UKRAINE

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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.

Adopted in 1994 and last amended in 2017, the Law of Ukraine on International Commercial Arbitration (the “ICA Law”) does not expressly provide for a right to a physical hearing in arbitration.\(^1\) The ICA Law is an almost *verbatim* adoption of UNCITRAL Model Law 1985. The provisions relating to the conduct of arbitral proceedings, none of which expressly provide for a right to a physical hearing, were adopted in their entirety.

The ICA Law applies only to international commercial arbitration. Domestic arbitration is governed by the Domestic Arbitration Act of 2004.

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

Short answer: Likely not.

It is unlikely that a right to a physical hearing could be inferred from the provisions of the ICA Law. The ICA Law provides in Article 24(1) that an arbitral tribunal has the power to decide whether to hold *oral hearings* or conduct the proceedings solely based on documents and other materials. In this regard, the tribunal’s authority is subject to the contrary agreement by the parties. The provision further sets a presumption in favour of conducting oral hearings if two conditions are met: (i) if so requested by a party and (ii) if a hearing has not been previously excluded by the parties.\(^2\) There is no basis, however,

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\(^1\) The ICA Law is available in English at <https://icac.org.ua/en/arbitrazh/pravovi-resursy/> (last accessed 5 March 2021).
\(^2\) Article 24(1) of the ICA Law provides: “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence
to infer from the content of Article 24(1) a conclusion that would affirm that in case a hearing is conducted it must be necessarily physical. In fact, the opposite could be potentially inferred. Namely, the tribunal’s broad power to conduct the proceedings in the absence of the parties’ agreement under Article 19(1) of the ICA Law coupled with the lack of an express requirement for the a physical hearing could be interpreted as excluding such right.

It may be further successfully argued that whether the hearing is remote or physical is irrelevant as long as all fundamental principles of arbitration under Article 18 of the ICA Law are observed, such as equal treatment of the parties and giving each party a full opportunity of presenting his/her case.

Nevertheless, as of the time of completing this report, no jurisprudence has emerged to test either solution, i.e., as inferring or excluding the right to a physical hearing.

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

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

Short answer: Yes, with exceptions.

or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party”.

3 Article 19(2) of the ICA Law provides: “Failing such agreement, the arbitral tribunal may, subject to the provisions of the present Law, conduct the arbitration in such manner as it considers appropriate. The powers conferred upon the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence”.

4 It shall be noted that Ukraine is a civil law jurisdiction where jurisprudence does not have a precedential value. At the same time the new Supreme Court is responsible for unified judicial practice, its legal positions clarifying application of Ukrainian law are mandatory. According to Article 13(5)(6) of the Law of Ukraine “On Judiciary and the Status of Judges” No. 1402-VIII of 2 June 2016 in the edition of 20 June 2020: “(5) Conclusions regarding the application of the rules of law, laid down in the rulings of the Supreme Court are mandatory for all the subjects of state authority, which apply in their activity the legislative act containing the respective rule. (6) Conclusions regarding the application of the rules of law, laid down in the rulings of the Supreme Court shall be taken into account by other courts while applying such rules”.

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Both the Civil Procedural Code of Ukraine (Article 212) and the Commercial Procedural Code of Ukraine (Article 197) contain provisions enabling litigants to take part in the hearing through videoconference. There are important restrictions, however. The Civil Procedural Code (Article 212(7)) and the Commercial Procedural Code (Article 197(7)) make it mandatory for interpreters, witnesses, specialists (technical assistants in photographing, taking samples etc.), and experts to participate in the remote hearings from a courthouse. For instance, an expert may participate in the hearing before an appeal court conducted by videoconference from a local court in the region, but not from his home.

These provisions also anticipate the formation of a special technical system (so-called the “Unified Judiciary Information Telecommunication System”) that would among others create an independent platform for remote hearings. While the Unified Judiciary Information Telecommunication System is not in place yet, courts in Ukraine are using other tools, such as Skype or Zoom, to conduct remote hearings, particularly while the Covid-19 pandemic lasts.

Furthermore, Ukrainian courts may consider civil and commercial disputes in the so-called simplified proceedings where the amount in dispute does not exceed a certain level and where oral hearings could be disposed (Articles 279, 369(1) and 402 of the Civil Procedural Code of Ukraine and Articles 252, 270(1) and 301(4) of the Commercial Procedural Code of Ukraine). Other examples could be found in appeal and cassation levels where cases are considered without an oral hearing.

Because of the regulation on virtual hearings and the regulation disposing of the necessity to conduct hearings in specific categories of cases, one cannot say that there is an absolute right to a physical hearing in Ukraine either in civil or commercial litigation before Ukrainian courts. Or to be precise one cannot infer an unconditional duty of the courts to conduct physical hearings for all kind of disputes in civil and commercial litigation.

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: Likely not.

The procedural provisions guiding dispute resolution in civil and commercial cases before Ukrainian courts are not applicable to arbitration. Nevertheless, one cannot exclude that their content would inform the courts’ assessment of issues relating to remote hearing in international arbitration. In other words, Ukrainian courts would rather approve that hearings are conducted remotely.

Furthermore, Ukrainian courts may even approach an express risk allocation as between the parties in connection with technical failures or disruptions in the course of videoconference with understanding. Again while not directly applicable to arbitration, a statutory regulation on risk allocation in Article 212(5) of the Civil Procedure Code of
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Ukraine and Article 197(5) of the Commercial Procedure Code may stand behind acceptance of Ukrainian courts in relation to similar allocation by the parties in international arbitration. At the same time, the restrictions contained in Articles 197(7) and 212(7) mentioned above may potentially form a more stringent perception in respect to remote participation of witnesses, experts, and interpreters in arbitration. Again, however, the provisions are not directly applicable to arbitration, and it is not entirely clear to what extent an analogy shall be drawn, if at all.

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

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

Short answer: It depends upon the situation.

5 Article 212(5) of the Civil Procedure Code of Ukraine provides: “The risks of technical incapacity to take part in videoconference outside of the courthouse and disruptions in connection lie on the party who has submitted a respective application [on videoconference].”

6 Article 197(5) of the Commercial Procedure Code of Ukraine provides: “The risks of technical incapacity to take part in videoconference outside of the courthouse and disruptions in connection lie on the party who has submitted a respective application [on videoconference].”

7 It might be interesting to observe that in one most recent case, the Kyiv Court of Appeal considered that the risk for a technical failure connected with videoconferencing lies on a party insisting on remote hearing/own participation via videoconference. The case related to recognition and enforcement of a foreign arbitral award in the territory of Ukraine. The debtor/respondent insisted on own participation through videoconference. For technical reasons videoconference could not be conducted. Despite the resulting non-appearance of the debtor, the court continued consideration of the case. The court relied on an express regulation on risk allocation connected with technical incapability to participate in videoconference outside of the courthouse in Article 212(4) of the Civil Procedure Code of Ukraine. See Ruling of the Kyiv Appeal Court in Case No.824/183/20 of 11 January 2021.
If the parties have expressly agreed to hold a physical hearing in the arbitration agreement, such an agreement has to be enforced. The tribunal most likely would lack the power to hold a remote hearing in this case. If, however, the parties merely agreed to hold a hearing in the arbitration agreement, it is unlikely that such reference without more would be interpreted as requiring a physical hearing. Tribunals, in this case, would rather have discretion to hold a remote hearing. Their order should not have a negative impact as long as in the organization and conduct of the remote hearing the tribunal complies with the fundamental principles of arbitration, namely granting parties equal treatment and an opportunity to present their case.

In this context, one shall also note that the leading arbitral institute in Ukraine – the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (“ICAC”) – has adopted changes to the Arbitration Rules on 17 September 2020. These changes expressly empower tribunals to hold remote hearings. According to Article 43 of the amended rules, arbitral tribunals have the power to establish the procedure for conducting oral hearings, including the date, duration, form, content, procedure, deadlines and place, as well as regarding the form of oral hearings (physical, remote, or in a combined, or hybrid, way). If parties choose proceedings before ICAC, they would be deemed to have agreed to the tribunals’ power to order remote hearings.

The amended rules take effect as of 1 November 2020 and apply to all proceedings that are registered after 1 November 2020. The rules may also apply to proceedings that were initiated earlier if neither party objects. At the same time, the changes in the rules in relation to the right of the tribunal to hold remote hearings may also be perceived as a form of codification prompted by the pandemic, whereas the same scope of tribunals’ power can be inferred from the broad power of the tribunals to determine the conduct of the proceedings under the previous edition of the Rules (Article 42(1)) and lex arbitri (Article 19(2) of the ICA Law).

It shall also be noted that ICAC remote hearings conducted under the Arbitration Rules in force before 1 November 2020 have not been challenged before Ukrainian courts so far.

Similar changes were adopted in the Arbitration Rules of the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (“MAC”).

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8 The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry is a leading arbitral institute in Ukraine in existence for more than 25 years and with 300-600 international disputes registered annually. More information on the arbitral institute, including its statistics and activity, is available at <https://icac.org.ua/en/pro-icac/> (last accessed 27 February 2021).
10 The Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry is a twin arbitral institute created under premises of the Ukrainian Chamber of Commerce and Industry dealing with maritime disputes. More information on the arbitral
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.

A party’s failure to raise a breach of the right to a physical hearing during the arbitral proceeding most likely will be qualified as a waiver. According to Article 4 of the ICA Law, a party who knows that any non-mandatory provision of the law or any requirement under the arbitration agreement has not been complied with and yet fails to raise an objection without undue delay or within the time-limit set forth for such objection, shall be deemed to have waived its right to object. The ICAC Arbitration Rules and the MAC Arbitration Rules contain similar provision in Article 44 of the respective arbitration rules. Ukrainian courts routinely draw negative implications from a failure of the party to object to procedural irregularities in the arbitral proceedings.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:** N/A

As explained above, the ICA Law does not provide for the right to a physical hearing, whereas the ICAC Arbitration Rules and the MAC Arbitration Rules in their latest edition expressly provide for the tribunal’s power to order a remote hearing.

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:** Highly fact-dependent but, of itself, likely not.

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It is unlikely that a mere fact of conduct of a remote hearing, without more, would be sufficient for setting the award aside. Grounds for setting aside in Article 34 of the ICA Law duplicate the grounds for setting aside in the UNCITRAL Model Law of International Commercial Arbitration. Among them, none directly relates to the form of the hearings, being physical or remote. Setting aside in the context of remote hearings could accordingly be successful if there is any ground identified in Article 34 of the ICA Law. One may potentially think of the situation where a conduct of virtual hearing results in a violation of fundamental principles of due process and either deprives a party of an opportunity to present its case or leads to unequal treatment of the parties.\(^2\) If taking place, the situation can potentially fall under the ground for setting aside described in Article 34(2)(1): either because a party was unable to present its case or because the arbitral proceedings was not in accordance with a provision of the ICA Law. Furthermore, assuming the parties have expressly agreed on the conduct of physical hearings in an arbitration agreement (a rather rare but not entirely excluded option), a failure to conduct a physical hearing could be considered as a failure of the arbitral procedure to comply with the parties’ agreement and would fall under Article 34(2)(1) as a procedure conducted not in accordance with the agreement of the parties. Overall, one should note that courts rarely annul arbitral awards in Ukraine\(^3\) and, if they do, they do this for a rather tangible ground, like a failure to notify a party about the proceedings or invalidity of an arbitration agreement.\(^4\) None award has been annulled so far for a ground that would be factually premised on the conduct of a remote hearing.

**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)*

\(^2\) Article 18 of the ICA Law defines that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

\(^3\) See the statistics of the ICAC at the UCCI for 2015-2019 which identify only 3 annulled awards in the period 2015-2019, available at <https://icac.org.ua/ru/statystyka-ta-praktyka/statystyka/> (last assessed 5 March 2021).

\(^4\) In fact, a recent review of the judicial practice prepared by the Supreme Court does not give any example for setting aside. Instead the selected practice illustrate that the courts rather critically assess allegations that proceedings was not in accordance with the agreement of the parties or that the parties were treated somewhat unequally. See D.D. LUSPENIK, Y.V. CHERNYAK and M.M. SHUMYLO, “Review of the Practice of the Cassation Civil Court in the Supreme Court in Cases Related to Enforcement of Arbitral Awards and Their Setting aside” (Kyiv 2019) pp. 27-30. For an example of a rare successful setting aside of an arbitral award, see Resolution of the Supreme Court in Case No. 761/17236/17 dated 9 October 2019. The award was annulled because of the failure of an arbitral tribunal to properly notify a party. It shall be also noted that the judicial practice on setting aside, even rare and limited, is not free of criticism.
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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: Likely not.

Ukrainian courts have repeatedly held that the list of grounds for non-enforcement of foreign awards contained in Article V New York Convention and the corresponding provisions in Article 36 of the ICA Law and Article 478 of the Civil Procedural Code is exhaustive and must be interpreted narrowly. Overall, one may observe that there is a high threshold to refuse to recognize and enforce arbitral awards in Ukraine. The Supreme Court has recently clarified that:

“[…] Ill-grounded refusal to grant permission for enforcement of an award of international commercial arbitration court is a kind of blocking the award and can, in the event of an arbitrary application, have a character of an artificial normative barrier, which from the point of international law is absolutely impermissible. Such blocking will not only fail to meet the purposes of international arbitration but also will violate the legitimate rights, which such an award may actually grant to the creditor in other states. Refusal to recognise and grant permission to enforce in the territory of Ukraine of arbitral award may violate guarantees, provided for by part 1 of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, will constitute a disproportionate interference with the right of ownership of the creditor to the awarded money […]”.17

In applying provisions governing recognition and enforcement of arbitral awards in Ukraine, courts are most unlikely to find a violation of the right to a physical hearing,

16 See, e.g., Resolution of the Supreme Court of Ukraine of 25 January 2019 in Case No. 796/165/18, para. 83, and Resolution of the Supreme Court of 22 October 2020 in Case No. 824/124/19.
17 Resolution of the Supreme Court of Ukraine of 8 May 2019 in Case No. 761/39565/17 (also cited in Resolution of the Supreme Court of Ukraine of 24 September 2020 in Case No. 824/198/19).
18 The procedure on recognition and enforcement of foreign arbitral awards decisions is governed by the Civil Procedural Code of Ukraine (Articles 474-482). On the judicial guidance for the procedures on recognition and enforcement of foreign awards in Ukraine, see Resolution of the Plenum of the Supreme Court of Ukraine of 24 December 1999 No. 12
to the extent that such right exists in the relevant jurisdiction, as an automatic violation of the right of the party to present its case under Article V(1)(b), irregularity in the procedure under Article V(1)(d) and/or violation of public policy of the country where enforcement is sought under Article V(2)(b). Much would depend on the precise source of the right to a physical hearing in the relevant jurisdiction, whether mandatory or not, as well as surrounding circumstances, to find a party was deprived of a right to present its case or otherwise suffered a serious violation of due process. Only serious violations of due process may as a rule warrant refusal in recognition and enforcement, such as a failure to notify a party about the procedure or consideration of the dispute that falls outside of the scope of arbitration agreement, for instance. In what relates to inability of a party to present its case (Article V(1)(b)) or an allegation that a procedure was not in accordance with the parties’ agreement or the law of the country where an award was made (Article V(1)(d)), Ukrainian courts would rather approach these grounds with caution and only factually proven substantial violations would lead to non-enforcement. Ultimately, Ukrainian courts narrowly construe the concept of public policy. As early as in 1999, the Supreme Court of Ukraine defined public policy as “the legal order of state, the core principles and grounds, which form the basis of the order existing there (relate to its independence, integrity, self-sufficiency and inviolability, the main constitutional rights, freedoms, guarantees etc)”. More recently the Supreme Court of Ukraine narrowly construe the concept of public policy. As early as in 1999, the Supreme Court of Ukraine defined public policy as “the legal order of state, the core principles and grounds, which form the basis of the order existing there (relate to its independence, integrity, self-sufficiency and inviolability, the main constitutional rights, freedoms, guarantees etc)”.

“On the Practice of Consideration by the Courts of the Motions on the Recognition and Enforcement of the Judgments of Foreign Courts and Awards of Foreign Arbitral Tribunals and on Setting Aside the Awards Rendered in the International Commercial Arbitration Proceedings in the Territory of Ukraine”; Higher Specialized Court of Ukraine on Consideration of Civil and Criminal Cases, Generalization on the Practice of Consideration by the Courts of Cases on Setting Aside the Awards of the International Commercial Arbitration Court of Ukraine at the Chamber of Commerce and Industry of Ukraine and on Recognition and Enforcement of International and Foreign Arbitral Awards, 1 September 2015; Legal position laid down in the Resolution of the Judicial Chamber in Civil Cases of the Supreme Court of Ukraine of 30 September 2015 in Case No. ‘6-261цс15’.  
19 Ruling of the Kyiv Court of Appeal in Case no.824/132/20 dated 5 October 2020.  
20 Ruling of the Third Judicial Chamber of the Cassation Civil Court of the Supreme Court of 21 May 2020.  
21 In the recent review of the judicial practice prepared by the Supreme Court, none case actually demonstrates refusal in enforcement because of any of these reasons. See D.D. LUSPENIK, Y.V. CHERNYAK and M.M. SHUMYLO, “Review of the Practice of the Cassation Civil Court in the Supreme Court in Cases Related to Enforcement of Arbitral Awards and Their Setting Aside, fn. 14 above, pp. 4-25. Of interest, a previously cited Ruling of the Kyiv Court of Appeal in Case no.824/132/20 of 5 October 2020 (fn. 19 above) also illustrates a successful reliance on non-compliance of the conducted proceedings with the parties agreement as the proceeding took place in another place that what was agreed by the parties in the arbitration agreement.  
22 Resolution of the Plenum of the Supreme Court of Ukraine of 24 December 1999 No. 12, fn. 18 above, para.12.
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Court confirmed the extraordinary character of public policy and held that the provision on public policy is:

“[A] specific mechanism, which fixes the priority of state interests over the private ones and, therefore, safeguards the public policy of a state from any negative effects on it. The clause on the public policy in international civil process prevents the recognition on the territory of state the arbitral award if as a result of its enforcement/execution such acts will be committed which are directly prohibited by law or infringe sovereignty or security of a state”.23

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.

As mentioned, the ICAC Arbitration Rules and the MAC Arbitration Rules were amended to reflect and affirm the existent practice with remote hearings properly.

23 Ruling of the Supreme Court of Ukraine dated 8 May 2019 in Case No. 796/165/18.