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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

**Does a Right to a
Physical Hearing Exist
in International
Arbitration?**

GEORGIA

Nata Ghibradze

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Georgian *lex arbitri* – the Law of Georgia on Arbitration in force as of 1 January 2010, as amended (hereinafter “Georgian Law on Arbitration”)¹ – does not 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: Likely not.

While the Georgian Law on Arbitration does not expressly provide for a right to a physical hearing, several provisions of this Law are relevant for the analysis of whether such right can be inferred or excluded by way of interpretation.

First, Article 32(1) of the Georgian Law on Arbitration only refers to the parties' right to an “oral hearing”: “Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal is obliged to hold an oral hearing at any stage of the proceeding, if so requested by any party”.

There is no basis to assume that the wording of this provision implies only a physical hearing and excludes a possibility of a remote hearing. Rather, the general understanding

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¹ The Georgian Law on Arbitration does not distinguish between “international” or “national” / “domestic” arbitration. The Georgian Law on Arbitration is based on the language and spirit of the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006. An English version is available at <<https://giac.ge/wp-content/uploads/2016/04/Georgian-Law-on-Arbitration.pdf>> (last accessed 29 January 2021).

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is that the reference to “oral hearing” implies both.² There is no reported case in Georgia on the interpretation of Article 32(1) of the Georgian Law on Arbitration.

Of course, party autonomy in relation to the form of the arbitration proceedings is broad under the *lex arbitri*. Pursuant to Articles 32(1) and 24(1)³ of the Georgian Law on Arbitration, the parties may agree on the form of the arbitration proceedings. This means that the parties are free to agree on a physical hearing in the arbitration agreement, including the arbitration rules incorporated therein, or in the course of the arbitration proceedings.

Second, to the extent the parties have not agreed on the procedural rules governing the arbitration proceedings, Article 24(2) of the Georgian Law on Arbitration provides a broad discretion to the arbitral tribunal to conduct the proceedings as it deems appropriate.⁴

In cases where the parties have not agreed on the form of the proceedings, the first sentence of Article 32(1) of the Georgian Law on Arbitration empowers the arbitral tribunal to decide the case solely on the basis of the documents submitted by the parties.⁵

Third, Article 25(2) of the Georgian Law on Arbitration further provides that, unless otherwise agreed by the parties, the arbitral tribunal may convene meetings “at any place” for consultation among the tribunal members, for hearing witnesses, experts or the parties, or for inspection of evidence.⁶

This provision does not specify whether the “place” chosen by the arbitral tribunal for consultations or hearing of witnesses, experts or the parties implies a physical location and a physical hearing / meeting. It seems that such interpretation would be rather restrictive and contrary to the broad degree of discretion assigned to the arbitral tribunal. Such discretion rather suggests that the tribunal is free to order a remote hearing / meeting as well.

² No official commentary to the Georgian Law on Arbitration exists. The general understanding stems from the interpretation and understanding of the UNCITRAL Model Law.

³ Article 24(1) of the Georgian Law on Arbitration reads: “The procedural rules for arbitration proceedings are determined by the parties in compliance with the requirements of this Law”.

⁴ Article 24(2) of the Georgian Law on Arbitration provides: “In the case of absence of an agreement between the parties, the arbitral tribunal may resolve a dispute in accordance with the procedural rules determined by the arbitral tribunal, in compliance with the requirements of this Law”.

⁵ Article 32(1) of the Georgian Law on Arbitration provides: “If the parties have not determined the form of arbitration proceedings, the arbitral tribunal is authorised to hold oral hearing on the evidence presented in the case or to conduct the proceeding on the basis of documents and other evidence”.

⁶ Article 25(2) of the Georgian Law on Arbitration provides: “Unless otherwise agreed by the parties, the arbitral tribunal may convene a meeting at any place for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of evidences”.

Fourth, another provision that could be relevant for the interpretation of an implied right to a physical hearing is Article 33 of the Georgian Law on Arbitration (“Default of the party”), which states that: “Unless otherwise agreed to by the parties, if without reasonable cause, any party fails to appear at a hearing or to present his/her position or documentary evidence, the arbitral tribunal may continue the proceedings and render an award based on the evidence before it”.⁷

The original (Georgian) text of this article provides no clarity as to whether the wording “to appear at the hearing” infers a physical hearing. Rather, an appearance at the hearing may refer to a physical as well as a remote hearing.

Based on the above analysis of the relevant provisions of the *lex arbitri*, the right to a physical hearing cannot be inferred in the *lex arbitri*.

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.

Like the *lex arbitri*, general rules of civil procedure regulating proceedings before Georgian courts (courts of first instance, courts of appeal, and the Supreme Court of Georgia) do not provide for an express right to a physical hearing. The relevant provisions of the Civil Procedure Code of Georgia merely refer to an “oral hearing” throughout the Code.⁸

Hearings in the civil proceedings before Georgian courts are, as a matter of fact, held physically. In this context, the “place of the hearing” referred to in the Civil Procedure Code of Georgia is commonly understood to imply a physical place of the hearing.⁹

However, the Civil Procedure Code of Georgia also explicitly foresees the possibility of a remote hearing. Namely, Article 207(3) of the Civil Procedure Code of Georgia provides that: “With the consent of the parties, a hearing may be held, and the operative part of the decision may be announced by means of a video conference”.

This provision confirms that a remote hearing may satisfy the fundamental principle of due process.

⁷ This is the same wording as contained in the Article 25 of the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006.

⁸ See, e.g., Articles 196(2), 257(1), 376, 383, 403(1), 408(1) and 408(3) of the Civil Procedure Code of Georgia.

⁹ See, e.g., Articles 196(2), 260(1), 261(3)¹, 263(2), 267¹(1), 269, 356²(2), 363³(4), 430 of the Civil Procedure Code of Georgia referring to the “place of the hearing”.

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It also confirms that by default, the parties' right to an oral hearing implies the right to a physical hearing. Only in case of the parties' agreement (consent) can the court conduct the hearing remotely.

Therefore, while no express right to a physical hearing exists under the general rules of civil procedure, such right can be inferred.

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.

The implied right to a physical hearing under the Civil Procedure Code of Georgia does not extend to arbitration.

The general rules of civil procedure are not applicable to arbitration proceedings, unless specifically stated in the Georgian Law on Arbitration and/or the Civil Procedure Code of Georgia. The only part of the Civil Procedure Code of Georgia that applies to arbitration proceedings is Section 7¹ (Chapters XLIV³-XLIV⁵), which regulates the role of Georgian courts in assisting arbitration proceedings and the enforcement of arbitral awards. According to Article 356¹³ of the Civil Procedure Code of Georgia, under Section 7¹, the following matters may be addressed by the court with respect to arbitration:

- “a) Appointment, recusal and termination of an arbitrator;
- b) competence of the arbitral tribunal;
- c) provision of the security for a request for arbitration (provisional measures);
- d) support by the court in taking evidence and securing the attendance of witnesses;
- e) recognition and enforcement of and refusal to enforce provisional measures employed by the arbitral tribunal;
- f) issuance of a writ of enforcement;
- g) revocation of an arbitration award;
- h) recognition and enforcement of an arbitration award delivered outside Georgia;
- i) other cases provided for by the Law of Georgia on Arbitration”.

With regard to each of these matters in question, the Civil Procedure Code of Georgia specifically refers to the Georgian Law on Arbitration and the rules set out therein. Since the parties' right to oral hearings is regulated in the Georgian Law on Arbitration, the implied right to a physical hearing under the Civil Procedure Code of Georgia does not apply to arbitration proceedings either directly or by analogy.

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: No.

Although the Georgian Law on Arbitration provides for a broad discretion of an arbitral tribunal, such discretion is limited by the agreement of the parties. If the parties have agreed, either expressly in the arbitration agreement or by reference to the arbitration rules, to conduct a physical hearing, the arbitral tribunal may not order a remote hearing. Doing so could result in the setting aside of the award.¹⁰

The above conclusion follows from the clear wording of Articles 24 and 32 of the Georgian Arbitration Law.

According to Article 24(1) of the Georgian Law on Arbitration, the procedural rules of the arbitration proceedings are determined by the parties. Articles 24(2) and 32(1) of the Georgian Law on Arbitration grant the arbitral tribunal a broad discretion to conduct the dispute as it deems appropriate, including regarding the conduct of oral hearings, provided that the parties have not agreed on the procedure. In absence of a party agreement, an arbitral tribunal may use its broad discretion to not conduct an oral hearing at all, or conduct an oral hearing physically or remotely, taking into account all the circumstances of the individual case and weighing advantages and disadvantages of a physical hearing over a remote one.

The second sentence of Article 32(2) of the Georgian Law on Arbitration provides that the arbitral tribunal is obligated to hold an oral hearing, if any party so requests, unless the parties have agreed that no oral hearing shall be held. Again, this makes it

¹⁰ In case the tribunal decides to hold a virtual hearing against the parties' express agreement on a physical hearing, the party against whom the award is rendered could claim setting aside of the award on the basis of the following grounds: Article 42(2)(a.b) (“[A] party, requesting an arbitration award to be set aside was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present his/her case or protect his/her interests”), Article 42(2)(a.d) (“[T]he composition of the arbitral tribunal or the arbitration procedure did not comply with the agreement of the parties, or in the cases of absence of such an agreement, did not comply with this Law”), and Article 42(2)(b.b) (“[T]he award is in conflict with the public order of Georgia”) of the Georgian Law on Arbitration.

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clear that the tribunal is bound by an agreement of the parties regarding the form of the arbitration proceedings.

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Yes.

As discussed above, the Georgian Law on Arbitration does not provide for a right to a physical hearing.

Assuming, however, that such a right was recognized in a specific case, the party would need to raise a breach thereof during the arbitration proceeding. This follows from Article 31 of the Georgian Law on Arbitration, which reads that

“If any requirement of this Law from which the parties may derogate from, or any requirement under the arbitration agreement have not been complied with, and a party proceeds with the arbitration without submitting a response to such violation immediately and/or within any period of time provided for by this law, by the arbitration agreement or by the arbitral tribunal, it shall be deemed that such party has waived his/her right to object”.

This provision fully corresponds to Article 4 of the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006 (hereinafter “Model Law”).

Based on Article 31 of the Georgian Law on Arbitration, like with any other breach, if a party does not raise an objection with regard to the breach of its right to a physical hearing during the arbitration proceedings, it would later be prevented from using those circumstances as a ground for challenging the award before Georgian courts.

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 discussed above, the Georgian Law on Arbitration does not provide for a right to a physical hearing in arbitration. It is not possible to answer this question, as no court case exists regarding a violation of a right to a physical 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: It depends.

Considering that the Georgian Law on Arbitration does not provide for a right to a physical hearing in arbitration, the question is whether the tribunal's failure to hold a physical hearing could nevertheless constitute a basis for setting aside the award.

If the parties have not separately agreed on a physical hearing, failure to hold such a hearing would likely not constitute a basis for setting aside of the award.¹¹

As addressed with respect to sub-paragraph c.6 above, if the parties have agreed, either expressly in the arbitration agreement or by reference to the arbitration rules, on a physical hearing, then the arbitral tribunal's order to hold a remote hearing could potentially constitute a basis for setting aside on the basis of violating the principle of due process / right to present its case,¹² arbitration procedure not being compliant with the parties' agreement or the law,¹³ or the public order of Georgia.¹⁴

No case law has formed on this specific subject matter yet. In fact, Georgian courts have not yet dealt with a situation where a request to set aside an award related to the tribunal's failure to hold an oral hearing generally.¹⁵ Due to a rather scarce practice of the Courts of Appeals, it can only be presumed that the courts would review and take into account the court practice from other Model Law jurisdictions with respect to the application of the same grounds for setting aside.¹⁶

¹¹ While no court practice exists in Georgia, the Courts of Appeals could refer to court decisions from other Model Law jurisdictions where the courts have stated that an oral hearing is not a "must" unless the parties have agreed or call for it or the tribunal decides to hold one. See, e.g., *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2006], SGHC 206, dated 17 November 2006, at para. 33.

¹² See Article 42(2)(a.b) of the Georgian Law on Arbitration, fn. 10 above.

¹³ See Article 42(2)(a.d) of the Georgian Law on Arbitration, fn. 10 above.

¹⁴ See Article 42(2)(b.b) of the Georgian Law on Arbitration, fn. 10 above.

¹⁵ The setting aside of arbitral awards rendered on the territory of Georgia falls within the jurisdiction of the Georgian Courts of Appeals. Contrary to the library of the Supreme Court of Georgia, the online database of the Courts of Appeals is not kept up to date. As a result, no relevant court decisions can be found to even identify the basic principles the court has established in relation to setting aside arbitral awards.

¹⁶ Judges of the Georgian Courts of Appeals have undergone several trainings on the application of the Georgian Law on Arbitration and the international practice on the application of the Model Law. Arbitration Initiative Georgia, with the support of the United

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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: It depends.

So far, Georgian courts have formed no practice on this specific subject matter. The following briefly addresses the grounds for refusing recognition and enforcement of foreign arbitral awards that could be relevant for a breach of a right to a physical hearing. The offered conclusions have, however, a rather speculative character and will depend on the actual practice being developed in Georgia.

Grounds set forth in the Georgian Law on Arbitration for the refusal of the recognition and enforcement of foreign arbitral awards largely mirror the grounds of the New York Convention.¹⁷

There are three potential scenarios to analyze: *first*, the *lex arbitri* of the country where the award was rendered does not provide for a right to a physical hearing; *second*, the *lex arbitri* of the country where the award was rendered provides for a right to a physical hearing and the tribunal ordered a remote hearing notwithstanding the party's objection; *third*, the parties have agreed on a physical hearing.

Nations Development Programme, released a Guide to Arbitration for the Judges of the Georgian Courts of Appeals. This Guide discusses the key questions the judges should ask with respect to the application of the Georgian Law on Arbitration and makes specific references to international court practice with respect to each provision of the Georgian Law on Arbitration that corresponds to the Model Law.

¹⁷ Article 45(1)(a.b) of the Georgian Law on Arbitration corresponds to Article V(1)(b) of the New York Convention. Article 45(1)(a.d) of the Georgian Law on Arbitration corresponds to Article V(1)(d) of the New York Convention. Article 45(1)(b.b) of the Georgian Law on Arbitration corresponds to Article V(2)(b) of the New York Convention and provides that the recognition or enforcement of a foreign arbitral award may be refused if the court finds that "the award is in conflict with the public order". The notable difference is that while the New York Convention refers to the public policy of the country where the recognition and enforcement is sought, Article 45(1)(b.b) of the Law on Arbitration generally refers only to the "public order" without specifying that an award has to be in conflict with Georgia's public order.

In examining whether a breach of the right to a physical hearing may constitute a ground to refuse recognition and enforcement of an award, the Supreme Court would not only look at the Georgian *lex arbitri*, but likely also whether a right to a physical hearing exists at the seat of arbitration.¹⁸ Based on the Supreme Court's practice, it would look at the relevant arbitration law rather than the civil procedure law of the seat.

Since no right to a physical hearing exists under the Georgian Law on Arbitration, in the *first scenario* it would only be reasonable to assume that the Supreme Court of Georgia would not refuse recognition and enforcement of a foreign arbitral award on any of the grounds listed above.

A more detailed analysis would be required in the *second* and *third scenarios*.

The Supreme Court of Georgia has not dealt with a case where a breach of the right to an oral hearing generally was analyzed under Article V(1)(b) or V(1)(d) of the New York Convention. Therefore, it cannot be conclusively assessed whether the Supreme Court would consider the breach of the right to a physical hearing as a ground for refusing recognition and enforcement of an arbitral award.

For the purposes of the analysis under Article V(1)(b) of the New York Convention, in the absence of the relevant local court practice, the court would likely analyze whether circumstances lead to significant procedural violations, which are so serious that they contradict the basic principles of private law disputes.¹⁹ In doing so, the court would likely examine whether the remote hearing resulted in the party's actual inability to present its case.

For the purposes of the analysis under Article V(1)(d) of the New York Convention, the Supreme Court of Georgia would look at the *lex arbitri* of the seat of the arbitration and/or the parties' agreement and could potentially consider the breach of the right to a physical hearing as the ground for the refusal of the recognition and enforcement. However, the court would likely examine whether a virtual hearing caused an actual prejudice to the party requesting the refusal of the recognition and enforcement of the award in question.

In the absence of relevant local court practice, the Supreme Court of Georgia would also likely analyze the international court practice applying Articles V(1)(b) and V(1)(d)

¹⁸ Although not directly relevant to the subject matter at hand, in the case A-204-Sh-43-03 dated 2 April 2004, the Supreme Court of Georgia referred to and relied upon the *lex arbitri* of the seat of arbitration. In that case, the party objecting the recognition and enforcement of the arbitral award had argued that the composition of the arbitral tribunal was not compliant with the agreement of the parties. The Supreme Court relied on Article 17 of the 1996 English Arbitration Act allowing a party to appoint its own arbitrator as the sole arbitrator, if the other party has failed to appoint its co-arbitrator within the set timeframe. Relying on the *lex arbitri* of the seat of arbitration, the court refused to deny the recognition and enforcement of the arbitral award.

¹⁹ Georgian Supreme Court Ruling, Case A-2427-SH-74-2014, dated 30 December 2014.

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of the New York Convention to situations of violations of the right to a physical hearing (or oral hearing generally).²⁰

The Supreme Court of Georgia provides slightly more guidance regarding the “public order” ground for refusing recognition and enforcement of an award (Article V(2)(b) of the New York Convention and Article 45(1)(b.b) of the Georgian Law on Arbitration). In the case A-2344-S-67-2014 dated 22 October 2014, the Supreme Court of Georgia explained that:

“The principle of equality of the parties and the adversarial proceedings is the cornerstone of a person’s relationship with the court and is the guarantor of his/her legitimate interests, notwithstanding whether the case is decided by a court or an arbitral tribunal. A decision made in violation of this principle should be considered to be contrary to public order”.²¹

In that case, the Supreme Court of Georgia denied the recognition and enforcement of the award rendered by the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation dated 28 January 2014 – on the ground that the party was unable to participate in the hearing at the place of arbitration. In that case, the court determined that the party unable to appear at the oral hearing had an objective reason for such non-appearance: due to the political situation between Russia and Georgia, the Russian government restricted the issuance of visas to Georgian citizens. Even though the party repeatedly informed the arbitral tribunal on its inability of attending the oral hearing, the tribunal held such hearing (physically) nevertheless. The Supreme Court found this to be a violation of the principle of equality and adversarial proceedings and ruled that the resulting award was contrary to public order and therefore unenforceable in Georgia.

Whether the Supreme Court of Georgia would consider a remote hearing as a violation of “public order” would depend on whether the court deems this to be a violation of the equality of the parties and of the due process principle. If a party proves that it was significantly or substantially disadvantaged by a virtual hearing, the court may consider it a violation of public order. It seems unlikely that a mere disadvantage would be sufficient to refuse the recognition and enforcement of an award.

f. COVID-Specific Initiatives

²⁰ In the recent years, the Supreme Court judges have undergone various trainings in the interpretation and application of the New York Convention. In 2013, a Georgian translation of the ICCA *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011) was made available.

²¹ Georgian Supreme Court Ruling, A-2344-S-67-2014, dated 22 October 2014.

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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.

On 23 March 2020, the Government of Georgia issued its Decree No. 181, requiring all arbitration and mediation proceedings to be carried out remotely for the period of the state emergency.²² In line with this Decree, in April 2020, the leading arbitration centre in Georgia – Georgian International Arbitration Centre (“GIAC”) – issued the Protocol on Remote Hearings promoting adoption of procedures for remote hearings and assisting parties with the practical aspects of such remote hearings. Other local arbitral institutions also switched to fully remote hearings.

With regard to the court proceedings, on 13 March 2020, the High Council of Justice of Georgia approved a recommendation to switch the national courts to a remote regime. As a result, civil proceedings are being held via Webex, subject to the parties’ agreement provided for in Article 207(3) of the Civil Procedure Code of Georgia.

²² See President’s Decree No. 1 on declaring a state of emergency on the whole territory of Georgia, dated 21 March 2020; President’s Decree No. 2 on declaring a state of emergency on the whole territory of Georgia, dated 21 April 2020.