

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

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

AUSTRALIA

Lucy Martinez
Jay Tseng

Update: October 2022

AUSTRALIA

[Lucy Martinez](#)*

[Jay Tseng](#)**

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.

Brief overview of Australian arbitration law generally. Australia is a federation consisting of six states and two territories. Legislative powers are divided between the Commonwealth of Australia, as the federal entity, and the six states; the two territories also have their own governments. International arbitration is governed by the federal statute, the International Arbitration Act 1974 (Cth) (“IAA”). Domestic arbitration is governed by the Commercial Arbitration Acts (“CAAs”) in each state or territory.¹ The focus of this report is on international arbitration under the IAA.

The IAA adopts and gives effect to the Model Law, which thus “has the force of law in Australia”.² Unless parties have expressly excluded the Model Law, as permitted under s 21 of the IAA, the Model Law will apply to international arbitrations seated in Australia. The IAA also adopts and gives effect to the New York Convention.³ Thus, references in this report to “the IAA” include the IAA, the Model Law, and the New York Convention, unless otherwise indicated.

* Lucy Martinez is an independent arbitrator and counsel at Martinez Arbitration.

** Jay Tseng is a Senior Associate at Enyo Lawyers. The research in this report was current as of November 2020 and was updated in June and October 2022 to take into account certain key developments in the interim.

¹ Commercial Arbitration Acts 2010 (NSW), 2011 (NT), 2011 (SA), 2011 (Tas), 2011 (Vic), 2012 (WA), 2013 (Qld), 2017 (ACT).

² IAA, 16; see also IAA, s2D(d) (one object of Act is “to give effect to” Model Law), Schedule 2 (setting out Model Law); *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 (*TCL v FCA*), [1] (per French CJ and Gageler J), [43] (per Hayne, Crennan, Kiefel and Bell JJ) (confirming applicability of Model Law in Australia). Generally, in relation to arbitration in Australia see: Malcolm HOLMES and Chester BROWN, *The International Arbitration Act 1974: A Commentary*, 3rd edn. (LexisNexis 2018); Doug JONES and Janet WALKER, *Commercial Arbitration in Australia under the Model Law*, 3rd edn. (Thomson Reuters 2022).

³ IAA, s 2D(d) (one object of Act is “to give effect to Australia’s obligations under the” New York Convention), Schedule 1 (setting out New York Convention).

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

Like other common law countries, decisions from federal, state, and territory courts are important sources of law in the interpretation and application of the IAA. The Federal Court of Australia (“FCA”) is a “competent court” for certain identified functions which a court performs pursuant to the IAA,⁴ and is the forum for many (but not all) IAA-related proceedings. In interpreting the IAA, Australian courts regularly cite jurisprudence from other common law jurisdictions, including, for example, Canada, Hong Kong, Singapore, New Zealand, the United Kingdom, and the United States.

*Right to physical hearing in arbitration?*⁵ Under the IAA, there is no express right to a physical hearing in arbitration. The only relevant express rights are for the parties to be treated “with equality” and to have “a reasonable opportunity to present [their] case”.⁶ The “reasonable opportunity” test is a modification from the “full opportunity” required by the Model Law.⁷ The Explanatory Memorandum for this modification confirms that it “is intended to give arbitral tribunals a wider degree of flexibility in controlling arbitral proceedings without removing requirements for the parties to be treated with equality and have an appropriate opportunity to make out their case”.⁸ Thus, under the IAA, beyond protecting the express rights of equality of treatment and reasonable opportunity to present their case, the tribunal enjoys a broad discretion to “conduct the arbitration in such manner as it considers appropriate”.⁹ Australian courts have confirmed that the tribunal may decide whether or not to hold evidentiary hearings, as well as the format that any hearing will take.¹⁰ Thus, under the IAA, the arbitration proceedings must be fair and equal, which may entail a physical hearing, a remote hearing, or no hearing at all, depending on the circumstances of the individual case, and at the tribunal’s discretion.

In addition, Australian courts have rejected challenges to arbitration awards issued after remote hearings, thus implicitly rejecting any right to a physical hearing in arbitration. The leading Australian case on this issue is *Sino Dragon Trading Ltd v Noble*

⁴ IAA, s 18; Model Law, Article 35(1); see also *TCL v FCA*, [52].

⁵ This answer assumes no express party agreement to hold a physical hearing.

⁶ IAA, s 18C (parties must be “given a reasonable opportunity to present the party’s case”); Model Law, Article 18 (“The parties shall be treated with equality [...]”).

⁷ IAA, s 18C (“For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party’s case if the party is given a reasonable opportunity to present the party’s case”); see also *International Relief and Development Inc v Ladu* [2014] FCA 887 (*IRD v Ladu*), [183]; *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [100]; *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648 (*Hui v Esposito*), [224].

⁸ Revised Explanatory Memorandum, International Arbitration Bill 2010 (Cth), [95]-[96].

⁹ Model Law, Article 19(2) (tribunal may “conduct the arbitration in such manner as it considers appropriate”).

¹⁰ See, e.g., *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77, [317] (quoting the approach referred to in UK sources regarding arbitration as a “free-standing system, free to settle its own procedure [...]”).

Resources International Pte Ltd (Sino Dragon v Noble Resources).¹¹ This case is relevant for many of the questions in this report, and accordingly is discussed in detail here, and cross-referenced as appropriate below. The dispute arose out of an iron ore sales contract, which provided for disputes to be resolved by UNCITRAL arbitration; the governing law of the contract was Western Australia law.¹² Over the course of the arbitration, Sino Dragon (“SD”) made numerous unsuccessful challenges to the arbitrators.¹³ At a merits hearing, held in Sydney, certain witnesses proffered by SD gave evidence by video-conference, at SD’s request.¹⁴ Various “technical difficulties in the mode of communication” arose during the hearing, including: (i) the planned video-link did not work and instead evidence was given by another platform; (ii) a “split format” was adopted, with video transmitted via computer, and audio by a separate telephone link; (iii) witnesses could not access relevant documents; (iv) the interpreter was not qualified and was replaced; and (v) another fact witness was apparently present in the room with one witness during his testimony.¹⁵ In the final award, the tribunal noted the “highly unusual circumstances” of the video-conference testimony, and concluded that “the examination and cross-examination of Mr. Li [SD’s witness] was carried out in a way that was quite unsatisfactory”.¹⁶ The tribunal ruled in favour of Noble Resources (“NR”); NR successfully enforced the award in Hong Kong and also filed a winding-up petition against SD in Hong Kong courts.¹⁷

SD then applied to set aside the award in the FCA, alleging, *inter alia*, lack of procedural fairness, unequal treatment, and inability to present their case.¹⁸ SD alleged that the video-conference evidence “was beset by technical difficulties, which meant that such evidence could not be properly presented”.¹⁹ Critically for present purposes, SD did *not* allege that it had a right to a physical hearing in arbitration under Australian law.

The FCA rejected SD’s arguments, noting, *inter alia*: SD chose the mode for its witness evidence; SD selected the video-conference technology, and did not properly test it before the hearing; the technical difficulties did not result in the exclusion of SD’s witness evidence; SD did not object during the video-conference hearing, nor in closing submissions; to the contrary, SD’s closing submissions emphasized the clear testimony of SD’s witnesses and the consistency of that testimony with SD’s case theory; and the video-conference difficulties mainly caused issues for NR, as the cross-examining party, and not SD.²⁰ The FCA noted that “the conduct of the party who complains of a lack of procedural fairness or a lack of equality is relevant to any asserted inability to present its

¹¹ *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131.

¹² *Ibid* [1]-[3], [18].

¹³ *Ibid* [30]-[47].

¹⁴ *Ibid* [3], [149].

¹⁵ *Ibid* [149] (quoting paragraphs from award, summarising technical difficulties).

¹⁶ *Ibid* [149] (quoting award).

¹⁷ *Ibid* [3]-[4].

¹⁸ *Ibid* [5]-[6].

¹⁹ *Ibid* [6(b)] (summarizing SD’s arguments).

²⁰ *Ibid* [155]-[178].

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

case or any asserted lack of opportunity in that respect”.²¹ The FCA also confirmed that “significant judicial restraint must be exercised in considering and determining an [award] challenge [...] [I]t is not an occasion for delving into the adequacy of evidence to support particular findings through the confected mechanism of a procedural fairness type challenge”.²² The Court continued:

“[I]f a procedural fairness type challenge has been made, the context and practical circumstances and consequences are all important. One starts with the context that one is dealing with a significant international commercial dispute between well-represented and well-heeled commercial operators. One adds to that context that the parties have chosen arbitration as the relevant dispute mechanism, which necessarily entails some compromise in the choice of procedures dictated by efficiency and expedition. The normative evaluation involved in deciding whether a party has been given a reasonable opportunity to put its case must necessarily be undertaken in that context. Moreover, this should be able to be readily demonstrated with clarity and expedition. It ought not to involve the contested evaluation of a fact-finding process. Further, taking into account the context I have described, any consequence short of ‘real unfairness’ or ‘real practical injustice’ should be put to one side [...]”.²³

Finally, and critically for present purposes, the FCA found that “the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce ‘real unfairness’ or ‘real practical injustice’”.²⁴ *Sino Dragon v Noble Resources* is also relevant to subparagraphs d.7, d.9, and e.10, but for present purposes it helps confirm that there is no right to a physical hearing in arbitration in Australia.

Also relevant in this context is a recent decision by the Supreme Court of Western Australia (“SCWA”), albeit in the context of a domestic arbitration award, in *Venetian Nominees v Weatherford Australia*.²⁵ In the underlying arbitration, “[d]ue to COVID-19 restraints which had prevailed at the time, the arbitral hearing was conducted remotely [over two days in March 2020], utilising an audio-link between the arbitrator and the respective counsel for each of the parties”.²⁶ The parties did not arrange for a transcript of the hearing to be produced; both parties made post-hearing written submissions; and Venetian did not object to the hearing taking place by audio-link, nor complain regarding any denial of reasonable opportunity to present its case.²⁷ Venetian challenged the award

²¹ *Ibid* [157].

²² *Ibid* [73].

²³ *Ibid* [74].

²⁴ *Ibid* [154].

²⁵ *Venetian Nominees Pty Ltd v Weatherford Australia Pty Ltd* [2021] WASC 137.

²⁶ *Ibid* [5], see also [4].

²⁷ *Ibid* [33]-[34], [47], [126].

on the basis of, *inter alia*, denial of procedural fairness and inability to present its case, although the challenge did not specifically focus on the mode of the hearing. In rejecting the challenge, the SCWA noted the difficulty of evaluating the overall fairness of the hearing without a transcript, but ultimately concluded that “Venetian received an entirely fair two-day arbitral hearing. The process followed by the learned arbitrator, on my assessment, was perfectly fair” and “losing is not a violation of procedural fairness principles”.²⁸

For completeness, we note one other pre-pandemic Australian court decision addressing remote hearings in the context of arbitration (and litigation) – *International Relief and Development v Ladu*.²⁹ The dispute related to termination of an employment contract for foreign aid work in South Sudan, which gave rise to court proceedings in South Sudan, and AAA arbitration seated in the United States.³⁰ The arbitration hearing was held in-person in Virginia, with video-conference facilities available for Mr. Ladu – although he did not join the hearing, via video-con or in-person, and did not otherwise participate in the arbitration.³¹ The tribunal ruled in International Relief and Development (“IRD”)’s favour, and IRD successfully confirmed the award in US courts, which rejected Mr. Ladu’s objections that, *inter alia*, he had “no opportunity to defend himself due to lack of notice, bad timing and resources”.³²

IRD also successfully enforced the award in Australian courts. Part of the hearing in the Australian court was via video-conference (pre-pandemic); Mr. Ladu gave evidence in person, but two of the witnesses he relied upon gave evidence via video-conference; IRD’s witnesses also gave evidence via video-conference.³³ The FCA found that the “one principal issue” before it was: “Has Mr. Ladu proved to the satisfaction of the Court that he was not given *proper notice* of the appointment of the arbitrator or of the arbitration proceedings?”³⁴ The FCA found that some of the documents submitted by Mr. Ladu were fabrications, and the evidence he put forward was not “honest and reliable”.³⁵ Perhaps unsurprisingly in this context, the FCA also rejected Mr. Ladu’s due process objection relating to the video-con hearing in the litigation, even after “allowing for the difficulties occasioned by giving evidence by videoconference”: “Having regard to the conduct of the hearing, the parties’ use of videoconferencing to adduce evidence from witnesses outside Australia and the time available between the conclusion of the hearing [...] and its resumption [...] to take remedial steps, I reject the submission [...] that *in this proceeding* Mr. Ladu was in any sense deprived of a proper opportunity to put forward his case and respond to IRD”.³⁶ In other words, Mr. Ladu was not denied

²⁸ *Ibid* [34], [49], [85], [94], [126].

²⁹ *IRD v Ladu* [2014] FCA 887.

³⁰ *Ibid* [2], [5], [19].

³¹ *Ibid* [31], [32]-[33].

³² *Ibid* [36], [37], [40].

³³ *Ibid* [53], [55], [102], [143].

³⁴ *Ibid* [58] (emphasis in original).

³⁵ *Ibid* [65], [67], [70]-[71], [80], [82], [91], [101], [113], [114].

³⁶ *Ibid* [102] (emphasis added), [121], [128]-[129].

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

procedural fairness either in the underlying arbitration (where the hearing was held in part via video-con, and Mr Ladu did not attend), or in the litigation to enforce the award (where the hearing was held in part via video-con, and Mr Ladu did attend). This case also confirms that there is no 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: Potentially excluded.

As noted in other national reports, Article 24(1) of the Model Law refers to "oral hearings" and Article 25(c) refers to party "appear[ance]" at a hearing. However, Australian courts have not inferred any right to a physical hearing from these provisions, and indeed parties have rarely (if ever) made such an argument, instead focusing on the overall fairness of the proceeding. Further, as noted above in sub-paragraph a.1, Australian courts have rejected challenges to awards issued after remote hearings, thus implicitly rejecting any right (express or implied) to a physical hearing in arbitration.

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: N/A. As noted above, there is no right to a physical hearing in arbitration. In any event, as explained below, there is no right to a physical hearing in litigation.

For completeness, we note that the rules which govern civil procedure for FCA matters are the Federal Court of Australia Act 1976 (Cth) ("FCA Act") and the Federal Court Rules 2011 (Cth) ("FCA Rules"). The "overarching purpose of the civil practice and procedure rules" in the FCA Act and FCA Rules "is to facilitate the just resolution of disputes [...] according to law; and [...] as quickly, inexpensively and efficiently as possible".³⁷ This "overarching purpose includes the following objectives: [...] the efficient use of the judicial and administrative resources available for the purposes of the Court; the efficient disposal of the Court's overall caseload; the disposal of all

³⁷ FCA Act, s 37M(1).

proceedings in a timely manner; [and] the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute”.³⁸ Further, the FCA Act expressly permits “testimony” and “submissions” to be given via “video link, audio link, or other appropriate means” in certain circumstances.³⁹ These video-link provisions were often used before the COVID-19 pandemic, for example, to allow witnesses to testify by video or telephone when travel to the place of trial was impractical or unduly expensive.⁴⁰ However, some judges questioned the effectiveness of video-con witness testimony, at least pre-pandemic.⁴¹

In any event, during the pandemic, a number of Australian courts accepted the appropriateness of remote hearings, and rejected arguments based on alleged unfairness, in the context of litigation (not arbitration).⁴² Such decisions confirm that there is no right to a physical hearing in litigation in Australia. For example, *Capic v Ford Motor Co.* was a class action alleging defective gear boxes, scheduled for a six-week hearing in mid-2020, potentially involving 50 witnesses.⁴³ Ford applied for an adjournment, based on the pandemic, arguing that the trial should be conducted in-person; Capic submitted that the trial should proceed in a remote format.⁴⁴ The FCA (Perram J) rejected Ford’s objections based on, *inter alia*, technological limitations, physical separation of legal teams, cross-examination of expert and lay witnesses, document management, and trial length and expense associated with remote hearings.⁴⁵ The FCA noted that

³⁸ *Ibid*, s 37M(2).

³⁹ FCA Act, ss 47A (testimony), 47B (submissions), 47C (specifying conditions regarding exercise of these powers), 47D (putting documents to witnesses), 47E (administration of oaths), 47F (payment of expenses).

⁴⁰ *Australian Competition and Consumer Commission v StoresOnline International Inc* [2009] FCA 717, [15]; *Australian Competition and Consumer Commission v Fila Sport Oceania Pty Ltd* [2003] FCA 430, [20] (“The alternative of some evidence being heard by video link is one [is] not only [...] expensive but undesirable”).

⁴¹ See, e.g., *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152, [78] (discussing “the prospect (or possibility) that the cross-examination of an important witness might be rendered less effective by the limitations of video link technology or the absence of the witness from the courtroom”).

⁴² See, e.g., (as of November 2020) *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486; *ASIC v GetSwift Limited* [2020] FCA 504; *Wharton on Behalf of the Kooma People v State of Queensland* [2020] FCA 574; *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd* [2020] FCA 1153; *Long Forest Estate Pty Ltd v Singh* [2020] VSC 604; *Ozamac Pty Ltd v Jackanic* [2020] VCC 790; *Ascot Vale Self Storage Centre Pty Ltd (In Liquidation) v Nom de Plume Nominees Pty Ltd* [2020] VSC 242; *McDougall v Nominal Defendant* [2020] NSWDC 194; *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38; *Universal Music Publishing Pty Ltd v Palmer* [2020] FCA 1472.

⁴³ *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, [1], [16], [18].

⁴⁴ *Ibid* [1].

⁴⁵ *Ibid* [10]-[26].

technological challenges involved with remote hearings were “tiresome” and “aggravating” but “tolerable” and “not insurmountable”, and concluded: “Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try”.⁴⁶

To give one additional example, *ASIC v GetSwift Limited* was an action by the regulator together with a class action alleging breaches of securities laws, with some defendants based in the United States; the case was scheduled for a ten-week hearing in mid-2020, potentially involving 41 witnesses.⁴⁷ The defendants applied for an adjournment, based on the pandemic, arguing that the trial should be conducted in-person; ASIC submitted that the trial should proceed in a remote format.⁴⁸ The FCA (Lee J) rejected the defendants’ objections, noting, *inter alia*, that the witness evidence was “relatively confined”, and cross-examination of the US witnesses and defendants would be at hours convenient to them – and not necessarily convenient to the FCA and counsel.⁴⁹ Whilst acknowledging criticisms about remote hearing technology, the FCA noted that there was nothing “second rate” about remote hearings, including remote cross-examination, and “at least in some respects, it was somewhat easier to observe a witness closely through the use of the technology than from a sometimes partly obscured and [...] distant witness box”.⁵⁰

By contrast, a number of Australian courts during the pandemic have concluded that remote hearings are *not* appropriate, and accepted arguments based on alleged unfairness, in the context of litigation.⁵¹ For example, *ASIC v Wilson* involved alleged breaches of statutory directors’ duties and misleading or deceptive conduct; the case was scheduled for a 15 day hearing in mid-2020, potentially involving 11 witnesses.⁵² One key issue was the credibility of a US-based witness, who would testify on matters not covered by contemporaneous documents.⁵³ The defendants applied for an adjournment, based on the pandemic, arguing that the hearing should be conducted in-person; ASIC

⁴⁶ *Ibid* [10]-[12], [25].

⁴⁷ *ASIC v GetSwift Limited* [2020] FCA 504, [1]-[3], [13].

⁴⁸ *Ibid* [4], [9], [11]-[23].

⁴⁹ *Ibid* [29], [36].

⁵⁰ *Ibid* [25], [33].

⁵¹ See, e.g. (as of November 2020), *Roberts-Smith v Fairfax Media Publications Pty Limited (No 4)* [2020] FCA 614; *ASIC v Wilson* [2020] FCA 873; *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913 (Bromwich J); *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942; *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430; *Quince v Quince* [2020] NSWSC 326.

⁵² *ASIC v Wilson* [2020] FCA 873, [2]-[4], [13].

⁵³ *Ibid* [15]-[16], [26]-[28].

submitted that the cross-examination should proceed in a remote format.⁵⁴ The FCA (Jackson J) accepted the defendants’ objections, declined to order a remote hearing, and adjourned the proceedings until an in-person hearing could be held.⁵⁵ The FCA found that there was “a real risk that [the defendant] will not have a fair and proper opportunity to test the evidence of [the US witness] if that evidence is not given in-person”, and the risk of injustice to the defendant outweighed the risk of injustice to ASIC and any resulting harm to the public interest.⁵⁶

Australian courts have also refused to order remote hearings in litigation (not arbitration) involving allegations of fraud, misrepresentation, forged documents, self-represented litigants, employment disputes, defamation, and national security concerns, and more recently as the pandemic has eased, have expressed a preference for a return to in-person evidence.⁵⁷ In addition, some Australian courts have refused to order remote hearings in litigation involving witnesses based in the People’s Republic of China (“PRC”), based on potential PRC civil procedure law restrictions on such evidence⁵⁸ – although these restrictions may not apply in the context of arbitration.

These decisions confirm the conclusions above, i.e., there is no right to a physical hearing in litigation (or arbitration) under Australian law, and each case will turn on its individual facts, with the focus on procedural fairness.

⁵⁴ *Ibid* [4]-[5].

⁵⁵ *Ibid* [37].

⁵⁶ *Ibid* [26], [34]-[38].

⁵⁷ See cases cited at fn. 51 above. See also, e.g., *Palmer v McGowan (No 2)* [2022] FCA 32, [1], [12], [44]-[46] (Lee J, judge in *ASIC v GetSwift*, found that witness evidence relating to alleged distress, upset, and injury to feelings caused by alleged defamation in case involving high profile businessman and head of government should be heard in-person, rather than via audio-visual link, based on “the nature of the evidence and the other bespoke circumstances of the case”; post-*ASIC v GetSwift* he had “vastly more experience with the conduct of remote hearings [...] I want to go back to having trials in the usual way [...] It is jejune to assume that exchanges (which may include confrontational exchanges) between two persons in close physical proximity to one another, is the same as exchanges that occur in the less intimate world of a video link. Related to this point, is that increasingly I have felt a nagging disquiet that I may perhaps be missing something in assessing the evidence of a witness by reference to the tone of voice or non-verbal signals. As time has gone on, it has become more evident to me that in an audio-visual feed, minor differences in emphasis or tone can be more difficult to appreciate and assess [...] I have a better prospect of understanding the subtleties and nuances of the sort of evidence to be given in the present case, if it is given in person. Credit is likely to be a factor in resolving at least some issues in this case”).

⁵⁸ See, e.g., *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539 (no virtual hearing), [2020] FCA 987 (video-conference evidence appropriate because witnesses could travel to Macau, thus avoiding potential application of PRC law); *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732; but see *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd* [2020] FCA 1153 (approval granted by relevant PRC authority).

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

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

Short answer: N/A

As noted above, there is no right to a physical hearing in litigation (or arbitration). In any event, Australian courts recognize that arbitration tribunals are not required to “slavishly adhere to the minutiae of civil litigation procedure”.⁵⁹

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

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

Short answer: N/A

As noted above, there is no right to a physical hearing in arbitration.

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: Potentially yes; such an order would theoretically bind the parties but may not be enforceable, and it may give rise to a challenge to the tribunal and/or to the award.

If the parties have agreed to a physical hearing, as part of the text of the original arbitration agreement, either expressly or by reference to institutional rules expressly requiring a physical hearing, or as a formal written contractual agreement after the arbitration has commenced, then it would be difficult for a tribunal to decide to hold a remote hearing. Australian courts have repeatedly confirmed that arbitration is a matter of contract, and arbitration agreements must be enforced according to their terms.⁶⁰ Such an order could potentially be challenged in Australian courts for excess of authority.⁶¹

⁵⁹ *Arnwell Pty Ltd v Teilaboot Pty Ltd* [2010] VSC 123.

⁶⁰ See, e.g., *Rinehart v Hancock Prospecting Pty Ltd* (2019) 93 ALJR 582; *Rinehart v Welker* (2012) 95 NSWLR 221; see also *Rinehart v Hancock* (2017) 257 FCR 442. See also Jay TSENG, “Fiona Trust in Context: Interpreting Arbitration Clauses Following *Rinehart v Hancock*”, 36 *Arb. Int’l* (2020) p.109.

⁶¹ IAA, s 8(5)(d).

If the parties have agreed to a physical hearing as a separate procedural agreement after the arbitration has been commenced, then the tribunal probably could still decide to hold a remote hearing pursuant to its broad powers to determine the procedure of an individual case.⁶² However, there does not appear to be caselaw directly on this point.

In relation to the legal consequences of such an order: first, it would probably bind the parties (unless successfully challenged in the courts), pursuant to the parties' original arbitration agreement, which implies an obligation to comply with tribunal orders and awards.⁶³ However, there is some question regarding the enforceability of interim or provisional measures, and procedural orders.⁶⁴ Second, it may give rise to a challenge to the tribunal on the basis of alleged bias or lack of independence.⁶⁵ Third and finally, the award may be challenged on the basis that "the arbitral procedure [...] [was] not in accordance with the agreement of the parties" under the New York Convention, discussed further below in subparagraph e.10.

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: Probably not, but the challenge is less likely to succeed.

As noted above, there is no right to a physical hearing in arbitration in Australia. However, as a general principle, if a party fails to raise a breach of an alleged fundamental procedural right during the arbitration, that failure probably does not prevent that party from using it as a ground for challenging the award. This is because Australian courts treat certain fundamental procedural rights, including the rights to be treated equally and to present one's case, as mandatory and non-derogable rights, which

⁶² Model Law, Article 19(2) (tribunal has broad discretion regarding conduct of arbitration).

⁶³ See, e.g., IAA, s 23B (default by party to arbitration agreement), s 7 (enforcement of arbitration agreements).

⁶⁴ See, e.g., *Re Resort Condominiums International Inc* [1995] 1 Qd R 406 (interlocutory or procedural orders of US arbitrator in AAA arbitration did not constitute "foreign award" under IAA and thus not enforceable; enforcement also refused due to public policy concerns based on vagueness and uncertainty of language in orders); *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22, [25] (referring to "difficulty in enforcing awards that do not finally determine a matter in dispute, even though the award may only be a partial award with respect to the totality of the matters in dispute"); *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753, [25], [31] (discussing international authorities regarding meaning of "award" and noting that relevant determination was "decided as a preliminary question, rather than as part of an award on the merits" and thus may not be "award").

⁶⁵ Model Law, Articles 13, 34, 36; IAA, s 18A (adopting "real danger of bias" test).

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

cannot be waived.⁶⁶ For example, in *Sino Dragon v Natural Resources*, discussed above in subparagraph a.1, the FCA noted that the right to present one's case was "non-derogable" and could not be waived – but "the conduct of the party who complains of a lack of procedural fairness or a lack of equality is relevant to any asserted inability to present its case or any asserted lack of opportunity in that respect".⁶⁷ The Court continued: "I have also resisted the temptation to dispose of it on the basis that Sino Dragon may be seen largely to be the author of its own misfortune if there is any. Nevertheless, its conduct is not irrelevant or unimportant to my consideration and disposition of this ground [...] even though as a matter of law no waiver argument can arise".⁶⁸ Thus, in rejecting SD's challenge to the award, the FCA took into account SD's failure to complain during the arbitration about issues associated with the lack of a physical hearing.

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 noted above, there is no right to a physical hearing in arbitration in Australia. But even if such a right was recognized in a specific case, parties seeking to set aside an award generally must establish both a violation of a right *per se*, and that such violation actually prejudiced its case so as to deprive it of a fundamentally fair hearing; there must be "real unfairness or real practical injustice [...] able to be expressed, and demonstrated, with tolerable clarity and expedition".⁶⁹

⁶⁶ See Model Law, Article 4 (waiver of right to object, but only in relation to derogable rights).

⁶⁷ *Sino Dragon v Noble Resources*, [157].

⁶⁸ *Ibid* [6(b)]. See also *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 (*TCL v Castel*), [87] ("Article 18 of the Model Law is not an expression of a technical rule; it is the expression of a fundamental non-derogable requirement of fairness and equality").

⁶⁹ *TCL v Castel*, [55]. See also *Ibid* [110], [111] ("no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by an international commercial party in the conduct and disposition of a dispute in an award. It is likely that real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice"); *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* [2018] VSC 741 (*UDP v Esposito*), [25] ("any claimed denial of procedural fairness will not sound as a breach of

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: Potentially, but such a challenge is unlikely to succeed absent exceptional and egregious circumstances.

The leading Australian case on challenges to awards issued after a remote hearing is *Sino Dragon v Noble Resources*, discussed above in sub-paragraph a.1. The case sets a high bar for challenges to awards rendered after a remote hearing. In other words, a tribunal's failure to conduct a physical hearing may constitute a basis for setting aside the award, but such a challenge is unlikely to succeed absent exceptional and egregious circumstances. See also sub-paragraph e.10 below.

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: Potentially, but such challenges are unlikely to succeed absent exceptional and egregious circumstances.

Article 18 unless there is at least a possibility of a successful or more successful outcome for the party alleging a breach"); *Ringwood Agricultural Co Pty Ltd v Grain Link (NSW) Pty Ltd* [2013] NSWSC 191 (*Ringwood v Grain Link*), [54] ("the plaintiff has the burden of showing that any departure from any requirement under the Act, or the parties' agreement, did or might have prejudiced it", and endorsing the "principle that where there is a departure from rules of natural justice at a trial an aggrieved party will not get a new trial if it would inevitably result in the same result [...]"); *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323, [116] ("arguments 'manufactured' so as to be presented as suggested infringements against natural justice or procedural fairness principles need to be scrutinised with a high level of cautionary oversight. That is required to prevent what is a legislatively mandated 'hands off' policy objective underlying arbitrations being too easily undermined by a disgruntled arbitration participant resorting to confected efforts to manoeuvre around the finality of an adverse award, or to halt or slow down progress towards enforcement so as to thwart the legislative objects for a speedy and effective arbitral regime of dispute resolution").

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

Australian courts generally adopt a “pro-enforcement bias” towards arbitration awards, consistent with the New York Convention and the Model Law, as enacted in the IAA.⁷⁰ Thus, under the IAA, in determining applications to enforce or set aside awards, Australian courts “must [...] have regard to [...] the objects of the” IAA, and must also “have regard to [...] the fact that: (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and (ii) awards are intended to provide certainty and finality”.⁷¹ This pro-enforcement approach is consistent with Australia’s public policy of upholding contractual arrangements in international trade to support certainty and finality in international dispute resolution.⁷² In this context, challenges to arbitration awards in Australian courts, and actions to resist recognition or enforcement, will generally only succeed in exceptional and egregious circumstances.

New York Convention Article V(1)(b) / IAA s 8(5)(c) (right of party to present its case). As noted in sub-paragraph a.1, the test in Australia is whether a party has had a *reasonable* opportunity to present its case – a modification from the “full opportunity” required by the Model Law.⁷³ What is reasonable is a question of degree and depends on the facts and circumstances of the individual case. The leading Australian case on this issue, in the context of remote hearings, is *Sino Dragon v Noble Resources*, discussed above in sub-paragraph a.1; the decision in *International Relief and Development v Ladu*, discussed above in sub-paragraph a.1, is also relevant. Both cases set a high bar for challenges to awards on the basis of due process in the context of a remote hearing.

In this context, it is also worth noting *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* [2018] VSC 741. The applicants applied to set aside an award on the basis that, *inter alia*, they did not have a reasonable opportunity to present their case.⁷⁴ In the arbitration, “[n]ot all parties [...] were represented or took part in these [arbitration] proceedings. Nevertheless, critical parties were represented and these proceedings were

⁷⁰ IAA, s 2D(c) and (d) (two objects of Act are “to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce” and “to give effect to Australia’s obligations under the” New York Convention”); *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248, [346]; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 291 ALR 99 (*Traxys v Balaji*), [90]; *TCL v Castel*, [80]; *IRD v Ladu*, [185]; *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 (*Hub Street v Energy City*), [70] (“The point about the IAA having a pro-enforcement bias is that the grounds upon which enforcement may be resisted are finite and narrow [...]”).

⁷¹ IAA, s 39(2). In relation to objects of the IAA, see above fn. 66.

⁷² See, e.g., *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [190]-[194]; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 441, [126].

⁷³ IAA, s 18C (“For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party’s case if the party is given a reasonable opportunity to present the party’s case”); see also *IRD v Ladu*, [183]; *Liaoning Zhongwang Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [100]; *Hui v Esposito*, [224].

⁷⁴ *UDP v Esposito*, [2018] VSC 741, [1].

heard and determined on this basis”.⁷⁵ There were various court proceedings relating to the arbitration, including court subpoenas to produce documents, litigation relating to an indemnity under an insurance policy, and partial setting aside of a partial award made by an arbitrator subsequently removed.⁷⁶ The Victorian Supreme Court (Croft J) rejected the set-aside application, noting that the reasonable opportunity to present a party’s case “does not mean that that party ‘is entitled to present any case it pleases, any time it pleases’. Moreover, the right to ‘a full opportunity’ does not entitle a party to obstruct the arbitral proceedings by dilatory tactics. Additionally, it must be kept in mind that the provisions of Article 18 of the Model Law do not operate in a vacuum, thus context and practical circumstances and consequences are of critical importance. Though [this] will not be true in all cases, a typical context is that the court is dealing with a significant international commercial dispute between well-represented and ‘well-heeled’ commercial operators and, additionally, that the parties have chosen arbitration as the relevant dispute mechanism, which necessarily entails some compromise in the choice of procedures dictated by efficiency and expedition [...]”.⁷⁷

The Court noted that “the obligation of the arbitral tribunal is to provide a fair opportunity for the party to address any issues raised by the tribunal on all of the essential building blocks in the tribunal’s conclusion on the issue”.⁷⁸ The Court continued: “any claimed denial of procedural fairness will not sound as a breach of Article 18 unless there is at least a possibility of a successful or more successful outcome for the party alleging a breach”.⁷⁹ The Court also noted: “in the case of arbitral proceedings, there is the further consideration that they depend upon and arise from the arbitration agreement made between the parties. Thus, the additional dimension in arbitral proceedings, as compared to litigation in domestic courts, is that there is an obligation on a party to an arbitration agreement, whether express or implied, or confirmed or separately imposed by statute, to facilitate, or at least not obstruct, the arbitral process. Consequently, it follows that a party cannot be permitted to frustrate arbitral proceedings or, by its own acts or omissions, seek to produce a situation where the arbitral award may be impugned”.⁸⁰ Thus, for example, a party cannot object to a remote hearing for no legitimate reason or deliberately thwart the use of online technologies and then challenge the award under the New York Convention.

New York Convention Article V(1)(d) / IAA s 8(5)(e) (irregularity in procedure). Australian courts generally defer to, or at least place great weight upon, the tribunal’s interpretation of the parties’ agreement and the law of the seat, and will generally enforce an award unless there is substantial prejudice resulting from the procedural decision.

For example, *Ringwood Agricultural Company Pty Ltd v Grain Link (NSW) Pty Ltd* [2013] NSWSC 191 related to a domestic arbitration conducted under the Grain Trade

⁷⁵ *Ibid* [1] (Court, summarising status of arbitration).

⁷⁶ *Ibid* [7].

⁷⁷ *Ibid* [20]-[21].

⁷⁸ *Ibid* [24].

⁷⁹ *Ibid* [25].

⁸⁰ *UDP v Esposito*, [29].

Australia Dispute Resolution Rules (GTADRR).⁸¹ The tribunal issued an interim award, ruling that it had jurisdiction and finding the defendant liable for damages, then directed the parties to provide written submissions on quantum issues.⁸² The award debtor applied to set aside the final award, arguing that it was entitled to request an oral hearing on damages.⁸³ The court held that “when in the Procedural Orders the tribunal called for submissions on quantum [...] [t]he tribunal called for submissions within a limited ambit [in accordance with the GTADRR]. This did not give the [award debtor] open slather to re-litigate all or any questions it wished to raise in connection with damages”.⁸⁴ The award debtor “was undoubtedly entitled to an oral hearing” on certain issues under the GTADRR, “but it did not then, and does not now, seek that. Not only was it given that opportunity, from the outset it was given the opportunity to present its case in full, a course which did not commend itself to it [because it declined to participate in the proceedings]. It follows that the arbitral procedure was not otherwise than in accordance with the agreement of the parties, nor was it otherwise than in accordance with the Act”⁸⁵

New York Convention Article V(2)(b) / IAA s 8(7) (violation of public policy). Such claims must raise “those elements of the public policy of Australia which are so fundamental to our notions of justice that the courts of this country feel obliged to give effect to them even in respect of claims which are based fundamentally on foreign elements such as foreign awards under the IAA”.⁸⁶ Australian courts have confirmed that such challenges face a high bar, as “too rigid an enforcement of the public policy of the domestic jurisdiction runs the risk of undermining the very purpose of the [IAA], being the facilitation of enforcement and the maintenance of certainty of foreign arbitral awards”.⁸⁷ Australian courts have also confirmed that: “it is only those aspects of public policy that go to the fundamental, core questions of morality and justice [...] which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state [...] This approach also ensures that due respect is given to Convention-based awards as an aspect of international comity in our interconnected and globalized world which, after all, are the

⁸¹ *Ringwood v Grain Link* [2013] NSWSC 191, [12].

⁸² *Ibid* [2].

⁸³ *Ibid* [6], [36].

⁸⁴ *Ibid* [49].

⁸⁵ *Ibid* [51]. But cf. *Hub Street v Energy City*, [59], [60], [85], [104] (composition of tribunal not in accordance with agreement of parties, under Qatari law as applicable law, and thus award not enforced).

⁸⁶ *Traxys v Balaji* [2012] 201 FCR 535, [96].

⁸⁷ *Ibid* [98].

product of freely negotiated arbitration agreements entered into between relatively sophisticated parties”.⁸⁸

Two legislated examples of the public policy exception to enforcement, as stated in the IAA, are: (i) where “the making of the award was induced or affected by fraud or corruption”; or (ii) “a breach of the rules of natural justice occurred in connection with the making of the award”.⁸⁹ Natural justice rules are breached where a party has not been afforded a reasonable opportunity to present their case, and thus this ground overlaps with New York Convention Article V(1)(b), discussed above in subparagraph e.10, and was also addressed in *Sino Dragon v Noble Resources*, discussed above in subparagraph a.1.⁹⁰ Australian courts will only intervene on this ground where the arbitration process was contrary to the “fundamental principles of justice and morality of the state, recognizing the international dimension of the international arbitration context”.⁹¹

One of the leading cases on alleged breaches of natural justice and public policy is the decision of the Full Court of the FCA in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.⁹² The issue was whether the alleged “absence of probative evidence” for the tribunal’s factual findings amounted to a breach of natural justice.⁹³ The Full Court criticised “the dressing up of complaints about the factual findings into a claim concerning asserted procedural unfairness [...] [N]othing in the IAA is likely to permit a party to an arbitration award to spend three days before a judge arguing about the factual findings made by experienced arbitrators after a ten-day hearing, when the substance of the complaint is the evidential foundation for, and reasoning process towards, facts as found [...]”.⁹⁴ The Full Court continued: “If the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been

⁸⁸ *Ibid* [105].

⁸⁹ IAA, s 8(7A). See also *ibid*, s 19 (same examples relating to interim measures or interim awards in conflict with, or contrary to, public policy of Australia).

⁹⁰ *Sino Dragon v Noble Resources*, [174], [177]. See also *Sauber Motorsport AG v Giedo van der Garde BC* [2015] VSCA 37, [7]-[8]; *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229, [42]; *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, [37].

⁹¹ *TCL v Castel*, [76]. See also *Traxys v Balaji Coke Industry Pvt Ltd (No 2)*; but cf. *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* [2021] FCA 477 (one award debtor, Mrs. Liu – the wife of Mr. Liu, another award debtor - not given proper notice of arbitration or appointment of tribunal, and thus award not enforced against Mrs. Liu, on basis of breach of natural justice and violation of public policy; award enforced against other award debtors who had received proper notice, including Mr. Liu).

⁹² This case leads on from the 2013 decision of the High Court, *TCL v FCA*.

⁹³ *TCL v Castel*, [7], [55].

⁹⁴ *Ibid* [53].

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

conducted regularly and fairly. That danger is acute if natural justice is reduced in its application to black-letter rules, if a mindset appears that these rules can be ‘broken’ in a minor and technical way and if the distinction between factual evaluation of available evidence and a complete absence of supporting material is blurred. All these things occurred in the argument in this case. Their presence persuaded or required the judge to spend three days reviewing the award that was the product of a ten-day reference. That should not be how such a review takes place. We are not being critical of the primary judge. His reasons are careful, thorough and substantially correct. The application was a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice. An international commercial arbitration award will not be set aside or denied recognition or enforcement under Articles 34 and 36 of the Model Law (or under Article V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness. The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition. It does not involve the contested evaluation of a fact finding process or ‘fact interpretation process’ or the factual analysis of asserted ‘reasoning failure’, as was argued here”.⁹⁵

Conclusion on enforcement. In Australia, a breach of an alleged right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of Australia or otherwise) would probably not constitute a ground for refusing recognition and enforcement of a foreign award under New York Convention Articles V(1)(b) (right of party to present case), V(1)(d) (irregularity in procedure) and/or V(2)(b) (violation of public policy), absent exceptional and egregious circumstances.

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: Various – see below.

During the pandemic, Australian courts and tribunals enabled electronic filings of all written submissions and accompanying material, to the extent such filings were not already permitted.⁹⁶ Australian courts and tribunals also permitted one or more of the

⁹⁵ *Ibid* [54]-[55].

⁹⁶ See, e.g., Supreme Court of the Northern Territory of Australia Practice Direction No 1 of 2020; Supreme Court of Tasmania Circular to Practitioners No 2 of 2020; see also

following hearing options, depending on the individual case: (i) adjourning hearings to a future date; (ii) proceeding with physical hearings with social distancing measures; (iii) proceeding with hearings using a combination of physical and remote technologies; and (iv) proceeding with hearings wholly using remote technologies. Most hearings in Australian courts have taken place via Microsoft Teams, as it is perceived as more secure than other online platforms. Several courts have installed, or are in the process of installing, video platforms and providing training to judges and court personnel, together with guidelines and instructions for lawyers.⁹⁷

All States and Territories have enacted legislation to deal with the effect of the pandemic. Under this legislation, regulations, orders and directions and other legislative instruments are issued to deal with the effects of the pandemic. Some of the legislative instruments which have been enacted have the effect of excluding a period for the purposes of calculating statutory limitation periods in civil causes of action and/or altering the arrangements for signing documents and witnessing signatures.⁹⁸

The Australian Centre for International Commercial Arbitration (“ACICA”), the leading body for international arbitration in Australia, developed an “Online Arbitration Guidance Note” for the conduct of arbitration on online platforms.⁹⁹

The Judicial College of Victoria developed an online publicly-available resource summarizing legislative changes and Australian court decisions relating to the impact of the pandemic on the courts, including decisions regarding due process and remote hearings (in the context of litigation, not arbitration).¹⁰⁰

Queensland Law Society, COVID-19 Information and resources, available at <https://www.qls.com.au/For_the_profession/Courts_commissions_and_tribunals> (last accessed 26 November 2020) (discussing a physical “drop in box” monitored by security guards to keep track of documents filed by litigants) (no longer used in June 2022).

⁹⁷ See, e.g., Supreme Court of New South Wales, Courtroom technology facilities - An Overview available at <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_facilitiesupport/sco2_courtroomtechnology/sco2_courtroomtechnology.aspx> (last accessed 14 June 2022); Department of Justice and Attorney General, Pexip Instructions – External User, available at <https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/646481/external-user-pexip-instruction-guide.pdf> (last accessed 14 June 2022).

⁹⁸ See, e.g., COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW); COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic); COVID-10 Emergency Response Act 2020 (Qld); Emergency Management Act 2005 (WA); COVID-19 Emergency Response Act 2020 (SA); COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas); COVID-19 Emergency Response Act 2020 (ACT); Public and Environmental Health Legislation Amendment Act 2020 (NT).

⁹⁹ Australian Centre for International Commercial Arbitration, Guidance Note for Online Arbitration, available at <<https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf>> (last accessed 14 June 2022).

¹⁰⁰ Judicial College of Victoria, Coronavirus Jurisprudence, available at <<https://www.judicialcollege.vic.edu.au/resources/coronavirus-jurisprudence>> (last accessed 14 June 2022).

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