, it can be inferred that the parties or, once constituted, the arbitral tribunal can decide that the proceedings will take place remotely.

Nevertheless, the above provisions are subject to the mandatory rules of civil procedure and public policy principles such as: parties' equal opportunity to present their case; right to dispose and waive off procedural rights; good faith; right to be heard; right to be represented by counsel; adversarial principle; orality of the proceedings; immediacy; continuity, etc.⁸ For the scope of the present analysis, it is worth having a closer look at the principle of orality of the civil proceedings. At first glance, it could be assumed that such principle can imply the existence of a right to a physical hearing. However, for a better understanding of how the principle of orality shall be applied, it is important to interpret it in correlation with other provisions from the CCP, which we will address in further detail at sub-paragraph b.3 below.

Similar provisions regarding party autonomy are found also in the CCP section referring to international arbitration. Article 1115⁹ of the CCP provides that the parties

⁶ For the full text, please see fn. 3 above.

⁷ For the full text, please see fn. 4 above.

⁸ Article 575 (2) of the CCP provides: “(1) The arbitral proceedings shall be conducted according to the procedural rules established in Article 576. (2) However, the fundamental principles of the civil process provided in Article 5 paragraph (2) [obligation to solve the dispute assigned to the judge/arbitrator], Articles 8-10 [parties' right to an equal opportunity to present their case; right to dispose and waive off procedural rights; obligation to follow the procedural rules and deadlines], Articles 12-16 [duty to act in good faith; right to be heard/defence; right to adversarial proceedings; orality of the proceedings; direct assessment of the evidence], Articles 19-21 [continuity of the proceedings; respect of fundamental rights; encouragement of settlement of the dispute], Article 22 paragraphs (1), (2), (4), (5) and (6) [the role of the judge arbitrator in finding the truth] and in Article 23 [duty of respect owed to the judge/arbitrator] shall be observed during the arbitration proceedings”.

⁹ Article 1115 of the CCP provides, in relevant part: “(1) The parties may establish the rules applicable to the arbitration proceedings themselves or by reference to the rules of an arbitral institution or may subject them to a procedural law of their choice. (2) If the parties did not make a choice as to the arbitration rules, then the arbitral tribunal shall establish the procedure applicable in line with paragraph (1) above. (3) In any case, the arbitral tribunal shall guarantee the equality of the parties and their right to be heard in adversarial proceedings”.

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

may establish the rules applicable to the arbitration proceedings themselves or by reference to the rules of an arbitral institution or may subject them to a procedural law of their choice. If the parties fail to do so, then the arbitral tribunal shall establish the procedure. In any case, the arbitral tribunal shall guarantee the equality of the parties and their right to be heard in adversarial proceedings.

Pursuant to Articles 544,¹⁰ 576¹¹ and 1115¹² of the CCP, the *lex arbitri* gives parties the autonomy and the arbitral tribunal the authority to decide on how the arbitration proceedings shall take place, which includes the possibility for the parties to agree upon having a remote hearing and, failing such agreement, for the tribunal to order a remote hearing, instead of one that will require the physical presence of the attendees.

Secondly, the CCP gives the arbitral tribunal the right to hear fact and expert witnesses, at their request or with their consent, at the residence or workplace of the witness or even to ask them to reply in writing to the questions addressed by the parties and the tribunal.¹³ This flexibility in regards to witness and expert questioning shows that the *lex arbitri* is accommodating in respect of how an arbitration hearing can take place and reinforces the conclusion that a physical presence is not necessarily required.

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

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

Short answer: No.

The CCP rules applicable to civil litigation do not contain any express provision regarding the parties' right to a physical hearing.

¹⁰ See fn. 3 above.

¹¹ See fn. 4 above.

¹² See fn. 9 above.

¹³ Article 589 (2) of the CCP provides the following: "(2) Witnesses and experts may also testify, at their request or with their consent, at their dwelling or their workplace. The arbitral tribunal may also ask them to answer the questions in writing, giving them a time limit for doing so". As noted above, since there is no specific provision covering the same issue in international arbitration proceedings (Book VII, Title IV), Article 589 (2) of the CCP applicable to domestic arbitration (Book IV) will be equally applicable to international arbitration, to the extent the parties or the arbitral tribunal do not decide otherwise.

However, it is important to mention that there are certain articles in the CCP which can hint at the necessity for parties to attend hearings in person (as opposed to being represented by counsel) and to present the case orally.

We will briefly address the principle of orality of trials and the requirement, in certain circumstances, to appear in person / be personally present at a hearing.

According to Article 15¹⁴ of the CCP, litigation trials are governed by the principle of orality, meaning that the trials shall take place orally, unless the law provides otherwise or if the parties expressly request the court to decide the dispute only based on the documents submitted on record. This principle does not exclude, nevertheless, the parties' possibility to present those arguments orally via remote means.

Regarding the need to be present at a hearing, exceptionally, in only four limited instances the CCP refers to the obligation of the parties to appear in person / be present personally. As it will be seen from the examples below, this concept shall be read in contrast with the possibility of appearing in court by way of representation by the legal counsel.

(i) Article 13 of the CCP states that the court has the right to ask parties to appear in person even when they are represented by counsel.

(ii) Article 304 of the CCP provides that whenever an allegation of a forged document is made by one party, the party that submitted that document shall appear in person before the court to take note of the allegation and give explanations. By way of exception, in special circumstances, the party called to appear in person can actually be represented by someone else with a special power of attorney.

(iii) Article 352 of the CCP requires the party called for cross-examination by the opposing party/court to be present in person before the court.

(iv) Article 921 of the CCP imposes the obligation on parties subject to divorce proceedings to appear in person before the court (with some limited exceptions). The aim, in this case, is mainly for the court to try to mediate the conflict directly between the parties (spouses) and not through their legal representatives.

As a general conclusion, in civil trials, parties shall present their arguments orally before the court, and the CCP allows them to do that personally or through their legal counsels. If all the parties agree, they can ask the court to resolve the dispute based only on the documents on record, without holding an oral hearing. However, even when parties have to present their arguments orally, they can do so remotely. Further, in only a few specific cases, being represented by legal counsel is not sufficient and the parties can be asked to appear in person. Still, there are no provisions requiring the parties to be physically present.

¹⁴ Article 15 of the CCP provides as follows: "The trials are debated orally, unless the law provides otherwise, or if the parties expressly request the court that the trial be held only on the basis of the documents submitted on record". For a further discussion about the principle of orality and remote hearings, see Lucian LUNGU, "Principiul oralității în procesul civil vs. ședința de judecată prin sistem videoconferință", *Juridice* (May 2020) available at <<https://www.juridice.ro/682824/principiul-oralitatii-in-procesul-civil-vs-sedinta-de-judecata-prin-sistem-videoconferinta.html>> (last accessed 1 December 2020).

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

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

Short answer: N/A

According to Article 575 (2)¹⁵ of the CCP, the orality principle from civil litigation applies also to arbitration proceedings. As noted above, however, the orality requirement does not preclude the presentation of arguments remotely.

The other provisions discussed above about the obligation of the parties to appear in person before the judge (Articles 13, 304, 352 and 921 of the CCP) do not apply to arbitration proceedings.

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: If inferred, it can be waived.

Even if it is inferred that a right to a physical hearing exists, such right can be waived by the parties.

Firstly, Article 9¹⁶ of the CCP, which applies equally to civil trials and arbitration proceedings, expressly provides that the parties can dispose / waive certain procedural rights: withdraw the statement of claim; waive the right to challenge a decision; waive the right to enforce a decision; or dispose of any other rights as allowed by the law. Since the rights which can be waived have the potential to impact significantly the parties' position, by applying the principle *qui potest plus potest minus*, it can be concluded that the parties can waive an inferred right to be physically present in a

¹⁵ Please see fn. 8 above.

¹⁶ Article 9 of the CCP provides: "(1) The civil process may be initiated at the request of the interested party or, in the specific cases provided by law, at the request of another person, organization or of a public, or of public interest, authority or institution. (2) The object and limits of the proceedings are set by the requests and defences of the parties. (3) A party may, as the case may be, withdraw the statement of claim, waive the right claimed, make admissions, enter into a full or partial settlement, waive the right to challenge a decision, waive the right to enforce a decision, or dispose of any other rights as allowed by the law. A party may also dispose of its rights in any other manner permitted by law".

hearing in favour of appearing remotely and presenting their arguments by audio-visual means.

Secondly, Articles 583¹⁷ and 575 (2)¹⁸ read in conjunction with Article 15 of the CCP expressly allow each of the parties to ask the arbitral tribunal to decide the case in their absence and rely only on the documents on record.

Thirdly, if the parties decide to submit their case to the rules of an arbitral institution, then those rules will have priority over the CCP provisions.¹⁹ By way of example, the 2018 Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania²⁰ contain express provisions which allow the parties to take part to the hearings remotely.²¹

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.

¹⁷ Article 583 of the CCP provides as follows: “Either party may request in writing that the dispute be settled in its absence, on the basis of the evidence on record”.

¹⁸ Please see fn. 8 above.

¹⁹ Article 576 (2) of the CCP provides: “When the parties have opted for institutional arbitration, the provisions of Article 619 (3) shall apply”. Article 619 (3) of the CCP provides: “Unless otherwise agreed by the parties, the rules applicable to the proceedings will be those in force on the date of the commencement of the arbitration”.

²⁰ Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania adopted by the Board of the Court of International Commercial Arbitration in force as of 1 January 2018, available in English at: <<http://arbitration.ccir.ro/arbitration-rules-2/>> (last accessed 1 December 2020).

²¹ Article 3 (“Arbitration Hearings”): “(4) The hearings may be conducted by videoconference, telephone or by any similar means of communication”; Article 31 (“Case Management Conference”): “(3) The case management conference may be conducted in person or any other remote audio or video means of communication”; Annex IV (“Case Management Techniques”): “Arbitration must be conducted in an expedited manner, especially in cases of low complexity and value, where the arbitral tribunal shall ensure that the duration and costs of the proceedings shall be commensurate with [what] is at stake in the dispute. It follows that the arbitral tribunal, relying on its procedural autonomy, may use any of the methods presented below: [...] g) the use of remote, audio and video communication means for procedural hearings where attendance in person is not essential and the use of electronic means that enables online communication among the parties, the arbitral tribunal and the Secretariat”. See also Cornelia TĂBÎRȚĂ, “Procedura arbitrală simplificată - un echilibru mai puțin imperfect pentru pretențiile de ‘valoare’ redusă (II)”, *Revista Română de Arbitraj* (2020) p. 74.

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

According to Articles 544,²² 576,²³ 1121²⁴ and 1129 d)²⁵ of the CCP, the arbitration proceedings shall be conducted in line with the arbitration agreement.

The consequences of an arbitral tribunal's decision to hold a remote hearing despite the parties' agreement to a physical one will, however, depend upon the moment when the parties have reached such an agreement. If the parties have agreed before the constitution of the arbitral tribunal, either when signing the arbitration agreement or afterwards by way of written consent to have physical hearings, the arbitral tribunal is bound to follow the parties' choice. For the consequences of failing to comply with the parties' choice please see sub-paragraph d.9 below. After the constitution of the arbitral tribunal, the procedural rules fall primarily within the arbitral tribunal's prerogatives.²⁶

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: Likely yes.

According to Article 592²⁷ of the CCP, procedural objections shall be raised in due time by the latest at the next following hearing of which the party has notice of / been

²² See fn. 3 above.

²³ See fn. 4 above.

²⁴ Article 1121 (1) of the CCP provides as follows: "The arbitral award shall be rendered based on the procedure agreed by the parties. In the absence of such provisions in the arbitration agreement, the award shall be rendered based on the vote of the majority of arbitrators, and in case of deadlock, the presiding arbitrator has the casting vote".

²⁵ Article 1129 d) of the CCP provides, in relevant part: "Recognition or enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof of one of the following circumstances: [...] d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

²⁶ Article 544 (3) of the CCP, please see fn. 3 above. Article 576 of the CCP, please see fn. 4 above.

²⁷ Article 592 of the CCP provides as follows: "(1) Any exception concerning the existence and validity of the arbitration agreement, the constitution of the arbitral tribunal, the limits of the arbitrator's mandate and the conduct of the proceedings shall be raised by the latest at the next following hearing of which the party has notice of / been summoned to, unless a shorter deadline was set for raising such exceptions. (2) Any application and documents shall be submitted at the latest by the first hearing at which the parties have been legally

summoned to. A procedural irregularity is deemed corrected or waived, if not raised as soon as possible by the interested party who had knowledge of the arbitral proceedings, at the latest by the moment when the closing submissions on the merits of the dispute take place.²⁸

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

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

Short answer: Yes, in certain circumstances.

According to Articles 544,²⁹ 576,³⁰ 1121³¹ and 1129 d)³² of the CCP, the arbitration proceedings shall be conducted in line with the arbitration agreement. It is important to

summoned. The provisions of Article 587 [administration of evidence] shall apply accordingly. (3) A procedural irregularity is deemed corrected or waived, if it was not invoked by the interested party at the hearing at which it occurred or, if they were absent at that hearing, at the following next hearing at which the party was present or was legally summoned after the irregularity occurred. A procedural irregularity shall be raised by the latest before the closing submissions on the merits of the dispute”.

²⁸ Article 608 (2) of the CCP provides as follows: “(2) The irregularities that have not been raised according to Article 592 paragraphs (1) and (3) [see fn. 27 above] and which can be remediated as provided by Article 604 [interpretation, supplementation and correction of the award] can no longer be invoked as reasons for the annulment/set aside of the arbitral award”. Article 1121 (3) (international arbitration) of the CCP expressly provides that the regime regarding the setting aside / annulment of a domestic arbitration award equally applies to international arbitration awards: “The arbitral award shall be enforceable and binding upon its communication to the parties and may be challenged only by an action for annulment / setting aside on the grounds and in the manner set out in Book IV, which shall apply accordingly”. Therefore, Article 608 (2) of the CCP is equally applicable to international arbitration. See also Ioan SCHIAU, “The Arbitral Proceedings” in Crenguța LEAUA and David BAIAS, eds., *Arbitration in Romania: A Practitioner’s Guide* (Kluwer Law International 2016) at p.148.

²⁹ See fn. 3 above.

³⁰ See fn. 4 above.

³¹ See fn. 24 above.

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

note that there is no express ground for setting aside an award if the arbitral tribunal failed to observe the arbitration agreement, except if it concerns the constitution of the arbitral tribunal. However, if the arbitral tribunal does not hold a physical hearing, despite the existence of such requirement in the arbitration agreement, then the interested party can argue that the award is against the public policy and ask the court to set it aside based on Article 608 (1) h³³ of the CCP.

Nevertheless, allegations of breach of public policy or due process (e.g., in case a party challenges the award based on the arbitral tribunal's decision to order a remote hearing over that party's objection) are subject to a high bar, and the national courts proved so far cautious on annulling / setting aside arbitral awards on these grounds.³⁴

As noted in sub-paragraph d.7 above, if the party failed to invoke the procedural irregularity during the arbitration proceedings, they cannot rely on it as a ground to set aside / annulment of the award.

e. Recognition/Enforcement

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

Short answer: Yes.

Romania is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") and has enacted it in the internal legislation in 1961 by adopting the Decree No. 186/1961. The New York Convention was ratified by Romania with a reciprocity reservation.

³² See fn. 25 above.

³³ Article 608 (1) h) of the CCP provides as follows: "The arbitral award may be annulled / set aside only by submitting an application to that effect based on one of the following grounds: [...] h) the arbitral award violates the public policy, the moral standards or the mandatory provisions of law". As noted above at fn.28, according to Article 1121 (3) of the CCP the provisions regarding the annulment / setting aside of a domestic award apply as well to international arbitration awards.

³⁴ Ștefan DUDAȘ, "Setting Aside of Arbitral Awards" in Crenguța LEAUA and David BAIAS, eds., *Arbitration in Romania: A Practitioner's Guide* (Kluwer Law International 2016) at pp. 229-231.

For those countries with which there are no reciprocity arrangements, Romania will recognise and enforce the foreign awards based on the procedure laid down in the CCP Book VII, Title IV (Articles 1111-1133). Article 1129 which covers the grounds for refusing the recognition or enforcement of a foreign award is largely similar with Article V of the New York Convention.

The failure to conduct a physical hearing in the arbitration proceedings could constitute a ground to refuse enforcement or recognition of a foreign award in the following circumstances: (i) if the interested party proves that it was impossible for it to present its case via remote hearings;³⁵ or (ii) if the arbitral procedure did not comply with the agreement of the parties or, in the absence of such agreement, with the law of the place / seat of arbitration (assuming the agreement or the law of the seat provided for a right to a physical hearing).³⁶

f. COVID-Specific Initiatives

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

Short answer: Yes.

³⁵ Article 1129 c) of the CCP provides, in relevant part: “Recognition or enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof of one of the following circumstances: [...] c) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrators or of the arbitration proceedings or was otherwise unable to present his case”. However, this ground is subject to a high bar. By Decision 427/A of 06 March 2017, the Bucharest Court of Appeal held that the party arguing impossibility to present their case shall provide to the court compelling evidence to that effect. The mere fact that the party was not informed by the proceedings “in due time” does not amount to an impossibility to present their case. In another decision (5 /A/2018 of 25 January 2018), the Court of Appeal Cluj held that: “It cannot be claimed that the right to defence was violated, as a ground for denying the request for recognition, provided by Article 1129 c), except when the party against whom the judgment is invoked was in an impossibility to present its case in the arbitral proceedings, but it appears from the content of the arbitral award that the appellant filed a statement of defence and requested several deadline extensions that were granted by the arbitral tribunal”. The court noted that since the party was informed about the constitution of the arbitral tribunal and was able to submit a statement of defence, they cannot argue impossibility to present their case as provided in Article 1129 c) of the CCP.

³⁶ Article 1129 d) of the CCP, see fn. 25 above.

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

To ensure continued access to justice during the pandemic, the Romanian President enacted the Decree 195/2020³⁷ followed by Decree 240/2020,³⁸ which expressly states that hearings in civil proceedings can take place by videoconference.³⁹

As the provisions of the decrees were applicable only during the duration of the state of emergency, the Ministry of Justice proposed a Draft Bill on measures to be adopted during the COVID pandemic.⁴⁰ The Draft Bill has been enacted as Law 114/2021 and entered into force on 2 May 2021.⁴¹ Article 3 of Law 114/2021 states that courts can hold remote hearings by using audio-visual tools, if the parties agree so. The applicability of the law is of temporary nature, it will take effect only during the COVID-19 pandemic.

Also, during the pandemic the High Court of Cassation and Justice⁴² and other courts of appeal⁴³ offered open online access to their hearings via their websites.

³⁷ Article 42 (3) of Annex 1 to the Decree 195 of 16 March 2020, published in Official Gazette No. 212 of 16 March 2020.

³⁸ Article 63 (3) of Annex 1 to the Decree 240 of 14 April 2020, published in Official Gazette No. 311 of 14 April 2020.

³⁹ For an opinion about the applicability of the Decree 195/2020 to arbitral proceedings, see Claudiu C. DINU, “Câteva considerații referitoare la impactul Decretului Președintelui României nr. 195 din 16 martie 2020 privind instituirea stării de urgență în derularea proceselor civile”, *Revista Pandectele Române* (2020).

⁴⁰ Available in Romanian at <<http://www.just.ro/proiect-de-lege-privind-unele-masuri-in-domeniul-justitiei-in-contextul-pandemiei-de-covid-19/>> (last accessed 1 December 2020).

⁴¹ Law 114/2021 on certain measures to be adopted by the justice system during the COVID-19 pandemic, published in the Official Gazette No. 457 of 29 April 2021.

⁴² Available in Romanian at <https://www.scj.ro/intrac_monitor> (last accessed 1 December 2020).

⁴³ Available in Romanian at <<https://www.curteadeapelcraiova.eu/>> (last accessed 1 December 2020).