TUNISIA

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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: Yes but not expressly. The Tunisian lex arbitri provides for the option to conduct hearings but does not specify under which form they must be conducted. This said, in practice, hearings have always been physical.

The 1993 Tunisian Code of Arbitration (the “Code of Arbitration”),¹ addresses in Article 13² the arbitration’s procedure, and presents two options for different types of arbitration. In the event of ad hoc arbitration, the Arbitral Tribunal is granted the broadest powers to select the procedure to be followed by the Arbitral Tribunal and respected by the Parties, unless the Parties agree otherwise, or simply choose to apply a set of specific rules to conduct the arbitral proceedings. In the event of Institutional Arbitration, the procedure is determined in accordance with the rules of the selected institution.

The Code of Arbitration is silent on how hearings must be conducted (physically or remotely), and leaves that determination to the total discretion of the Arbitral Tribunal and the Parties.

Nevertheless, the last sub-paragraph of Article 13 of the Code, which applies to both institutional and ad hoc arbitration, subjects the arbitrators’ seemingly broad powers and the Parties’ freedom in selecting the applicable procedure to an overarching requirement:

² Article 13 of the Tunisian Code of Arbitration: “Arbitration can be ad hoc or institutional. In the event of ad hoc arbitration, the arbitral tribunal will take charge of organizing it by fixing the procedure to be followed, unless the parties otherwise agree or choose an arbitration rule. In the event of arbitration brought before an arbitration institution, the latter will organize it in accordance with its rules. In all cases, the fundamental principles of civil and commercial procedure, and in particular the rules relating to defence rights, must be respected”.

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“In all cases, the fundamental principles of civil and commercial procedure, and in particular the rules relating to due process must be respected”.

The first two paragraphs of Article 13 are a mere consecration and transposition of Article 19 of the UNCITRAL Model Law on International Commercial Arbitration, and a manifest effort from the Tunisian legislator to be in conformity with the international order in a historical context of investment incentives policies adopted by past governments. The last paragraph was in turn intended to shield the arbitral proceedings with a set of inviolable rules that can never be disregarded by the Parties or the Arbitral Tribunal. Article 13 could be considered as the cornerstone of procedure, which the Tunisian courts have repeatedly enforced to protect those inviolable rules since 1999, 6 years after the promulgation of the Code of Arbitration.

Tunisian scholars and courts have adopted a narrow interpretation of the fundamental principles of procedure set in the last subparagraph of Article 13, encompassing the so-called “elite”, i.e., the essential and indispensable, principles sustaining due process. These guiding principles comprise the essentials of the *ius commune* of civil proceedings. The common point of these principles is that they aim to regulate the conduct of the Parties and the arbitrators in order to ensure due process. They are therefore part of Tunisia’s public policy (*ordre public*), and are generally linked to general principles of law. These are universal and timeless principles, not specific rules, namely: equal treatment of the Parties, protection of defence rights, a right to adversarial proceedings, and loyalty, the breach of which is addressed explicitly in Article 14 of the Code of Civil and Commercial Procedures: “Procedural acts are void: […] (2) when they infringe public policy provisions or fundamental rules of procedure”.

3 Article 19 of The UNCITRAL Model Law on International Commercial Arbitration (“Determination of rules of procedure”): “(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”.

4 Tunis Court of Cassation, decision n° 59073, dated 1 February,1999; Tunis Court of Appeals, decision n°40, dated 4 May 1999.

5 Tunis Court of Cassation, decision n° 5139, dated 20 February 2001; Tunis Court of Appeals, decision n° 89, dated 29 May 2001; Tunis Court of Appeals, decision n° 115, dated 8 October 2002; Tunis Court of Appeals, decision n° 30539, dated 7 June 2005; Tunis Court of Appeals, decision n° 5471, dated 31 October 2005; Tunis Court of Cassation, decision n° 63984, dated 18 July 2011; Tunis Court of Appeals, decision n° 40438, dated 10 December 2013.

6 Tunis Court of Appeals, decision n° 51, dated 15 February 2000: “What is meant by the fundamental principles of procedures is ‘the elite’ procedural principles, which are the principles that in the breach of which, no just and equitable decision can be rendered, and most importantly the respect of defence rights”.

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6 Tunis Court of Appeals, decision n° 51, dated 15 February 2000: “What is meant by the fundamental principles of procedures is ‘the elite’ procedural principles, which are the principles that in the breach of which, no just and equitable decision can be rendered, and most importantly the respect of defence rights”.  

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It is also accepted that under Article 69, paragraph 1, of the Code of Arbitration, which is in the section governing international arbitration, the arbitrators can rule over a dispute solely on the basis of the written submissions of the Parties, either because the Parties failed to appear or if the Parties and/or the Arbitral Tribunal has decided to rely on written documents only to make their award. It must be noted that no similar provision is provided for in the section of the Code of Arbitration governing domestic arbitration.

In domestic arbitration, in regard to witness testimony, the Code of Arbitration does not specifically address the form (physical or remote) of hearing such testimony, and leaves such prerogative to the Arbitral Tribunal, as Article 28 provides:

“The Arbitral Tribunal shall carry out all investigations by hearing witnesses, commissioning experts or by any other act necessary for the manifestation of the truth. If a party has evidence, the Arbitral Tribunal may order it to produce it. It may also hear any person considered necessary to hear for the assessment of the dispute. Likewise, it can appoint in writing, one of its members to perform a specific act. It may request assistance from the state judiciary to obtain any decision to achieve the objectives provided for in this article”.

In practice, ad hoc Arbitral Tribunals, specifically in domestic arbitration, were often faced with opposition when suggesting that witness testimony be virtual, on the basis that it runs against the essence of the procedure and opens a window for lies and deceit. Some others encourage it if presented with the necessary safeguards, such as a high-quality webcam to be sure the witness is who they claim to be, or a good internet connection for the process to not be interrupted.

There is no precedent by the Tunisian courts addressing this specific topic. However, practitioners believe that the courts are not opposed to the use of technology by the justice system and will very likely accept the use of virtual hearings, if presented with the necessary safeguards.

The Arbitral Tribunal may determine that the circumstances of the case do not allow for a physical examination, which has been the case in many ad hoc proceedings since COVID-19 pandemic, and order a remote hearing.7

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

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7 Article 66 of the Tunisian Code of Arbitration: “Notwithstanding the provisions of the preceding article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place in any place that it will judge suitable, for the organization of consultations between its members for the hearing of witnesses, experts or parties’ witnesses, experts or parties to the proceedings, to examine the goods or other or other property, or to examine the means”. الفصل 66 مجلة التحكيم التونسية: “استثناء من أحكام الفصل المتقدم، يجوز لهيئة التحكيم أن تجتمع في أي مكان تراه مناسبا للمداولة بين أعضائها وسماع أقوال الشهود أو الخبراء أو أطراف النزاع أو لمعاينة البضائع أو غيرها من الممتلكات أو لفحص المستندات، ما لم يتفق الأطراف على خلاف ذلك”.

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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: As demonstrated above, it is understood by current practice that the right to a hearing is physical; however the Tunisian lex arbitri allows the Arbitral Tribunal to conduct an arbitration on the basis of documents only.

The right to a hearing (audience) was tackled expressly in Article 69 of the Tunisian Code of Arbitration, which contemplates that unless the Parties agree otherwise, the Arbitral Tribunal is given the liberty to hold one or several hearings or simply rely on the documents and written submissions of the Parties.

Like arbitrators, judges in domestic proceedings may hold hearings or rule solely on the basis of documents under Article 70, subparagraph 3, of the Code of Civil and Commercial Procedures, which provides:

“The motion to institute proceedings must also contain the summons to the defendant to present their response in writing accompanied by supporting evidence through a lawyer and at the hearing set for the case and failing that, the court will continue to examine the case on the basis of the documents provided”.

The combined reading of the above-mentioned Articles allows us to say that the Tunisian Legislator expressly contemplated the possibility of ruling over a dispute only by the examination of the written submissions of the Parties, assuming that they were notified timely and were given the time to appear but have failed to do so. This being said, the right to a physical hearing is available but optional. The notion of remote

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8 Article 69 of the Tunisian Code of Arbitration: “(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether it will have to hold one or more hearings during which it will hear the parties or will simply rule on documents and exhibits. However, it may, at the request of a party, hold a hearing in a timely manner. (2) The parties must receive notification in sufficient time of all procedural acts to be performed by the arbitral tribunal. (3) All the conclusions, documents or information that a party provides to the arbitral tribunal must be communicated to the other parties, who must also receive any expert report or any means on which the arbitral tribunal could rely upon to make its award”.

الفصل 69 مجلة التحكيم التونسية: “1. ما لم يتفق الأطراف على خلاف ذلك فإن هيئة التحكيم تقرر ما إذا كانت ستعقد جلسة أو جلسات تستمع فيها إلى الأطراف أو ستستمع إلى النظر في الموضوع استنادا إلى ما يقدم له من وثائق وأوراق ومع ذلك يجوز لها بطلب أحد الأطراف أن تعقد جلسة في الوقت الذي تراه مناسبا.
2. يجب أن يتلقى الأطراف في أجل كاف الإشعار بموضع أي عمل إجرائي تقوم به هيئة التحكيم.
3. يجب أن تبلغ إلى الأطراف جميع الملاحظات الكتابية والأوراق والمعلومات التي يقدمها أحدهم. كما يجب أن يبلغ إليهم أي تقرير أخبار أو أي مستند قد تصنع إليه هيئة التحكيم في حكمها”.

9 Emphasis added.
hearings is still new to the parties and, if presented to them, it is often as a last resort, not a default option. Therefore, we are unable to say that it is applicable automatically.

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: Possibly.

As explained above, under its Article 13, the Code of Arbitration is supplemented by the Code of Civil and Commercial Procedures, from which it could be inferred that hearings are physical, because it is the standard practice of the Tunisian Judicial System by virtue of the adversarial principle (principe du contradictoire), a general principle of law enshrined in Article 108 of the 2014 Tunisian Constitution:

“All individual is entitled to a fair trial within a reasonable period. Litigants are equal before the law. The right to litigation and the right to due process are guaranteed. The law facilitates access to justice and provides legal assistance to those without financial means. The law guarantees the right to appeal. Court sessions shall be public unless the law provides for a closed hearing. Judgments must be pronounced in a public session”.

A very important due process requirement is provided for in the last sub-paragraph of Article 108 of the Tunisian Constitution, which requires that: “Court sessions shall be public unless the law provides for a closed hearing. Judgments must be pronounced in a public session”. This principle is further supported and developed by Article 117 of the Code of Civil and Commercial Procedures, which provides: “The proceedings are public, unless the court decides it be private, either ex officio or at the request of the Public Prosecutor or one of the Parties, to safeguard public policy, good morals or the inviolability of family secrets”.

Two chapters are dedicated to hearings in the Code of Civil and Commercial Procedures, namely Chapter Two of Title III of the Code, which addresses “Preparatory Hearings” in civil proceedings, where the Parties are notified to appear before trial/division courts, while Chapter VI of the same title addresses “Merits Hearings and Judgments”, specifically the conduct of hearing, the role of the lawyers and most importantly notifications. Chapter VI contains generic provisions on how hearings must be conducted, and specifies the rules of each intervening party, the court, the Parties and the lawyers.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Article 92 of the Code of Civil and Commercial Procedures specifically requires that witness testimony be physical, and precludes any testimony taken in violation of its provisions:

“If it is necessary to hear witnesses, the president or ‘the reporting judge’ authorizes the party invoking their testimony to have them appear before him at the appointed day and time. The president or ‘the reporting judge’ proceeds personally to hear of witnesses, and may, if necessary, deputize a magistrate practicing at the seat closest to the home of the witness. All testimonies collected outside these forms are null and void”.

These rules apply to the domestic conduct of litigation and have served as guidance in ad hoc arbitration. Very often arbitrators resort to the Code of Civil or Commercial Procedures when grappling with contentious questions not addressed in the lex arbitri, which leads us to conclude that the ius commune extends to 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: Yes, the right to a physical hearing could be extended to arbitration.

As previously described, arbitration in Tunisia is governed specifically and directly by virtue of the Code of Arbitration, which is based on the Model Law and provides for an arbitration friendly forum where the Parties and the arbitrators are free to select the procedure they wish to apply.

It is important to note that Article 46 of the Code of Arbitration, in an attempt to better organize the domestic arbitral practice, explicitly expands the application of the Code of Civil and Commercial Procedure to arbitration, and provides: “The provisions of the Code of Civil and Commercial Procedure shall apply, if they are not contrary to those of this chapter and in cases it has not provided for”.

We are unable to conclusively assert that witness testimony must be given remotely or physically in arbitration. However, as discussed above, Article 92 of the Code of Civil and Commercial Procedures, which is also an element of the lex arbitri, specifically requires that witness testimony be physical, and precludes any testimony taken in violation of its provisions.

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: Yes.

The combined reading of Articles 13, 69 and 70 of the Code of Arbitration ensures the freedom of the Parties and/or the Arbitral Tribunal to conduct the proceedings according to the rules of their choice, further underpinning the flexibility of arbitral proceedings, which is the cornerstone of arbitration. Protecting the Parties’ autonomy was clearly the intent of the Tunisian Legislator, as the lex arbitri recognized the possibility for the Parties to let arbitrators conduct the proceedings and decide the dispute only on the basis of the documentation provided by the Parties. The Parties’ freedom to fashion the arbitral proceedings includes their freedom to waive physical hearings.

Importantly, any procedure adopted by the Parties must comply with due process in all cases, as it is recognized by the Constitution and the Code of Civil and Commercial Procedures. Physical hearings are a mere illustration and consecration of the right to an adversarial process (principe du contradictoire), which constitutes just one element of due process. There is no indication remote hearings would not protect due process.

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

Short answer: No.

The Arbitral Tribunal is bound by the choice of the Parties, as Articles 13, 69 and 70 of the Code of Arbitration all recognize the arbitrators’ discretion to define the applicable procedure “[u]nless the Parties agree otherwise”. Therefore, unless the Parties omit or simply do not request a physical hearing, arbitrators will be bound and held accountable by the Parties’ choice, which they cannot decide against. As a matter of fact, under Article 78 of the Code of Arbitration, an award can be set aside on the basis of a breach of parties’ agreement on the procedure to be followed in arbitration. However, the interested party must demonstrate that the Tribunal’s conduct severely altered the parties’ right to present their case in a fair and just manner.

d. Setting Aside Proceedings

10 See Article 70, paragraph 3, of the Tunisian Code of Arbitration: “If one of the parties fails, without legitimate reason, to appear at a hearing or to produce its evidence, the arbitral tribunal may continue the proceedings and rule on the basis of the evidence at its disposal”.

الفصل 70- الفقرة 3 مجلّة التحكيم التونسية

3 "إذا تخلف أحد الأطراف دون عذر شرعي عن حضور جلسة أو عن تقديم مستنداته، فلهيئة التحكيم مواصلة الإجراءات وإصدار حكمًا بناءً على ما تتوفر لديها من الأدلة. كل ذلك ما لم يتفق الأطراف على خلافه". 
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

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: No, a party can always raise the breach of the right to a physical hearing. However, such breach is not *per se* sufficient to set aside an award.

There are no express provisions that preclude the parties from raising a procedural violation before a court in an action to set aside an award. This being said, a party must demonstrate that it actively and continuously opposed the violation before the Tribunal and expressed its discontent with the procedural measures undertaken by the arbitrators. Moreover, a material breach of a right is not sufficient to set aside an award, but a series of criteria must be met to establish the violation constitutes a violation of due process. It must be demonstrated that the Party “[w]as not given proper notice […] of the arbitration procedure, or that it was otherwise unable to assert its rights”. 11

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: Yes, but it is not automatic, the party must demonstrate that there was indeed a breach of due process.

The Code of Arbitration does not specifically require that hearings (*audiences*) be physical and refers the matter to the Parties or the Arbitral Tribunal. In case the Parties agreed to conduct virtual hearings, there is no ground to set aside the award. In fact, Parties increasingly agree to have virtual hearings since they are cost-effective. In case the Parties did not agree to have a virtual hearing, but the Tribunal ordered one, chances are that the award might be set aside if it blatantly violates the fundamental principles of civil and commercial procedure.

Remote hearings must be conducted in compliance with the above-mentioned principles, the breach of which may subject the award to be set aside on the basis of breach of due process.

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11 See Article 78, paragraph (b), of the Tunisian Code of Arbitration: “He or she was not given proper notice of the appointment of an arbitrator or the arbitration procedure, or that it was otherwise unable to assert its rights”. 
الفصل 78، الفقرة (ب) مجلة التحكيم التونسية: “بـ أن طالب الإبطال لم يقع إعذامه على وجه صحيح بتعيين أحد المحكمين أو بإجراءات التحكيم أو أنه تعر عليه نسب أخر الدفاع عن حقوقه”. 

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Article 42 of the Code of Arbitration enumerates the cases in which a final award can be annulled/challenged in *ad hoc* arbitration:

“Even if the Parties agree otherwise, the recourse for the annulment of a final arbitration award, may be formed in the following cases:

(4) if the award is issued in violation of a rule of public policy,

(6) if the fundamental rules of procedure had not been respected”.

As for international arbitration Article 78 lists the grounds of annulment, including the breach of the agreed rules of procedure:

“(1) The arbitral award can only be appealed for annulment. In this case, the procedure to be followed will be that provided for in paragraphs two and three of those articles.

(2) The Tunis Court of Appeals can annul an arbitration award only in the following two cases: (I) When the party requesting annulment proves one of the following: (a) that a party to the arbitration agreement referred to in Article 52 of this code was under some incapacity, or the said arbitration agreement is not valid under the law to which the parties have submitted it or, failing the choice of applicable law,
under the rules of private international law private, (b) that the party was not duly informed of the appointment of an arbitrator or the arbitration procedure, or was prevented, for another reason, from asserting its rights, (c) that the arbitration award relates to a dispute not referred to in the contract, or not included in the arbitration clause, or that has ruled on matters outside the scope of the contract or of the arbitration clause. However, if the provisions of the award which relate to matters submitted to arbitration may be dissociated from those relating to questions not submitted to arbitration, only the part of the award ruling on matters not submitted to arbitration may be annulled, (d) that the constitution of the arbitral tribunal, or (*) the arbitration procedure did not comply with the provisions of the arbitration agreement in general, to a chosen arbitration rule, to the law of a country chosen as applicable or to the rules enacted by the provisions of this chapter relating to the constitution of the arbitral tribunal. (II) When the court considers that the arbitration award is contrary to public policy within the meaning of private international law. (3) The annulment request cannot be presented after the expiration of a period of three months from the date on which the applicant was issued the award or, if a request has been made under Article 77 of this Code, from the date on which the arbitral tribunal ruled on this request. (4) The court hearing the request for annulment may, where appropriate, and at the request of a party, suspend the annulment procedure, during a period of time it fixes in order to give the arbitral tribunal the possibility of resuming the arbitral proceedings or of taking any measure that the court considers likely to eliminate the grounds for annulment. (5) When the court, seized of the request for annulment, cancels totally or partially the award, it may, where appropriate and at the request of all parties, rule on the merits, it will act as amiable compositeur provided for in Article 14 of this Code, if the arbitral tribunal itself fulfils the required conditions. The rejection of the appeal for annulment confers the exequatur on the arbitral award subject to the challenge. (6) Parties who have neither domicile nor principal residence or establishment in Tunisia, may expressly agree, to exclude any recourse, total or partial, against any decision of the arbitral tribunal. If they seek recognition and enforcement of the arbitral award thus rendered in the Tunisian territory, it is mandatory to apply Articles 80, 81 and 82 of this Code.”
The examination of these provisions demonstrates that the Parties can challenge an award if they prove a breach in the procedure selected by the Parties or of the lex arbitri in case of absence of specific rules.

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: Inconclusive.

The failure to conduct a physical hearing would not per se constitute a basis to set aside an award. Rather, it is the failure to safeguard due process and fundamental rules of procedure, for instance, a failure to provide the Parties a reasonable time to present their case, a failure to communicate the dates of a hearing and most importantly a failure to notify the Parties of important procedural rules that they should be aware of in order to defend their case timely and duly before the Arbitral Tribunal.

Therefore, if the Parties were notified timely and correctly about the organization of a hearing or given the time to present their case, courts are unlikely to set aside an award just because the hearing was conducted remotely.

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, if it has been demonstrated that the conduct of a remote hearing amounted to a violation of due process.

Section VIII of the Code of Arbitration expressly deals with the recognition and enforcement of foreign arbitral awards. Article 81 enumerates the setting aside of an arbitral award, irrespective of the country in which it was made, may be refused only in the following two cases: (I) At the request of the party against whom it is invoked, if the latter submits to the Tunis Court of Appeal seized of the application for recognition or enforcement evidence establishing one of the following cases: (a) that a party to the arbitration agreement referred to in section 52 of this Code was under some incapacity, or that the agreement is invalid under the law to which the parties have submitted it, or, in the absence of such indication, under the rules of private international law, (b) the party against whom the award is invoked was not duly informed of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to assert his rights, (c) the arbitral award relates to a dispute not covered by the arbitration agreement or the arbitration clause, or that the arbitral award deals with matters outside the scope of the agreement or the arbitration clause. However, if the provisions of the award that relate to matters submitted to arbitration can be separated from those that relate to matters not submitted to arbitration, only that part of the award that deals with matters submitted to arbitration shall be recognized and enforced, and only that part of the award that deals with matters not submitted to arbitration shall be denied recognition, (d) the constitution of the arbitral tribunal or the arbitral procedure followed was not in accordance with the arbitration agreement in general, the chosen arbitration rules, the law of a country chosen as applicable or the rules of this chapter relating to the constitution of the arbitral tribunal, (e) the arbitral award has been set aside or suspended by a court of the country in which, or under the law of which it was made. (II) If the court considers that the recognition or enforcement of the award is contrary to public policy within the meaning of private international law”.

14 See Article 81 of the Tunisian Code of Arbitration: “The recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only in the following two cases: (I) At the request of the party against whom it is invoked, if the latter submits to the Tunis Court of Appeal seized of the application for recognition or enforcement evidence establishing one of the following cases: (a) that a party to the arbitration agreement referred to in section 52 of this Code was under some incapacity, or that the agreement is invalid under the law to which the parties have submitted it, or, in the absence of such indication, under the rules of private international law, (b) the party against whom the award is invoked was not duly informed of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to assert his rights, (c) the arbitral award relates to a dispute not covered by the arbitration agreement or the arbitration clause, or that the arbitral award deals with matters outside the scope of the agreement or the arbitration clause. However, if the provisions of the award that relate to matters submitted to arbitration can be separated from those that relate to matters not submitted to arbitration, only that part of the award that deals with matters submitted to arbitration shall be recognized and enforced, and only that part of the award that deals with matters not submitted to arbitration shall be denied recognition, (d) the constitution of the arbitral tribunal or the arbitral procedure followed was not in accordance with the arbitration agreement in general, the chosen arbitration rules, the law of a country chosen as applicable or the rules of this chapter relating to the constitution of the arbitral tribunal, (e) the arbitral award has been set aside or suspended by a court of the country in which, or under the law of which it was made. (II) If the court considers that the recognition or enforcement of the award is contrary to public policy within the meaning of private international law”.

الفصل 81 مادة التحكيم التونسية:
"لا يجوز رفض الاعتراف بأي حكم تحكيمي أو رفض تنفيذه. يقع النظر عن البلد الذي صدر فيه، إلا في الحالتين التالتين: أولاً، بناء على طلب الطرف المتعلق بمادة تنفيذ الحكم ضده، إذا قدم هذا الطرف إلى محكمة الاستئناف بتونس المقدم إليها طلب الاعتراف أو التنفيذ دليلاً يثبت أحد الأمور التالية: أن طرقاً في اتفاقية التحكيم المشار إليها بالفصل 52 من هذه المادة لا يتوفر فيه شرط أو شروط الأخرى، أو أن هذه الاتفاقية غير صحيحة في نظر القانون الذي ي أغضضته له الأطراف، أو أنها عند عدم الإشارة إلى مثل هذا القانون، غير صحيحة في نظر قواعد القانون الدولي الخاص.
ب، أن الطرف المتعلق بمادة تنفيذ الحكم ضده لم يقع إعلامه على الوجه الصحيح بتعيين المحكم، أو بأدراجات التحكيم، أو أنه تعرّض عليه نسب آخر الدفاع عن حقوقه، أو أن المحك التحكيم يتنافر نزاعاً لا يقاسه الاتفاقية على التحكيم أولاً يشمله الطرف التحكيمي، أو أنه يشتمل على الحكم في مسائل خارجة عن نطاق الاتفاقية على التحكيم أو الشرط التحكيمي. على أنه إذا كان من الممكن نص الحكم المتعلق بالمسائل المعروضة على التحكيم عن نصه المتعلق بالمسائل غير المعروضة على التحكيم، فجزاؤه الفاضي بالحكم في المسائل المعروضة على التحكيم هو حيدة الذي يجوز الاعتراف به وتنفيذه.

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arbitral award, it is a literal transposition of Article V\(^\text{15}\) of the New York Convention.

A failure to conduct a hearing in violation of the arbitration agreement or the applicable rules or law might form a basis to deny recognition and enforcement of the foreign award under paragraph I(d) of Article 81: “That the constitution of the arbitral tribunal or the arbitral procedure followed was not in accordance with arbitration agreement in general, the chosen arbitration rules, the arbitration rules, the law of a country chosen as applicable or the rules of this chapter relating to the constitution of the arbitral tribunal”.

Also, the interested party can always rely on the interpretation of paragraph II of Article 81 which provides for a setting aside option, if it has been demonstrated that the awards’ recognition comes in violation of the public policy: “If the court considers that the recognition or enforcement of the award is contrary to public policy within the meaning of private international law”.

However, like demonstrated above, the material breach alone does not result in the automatic refusal to deny recognition of the foreign award, absent a violation of the parties’ due process rights.

\(^\text{15}\) See Article V of the New York Convention: “(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority 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; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country”.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

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, however since the lifting of the general lockdown, the efforts to digitalize the administration of Justice are wearing out.

Following the announcement of the first person testing positive for COVID-19 in Tunisia, on March 2, 2020, the Ministry of Justice first undertook a series of protective measures within judicial establishments, as well as measures to restrict work within these establishments following the implementation of a general lockdown in Tunisia. Other measures have also been applied to penitentiary establishments where the number of people imprisoned has been considerably reduced during that period.

Decree-law number 12 supplementing the provisions of the Code of Criminal Procedure, which was adopted on April 27, 2020, was implemented following the

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16 Article 1 of the Decree-Law of the Prime Minister no 2020-12 of April 27, 2020, supplementing the Code of Criminal Procedure as follows: ‘Art. 141 bis – (1) The court may on its own initiative, at the request of the Public Prosecutor or the defendant, decide on the presence of the incarcerated defendant at hearings and the pronouncement of the judgment, by using secure audio-visual communication means to ensure communication between the courtroom in which the court is installed and the penitentiary space equipped for this purpose, and this, after consulting the Public Prosecutor and with the agreement of the accused. (2) In the event of imminent danger or with a view to preventing one of the communicable diseases, the court may decide to implement this procedure without having obtained the consent of the imprisoned defendant. The decision to adopt audio-visual means of communication is rendered by the court in writing, it is reasoned and not subject to any appeal. (3) The decision is brought to the attention of the prison director concerned, the accused, and, where applicable, their lawyer, by any means leaving a written record, within a period of at least five (5) days before the date of the hearing. In this case the lawyer has the choice of defending the principal from the courtroom, or from the prison space in which the principal is present. (4) The prison space reserved and equipped for the purposes of audio-visual communication between the court and the accused, and where applicable, his lawyer, is considered to be an extension of the courtroom, in which the same rules governing the conduct of the trial apply, including rules governing the hearing, the discipline of the hearing and the repression of any disturbance to order, in accordance with the legislation in force. (5) In all cases, the imprisoned defendant who is the subject of a trial by means of audio-visual communications enjoys all the guarantees of a fair trial. The same procedures governing the case of the defendant present
installation of the technical and logistical equipment necessary for the implementation of remote trials. A first series of six prisons and various courts across the country have been equipped with a video conferencing platform. The experimentation of this platform started at Mornaguia prison and at the Tunis Court of First Instance on May 2, 2020, with a view to its expansion to other courts and prisons in the country. 17

On March 11, 2020, the Tunisian Ministry of Justice issued a note to the presidents of various jurisdictions, the Attorney Generals and regional directors of Justice, encompassing the exceptional measures and procedures to be put in place as precautions against the COVID-19 pandemic. The note required limiting the access points to the courts at the entry doors already under control, limiting access to these establishments only to the people concerned by a service or a hearing, avoiding congestion within the courts, protecting the personnel of these establishments suffering from chronic diseases and having a weak immunity, to set up a single reception desk far from the other offices to receive the requests and to detect as much as possible the suspected cases of COVID at the entry of the courts. This note called on the regional directorates of Justice to make the necessary hygiene products and disinfectants available to court staff, as well as to organize awareness-raising campaigns within the courts about the pandemic in collaboration with regional health directorates. From that date, the regional offices began a campaign to disinfect the various jurisdictions, affecting both offices and courtrooms.

On March 12, 2020, the Tunisian Supreme Judicial Council issued a memorandum calling on the presidents of the courts, to take into account the exceptional health situation, not to allow the presence of litigants in civil matters in which the presence of a lawyer is compulsory, and limit attendance to hearings to litigants and their lawyers.

With the evolution of the public health situation in the country, the Ministry of Justice announced in a press release dated March 15, 2020, the suspension of work within the courthouses, from March 16, 2020 until further notice, except for matters of extreme urgency. On March 21, 2020, on the eve of the entry into force of the decision of the National Security Council to implement a general sanitary lockdown from March 22 to April 4, 2020, the Ministry of Justice announced the continuation of the suspension of personally in the courtroom apply to such a trial, which trial has the same legal effects. (6) In the event that the lawyer chooses to appear alongside his principal in the prison space reserved for audio-visual communication with the court, he is permitted to plead for his principal and to present his observations and requests in accordance with the law, provided that the written conclusions and the supporting documents are sent to the court at least one day before the date of the hearing. (7) The President of the hearing may, in the event of technical malfunction or interruption in the connection and audio-visual transmission, suspend the hearing for a period not exceeding two hours, or postpone it to a later date after consulting with the representative of the Public Prosecutor. (8) If the hearing is suspended, it will resume at the point where it was left off”.

work within the courthouses thus limiting their activities to the on-call services for the prosecution, investigation and criminal chambers. The Ministry of Justice also announced the suspension of the activity of clerks responsible for the reception of appeals and the enrolment of new cases. In the meantime, an on-duty system was put in place in the various courts in order to ensure the work of the prosecution and the investigation. Indeed, an on-duty chamber composed of a president and four magistrates from the sitting chambers was also set up in the various courts in order to examine criminal cases relating to detainees caught *in flagrante delicto* as well as for cases of extreme emergency. A minimum service was also put in place for the administrative tribunal and the tax court. These various measures were maintained after the two-week extension of the general lockdown period in accordance with the decision of the National Security Council dated March 31, 2020.

Various measures were adopted to substantially reduce the legal processing times, in particular for cases relating to offenses related to non-compliance with the general lockdown.

The Ministry of Justice prepared a decree-law suspending the statutes of limitations for proceedings, appeals and enforcement cases until the end of the lockdown period, and did so after having collected the opinions of all stakeholders. This adoption of this decree-law, which was published in the Official Gazette of the Tunisian Republic number 33 dated April 18, 2020, was welcomed by professional organizations who qualified it as addressing a “pressing emergency” of preserving the rights of litigants and guaranteeing equality before the courts.

The suspension was extended, following government decisions to extend the state of sanitary lockdown. As a result, this has significantly slowed down the ordinary functioning of the courts, thus causing the postponement of hearings and the extension of the periods of detention and preventive detention of detainees, while limiting the right of litigants to access justice. In order to mitigate these repercussions, the Ministry of Justice has taken steps aimed at limiting as much as possible the extension of detention periods through the establishment of a videoconferencing platform allowing remote hearings between courts and prisons, in order to reduce the movement of detainees, limit the risk of their contamination and strengthen the security of courts and prisons while guaranteeing the right to a fair trial.