

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

VIETNAM

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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.

Neither Law No. 54/2010/QH12 on Commercial Arbitration (LCA), being the law governing both domestic and international arbitration seated in Vietnam, nor Resolution No. 01/2014/NQ-HDTP of the Supreme People's Court guiding certain provisions of the LCA (Resolution 01) expressly provide for a right to a physical hearing in arbitration.

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: Yes, it can be inferred.

Although the *lex arbitri* of Vietnam does not explicitly provide for a right to physical hearings in arbitration, such right can be inferred from certain provisions of the LCA, the Rules of Vietnam International Arbitration Centre (VIAC), and other institutional rules as well as common arbitration practice in Vietnam.

The most relevant provisions of the LCA on hearings include Article 11.2 (place of hearing), Article 47 (summons of witness to hearing), Article 54 (preparation of a hearing), Article 55 (attendee and procedure of hearing), Article 56 (absence of parties), and Article 57 (postponement of hearing). Although none of these provisions requires explicitly that any physical hearing must take place, some provisions imply so.

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To be specific, Article 11(2) of the LCA states that: “Unless otherwise agreed by the parties, the arbitration tribunal may conduct hearing sessions at a location which it deems appropriate for mutual consultation between the members of the tribunal, for taking statements from witnesses, for seeking advice from experts, or for conducting evaluations of goods, assets or other materials”. Article 54(1) of the LCA provides that: “The arbitration tribunal shall make decisions on the time and location for holding dispute resolution sessions, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre”. Even though these provisions do not strictly refer to in-person hearings, as these provisions require the arbitral tribunal to determine both the time and *the location* of hearings, they can be read that unless otherwise agreed by the parties, the arbitral tribunal must always conduct physical hearings. Additionally, pursuant to Article 56(3) of the LCA, “the arbitration tribunal may, at the request of the parties, rely on the file to conduct a dispute resolution session without requiring the presence of the parties”. Accordingly, the LCA allows the tribunal to decide the case solely on the documents submitted by the parties only if this is requested by the parties. In other words, under Vietnamese law, the hearings shall always be oral unless otherwise agreed by the parties.

The above-implied right to physical hearings under the LCA is also supported by the rules on conducting hearings of the most favoured arbitration institutions in Vietnam. Article 25(1) of the 2017 Rules of Arbitration of the VIAC¹ (VIAC Rules), being the pre-eminent and most commonly utilized arbitration centre in Vietnam, provides that: “The Arbitral Tribunal shall fix the time and the location of hearings unless the parties have agreed otherwise. The Arbitral Tribunal may conduct the hearings by means of *teleconference, video-conference or by any other appropriate means if the parties have agreed so*” (emphasis added). Accordingly, under the VIAC Rules, by default, the hearings must always be conducted physically. Virtual hearings are only possible upon the parties’ agreement. Furthermore, under the VIAC Rules, documentary hearings may only be conducted at the request of parties.²

In addition, pursuant to the expedited procedure of Article 37 of VIAC, the arbitral tribunal may (i) conduct the hearing by means of teleconference, video-conference or by any other appropriate means and (ii) conduct the hearing based on documents in absence of the parties unless there is an objection of a party. Accordingly, under the expedited procedure, by default, the arbitral tribunal shall have the discretion to conduct a hearing remotely unless a party objects thereto. However, as specifically laid down in Article 37(1) of the VIAC Rules, the expedited procedure would only be applicable if the parties agree so. As a result, for the arbitral tribunal to enjoy the discretion to conduct a hearing remotely or document-based under the expedited procedure, the prerequisite is still that the parties must agree on the application of the expedited procedure. In other words, by

¹ VIAC is considered as the most prominent arbitration institution in Vietnam.

² Article 27(3) of the VIAC Rules: “The Arbitral Tribunal may, at the request of the parties, rely on the documents and evidence readily available to proceed with a hearing without the presence of the parties”.

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agreeing on the application of Article 37(1) of the VIAC Rules, parties have limited their right to physical hearings.

In practice, from January to October 2020, two (02) hearings have been conducted completely remotely under the VIAC Rules whereas twelve (12) hybrid hearings which combined virtual and physical hearings have been conducted, showing that parties are now more open to a shift from in-person hearings to virtual hearings due to the COVID-19 pandemic. For instance, upon the parties' consenting to hybrid hearings, the involved parties and arbitrators who could attend physically shall do so in person at the location chosen by the parties or decided upon by the arbitral tribunal, while those other parties and arbitrators who could not attend in person at the location of the hearing shall participate in the hearing via remote means supported by the VIAC.

Other Vietnamese arbitration institutions have also followed the approach that remote hearings can be conducted only with the parties' agreement. Typically, although the Hanoi International Arbitration Centre (HIAC) has developed the first online arbitration platform in Vietnam, under the HIAC Rules the arbitral tribunal may conduct the hearings online via the platform of the HIAC only if the parties have agreed so.³ Similarly, the arbitral tribunal may conduct the hearing solely based on the documents without the presence of the parties only if the parties agreed so.⁴

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.

Under the Vietnamese rules of civil procedure, court trials can only be conducted in-person and remote hearings are not contemplated in civil proceedings.

To illustrate this, the 2015 Civil Procedure Code (CPC) provides that first-instance hearings must be conducted at the time and *the place* as stated in the decision to bring the case for trial,⁵ which is also true for hearings conducted under expedited proceedings.⁶ The hearings shall be held inside or outside the court's headquarters provided that due solemnity is ensured and that the arrangement of the trial room

³ Article 26(1) of the HIAC Rules.

⁴ Article 28(3) of the HIAC Rules.

⁵ Article 220(1)(g) and 222 of the CPC.

⁶ Article 318 of the CPC.

conforms to applicable regulations.⁷ As such, court trials can only be conducted physically in a trial room which satisfies the formality requirements for the hearings under Article 224 and 234 of the CPC, such as that the national emblem must be hung on the wall of the trial room, the participants must be checked by the security forces before entering the trial room, must present the relevant summons to the court clerk's table before the commencement of the hearing, and must sit at the right position in the trial room as guided by the clerk.⁸ Importantly, the CPC specifically recognizes the principle of "direct and oral trial" which requires that the court must *directly* determine the facts of the case by listening to the statement of the parties, asking questions and listening to the answers, and managing the debate between the parties conducted in the trial room.⁹ At the end of the hearing, the participants shall sign the hearing minutes.¹⁰

In addition, the activities conducted before the commencement of the hearings are also understood to be conducted physically. For instance, if there is a discrepancy in the statements of the parties and/or witnesses or otherwise upon the request of the parties, the court would conduct a confrontation between the parties and/or witnesses. The confrontation process would be recorded in writing and signed by the parties and/or witnesses.¹¹ For preparation of the trial, the court shall conduct the meeting for examination of evidence and mediation with the parties, which shall also be recorded in writing and signed by the parties.¹²

As the current civil procedure rules are designed specifically for physical hearings, if remote hearings are to be conducted, certain procedural requirements as illustrated above can hardly be met.

Nevertheless, it should be noted that Vietnam is in the process of building and developing an electronic court. As long ago as 2014, the Prime Minister had approved the project to invest in working equipment for the People's Court system, laying the foundation for the project of development of digital courts in 2024.¹³

As a first step, the State in general and the Supreme People's Court (SPC) in particular have been promoting the application of technology to judicial activities. For instance, the submission of claims and evidence and the service of judicial documents via electronic means have been recognized under the 2015 CPC and further guided by Resolution No. 04/2016/NQ-HDTP of the SPC dated 30 December 2016. Further, since 2017 redacted court judgments and decisions have started to be made public on the court's digital portal as per Resolution No. 03/2017/NQ-HDTP of the SPC dated 16 March 2017. Under Directive No. 01/2020/CT-CA dated 09 January 2020, the SPC

⁷ Article 223 of the CPC: "The Court hearings must be held at the head offices of the Court or outside the Court, provided that the solemnity is ensured and the arrangement of the courtrooms shall conformed to regulations under Article 224 of this Code".

⁸ Articles 224 and 234 of the 2015 CPC.

⁹ Article 225 of the 2015 CPC.

¹⁰ Article 236 of the 2015 CPC.

¹¹ Article 100 of the 2015 CPC.

¹² Article 211 of the 2015 CPC.

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further ordered the strengthening of the application of technology to judicial activities with the aim of establishing a “digital court system”. However, there has been no specific instrument regarding virtual hearings. Furthermore, virtual trials are still far from becoming applicable in Vietnamese court practice. Even in big cities such as Hanoi and Ho Chi Minh, local courts are often not equipped with the necessary technology to go entirely virtual. But even where they are, courts still face substantial technical challenges and security issues.

This is one of the reasons why, during the outbreak of COVID-19 pandemic in Vietnam, the SPC has issued several notices instructing lower courts to suspend opening hearings or summoning the parties to the court.¹⁴ In case of necessity, the courts might open the hearings under strict requirements such as the maximum number of participants in the trial room and the minimum distance among the participants. Notably, the lower courts were required to conduct the hearings via virtual means if possible. Nevertheless, in practice, due to the lack of detailed guidance on how to progress virtual hearings and the poor facilities of lower courts, to our best knowledge, there were several criminal hearings that were broadcast online on television in April 2020 only.¹⁵

From the above, it could be concluded that the current rules on civil procedures only contemplate physical hearings, the right of the parties to a physical hearing can hardly be denied and the conduct of any virtual hearing if conducted should be further guided for the avoidance of procedural violations.

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

Short answer: No.

In principle, the rules of civil procedures are not applicable to arbitration proceedings which are governed separately by the LCA and its bye-laws. Pursuant to the scope of regulation in Article 1 of the CPC, it provides for, among other matters, the basic principles in civil proceedings, the order and procedures for initiating lawsuits at the People’s Court to settle civil cases and lawsuits; procedures for recognition and

¹⁴ Directive No. 02/2020/CT-CA dated 10 March 2020, Letter No. 113/TANDTC-VP dated 30 March 2020, Letter No. 127/TANDTC-VP dated 16 April 2020, and Letter No. 289/TANDTC-VP dated 27 July 2020.

¹⁵ *News on the activities of the People’s Procuracies in Quang Ninh, Thai Nguyen, and Quang Tri*, The Digital Portal of the Supreme People’s Procuracy, 10 April 2020, available at <<https://vksndtc.gov.vn/tin-tuc/tin-hoat-dong-vksnd-dia-phuong--quang-ninh---thai--t7666.html?Page=14#new-related>>; the People’s Procuracies of Tan Son district digitized documents and published evidence by images, available at <<http://vienkiemsattinhphutho.gov.vn/tin-tuc/VKSND-Huyen-Tan-Son/29963/vksnd-huyen-tan-son-thuc-hien-so-hoa-ho-so-va-cong-bo-chung-cu-bang-hinh-anh>>.

enforcement of foreign civil judgments/decisions or foreign arbitral awards in Vietnam. Whilst, as further specified under Article 415 of the CPC, when intervening in the arbitral proceedings to the extent expressly provided for in the LCA, the courts shall apply the laws on commercial arbitration, i.e., the LCA and its bye-laws. This principle is also confirmed in the SPC's guidance to lower courts.¹⁶ Therefore, the right to a physical hearing existing under civil procedures does not extend to arbitration. In any case, as stated in subparagraphs a.1 and a.2 above, although not expressly set out, the right to physical hearings in arbitration does exist by inference.

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.

As noted in subparagraph a.2 above, pursuant to Article 11(2) and Article 54(1) of the LCA, unless the parties agree or the arbitration rules provide otherwise, the tribunal shall fix the time and the place of the hearing. The wording of these provisions does not limit the parties' right to agree on the time and place of the hearing. Rather, it is widely accepted that the parties could agree on whatsoever issue they wish concerning conducting hearings, including the mode of hearing. This understanding is supported by the several arbitration rules as well as the arbitration practice at the arbitration institutions.

In particular, as provided for under Article 25(1) of the 2017 VIAC Rules, the arbitral tribunal may conduct the hearings by means of teleconference, video-conference or by any other appropriate means if the parties have agreed so. Or by agreeing on the application of Article 37(1) of the VIAC Rules, the parties could exclude their right to physical hearings and confer the discretion on the tribunal to decide on this matter. In practice, several completely or partially remote hearings have been held under the VIAC Rules upon the agreement of the parties.

Besides, the LCA is silent about whether the agreement on other hearing modes must be made prior to or after the dispute arises. Therefore, in principle, the parties can waive the right to physical hearings in advance of the dispute.

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?*

¹⁶ Supreme People's Court, *Judicial Manual on Arbitration and Mediation* (Thanh Nien Publishing House 2017) p. 101.

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Short answer: Likely no.

As submitted in subparagraph a.2 above, the right to a physical hearing does exist although by inference. Therefore, unless otherwise agreed by the parties, the arbitral tribunal must always hold a physical hearing. As further detailed in the following answers, a failure to conduct a physical hearing, especially when absent party agreement to dispense with one, would very likely be a violation of the arbitration procedure under the LCA or a violation of the fundamental principles of Vietnamese laws, which are the grounds for setting aside arbitral awards. Remarkably, in a recent case the court set aside an arbitral award when the arbitral tribunal failed to honour the parties' agreement on the location of the 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: It depends.

As mentioned in subparagraph c.6 above, a breach of the right to a physical hearing during the arbitral proceeding could be deemed to be (i) the violation of the parties' agreement or of the provisions of LCA and/or (ii) the violation of the fundamental principles of Vietnamese law. As a result, it could constitute grounds for setting aside arbitral awards, as set out under Article 68(2)(b) and 68(2)(dd) of the LCA and further guided by Article 14 of Resolution 01¹⁷.

Under Article 13 of the LCA, as further guided by Article 6 of Resolution 01,¹⁸ if a party discovers a breach of the provisions of the LCA but fails to object to such breach

¹⁷ Article 68 of the LCA.

¹⁸ Article 13 of the LCA provides that: "If a party discovers a breach of the provisions of this Law or of the arbitration agreement but continues to conduct to arbitral proceeding and does not object to such breach within the time-limit stipulated in this Law, [such party] shall lost the right to object at the arbitration or before the court". Article 6(1) of Resolution 01 provides that: "1. Where a party discovers any violation of the LCA or of the arbitration agreement by the other party but continues with the arbitration procedure and does not object to such violation to the Arbitral Tribunal or the relevant Arbitration Centre within the time limit set by the LCA, such party shall lose its right to object to any such violation in the Arbitration or in Court. Where no time limit is set by the LCA, the time limit shall be determined in accordance with the parties' agreement or by the arbitration rules. In case the parties have no agreement or it is not specified by the arbitration rules, objection must be raised before the Arbitral Tribunal renders the arbitral award".

within the time limit set out by the LCA, the parties' agreement, or the arbitration rules or otherwise before the arbitral tribunal renders the award, that party shall lose its right to raise any objection or use it as a ground for any application to set aside an award. In any case, any objection by either party must be raised before the arbitral tribunal renders the arbitral award. Article 6(2) of Resolution 01/2014 further requires the court to examine the documents, evidence, and arbitration rules to determine whether or not one or more parties have waived their rights to object with regard to such requests.¹⁹

However, in the case of an application for setting aside an arbitral award based on the violation of the fundamental principles of Vietnamese law under Article 68(2)(dd), the competent court shall be obliged to decide whether such award should be set aside or not. As a result, under Article 6(3) of Resolution 01, the principle of "waiver of right to object" does not apply. Accordingly, if a party fails to raise the objection to the breach of its right to a physical hearing during the arbitral proceeding, it shall lose its right to refer to such breach to set aside the arbitral award based on the ground that the arbitration proceeding was in violation of the LCA under Article 68(2)(b) but shall not lose its right to refer to such breach in applying to set aside the arbitral award based on the ground that the arbitral award is contrary to the right to present the case or the *party-autonomy* principle, which are widely accepted as two of the fundamental principles of Vietnamese law under Article 68(2)(dd).

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: It depends.

First of all, according to Article 68(2)(b) of the LCA, an arbitral award shall be set aside if "the composition of the arbitral tribunal was [or] the arbitral proceedings were inconsistent with the agreement of the parties or contrary to the provisions of this Law".

¹⁹ Article 6(2) of Resolution 01/2014: "Before examining the request of one or more parties on whether there were violations of the LCA or the arbitration agreement, the Court shall examine the documents, evidence, and arbitration rules to determine whether or not one or more parties have waived their rights to object with regard to such requests. Where the Court determines that the right to object to any such violation has been waived as provided in Article 13 LCA and in accordance with the guidance in Clause 1 of this Article, the party waiving its right to object shall not be entitled to any recourse against the decisions of the Arbitral Tribunal or to request to set aside the arbitral award with regard to any such violation. The Court must not rely on the violations to which one or more parties has lost its (their) right to object in determining whether or not to accept the request of one or more parties".

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As noted above, a failure of the arbitral tribunal to hold the hearings physically is very likely to be deemed as a procedural violation of the LCA which is an explicit ground for setting aside an arbitral award under Article 68(2)(b) of the LCA.

Although the wording of Article 68(2)(b) of the LCA is silent as to what types of procedural irregularities should lead to the setting aside of arbitral awards, Article 14 of Resolution 01 has also required that only “serious violations” of procedure would be sufficient to annul an award:

“2. The court shall annul the arbitral awards in accordance with the provisions in Article 58 and Article 61 of LCA in one of the cases below:

b) The composition of the arbitral tribunal or the arbitral proceedings were inconsistent with the agreement of the parties or contrary to the provisions LCA are circumstances where the parties have an agreement on the composition of the Arbitral Tribunal and/or the arbitration rules but the Arbitral Tribunal fails to comply with such an agreement or the Arbitral Tribunal fails to comply with the LCA and the Court determines that such violations are serious and the award must be set aside if the Arbitral Tribunal cannot remedy or does not remedy the violations upon being requested the Court in accordance with Clause 7 Article 71 LCA”.²⁰

The examples listed in Resolution 01 also reflect an understanding that the procedural violation must prejudice the award debtor or affect the outcome of the proceeding. This requirement has also been reiterated by the Supreme People’s Court in its training guidelines for local judges so, accordingly, the court is required to determine whether the arbitral tribunal made a procedural violation and then whether this violation is serious.²¹ Accordingly, it is arguable that the failure to conduct physical hearings *per se* does not constitute a procedural violation as a ground for setting aside under Article 68(2)(b) of the LCA. However, in practice, the courts often take a very strict approach to this matter.

For instance, pursuant to Article 25(4) of the VIAC Rules, after the final arbitral hearing, the arbitral tribunal shall not have any obligation to consider any additional document or evidence, unless the parties agree otherwise. In a recent case, after the final arbitral hearing was held, the arbitral tribunal accepted a claimant’s submission on costs although the parties did not have any agreement pursuant to Article 25(4) of the VIAC Rules. In Decision No. 07/2019/QD-PQTT dated 18 July 2019, the People’s Court of Hanoi determined that this constituted a procedural violation and set aside the award based on Article 68(2)(b) of the LCA without any reasoning on the severity of the violation.

²⁰ Article 14 of Resolution 01, *Grounds for annulment of arbitral awards prescribed in Article 68 of LCA*.

²¹ Supreme People’s Court, *Judicial Manual on Arbitration and Mediation*, fn. 16 above, pp. 90-92.

In another high-profile case, the arbitral tribunal decided to change the location of the hearings to Singapore and Japan although during the arbitration proceedings the parties agreed that the hearing would take place in Hanoi. When the award debtor, being the Respondent in the arbitration case, challenged the arbitral award before the competent court of Vietnam, the court only determined that this change of place of hearing “affected the ability to participate in the hearing of [the respondent] and is a serious violation of arbitral procedures”.²² The Decision failed to clarify how the hearings to be conducted in Singapore and Japan would prevent the Vietnamese respondent from participating and presenting their case. This change might inevitably have caused some logistical difficulties for the respondent being a Vietnamese company to participate. However, considering the relevant facts of this case that the respondent is the employer of a multi-million USD project and actively engaged Singapore law firms since the beginning of the arbitration, a conclusion that a change of hearing place from Vietnam to Singapore or Japan deprived the respondent of an opportunity to participate would need a lot more to convince. Moreover, it is the Court that also indicates in another part of Decision No 11/2019/QĐ-PQTT that “[d]uring arbitration proceedings, Respondent did not participate in the hearings which is their own fault, failure to fulfil responsibilities and disadvantage in presenting evidence”.²³ Nevertheless, the court finally decided to set aside the arbitral awards under both Article 68(2)(b) and 68(2)(dd) of the LCA.

Secondly, according to Article 68(2)(dd) of the LCA, an arbitral award shall be set aside if “the arbitral award is contrary to the fundamental principles of Vietnamese law”. According to Article 14(2)(dd) of Resolution 01, the fundamental principles of Vietnamese law are “the basic principles having overriding effect on the formulation and implementation of Vietnamese laws”. The requirements for the courts to set aside arbitral awards based on this ground are specified under Article 14(2)(dd) of Resolution 01 as follows:

“The courts shall set aside an arbitral award only after proving that the contents of the arbitral award are *contrary to one or several fundamental principles of Vietnamese laws* that the Arbitral Tribunal failed to honour when rendering the arbitral award *and the arbitral award infringes seriously the interests of the state, the lawful rights and interests of one or several parties, or of third parties*” (emphasis added).

²² Decision No. 11/2019/QĐ-PQTT dated 14 November 2019 of the People’s Court of Hanoi.

²³ More detailed analysis of the case can be found in NGUYEN Ngoc Minh, NGUYEN Thi Thu Trang and NGUYEN Thi Mai Anh, *Vietnam Chapter in The Asia-Pacific Arbitration Review 2021 of Global Arbitration Review* (Law Business Research LTD 2021) available at <<https://globalarbitrationreview.com/edition/1001508/the-asia-pacific-arbitration-review-2021>>.

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Some examples of the fundamental principles of Vietnamese laws are given under Resolution 01 include the party autonomy principle and the independence of the arbitrators.

As noted above, the right to physical hearings is recognized by inference under both the LCA and the rules on civil procedure. However, whether the right to physical hearings is considered as a fundamental principle of Vietnamese laws is still open to debate. To rule that a failure to conduct physical hearings is a violation of the fundamental principles of Vietnamese laws as a ground to set aside the arbitral award, it is needed to prove that (i) physical hearing is a fundamental principle of Vietnamese laws and (ii) the failure to conduct the hearing physically infringes seriously the interests of the state, the parties or third parties.

Meanwhile, it should also be noted that party autonomy is consistently considered as a fundamental principle of Vietnamese law under both Resolution 01 and the draft Resolution on recognition of foreign arbitral awards. Therefore, the party challenging the arbitral award often tries to prove that the breach of its right to physical hearings has translated into a material violation of the party autonomy principle or violation of their right to present their case.

To sum up, a breach of a party's right to a physical hearing may constitute a per se ground for setting aside an award under Article 68(2)(b) of the LCA, or can be translated into a violation of a fundamental principle of Vietnamese law and become a ground for setting aside under Article 68(2)(dd).

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: N/A.

As submitted above, the right to a physical hearing in arbitration does exist although by inference.

In any case, if the parties have made an agreement on physical hearing, the failure of an arbitral tribunal to conduct the proceedings in line with the parties' agreement is likely to constitute a basis for setting aside the award.

e. Recognition/Enforcement

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

(violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: Yes.

Articles V(1)(b), V(1)(d) and V(2)(b) of the New York Convention have been adopted into Articles 459(1)(c), 459(1)(dd) and 459(2)(b) respectively of the 2015 CPC.²⁴ Previously, these grounds were laid down largely the same under Articles 370(1)(c), 370(1)(dd) and 370(2)(b) of the 2004 Civil Procedure Code. While there has not been any official guidance on how to apply the grounds under Article 459 of the 2015 CPC, during the time when the 2004 CPC was effective, the SPC issued Letter No. 246/TANDTC-KT dated 25 July 2014 to guide the lower courts about the grounds for refusal of recognition of foreign arbitral awards under the 2004 CPC. Pursuant to Letter No. 246/TANDTC-KT, to determine whether there was a procedural violation, the court shall “base on the arbitration agreement or base on the law of the country where the foreign arbitral award was rendered if the arbitration agreement is silent”. In the 2017 Judicial Manual on Arbitration and Mediation of Vietnam, the SPC also provides some guidelines for the lower courts about the grounds for refusal of recognition of foreign arbitral awards under the 2015 CPC. Upon the recent draft Resolution of the SPC in July 2019 (the Draft Resolution) also provides some guidance on the procedure for recognition and enforcement of foreign arbitral awards, including the interpretation of the abovementioned provisions. Although the Draft Resolution has not come into force, it reflects the common understanding of the Vietnamese courts on this matter. The specific guidelines of the SPC are summarized as follows:

(i) Regarding the ground under Article 459(1)(c) of the 2015 CPC (right of the party to present its case due to plausible reasons): The award debtor must prove that they have been deprived of due process. The plausible reasons for the award debtor’s failure to exercise their procedural rights is a force majeure event or objective obstacle in which the debtor cannot exercise their procedural rights, or when the arbitral tribunal seriously

²⁴ Article 459(1)(c) of the 2015 CPC provides that, “The judgment debtors being agencies, organizations and individuals are not promptly and conformably notified of the appointment of arbitrator officer and of procedures for processing the disputes at foreign arbitrator, *or due to other plausible reasons, such agencies, organizations and individuals cannot exercise their procedure rights*” (emphasis added).

Article 459(1)(dd) of the 2015 CPC provides that, “Compositions of foreign arbitrator and/or procedures for settlement of disputes conducted by foreign arbitrator is not conformable to the arbitration agreement or to the law of the country where the foreign arbitrator’s award has been made, in case the arbitration agreement does not provide for such matters”.

Article 459(2)(b) of the 2015 CPC provides that, “The recognition and enforcement in Vietnam of foreign arbitrator’s award are contrary to basic principles of law of the Socialist Republic of Vietnam”.

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violated the principle of independence and impartiality principle while resolving disputes;²⁵

(ii) Regarding the ground under Article 459(1)(dd) of the 2015 CPC (irregularity in the procedure): The legal ground to determine the appropriateness of the arbitral procedure is the parties' agreement, the arbitration rules, and the law of the seat respectively.²⁶ The rules on civil procedure of Vietnam shall not be applicable.²⁷ The principle of "waiver of right to object" could also be applicable in this ground.

(iii) Regarding the ground under Article 459(2)(b) of the 2015 CPC (public policy/fundamental principles of Vietnamese laws): the recognition of a foreign arbitral award is considered as violating the fundamental principles of Vietnamese laws if (i) Such recognition infringes upon sovereignty, national security, social order and safety, social morals, or public health; (ii) The award is rendered under coercion, deception, threat or bribery; and (iii) The award does not recognize the parties' agreement on the dispute resolution.²⁸

The above regulation together with the requirements under Resolution 01 indicates that any breach of the right to physical hearings or parties' agreement in this matter could lead to the refusal of recognition and enforcement of foreign arbitral awards in Vietnam on the ground of the (i) violation of the right of parties to present the case, (ii) the irregular process and (iii) the violation of fundamental principles of Vietnamese laws.

In line with the above guidelines, in principle, the courts would have to determine whether a right to a physical hearing existed pursuant to the parties' agreement, the arbitration rules or otherwise the law of the seat. However, assuming that such right existed, these guidelines do not specify whether the courts would have to undertake an analysis of whether a failure to conduct physical hearings has caused actual prejudice. In practice, pursuant to the decisions to refuse or accept the recognition of foreign arbitral awards, the courts would not go further to determine whether the breach caused actual prejudice.

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.

²⁵ Article 16 of the Draft Resolution.

²⁶ Article 19 of the Draft Resolution.

²⁷ Supreme People's Court, *Judicial Manual on Arbitration and Mediation*, fn. 16 above, p. 136.

²⁸ Article 23 of the Draft Resolution.

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As noted above, since the outbreak of the COVID-19 pandemic, the SPC has issued several notices to instruct lower courts on how to conduct judicial activities safely. Accordingly, the courts were required to suspend opening the hearings or summoning the parties to the court. In case of necessity, the courts might open the hearings under strict requirements such as the maximum number of participants in the trial room and the minimum distance among the participants. Notably, the lower courts were required to conduct the hearings via virtual means if possible.

Regarding arbitration, although the state authorities have not issued any specific guidance, the arbitration institutions themselves have been active in assisting the parties to overcome the unprecedented time with many initiatives. For instance, besides offering a discount on the arbitration fee, the VIAC has suggested that parties to submit the statement of claim and other documents via courier/email rather than personal service. The VIAC has also encouraged parties to conduct case management conferences and hearings virtually. To that end, the VIAC has organized a number of webinars to promote virtual hearings to the business community. Another arbitration centre, namely Hanoi International Arbitration Centre (HIAC), released its Online Dispute Resolution System which allows the parties to participate in online arbitral proceedings through its website and the arbitral tribunal may conduct the hearings by online means. However, this system is currently not working and there is no information as to whether any case has been resolved under these online arbitral proceedings of HIAC or not.

Regarding the disputing parties, the practice from VIAC shows that they are more open to virtual hearing. In 2020 to date, twelve (12) hybrid hearings and two (02) virtual hearings have been held under the VIAC Rules. This means that at least the parties in these cases reached an agreement to conduct the hearing virtually.

In any case, under the effect of the COVID-19 pandemic and the development of sciences, it is expected that there would be more and more hearings without the parties' physical presence in the future.