ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

SPAIN

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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 Spanish Arbitration Act[1] ("SAA"), which is based on the UNCITRAL Model Law and constitutes the main piece of Spanish legislation governing arbitration proceedings, does not establish a right to a physical hearing in arbitrations seated in Spain. This conclusion applies to both domestic and international arbitrations, as Spain follows a monist system.[2]

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 be excluded.

The SAA neither recognises a right to a physical hearing nor establishes a distinction between physical and remote hearings, as it only refers to "*audiencias*" (hearings). This

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[1] The Spanish Arbitration Act of 2003 (L.O. 2003, 60, 23 Sep.) was based on the UNCITRAL Model Law and was subject to reform in 2011. The SAA replaced the old Arbitration Act of 1988. Spain passed its first specific law dealing with arbitration in 1953 and, until then, other provisions such as the Civil Code (1889), the Code of Commerce (1885), and the Civil Procedure Act (1881) dealt with matters connected with arbitration.

[2] The Preamble to the SAA (§ 2) expressly highlights the non-dualistic nature of the Spanish arbitration regime: "Thirdly, this act clearly opts for unified regulation of domestic and international arbitration. Furthermore, it is aligned with the monistic approach (in which, with rare exceptions, the same provisions are applied to both domestic and international arbitration) rather than the dualistic philosophy (in which international and domestic arbitration are wholly or largely regulated by different rules)" (free translation by the Authors).

should come as no surprise given the accepted use of technology in arbitral practice at the time when the SAA was reformed.[3] As a matter of fact, the SAA does not contain any specific reference to the taking of evidence (like witness testimony, for instance) through virtual or remote means.[4]

In consistence with international practice, the SAA leaves almost every aspect of the actual arbitration proceedings to party autonomy. As a result, it does not contain practically any specific rules regarding how hearings are to be conducted (whether physically or remotely) or any other guidelines to arbitrators and parties in that regard.[5] More specifically, it is clear that the scarce wording of the SAA as regards hearings in general cannot be interpreted as providing a right to a physical hearing in arbitrations seated in Spain.

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[3] Regarding the use of technology in dispute resolution, in 2011 (when the SAA underwent a significant reform), the Spanish Civil Procedure Act ("SCPA") "opened the door" to the submission and service of documents through technological means. This was the exact wording of the Preamble to the SCPA at the time (2011): "The Law [SCPA] bearing in mind the present and with an eye on the future, opens the door to the presentation of party submissions and documents and to the service of documents through electronic, telematic and other similar means, without imposing an obligation on citizens and accused parties to have access to such means, while expressly regulating its requirements" (free translation by the Authors). No trace of the possible use of technology in the conduct of hearings (such as, for example, the remote hearings common today) could be found in the SCPA in 2011. In today's version of the SCPA (lastly amended on 12 November 2020), professional subjects who deal with the Spanish judiciary (e.g., lawyers and court agents) are obliged to do so through electronic means (Article 273 SCPA). However, in 2003 (when the SAA was enacted) the Spanish Organic Act on the Judiciary ("SOAJ") foresaw the possibility of remote witness testimony (through videoconference, as set out in its Article 229). Further, the use of videoconference in Spanish hearings was introduced in the system through Act 13/2003, of 24 October 2003. But what was not foreseen in any of these laws was the possibility to have full remote hearings as they are conducted today.

[4] Nonetheless, it could be argued though that Spanish law foresaw the possibility of using "electronic means" throughout the whole arbitration (including during the taking of evidence) as long as the parties agree to it (SAA Preamble, §VII): "As in the case of the arbitration agreement, the act envisages not only the use of electronic, optical or other types of media for the award, but also for non-written formats, providing a record is kept of the content, which must be accessible for subsequent reference. The act deems that any technology that meets the aforementioned requirements must be admissible for both the arbitration agreement and the award. *Arbitration proceedings may, then, be conducted solely on computer, electronic or digital means, if the parties so decide*" (emphasis added; free translation by the Authors).

[5] Save for the general right to be heard enshrined in Article 24.1 SAA ("*principios de igualdad,* audiencia *y contradicción*"): "The parties will be treated with equality and each party will be given full opportunity to present its case" (emphasis added; free translation by the Authors).

Article 30 of the SAA[6] empowers arbitrators to decide whether a hearing is to be held or not (regardless of the physical or remote nature of such hearing), as the SAA allows for documents-only arbitrations. However, the same article provides that arbitrators are bound to hold a hearing unless the parties have expressly ruled it out (i.e., a hearing will be held if any of the parties so requests, but the SAA does not require such hearing to be *physical*).

Interestingly, the Preamble to the SAA (section VI) makes the following reference (which might be of note) in connection with documents-only arbitration: "Flexibility is also present in the subsequent conducting of the proceedings, which may in certain cases be predominantly in writing, if the circumstances of the case call for no hearings. Nonetheless, as a rule hearings are held to take evidence" (free translation by the Authors).

Yet again, although the SAA might favour hearings as a general rule, it remains silent as to the nature of such hearings and it certainly does not establish a preference for physical hearings over remote ones.

When referring to expert testimony (and particularly to arbitrator-appointed experts), Article 32.2 of the SAA[7] provides that experts must appear at a *hearing* after the submission of their reports if the arbitrators or one of the parties wish to subject them to questioning. Again, there is no indication as to the *physical* nature of such hearing.

In general terms, and in absence of an agreement by the parties, Article 25[8] of the SAA expressly grants arbitrators the power to conduct the "taking of evidence" as they see fit. In light of the wide discretion granted to arbitrators, it is then unlikely that other sections of the SAA can be interpreted as supporting the existence of a right to a physical hearing in arbitrations seated in Spain.

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

[6] SAA, Article 30 **(**"Form of arbitral proceedings"): "Subject to the contrary agreement by the parties, the arbitrators will decide whether to hold hearings for the presentation of statements or evidence and the issuance of conclusions, or whether the proceedings will be conducted in writing only. Unless the parties have agreed that no hearings will be held, they will be set by arbitrators at an appropriate stage of the proceedings, if so requested by a party" (free translation by the Authors).

[7] SAA, Article 32.2: "If requested by a party or deemed necessary by the arbitrators, and subject to any contrary agreement by the parties, after delivery of their reports, experts will participate in a hearing to enable the arbitrators and the parties, themselves or assisted by experts, to put questions to them" (free translation by the Authors).

[8] SAA, Article 25.1: "Subject to the provisions of the preceding article, the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings. 2. Failing such agreement, the arbitrators may, subject to the provisions of this act, conduct the arbitration in such manner as they deem appropriate. The power vested in the arbitrators includes the power to determine the admissibility, relevance, materiality, taking (even ex officio) and evaluation of the evidence" (free translation by the Authors).

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: Yes.

As explained in sub-paragraph a.2 of this report, the two main legal instruments that govern civil proceedings in Spain (the SCPA and the SOAJ) allow for the use of certain virtual tools during hearings and, in particular, as regards the taking of evidence. In some instances, the Spanish legislator has expressed a slight preference for the use of videoconferencing for witness examination over the regular examination of those witnesses in an actual court.

One clear example of this is the examination of underage individuals. Article 778.5-8 of the SCPA[9] establishes that in the context of proceedings related to child abduction, minors may be examined remotely, through videoconference. This could be indeed read as the legislator permitting expressly a partly remote hearing in light of the particularly sensitive subject matter, as the SCPA does not contain other mentions to videoconferences.

In addition, Article 229.3 of the SOAJ[10] also allows the parties to examine witnesses and experts via videoconference, and such provision even extends to witness and expert

[9] SCPA, Article 778.5-8: "Before taking any decision regarding the appropriateness or inappropriateness of the return of the child or his or her return to the place of origin, the judge, at any time during the proceedings and in the presence of the public prosecutor, shall hear the child separately, unless a hearing of the child is not considered appropriate in view of the child's age or degree of maturity, which shall be stated in a reasoned decision. In the examination of the minor, it shall be guaranteed that he or she can be heard in conditions suitable for safeguarding his or her interests, without interference from other persons, and exceptionally with the help of specialists when necessary. This examination may be carried out by means of videoconference or another similar system" (free translation by the Authors).

[10] SOAJ, Article 229: "1. Judicial proceedings will be predominantly oral, especially in criminal matters, without prejudice to their documentation. 2. Statements, examinations, depositions, confrontations, explorations, reports, ratification by experts and hearings shall be carried out before a judge or court with the presence or intervention, as the case may be, of the parties and in a public hearing, except as provided for by law. 3. These actions may be carried out by means of videoconference or other similar system that allows two-way and simultaneous communication of image and sound, and visual, auditory and verbal interaction between two persons or groups of persons geographically distant from each other, ensuring in all cases the possibility of contradiction between the parties and safeguarding the right of defence, when so agreed by the judge or court. In these cases, the clerk of the court or tribunal that has adopted the measure will verify the identity of the persons intervening via the

"hot-tubbing". But this section of Article 229.3 SOAJ must be read in the context of the rest of Article 229 SOAJ and also in the light of the so-called "*principio de inmediación*"[11] or "immediacy principle", which is legally established.[12]

In addition, subsection 1 of Article 229 SOAJ, primarily rules that court proceedings are to be *oral*, and particularly so in criminal cases. The next subsection of Article 229 SOAJ (2), can be useful to unravel the meaning of "oral" in this context. Subsection 2 establishes that witness and expert examination must be carried out in front of a judge with the parties present, and, unless otherwise provided by the law, in a publicly accessible audience.

Only after setting out these rules, does Article 229.3 SOAJ point out that some of these activities (such as witness examination) can be performed via videoconference. But this possibility must not be taken for granted, as subsection 3, paragraph two of Article 229 SOAJ clearly rules that these videoconferences will only be ordered insofar as the expert or witness is unable to attend the *hearing* (i.e., the physical hearing, in which the judge and the parties must be present) due to geographical distance (which will be proven to the court clerk by the witness or expert through physical evidence).

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videoconference from the court headquarters by means of the prior submission or the direct exhibition of documentation, by personal knowledge or by any other suitable procedural means" (free translation by the Authors).

[11] SCPA, Preamble XI: "A special emphasis should be placed on the provisions regarding the necessary publicity and presence of the Judge or Justices -not only the Reporting Judge, if it is a collegiate body- in the acts of evidence, appearances and hearings. This insistence on general rules will later be fully reflected in the regulation of the different processes, but, in any case, the infringement of the provisions on judicial presence or immediacy in the broad sense will be sanctioned with radical nullity" (free translation by the Authors).

SCPA, Preamble XII: "The Law establishes the declarative processes so that immediacy, publicity and orality shall be effective. In oral summary judgments, because of the importance of the hearing; in ordinary proceedings, because after the exchange of statements of claim and defence, the most important procedural milestones are the pre-trial hearing and the trial itself, both with the inexcusable presence of the judge" (free translation by the Authors).

[12] SCPA, Article 137 ("Chapter II, On immediacy, publicity and the official language. Article 137. Judicial presence in statements, evidence and hearings"): "The Judges and the Justices members of the tribunal hearing a case shall be present at the statements of the parties and witnesses, the confrontations, the exhibitions, explanations and answers to be given by the experts, as well as the oral critique of their report and any other act of evidence which, in accordance with the provisions of this Law, must be carried out in a contradictory and public manner. Hearings and appearances for the purpose of hearing the parties before a decision is made shall always be held before the Judge or Justices of the tribunal hearing the case. *The* provisions of the foregoing paragraphs shall be applicable to the court clerks in respect of actions to be carried out only before them. 4. Infringement of the provisions of the foregoing paragraphs shall determine the nullity of the corresponding proceedings" (free translation by the Authors).

In sum, Spanish rules of civil procedure clearly establish a system based on orality and on physical (and public)[13] hearings in front of a judge or tribunal, as the case may be. As an exception, and only if a witness or an expert are not able to appear before the judge or tribunal (due to distance) then there is legal basis to arrange a partially remote hearing.[14]

Accordingly, in general circumstances (which have indeed been altered by COVID and have given rise to a temporary *lex specialis*),[15] parties have a right to request a physical hearing before a Spanish court of law. Such right may only be abrogated under special and extreme circumstances which might leave no other option but to physically separate judges from parties and their representatives.

In this sense, the immediacy principle has been recently referred to as a possible collateral damage of the recent pandemic.

The principle of immediacy enshrined in Article 137 SCPA establishes an obligation of judges and tribunals to issue judgments only if the specific judge handing down the judgment has been present at the hearing in which evidence was taken. Otherwise, if a judgment is rendered by another judge who was not present at the hearing, a ground for annulment of the whole proceedings may arise.

Some have argued that the eruption of the virus and the introduction of full remote hearings in the Spanish judicial system (i.e., not only certain aspects of the process, like examining one witness who is unable to travel, but also having the judge appearing remotely) can affect and diminish the immediacy principle due to the fact that judges may never have the same experience and grasp of what is being presented to them in a remote hearing as opposed to a traditional trial.[16]

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[13] SCPA, Article 138.1-2 ("Publicity of oral proceedings"): "1. Evidentiary proceedings, hearings and appearances for the purpose of hearing the parties before a decision is issued shall be held in a public hearing. 2. The proceedings to which the previous paragraph refers may, however, be held in camera when this is necessary for the protection of public order or national security in a democratic society" (free translation by the Authors). The expression "in camera" certainly shows how the whole system of Spanish litigation is conceived around physical hearings in court houses which are generally accessible to the public.

[14] It is interesting to note that Spanish courts have repeatedly expressed that the use of videoconference in hearings can be equated with a physical examination of a witness and that it does not imperil the right to be heard or access to justice. See Judgment of the Supreme Court no. 2163/2019, 27-06-2019: "The use of videoconferencing allows for total connection at the points of origin and destination as if they were present in the same place, thus fulfilling the premise that the legal proceedings are held in unity. No procedural principle is violated as the parties can address questions to the witnesses that are declared relevant with contradiction and without defencelessness or violation of effective judicial protection".

[15] Please refer to sub-paragraph f.11 for further details on special regulations of Spanish civil procedures after the COVID-19 pandemic.

[16] Manuel PACHECO, "COVID-19 y vistas por videoconferencia: el reto está en la seguridad, la confidencialidad y la inmediación", Garrigues (20 May 2020) at

The counter-argument to this is that the immediacy principle is not affected by a remote trial because judges will be able to assess evidence in the same manner as in a physical hearing. In addition, given that Spanish law already provided for remote examinations of witnesses and experts thus implicitly accepting same without a violation of the immediacy principle, it is hard to imagine why this principle should be now *per se* preventing that the parties and the judge also participate in the hearing remotely.

However, and as a conclusion, although the use of technology in the Spanish judicial sphere has been on the rise and has even led to the adoption of full remote hearings due to COVID-19, parties to Spanish cases are still entitled to have a physical hearing under normal circumstances.

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.

A long-established principle of the Spanish arbitration regime is that the SCPA or other provisions applicable to Spanish civil litigation do not apply to arbitrations seated in Spain.[17]

Article 4 of the SCPA states that its provisions will apply (by default) to criminal, administrative, labour, and military court proceedings in absence of specific provisions in the rules or laws governing those proceedings.[18] But this article does not mention arbitration, regardless of the fact that the SAA does not establish specific rules of procedure to conduct the actual arbitration process. This is left to party autonomy, as indicated earlier.

Additionally, it is important to bear in mind that Spanish courts have generally ruled out the possibility of resorting to the SCPA as a sort of guiding principle or general rule of interpretation.[19] Nothing would prevent the parties to an arbitration seated in Spain

<https://www.garrigues.com/es_ES/noticia/covid-19-vistas-videoconferencia-reto-esta-seguridad-confidencialidad-inmediacion> (last accessed 22 April 2021): "And finally, that the use of these systems affects the principle of immediacy: however perfect these telematic systems may be, the assessment of evidence taken before the judge or justice at the seat of the court or tribunal is very different from that of evidence taken remotely and viewed by the judge through a plasma screen" (free translation by the Authors).

[17] Antonio SÁNCHEZ-PEDREÑO, *Memento Experto Francis Lefebvre – Arbitraje* (Lefebvre 2015) p. 128.

[18] SCPA, Article 4 ("Supplementary nature of the *Spanish Civil Procedure Act*"): "In the absence of provisions in the laws regulating criminal, contentious-administrative, labour and military proceedings, the provisions of this Act shall apply to all of them" (free translation by the Authors).

[19] A.P. Barcelona, June 6, 2008 (R.J., No.245/2008) (Spain): "It is seriously questionable whether the provisions of the *Spanish Civil Procedure Act* regulating procedural aspects are

from adopting the SCPA in whole or in part as their procedural rule of choice, but in absence of such an agreement the provisions of the SCPA will not apply to arbitrations.

For example, if in the future the SCPA changes its current wording and forbids remote witness testimony (which is now perfectly allowed) such new rule would have no impact on arbitrations seated in Spain, as parties would remain free to adopt other rules other than the SCPA in order to keep using remote features in their hearings or indeed to have completely remote hearings in their arbitration.

Likewise, regardless of any hypothetical changes to the Spanish civil procedure system, arbitrators would still be allowed to impose a remote hearing on the parties because of their power to manage the proceedings and the taking of evidence as they see fit under Article 25.2 of the SAA[20] (provided, of course, they respect party autonomy).[21]

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

A right to a physical hearing in international arbitration does not exist in Spain but, in any event, if that were the case, parties would be free to adopt the procedural rules they see fit to manage their arbitration and they could do so in advance of any arbitration

applicable in the arbitration procedure, nor whether they can be compared" (free translation by the Authors).

[20] SAA, Article 25.2: "In the absence of agreement, the arbitrators may, subject to the provisions of this Law, conduct the arbitration in such a manner as they deem appropriate. This power of the arbitrators includes the power to decide on the admissibility, relevance and usefulness of the evidence, on its practice, including *ex officio*, and on its assessment" (free translation by the Authors).

[21] A.P. Madrid, March 15, 2012 (R.J., No.84/2012) (Spain): "The present procedure is governed by the provisions of the United Nations Rules of Procedure and the [Spanish] Arbitration Act. Article 4 of the Spanish Civil Procedure Act does not provide for supplementary application in arbitration proceedings. The SCPA does not have a mandatory application in matters of admission of evidence, since the [Spanish] Arbitration Act indicates that the competence of the arbitrators to determine the conduct of the proceedings refers expressly and specifically to the admission of evidence, and may do so in the manner the arbitrators deem appropriate (SAA art. 25.1 and 2). Therefore, other rules cannot be applied in a supplementary manner, when the [Spanish] Arbitration Act grants the Arbitral Tribunal the power to conduct the arbitration in matters of evidence in the manner the Tribunal deems appropriate" (free translation by the Authors).

actually starting.[22] Further, in any event, Article 25 of the SAA confers a broad power to arbitrators to arrange hearings at their discretion.

In addition, by adopting the procedural rules of the main arbitral institutions used for international arbitration in Spain (i.e., the ICC and the newly created Madrid International Arbitration Centre, "MIAC"), parties to Spanish arbitrations would be waiving any hypothetical right to a physical hearing, as both institutions expressly provide for remote examinations[23] and, more specifically, the ICC and MIAC have issued protocols[24] in connection with remote hearings and held these new sort of hearings under their auspices.

Finally, the 2021 ICC Rules (Article 26.1) establish that, "The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication", so if parties were to adopt these rules in an arbitration clause, there would be no doubt as to their complete acceptance of the possibility of a fully remote hearing.

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?

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[22] SAA, Article 14 ("Institutional arbitration"): "1. The parties may entrust the conducting of arbitration and appointing arbitrators to: a) public law corporations and public entities whose rules allow them to perform arbitral duties; b) not-for-profit associations and entities whose by-laws envisage engagement in arbitral activities. 2. Arbitral institutions will perform their duties in keeping with their own rules. 3. Arbitral institutions will ensure that arbitrators are independent and comply with the stated qualifications, and that their appointment is transparent" (free translation by the Authors).

[23] 2017 ICC Arbitration Rules, Appendix VI, Article 3.5: "The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication". And MIAC Rules of Arbitration, Article 36.2: "The arbitrators may allow the witnesses to give their testimony in writing, without prejudice to also allowing them to be examined before the arbitrators and in the presence of the parties, either orally or via any means of communication that renders their presence unnecessary".

[24] ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (9 April 2020) at <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> (last accessed 22 April 2021) and MIAC, "Nota sobre organización de audiencias virtuales" (Note regarding the organisation of virtual hearings) (21 April 2020) at <https://www.arbitramadrid.com/documents/20181/1936824/200421+Nota+sobre+organizaci%C3%B3n+de+audiencias+virtuales.pdf/a25e6f26-2da2-482a-8347-0750736ac328> (last accessed 22 April 2021).

Short answer: No, arbitrators are bound by *inter partes* agreements in connection with procedural rules (as long as these agreements are in conformity with the SAA and other applicable provisions).

An order issued by arbitrators in breach of an agreement by the parties to the arbitration would be a ground to annul the award, as per article 41.1 d) of the SAA.[25] Accordingly, if parties had agreed to exclude the possibility of remote hearings before the arbitration or during it (e.g., in the terms of reference or in the PO 1), arbitrators should not arrange a remote hearing against the will of the parties.[26]

The application of this ground of annulment (which is also established in Article V d) of the 1958 New York Convention) has evolved in Spanish jurisprudence as a result of the replacement of the former Spanish Arbitration Act of 1988.

Article 45.2 of the former Spanish Arbitration Act[27] ruled that an award could be annulled as long as an "essential" rule of procedure established in the act had been breached during the arbitration. Though it did not refer to agreements by the parties (as opposed to the present version of the SAA), Article 21 of the 1988 SAA also established that the arbitration proceedings were to be governed by the valid agreements of the parties. Hence, in order to annul an award for these grounds, the violation of the party agreement had to be related with an "essential" rule of procedure.

In today's version of the SAA, this "essentiality" requirement has been removed. Therefore, if arbitrators deviate from an agreement reached by the parties in connection with how the hearing is to be conducted (for example, physically) and they order the hearing to be conducted remotely against the plain will of the parties, then any of them could bring an action to annul the award. It remains, however, uncertain whether this rule will be applied automatically and in every case (e.g., such as in case of a minor breach).[28]

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[25] SAA, Article 41.1. d): "An award may be set aside only if the applicant alleges and furnishes proof: [...] d) that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with an imperative provision of this act, or, failing such agreement, was not in accordance with this act" (free translation by the Authors).

[26] Party autonomy is the primary source when regulating the arbitration procedure as *per* Article 25 SAA (including how hearings are to be conducted by the arbitrators).

[27] SAA 1988, Article 45.2: "When the appointment of the arbitrators and the conduct of the arbitration proceedings have not complied with the essential formalities and principles established by law" (free translation by the Authors).

[28] Scholars have reasonably adjusted the automatic application of article 41.1 d) in connection with minor deviations of the SAA which could be incurred by arbitrators. This would be the case of the non-observance of the two-month term to issue an award under Article 37 SAA. See Juan Antonio XIOL RÍOS "Artículo 41" in *Comentarios a la Ley de Arbitraje* (Consejo General del Notariado 2014) pp. 824-825.

To sum up, if a party bases the action for annulment on Article 41.1 d), in theory he will only have to prove that there was a valid agreement between the parties providing for either the right to a physical hearing or the prohibition to hold remote hearings and that such agreement was not respected. However, it should be noted that in practice, Spanish courts place importance on the materiality of the breach of the agreement to grant the annulment of the award. In this sense, the application to set aside the award has been rejected when the minimum procedural safeguards have been observed.[29]

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 mentioned before, the SAA does not grant a right to a physical hearing. However, the SAA leaves enough room for the parties to agree such a hearing in the arbitration agreement or at a later stage of the arbitral proceedings; for instance, the arbitral tribunal could order holding a remote hearing in a procedural order, notwithstanding a contrary agreement of the parties.

In this scenario, if a party does not raise a breach of the previously agreed right to a physical hearing, the tacit waiver of the right to object awards foreseen in Article 6 of the SAA[30] would apply. This principle is also enshrined in Article 27 of the MIAC Rules of Arbitration.[31]

According to this provision, the parties to the arbitration shall file an immediate and timely complaint against any violation of the default rules contained in the SAA or any other rules agreed by the parties on the basis of party autonomy. Thus, the failure to raise

[29] Lorenzo PRATS ALBENTOSA, ed., *Comentarios a la Ley de Arbitraje*, 1st edn. (La Ley 2013) p. 945, citing A.P. Madrid Section 10, Jan. 11, 2010 (R.J., No.4/2010) (Spain), reviewing whether an arbitral award decided in equity fulfills the minimum procedural requirements.

[30] SAA, Article 6 ("Tacit waiver of the right to object"): "A party who, aware of non-compliance with a default rule contained herein or any requirement under the arbitration agreement, fails to object to such non-compliance within the time limit or otherwise without undue delay, will be deemed to have waived his right to objection envisaged in this act" (free translation by the Authors).

[31] MIAC Rules of Arbitration, Article 27 ("Tacit waiver of challenge"): "If a party gains knowledge of an infringement of these Rules, of the arbitration agreement, or of the rules agreed upon for the proceedings, and still proceeds with the arbitration without promptly filing a complaint regarding such infringement, the party's right to object to such infringement shall be deemed waived", available at <https://madridarb.com/wp-content/uploads/2020/09/Arbitration-rules-EN.pdf> (last accessed 22 April 2021).

a breach to the right to a physical hearing (foreseen by the parties in the arbitration agreement or afterwards) would later prevent that party from using that breach as a ground for challenging the award.

This principle, which derives directly from Article 4 of the UNCITRAL Model Law, has been subject to criticism, but Spanish courts have regularly upheld the notion that parties are not allowed to bring a ground for annulment when the arbitrators and their counterparties were not given the opportunity to argue the issue at the time in which the alleged breach was to have taken place.[32]

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, but in very exceptional cases.

Generally, the party seeking annulment will have to prove that the implementation of a remote hearing constituted a material violation of the public policy/due process principle, causing an actual prejudice to its rights of defence.

If a remote hearing takes place pursuant to an order of the arbitrators (e.g., if the parties had not agreed on the nature of the hearing beforehand or are otherwise unable to come to an agreement when the need for a remote hearing arises)[33] a party could base the action for annulment of the award on two of the six grounds provided in Article 41.1 of the SAA, which are very similar to those established in Article 34 of the UNCITRAL

[32] See Jesús REMÓN PEÑALVER, "La anulación del laudo: el marco general, el pacto de exclusión y el orden público" in Carlos Alberto SOTO COAGUILA and Orializ Carla ESPINOZA SOTO, eds., *Convención de Nueva York de 1958. Reconocimiento y ejecución de sentencias arbitrales extranjeras* (Instituto Peruano de Arbitraje – IPA 2009) pp. 10-11.

[33] The current state of practice shows that parties often quarrel over the kind of hearing to be held (one party would prefer a physical hearing over a remote one and vice versa). This comes to show that a right to a physical hearing does not exist *ex ante* in arbitration, otherwise such discussions would all end the same way: a physical hearing would be held or there would be no hearing at all.

Model Law: (i) Article 41.1 b): inability to present its case;[34] (ii) Article 41.1 f): the award is contrary to public policy.[35]

If a party bases the annulment on Article 41.1 b) and/or f), it will have to furnish proof that the remote hearing actually prevented it from presenting its case adequately and that there was no real possibility of defence.[36] Thus, the breach of the agreement to conduct a physical hearing will not be considered a *per se* violation of public policy or the due process principle. The party requesting the annulment of the award will have to prove that its right of defence was hindered in some way by the holding of the remote hearing against its will.

As a matter of example, one of the parties could argue that if the hearing is set to last more than one day and involves multiple witnesses (which is usually the case in complex international arbitration proceedings), it will be very difficult for the arbitral tribunal to organise the hearing so that the parties, their representatives, the parties' counsel, witnesses, experts, translators, etc. are all connected to the same online platform at the same time.

Furthermore, Internet connectivity issues usually arise, more so if all the persons expected to intervene in the hearing are located in different parts of the globe. Likewise, as the Spanish General Council of the Judiciary has pointed out, platforms such as Zoom and Microsoft Teams can display poor video quality[37] and raise confidentiality concerns. For these reasons, the MIAC has included a caveat in its "Note regarding the organisation of virtual hearings".[38]

In sum, when conducting remote hearings there are several factors that fall outside the scope of the arbitral tribunal's control and thus, the possibility of jeopardising the rights of due process of the parties and their ability to adequately present their case is something to look into.

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[34] "That [the applicant] was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case" (free translation by the Authors).

[35] "That the award breaches public policy" (free translation by the Authors).

[36] L. PRATS ALBENTOSA, *Comentarios a la Ley de Arbitraje*, fn. 29 above, p. 933, citing, among others, S.T.C. (Spanish Constitutional Court), April 22, 1997 (R.J., No. 86/1997) and July 3, 1995 (R.J., No. 105/1995).

[37] Annex to the Guide for the Conduct of Telematic Judicial Proceedings of the Permanent Commission of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*) § 3.5.

[38] MIAC, "Nota sobre organización de audiencias virtuales", fn. 24 above, 3.1.6: "One of the first questions that the Participants must decide is the platform or service used as a support for the conduct of the Hearing. CIAM has accounts in the Zoom and Loopup platforms, which it makes available to its users if they consider them appropriate. The Centre does not make any statement or offer any guarantee regarding these external providers. Participants must act with due diligence as to the suitability of such platforms".

The party that considers that such violations to its rights have occurred could request the setting aside or the annulment of the award basing on Article 41.1 b) and/or f) of the SAA.

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, in case it translates into a material prejudice to the rights of defence.

According to the jurisprudence of Spanish courts, if a right to a physical hearing were to exist, a breach thereof has to create a material prejudice to the rights of defence of a party in order to refuse recognition and enforcement under Articles V(1)(b), V(1)(d) and/or V(2)(b) of the New York Convention.[39]

Moreover, even in the case that such right does not exist (i.e., because the law of the particular State or the rules of procedure of the arbitral institution do not foresee it), but a party has not been able to adequately present its case and the due process principle has been violated, it could still seek the refusal of the award under Article V(1)(b) of the New York Convention.

In this respect, both the Constitutional Court and the Supreme Court of Spain[40] have confirmed the refusal of the recognition of a foreign award handed down by lower courts if a party was not able to exercise its rights of defence during the arbitral proceedings.

Particularly, the Supreme Court has stated that in order to resist recognition and enforcement under Article V(1)(b) of the New York Convention, the party must furnish proof that its rights were indeed violated. Thus, a violation submitted on general terms, without reference to the specific circumstances of the case at hand, will not be considered sufficient to grant the refusal.[41]

With regard to the possibility to refuse recognition under Article V(1)(d), the Supreme Court has established that such irregularities in the procedure must be reviewed

[39] SAA, Article 46.2.

[40] Carlos GONZÁLEZ-BUENO, ed., "Artículo 46. Carácter extranjero del laudo. Normas aplicables" in *Comentarios a la Ley de Arbitraje*, fn. 28 above, p. 919, citing S.T.C. Section 2, May 13, 1987 and S.T.S. (Spanish Supreme Court) Oct. 6, 1983.

[41] *Ibid*. p. 920, citing S.T.S. March 24, 1982; Jan. 14,1983; October 8, 2002; and Feb. 3, 2004.

in accordance with the agreement made by the parties, which can make reference to the law of a particular State or the rules of procedure of an arbitral institution,[42] or, failing such agreement, the rules of the country where the arbitration was seated.[43]

Lastly, in relation to the ground of refusal set out in Article V(2)(b) of the New York Convention, the academic opinion in Spain affirms that this ground should not be upheld by the courts in the context of a possible violation of the due process principle or the rights of defense of a party, which should be dealt with under Articles V(1)(b) and (d) of the New York Convention (as long as the affected party so requests).[44]

The notion of "public policy" under Spanish law has traditionally been described as having both a substantive and a procedural meaning. Substantive or "material" public law has been defined as the set of rules that are indispensable for the organisation and governance of society at any given historical moment, whereas procedural public policy has been narrowed to certain formalities and principles that govern court proceedings and judicial protection.[45]

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: Spain has not taken any measures affecting physical hearings in arbitration due to the COVID pandemic.

The Spanish Government has not taken any measures affecting physical hearings in arbitration proceedings during the COVID pandemic. It has, however, issued certain new regulations regarding proceedings before domestic courts. Its approach has been twofold. During the first stage of the crisis, the Spanish Government opted for a general suspension of judicial proceedings, including hearings, and thus, it did not consider the possibility of remote hearings or any other alternative means. However, it did introduce this mechanism at a later stage of the crisis.

The Royal Decree 465/2020, of 14 March, which declared the State of Emergency in Spain due to the COVID-19 crisis, established a general suspension of all procedural deadlines before domestic courts in its 2nd Additional Provision. It did not mention arbitral proceedings, which were thus unaffected, in principle, by the norm.

[42] *Ibid*. p. 921.
[43] *Ibid*., citing S.T.S. Jan. 14, 1983; Feb. 10, 1984; and April 26, 1984.
[44] *Ibid*. p. 926.
[45] See Manuel VÉLEZ FRAGA and Luis GÓMEZ-IGLESIAS ROSÓN, "La anulación de laudos arbitrales por vulneración del orden público en las recientes resoluciones del Tribunal Superior de Justicia de Madrid", Actualidad Jurídica Uría Menéndez (2006) p. 85 at pp. 86-87.

Nonetheless, certain arbitral institutions decided to suspend all proceedings before them until the State of Alarm expired, unless the parties expressly agreed otherwise. This was the case of the Spanish Civil and Commercial Court of Arbitration ("CIMA"), which issued this decision on 16 March 2020. Other arbitration courts in Spain, like the Corte Española de Arbitraje ("CEA"), and the Tribunal Arbitral de Barcelona ("TAB"), also opted for suspending all proceedings in absence of an agreement by the parties (i.e., both parties needed to agree for the arbitral proceedings to resume, otherwise proceedings were suspended). The Court of Arbitration of the Madrid Chamber of Commerce only adjourned physical hearings until 12 April 2020 and offered parties the possibility to arrange remote hearings. In case of a disagreement by the parties (if one party requested a remote hearing while the other party refused to have one) arbitrators retained their discretion to rule on the matter under article 25 of the SAA. However, one of these courts (CIMA) later clarified[46] that its decision of 16 March 2020 actually prevented holding a fully remote hearing in light of the importance of such hearing.

Later, the Royal Decree 16/2020, of 28 April[47] opened the door to remote hearings during the State of Alarm and for the following three months. This was then prolonged by the Spanish legislature through Act 3/2020, of 18 September,[48] which regulated procedural matters during the health crisis, once again limiting its scope of application to national courts.

Article 14 of Act 3/2020[49] declared that all hearings would preferably be held remotely, as long as the court had the technical means to do so. Similarly, the court's deliberations would take place remotely. However, Act 3/2020 empowers courts to order the physical appearance of those involved whenever it deems necessary.[50] This measure will only be in force until 20 June 2021.

Given that the new regulation does not stipulate how the parties' rights are to be preserved, the Spanish General Council of the Judiciary has issued guidelines regarding

[46] Corte Civil y Mercantil de Arbitraje, "Nota informativa sobre el Acuerdo de la Corte de 16 de marzo de 2020" (6 April 2020) at <http://arbitrajecima.com/wp-content/uploads/2020/04/NOTA-INFORMATIVA-CIMA-200406.pdf> (last accessed 22 April 2021) p. 3.

[47] Royal Decree-Law on procedural and organizational measures to deal with COVID-19 in the sphere of the Administration of Justice (R.D.-Ley 2020, 16) April 28 (Spain).

[48] Law on procedural and organizational measures to deal with COVID-19 in the sphere of the Administration of Justice (L.O. 2020, 3) 18 September (Spain).

[49] Act 3/2020, Article 14.1: "Until 20 June 2021 inclusive, when the court or tribunal is constituted at its headquarters, the acts of trial, appearances, statements and hearings and, in general, all procedural acts, shall be carried out preferably by means of telematic presence, provided that the courts, tribunals and public prosecutor's offices have the necessary technical means at their disposal" (free translation by the Authors).

[50] Act 3/2020, Article 14.6: "At acts held by means of telematic presence, the judge or court clerk before whom the act is held may decide the physical attendance at the seat of the court or tribunal of the participants as they deem necessary" (free translation by the Authors).

the manner in which the proceedings should be conducted. These include necessary consent from the parties where the procedural act is of a "complex" nature. Regarding confidentiality, the guidelines refer to the use of devices and programmes which do not allow recording other than for official purposes and which allow for the tracking of unauthorized recordings, and professionals' duty to ensure that the proceedings take place in a reserved space. It also establishes the recommended bandwidth, IT and image quality standards, as well as certain requirements for the organisation of virtual rooms.