SWITZERLAND

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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.

Neither Chapter 12 of the Swiss Federal Private International Law Act (the “FPILA”) on international arbitration1 nor Part 3 of the Swiss Civil Procedure Code (the “CPC”) on domestic arbitration expressly provide for a right to a physical hearing.

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

**Short answer:** It can be excluded.

As recalled in the answer to question No. 1 above, the Swiss *lex arbitri*2 does not contain any provision dealing with hearings. That said, Article 182(3) FPILA does require the arbitral tribunal to ensure equal treatment of the parties as well as the parties’ right to be heard in adversarial proceedings3 (for present purposes, the two rights set out

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1 The revised Chapter 12 FPILA on international arbitration entered into force on 1 January 2021.
2 For present purposes, the Authors will use the expression *lex arbitri*, in order to refer to Chapter 12 FPILA dealing with international arbitration.
3 Article 182(3) FPILA was not amended by the entry into force of the revised Chapter 12 FPILA on 1 January 2021. This provision reads as follows: “Regardless of the chosen procedure, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings” (English translation by the Swiss Arbitration Association); “Unabhängig vom gewählten Verfahren muss das Schiedsgericht in allen Fällen die Gleichbehandlung der Parteien sowie ihren Anspruch auf rechtliches Gehör in
in Article 182(3) FPILA will be referred to in this report by using the English expression “due process”); the violation of rules of due process may lead to the setting aside of the award (Article 190(2)(d) FPILA).

The question is whether the right to due process encompasses a right to a physical hearing in an international arbitration in Switzerland.

In order to answer this question, the first step is to determine whether the right to a hearing exists as such as a matter of Swiss law. For present purposes, the term “hearing” is to be understood as a judicial session held with a view to deciding issues of fact, procedure or law, including hearing witnesses and oral pleadings.

According to a consistent line of decisions by the Swiss Federal Supreme Court (“Federal Supreme Court”, the Swiss highest court in the land),

4 The definition of “hearing” set out above is consistent with the definition of hearing to be found in Bryan A. GARNER, Black’s Law Dictionary, 9th edn. (West 2009) p. 788.

of commentators, due process within the meaning of Articles 182(3) and 190(2)(d) of the FPIA does not include the right for a party to present its case before the arbitrators orally.

In a similar vein, the Federal Supreme Court consistently held that the parties do not have a right to put questions (or have questions put) orally to a witness who filed a written statement.

This is so even in cases in which the parties agree to refer to arbitration rules providing for a right to a hearing or where the hearing (and the parties’ right to put questions orally to witnesses) is expressly mentioned in terms of reference. The Federal Supreme Court consistently held that the parties do not have a right to put questions (or have questions put) orally to a witness who filed a written statement.

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7 A. Sa v. B. Sàrl, decision of the Federal Supreme Court No. 4A_709/2014, para. 5.2.4, 21 May 2015; A. Inc. v. B. SA, decision of the Federal Supreme Court No. 4A_199/2014, para. 6.2.3, 8 October 2014; X. Ltd. v. Y. GmbH and Z. GmbH, decision of the Federal Supreme Court No. 4P.196/2003, para. 4.2.2.2, 7 January 2004.

8 U. v. Spouses G., decision of the Federal Supreme Court, para. 1.b.aa published in BGE/ATF 117 II 346, 1 July 1991. In this decision, the Federal Supreme Court examined the arbitral tribunal’s refusal to convene a hearing after re-opening the proceedings in order to instruct an expert despite a provision in terms of reference stating that the parties would have the opportunity to make oral pleadings before a decision is issued by the arbitral tribunal. It is worth mentioning that the parties did make oral arguments in the first phase of the arbitration.

X. v. Y. and Z., decision of the Federal Supreme Court No. 4P.196/2003, para. 4.2.2.2, 7 January 2004. Before the Federal Supreme Court the petitioner challenged the arbitral tribunal’s decision not to call at the hearing experts who submitted written reports despite a provision in terms of reference giving the right to the parties orally to examine witnesses who filed written statements. *T. AG v. H. Company*, decision of the Federal Supreme Court dated 24 March 1997 published in ASA Bull. (1997) p. 316 at p. 325. In this decision, the petitioner challenged the arbitral tribunal’s refusal to convene a second hearing after the parties’ exchange of submissions answering the arbitral tribunal’s questions. These questions were asked by the arbitral tribunal in writing after the parties’ “notes of pleadings” (notes de plaidoirie); the parties had an opportunity to comment in writing the other side’s answers to the arbitral tribunal’s questions. Terms of reference included the following provision: “8.11. After exchange of the written pleadings one or several hearings shall be held in order to hear
Supreme Court held that the mere reference by the parties to a set of arbitration rules containing provisions on the conduct of the proceedings does not render those provisions mandatory within the meaning of Article 182(3) FPILA.\(^9\)

In the Authors’ view the position set out above remains good law after the entry into force on 1 January 2021 of the revised Chapter 12 FPILA on international arbitration. If no right to oral pleadings and no right to put questions orally to a witness who filed a witness statement exist, one may thus be entitled to conclude that the parties have no right to a physical hearing as a matter of Swiss law. There are therefore, in principle, no limitations preventing arbitrators from convening remote hearings.

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:** Yes.

In a recent decision issued on 6 July 2020, the Federal Supreme Court dealt with the question whether the Zurich Commercial Court (*Handelsgericht*) could, against the will of the petitioner, validly hold the main hearing in ordinary proceedings governed by the CPC by way of Zoom® videoconference on 7 April 2020 (viz. when the first wave of the COVID-19 pandemic was in full swing in Switzerland).\(^{10}\)

In this decision, the Federal Supreme Court concluded that the main hearing (*Hauptverhandlung, débats principaux, dibattimento*) is to be intended as a physical hearing in a courtroom in the presence of the parties and the judges.\(^{11}\) This conclusion was based on a detailed analysis of the relevant provisions of the CPC calling for the parties to “appear” at the hearing which, according to the Court, implied a physical presence.\(^{12}\)


\(^{10}\) *C. AG v. A.*, decision of the Federal Supreme Court No. 4A_180/2020 published in BGE/ATF 146 III 194, 6 July 2020.

\(^{11}\) *Ibid.*, para. 3.2.

\(^{12}\) *Ibid.*, para. 3.2.
This precedent makes clear, for the time being, that a party has a right to a physical hearing in ordinary proceedings under the CPC.

It is worth noting that a revision of the CPC is in the making. The draft bill submitted to Parliament *inter alia* includes the possibility of hearing witnesses, parties and experts by means of videoconference.\(^\text{13}\) That said, the draft bill does not make provision for fully-fledged remote hearings.\(^\text{14}\)

Special, temporary measures were enacted as a result of the COVID-19 pandemic which include the use of videoconferences for hearings; in this respect, please refer to sub-paragraph f.11 below.

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: In principle, no.

As set out in sub-paragraph b.3 above, the CPC provides for physical hearings in ordinary proceedings.

It is trite as a matter of Swiss law that the provisions in the CPC dealing with court proceedings do not apply *per se* to international arbitration, neither is their application warranted *mutatis mutandis*.\(^\text{15}\)

According to Article 182(1) FPILA the parties are, in any event, free to agree on the manner in which the arbitral procedure is to be conducted. It is therefore conceivable – albeit rare in practice – for an international arbitration to be governed by the provisions of the CPC on court proceedings upon the parties’ agreement.\(^\text{16}\)

To the best of the Authors’ knowledge, the case described above has not yet been brought before Federal Supreme Court. That said, the Federal Supreme Court consistently held that the parties do not have a right to present their case orally or put questions orally to witnesses who filed written statements in international arbitration, even where the parties so agreed.\(^\text{17}\)

The present status of the law does not support the conclusion that a party would have a right to a (physical) hearing in an international arbitration even where the parties agreed on the application of the provisions of the CPC dealing with court proceedings.

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17 See the authorities in fn.5, 7and 8 above.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

c. **Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

**Short answer:** N/A

As indicated in sub-paragraph a.2 above, there is no right to a physical hearing in international arbitrations with seat in Switzerland.

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:** Yes, and there would be no consequences.

To the best of the Authors’ knowledge, this issue has not yet been decided by the Federal Supreme Court to date.

As already indicated in sub-paragraph a.2 above, the Federal Supreme Court held that the parties’ agreement to present their case before the arbitrators orally and to ask questions orally to witnesses does not produce the effect of rendering such activities mandatory within the meaning of Article 182(3) FPILA (due process).

Considering the Federal Supreme Court’s position described above, it is fair to conclude that no negative consequences would affect the award if the arbitral tribunal were to convene a remote hearing despite the parties’ agreement to hold a physical hearing.

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:** As a general rule, a party must raise an objection of breach of due process forthwith on pain of forfeiture.

The rule in Switzerland is that a party is under an obligation to raise forthwith any objection for breach of due process. In case of failure to do so, that party will not be entitled to rely on the alleged breach in setting aside proceedings against the award.
Since 1 January 2021 the party’s obligation mentioned above is expressly set out in Article 182(4) FPILA. Before the entry into force of the revised FPILA, the obligation was recognized by the Federal Supreme Court as a concrete rendering of the rules of good faith.

To the extent no right to a hearing exists as a matter of Swiss law, the present Authors concluded that the failure to convene a physical hearing does not amount to a breach of due process (see sub-paragraph a.2 above). That said, the interested party will be better off raising an objection forthwith in order to preserve its right to challenge the award on that ground.

Forfeiture of the right to complain of a breach of due process also extends to recognition and enforcement proceedings in Switzerland.

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

As indicated in sub-paragraph a.2 above, the parties do not have a right to a (physical) hearing in an international arbitration seated in Switzerland.

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18 Article 182(4) FPILA reads as follows: “A party that proceeds with the arbitration without immediately raising an objection to a violation of procedural rules which it knew or, exercising due diligence, ought to have known, may not subsequently raise such objection” (English translation by the Swiss Arbitration Association).
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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: No.

As recalled in sub-paragraph a.2 above, the Federal Supreme Court held that the parties’ right to due process does not include the right to a (physical) hearing.

The violation of due process is a ground upon which an award may be set aside pursuant to Article 190(2)(d) FPILA.21

The Federal Supreme Court consistently held that the parties cannot, by agreement, render the right to a hearing a mandatory rule of due process within the meaning of Article 182(3) FPILA22 (which is equivalent to the right to due process as a ground to set aside the award provided in Article 190(2)(d) FPILA).23

The grounds for challenge are set out exhaustively in Article 190(2) FPILA.24 The parties cannot by agreement add other grounds for challenge.

Failure to conduct a physical hearing by an arbitral tribunal is therefore very unlikely to constitute a basis for setting aside the award in Switzerland.

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

21 Article 190(2) FPILA reads as follows: “The award can only be challenged on the grounds that: (a) the sole arbitrator was not properly appointed or the arbitral tribunal was not properly constituted; (b) the arbitral tribunal wrongly accepted or declined jurisdiction; (c) the arbitral tribunal decided claims which were not submitted to it or failed to decide claims submitted to it; (d) the principle of equal treatment of the parties or their right to be heard in adversarial proceedings was violated; (e) the award is incompatible with public policy” (English translation by the Swiss Arbitration Association).


Short answer: It is not possible to give a clear-cut answer. On balance, the answer is likely to be in the negative.

According to Article 194 FPILA any and all foreign arbitral awards are recognised and enforced in Switzerland pursuant to the New York Convention for the Recognition and Enforcement of Arbitral Awards (“NYC”). This includes foreign arbitral awards made in a country which is not a signatory of the NYC.

Article V(1)(b) NYC (Right of the Party to Present Its Case). With regard to Article V(1)(b) NYC, the question is whether this provision is meant to make reference to a uniform and internationally recognised notion of the right of one party to present its case or whether one should rather construe that provision as making a mere reference to the notion of that right in the country where recognition and enforcement are sought.

According to the Federal Supreme Court the starting point should be the understanding of one party’s right to present its case in the country where recognition and enforcement are sought; that said, the decision must take into account the peculiarities of arbitration as well as international criteria. Therefore, the fact that a right to a physical hearing exists at the seat of the arbitration is per se not a sufficient criterion.

As already recalled in sub-paragraph a.2 above, Swiss law of international arbitration does not consider the right to a hearing as part of the right to due process.

The present publication will likely shed light on the question whether the right to a (physical) hearing may be considered as an international standard at all.

Should this not be the case, it is unlikely that a foreign arbitral award will not be recognised and enforced in Switzerland under Article V(1)(b) NYC on the basis that an arbitral tribunal decided to conduct a hearing remotely rather than in person.

Article V(1)(d) NYC (Irregularity in the Procedure). With regard to Article V(1)(d) NYC, it is debated whether a breach of any rule of procedure may constitute a valid ground for refusing recognition and enforcement of a foreign arbitral award.

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25 Article 194 FPILA reads as follows: “The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards” (English translation by the Swiss Arbitration Association).

26 P.M. PATOCCHI and C. JERMINI, “Article 194”, fn. 20 above, NN 33-35.

27 A. v. B., decision of the Federal Supreme Court No. 5A_409/2014, para. 5.2.2.2, 15 September 2014.

of Swiss commentators take the view that the breach must be serious and must relate to a fundamental rule of arbitral procedure.  

If Article V(1)(d) NYC is measured against this benchmark, to convene a remote hearing in violation of a procedural rule requiring a physical hearing would not be sufficient in order to deny recognition and enforcement in Switzerland in the present writers’ view.

In any event, for both Article V(1)(b) and (d) NYC, the party resisting recognition and enforcement must have raised an objection during the arbitral proceedings in a timely manner. That party needs not have sought to set aside the award in the country where the award was rendered.

Article V(2)(b) NYC (Public Policy). According to Article V(2)(b) NYC, the recognition and enforcement of an arbitral award may be refused if the competent authority in the requested country finds that the recognition or enforcement would be contrary to the public policy of that country.

This ground for resisting recognition and enforcement is examined of the court’s own motion.

Article V(2)(b) NYC refers to the concept of international public policy which is therefore different from domestic public policy.

According to the Federal Supreme Court, public policy within the meaning of Article V(2)(b) NYC is breached where the recognition or enforcement of a foreign award runs against the local conception of justice in an unbearable manner insofar as such award disregards fundamental provisions of the Swiss legal system. A foreign award may be contrary to the Swiss legal system not only due to its substantive content, but also in consideration of the procedure followed in the arbitration.


30 X. v. Y., decision of the Federal Supreme Court No. 4A_124/2010, para. 6.3.3.1, 4 October 2010.

31 Ibid.


With respect to procedure, public policy requires compliance with the fundamental rules of procedure which are based on the Swiss Federal Constitution such as the parties’ right to fair proceedings and the parties’ right to put their case before a court of law or an arbitrator.\textsuperscript{34}

Given the rather strict position adopted by the Federal Supreme Court with regard to public policy within the meaning of Article V(2)(b) NYC, it is highly unlikely that a foreign arbitral award would not be recognised and enforced in Switzerland merely on the basis that a remote hearing was conducted in lieu of a physical hearing.

\textit{Swiss Approach to the Grounds for Refusing Recognition and Enforcement}. The grounds for refusing the recognition and enforcement of a foreign arbitral award under Article V NYC are to be interpreted in a restrictive manner.\textsuperscript{35} Switzerland’s strong pro-enforcement bias adds weight to the proposition that, as a matter of principle, a breach of the right to a physical hearing (according to the \textit{lex arbitri} of the country were the arbitral tribunal was seated) is unlikely to lead to the foreign award being refused recognition and enforcement.

\textbf{f. COVID-Specific Initiatives}

\textit{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?}

\textbf{Short answer:} Yes.

On 25 September 2020 the Swiss Parliament adopted the Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic (the “COVID-19 Act”). Article 7 of the COVID-19 Act authorised the Federal Council (the Swiss Government) to enact provisions which derogate from the federal laws of procedure on civil and administrative matters, such as making use of teleconference or videoconference technology for activities involving the participation of the parties, witnesses and third parties.

On 16 April 2020 the Federal Council issued the Ordinance COVID-19 on Justice and Procedural Law (“Ordinance”). This Ordinance entered into force on 20 April 2020 with an initial validity until 30 September 2020; the validity was later extended until 31 December 2021.\textsuperscript{36}

\begin{footnotesize}
\textsuperscript{34} X. v. Y., decision of the Federal Supreme Court No. 4A_124/2010, para. 5.1, 4 October 2010; X. SA v. Y., decision of the Federal Supreme Court No. 4A_233/2010, para. 3.2.1, 28 July 2010.


\textsuperscript{36} Article 10 of the Ordinance COVID-19 on Justice and Procedural Law.
\end{footnotesize}
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In its first version which entered into force on 20 April 2020, hearings could be conducted remotely only if the parties so agreed or in case of justified reasons, notably in case of urgency (Article 2(1)). Witnesses and experts could be heard by videoconference without any specific requirement (Article 2(2)).

As of 26 September 2020 Article 2 of the Ordinance was amended as follows. Hearings can be conducted by videoconference if one of the following requirements is met: (a) the parties so agree; (b) a party or its counsel shows that he or she belongs to a category of persons considered to be “at risk” from COVID-19; (c) one of the members of the court belongs to the categories under (b) above; (d) in case of urgency.

Witnesses and experts may be heard remotely if either of the requirements set out under (a), (b) – with the inclusion of witnesses and/or experts – or (c) above are met.

The measures described above specifically refer to the rules of procedure in the CPC. They are therefore not applicable to an international arbitration in Switzerland, all the more so considering that there are in principle no limitations preventing an arbitral tribunal from convening a remote hearing in lieu of a physical hearing (see sub-paragraph a.2 above).