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

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VIRGIN
ISLANDS (BVI)**

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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. There is no express provision in the applicable law of the BVI that provides for the right to a physical hearing.

By way of a brief introduction to BVI arbitration: in December 2013 the BVI adopted the Virgin Islands Arbitration Act, based on the provisions of the UNCITRAL Model Law (the “Arbitration Act 2013”);² in February 2014 the BVI acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”);³ in September 2015, the Government of the British Virgin Islands announced the appointment of a Board of Directors for a new BVI International Arbitration Centre (“BVI IAC”) in Tortola; and in 2016, the BVI IAC adopted its international arbitration rules based on the UNCITRAL Arbitration Rules.

The Eastern Caribbean Supreme Court (“ECSC”)⁴ exercises a supervisory jurisdiction in relation to commercial arbitrations. Appeals lie first to the Eastern Caribbean Court of Appeal and from there to the Privy Council in London, whose Justices also sit on the UK Supreme Court. The Eastern Caribbean Supreme Court is bound by decisions of the Eastern Caribbean Court of Appeal and of the Privy Council on appeal from the particular jurisdiction. Other decisions of the Privy Council and of the English courts are persuasive.

¹ Officially the Virgin Islands but commonly known as the British Virgin Islands.

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² Virgin Islands Arbitration Act No 13 of 2013, amended by 6/2015.

³ See <<http://www.newyorkconvention.org/list-of-contracting-states>> (last accessed 9 March 2021).

⁴ The ECSC was established by the West Indies Associated States Supreme Court Order 1967 and provides the court structure for its member states or territories: (i) Antigua and Barbuda; (ii) the Commonwealth of Dominica; (iii) Grenada; (iv) Saint Kitts and Nevis; (v) Saint Lucia; (vi) the Grenadines; (vii) Anguilla; (viii) the BVI; and (ix) Montserrat. The ECSC is headquartered in Saint Lucia with High Courts in each individual state or territory. There is also a Commercial Division of the High Court which sits in the BVI and which hears, amongst other things, claims relating to arbitrations.

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The provisions of the Arbitration Act 2013 that would be of primary relevance to establishing the existence of the parties' right to a physical hearing are found in sections 44 (substitution of UNCITRAL Model Law Article 18 on equal treatment), 45 (substitution of UNCITRAL Model Law 19 on determination of rules of procedure), 46 (substitution of UNCITRAL Model Law 20 on the place of arbitration), and 50 (substitution of UNCITRAL Model Law 24 on hearings and written proceedings).⁵

In particular, section 50 of the Arbitration Act 2013 ("Hearing and written proceedings")⁶ provides that the Tribunal shall decide whether to hold "oral hearings" for the presentation of evidence or oral argument, subject to the contrary agreement by the parties.

As will be discussed further below, the primary question therefore is whether an "oral hearing" necessarily means a physical hearing. Commentators have argued that the principle of orality, which lies at the core of the physical hearing and allows for a simultaneous exchange of arguments, reveals the true meaning of the term "hearings" to be physical gatherings.⁷ However, it is unclear why a remote hearing would not meet these requirements. Just as in a physical hearing, a remote hearing allows for the simultaneous exchange of arguments, with the only difference being that in a remote hearing this is facilitated by electronic communication means.⁸

Thus if the principal of orality is attributed to both physical and remote hearings, the provision in section 50 of the Arbitration Act 2013 is merely a reference to oral submissions made by the parties to the tribunal as opposed to written submissions and it does not support a conclusion that the section implies a requirement of a physical hearing.

Reflecting section 50, Article 17 of the BVI IAC Rules grants the tribunal a broad discretion to conduct arbitrations "in such manner as it considers appropriate", subject to the Rules. Article 17(3) specifies that if a party requests, the tribunal shall "hold hearings for the presentation of evidence by witnesses or for oral argument". However the Rules do not express a right to a physical hearing.⁹

⁵ Virgin Islands Arbitration Act No 13 of 2013, as amended.

⁶ Section 50 of the Arbitration Act 2013 provides: "(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party".

⁷ See Maxi SCHERER, *Remote Hearings in International Arbitration: An Analytical Framework*, 37 J. Int'l Arb. (2020) p. 407 at p. 417, fn. 46, which refers to Joachim MÜNCH, *MünchKner Kommentar zur ZPO*, § 1047, paras. 8-9.

⁸ *Ibid.*

⁹ Article 17(3) provides: "If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral

We have not identified any decision of the BVI courts in which the issue has been considered.

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: It is unlikely that a right to a physical hearing may be inferred; and likely that any absolute right to a physical hearing is excluded.

While it may be that the original concept of the "hearing" in the Arbitration Act 2013 assumed a physical hearing,¹⁰ this has, we suggest, evolved to the extent that it should not now be inferred that this assumption persists.

Since the Arbitration Act 2013 is based on the UNCITRAL Model Law, it might be suggested that the hearings were envisaged as physical gatherings,¹¹ as when the Model Law was most recently revised (2006) prior to its adoption in the BVI, the drafters would not have had remote hearings in mind. However, even if this analysis were correct, it does not follow that the BVI laws exclude the possibility of remote hearings.

Further, we suggest that the issue in BVI arbitrations is not whether a hearing is physical or remote, but whether it is conducted in such a way that it is in accordance with the parties' arbitration agreement and the mandatory requirements of due process. Clearly, both parties must be able to present their cases. This is reflected in the provisions of both the Arbitration Act 2013 and BVI IAC Rules,¹² according to which the powers

tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials". The application of the BVI IAC Rules would be subject to the parties' contractual arrangement.

¹⁰ E.g., section 20(2) Arbitration Act 2013 ("Place of arbitration") provides: "[...] the arbitral tribunal may, unless otherwise agreed by the parties, *meet at any place it considers appropriate* for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (emphasis added). The reference to the power of the tribunal to "meet at any place" for hearing witnesses, experts or the parties may suggest that the word "hearings" is used in the Arbitration Act 2013 in the context of actual physical gatherings as opposed to a remote hearing. However Article 28(4) of the BVI IAC Rules states: "The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication *that do not require their physical presence at the hearing* (such as videoconference)" (emphasis added).

¹¹ See Articles 20(1), 22(1), 24, 25(c) and 26(2) of the UNCITRAL Model Law.

¹² See section 44(3) of the Arbitration Act 2013 which provides as follows: "(3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Act or by the parties to any of those arbitral proceedings, the arbitral tribunal is required (a) to be independent; (b) to act fairly and impartially as between the parties,

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of the tribunal to conduct arbitration proceedings are subject to the requirements of equality and that parties are provided a reasonable opportunity to present their case.

Finally it is to be noted that international arbitration in offshore jurisdictions including the BVI spans frontiers and, certainly in the BVI, involves parties from all over the world. This, together with the BVI's recent history of the devastation of hurricane Irma in 2017, the closure of its borders for much of 2020, and its sophisticated infrastructure enabling remote hearings, means that as a practical matter remote hearings are a well-accepted and essential part of the BVI arbitration environment. One expects that should the matter ever reach the BVI courts it will be confirmed that the *lex arbitri* permits ordering of remote hearings and that any general right to a physical hearing is excluded.

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: It is unlikely that the right to a physical hearing can be inferred from the relevant provisions of BVI law applicable to civil procedure in the courts.

During the pandemic, both listed first instance hearings and those in the Court of Appeal that involved advocates appearing by remote link with the permission of the Court of Appeal, have been conducted remotely, certainly in the Commercial Division of the High Court.

The law for this is in part 2.7(3) of the ECSC Civil Procedure Rules (the "ECSC CPR"), which grants the court discretion over the manner in which cases are dealt with:

"The court may order that any hearing be conducted in whole or in part by means of a telephone conference call, video-conference or any other form of electronic communication".

giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and (c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate", and Article 17(1) of the BVI IAC Rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case [...]".

The flexibility of the procedure is further illustrated by the practice directions on the emergency matters adopted following hurricane Irma in the BVI,¹³ which provided:

“[...] Hearings in the Commercial division shall proceed by personal appearance before the court or such other method as the judge may direct [...], except that case management hearings, interlocutory uncontested hearings, emergency applications and ex parte applications shall be conducted by teleconference hearings or such other method as the judge may direct”.

Importantly, the BVI Commercial Court even sat for some months in St Lucia, a different jurisdiction albeit part of the Eastern Caribbean Supreme Court.

The current position is that hearings take place remotely pursuant to the COVID-19 Emergency Guidelines and a COVID-19 Emergency Measures Practice Direction, which provide a similar broad grant of discretion. The measures provide for the majority of hearings to be held remotely and address procedural issues (such as service and filing) during social distancing restrictions. Hearings with attendance in person are allowed under these measures in exceptional circumstances, where the Judge has deemed the matter fit for such hearing during this period.

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 application of the practice direction referred to above is limited to the ECSC CPR. Similar to the laws in a number of other jurisdictions, the Arbitration Act 2013¹⁴ prevents the interference of the courts into matters governed by the Act except where such interference is expressly permitted.

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

¹³ See a practice direction on commercial division emergency matters, and in particular its Section 5.1 and 5.2 (“Hearing of matters”). This practice direction was adopted following hurricane Irma on 6 September 2017 and is no longer in force.

¹⁴ Section 10 of the Arbitration Act 2013 adopts Article 5 of the UNCITRAL Model law which provides that “In matters governed by this Law, no court shall intervene except where so provided in this Law”.

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As described above, there is no discernible general right to a physical hearing.

However, the Arbitration Act 2013 recognises the fundamental principle in arbitration of party autonomy and it was drafted in such way as to emphasize the supremacy of this concept. For example section 45 of the Arbitration Act 2013 provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal (whether these are institutional rules or *ad hoc* proceedings).¹⁵

Accordingly, applying the principle of party autonomy, even if any right to a physical hearing could be inferred from the provisions of the Arbitration Act 2013 (which is, as mentioned earlier, unlikely), the tribunal's power to decide whether to hold a physical or non-physical hearing for the presentation of evidence or for an oral argument is subject to any contrary agreement of the parties.

It should however be noted that in exceptional cases, the parties' fundamental due process right to be heard may provide a compelling reason for holding a physical hearing even though the parties have agreed not to hold one. Here, the mandatory due process rules prevail over the principle of party autonomy.¹⁶

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: Unlikely.

The above conclusion derives from the findings made in the previous section. As mentioned, the principle of party autonomy is an important principle recognised in BVI-seated commercial arbitrations. The parties are free to agree on the manner in which the arbitration proceedings are conducted and the tribunal should not interfere with the party's choice except in the limited circumstance of the agreement being in breach of a mandatory due process rule.

The tribunal might encourage the parties to reconsider their agreement but, ultimately, it is difficult to see how it could ignore an explicit agreement to hold the hearing physically and in-person. Furthermore, and as it will be explained, the decisions

¹⁵ See section 45 of the Arbitration Act 2013. Also the prevailing importance of the principle of the party's autonomy and flexibility of BVI jurisdiction in arbitration proceedings was noted by Francois Lasalle in Francois LASSALLE, "Procedural orders 2.0 for international arbitration", *Corporate disputes* (2021) p. 80.

¹⁶ The general dicta on the parties' fundamental right to be heard can be found in *R (Osborn) v The Parole Board* (2013) UKSC 61; (2014) AC 1115 stated by Singh LJ in *R (Citizens UK) v Secretary of State for the Home Department* (2018) 4 W.L.R. 123 (82-83).

on whether to conduct hearings remotely should be treated with great care by the tribunal, particularly in light of the possibility of a subsequent setting aside application.

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: Likely yes.

The provisions of the Arbitration Act 2013¹⁷ provide for the waiver of the right to object in cases when the party has knowledge of any derogations (be this either from the provisions of the Arbitration Act 2013 or the arbitration agreement) and fails to bring such derogation to the attention of the tribunal without an undue delay. This provision serves as an important safeguard against the abuse of process.¹⁸

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, there is no evidence that would univocally suggest that there is a right to a physical hearing in a BVI-seated arbitration. Assuming, however, that such right was recognized in a specific case, parties seeking to challenge an arbitral award would generally need not only establish a breach of this right, but also that the breach triggers one of the recognised grounds for setting aside as discussed in the next section.

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?*

¹⁷ Article 4 of the second schedule of the Arbitration Act 2013 provides: “A party who knows that any provision of this Law from which the parties may derogate or *any requirement under the arbitration agreement has not been complied with* and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object” (emphasis added).

¹⁸ See, e.g., *Stockman Interhold S.A. v Arricano Real Estate PLC* (2017) EWHC 2909 (Comm), where the claimant had lost the right to object under section 73 of the Arbitration Act 2013 (137-151).

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Short answer: Unlikely.

The grounds for refusing to enforce arbitral awards are dealt with in Part X of the Arbitration Act 2013.

The grounds in respect of awards under the NYC (“Convention awards”) are addressed by section 86(2) and (3) of the Act. These can be summarized as follows: (i) Incapacity of a party to the arbitration agreement; (ii) Invalidity of the arbitration agreement; (iii) No proper notice of the appointment of the arbitrator or of the arbitral proceedings or inability of the party to present its case; (iv) Inappropriate scope of the arbitration award; (v) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or the law; (vi) That the award has not yet become binding on the parties or has been set aside or suspended; (vii) The award is in respect of a matter that is not arbitral under BVI law; and (viii) Public policy.

In respect of the awards not rendered under the NYC (“Non-Convention awards”) section 83(2)(c) identifies an additional ground for refusing enforcement: Any other reason the Court considers just.

The BVI Court is supportive of the enforcement of Convention awards. For example in *PT Ventures SGPS SA and Vidatel Ltd* the Court stated at [27] that “the general approach to enforcement of an award should be *pro-enforcement* [...] There must [...] be *good reasons* for refusing to enforce a New York Convention award” (emphasis added).¹⁹ In *Grand Pacific Holdings Limited and Pacific China Holdings Limited* the court emphasized at [5]: “It is true that in enforcement proceedings, the court before which enforcement was sought might refuse, on one or more of the well-known grounds which apply to New York Convention awards, to permit it to be enforced, but that would be because the court found something *objectionable in the process by which the award had been obtained*, or declined to enforce it on public policy grounds” (emphasis added).²⁰

Although the Court was addressing Convention awards in *PT Ventures and Grand Pacific Holdings*, the statement of principle appears applicable to Non-Convention awards too. The approach identified by the Court suggests that in order to set aside an award it needs to be established that the breach would have had an impact on the outcome of the arbitration.

The Court’s approach is also clear from *IsZo Capital LP v Nam Tai Property Inc*²¹ in which judgment was delivered on 3 March 2021. At [6] Jack J described the trial:

“I heard the trial entirely virtually. All of the defence witnesses gave evidence from Macau or Hong Kong. Due to time differences this meant that the hearings from 2nd to 12th February were conducted 8.30am until between 11am and 11.30am BVI time

¹⁹ BVIHC (COM) 2015/0117 and BVIHC (COM) 2019/0067.

²⁰ BVIHCV 2009/389.

²¹ BVIHC(COM)2020/0165.

(8.30pm to 11 or 11.30pm Macau and Hong Kong time). [...] The evidence of [the claimant's witness] on 1st February commenced at 8.30am and continued until about 3pm. He gave evidence from New York. Although there were occasional internet glitches, these did not substantially interfere with the fair hearing of the trial”.

Nevertheless and by way of a general observation, any deviation from a conventional process is vulnerable to the risk of depriving a party of the right to a fair hearing.²² This can be for a number of reasons but predominantly due to the novelty which leads to an unawareness about what can go wrong. To ensure that the parties are on equal footing, the procedure would need to be carefully thought through. When making a decision on remote hearings arbitrators would need to consider the availability of the resources (for example whether there is reliable access to the internet and whether interpreters can be accommodated). In addition to carefully thought through logistics, tribunals would be advised to implement safeguards such as a detailed procedural order and default provisions in case the conduct of the remote hearing becomes unwieldy.²³

d. 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: Likely not.

As mentioned previously, the BVI is a strongly pro-enforcement jurisdiction.²⁴ The threshold for resisting enforcement of a Convention award on the specified grounds is high, as demonstrated below.

²² F. LASSALLE, “Procedural orders 2.0 for international arbitration”, fn. 15 above, p. 80.

²³ *Ibid.*

²⁴ *Ibid.* The enforcement of an award has been upheld by the following decisions: *PT Ventures SGPS SA v Vidatel Ltd*, ECSC J0316-1 (2020); *Donna Union Foundation v Koshigi Ltd*, ECSC J0514-2 (2019); *IPOC International Growth Fund Ltd v LV Finance Group Ltd*, 6 JBVIC 1801 (2007); *Eastern Pacific Industrial Corporation Berhad v Vela Financial Holdings Ltd*, 8 JBVIC 2501 (2005); *GL Asia Mauritius II Cayman Ltd v Pinfold Overseas Ltd* ECSC VG HC 20 (2013); *Cukurova Holdings A.S. v Sonera Holdings B.*, VG CA 10 (2017); *Sopers Hole Corporation Ltd v Sandstorm Virgin Islands Ltd*, VG 1984 CA 3; *Sandstorm Virgin Islands Ltd v Sopers Hole Corporations Ltd*, VG 1983 HC 5.

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*Right of the party to present its case (NYC, Art. V(1)(b)).*²⁵ In *Cukurova Holdings S.A. and Sonera Holding B.V.*²⁶ the Court of Appeal upheld enforcement of an award despite the resisting party's allegation that it was denied a fair hearing because the tribunal rejected an application that one of its witnesses should be permitted to attend before the tribunal in person and give evidence orally.

Elaborating on the meaning of inability to present one's case, the Judge referred to *Germany GmbH v. Ferco Steel Ltd.*,²⁷ in which it was decided that the inability to present a case to arbitrators within the meaning of the English Arbitration Act 1996²⁸ contemplates that the resisting party has been prevented from presenting its case by matters outside its control. This will normally cover the circumstances when the procedure adopted has been operated in a manner contrary to the rules of natural justice.²⁹ Where, however, the resisting party has, due to matters within its control, not taken advantage of an opportunity given to present its case, that is not a situation within the exception to enforcement under the Act.

Thus the mere fact of adopting a remote hearing would clearly be insufficient to resist the enforcement on this grounds: see *Cukurova* above.³⁰

²⁵ Sections 81 and 84 of the Arbitration Act 2013 give force of law to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10th June 1958 (see BVIHC (COM) 2015/0117 and BVIHC (COM) 2019/0067 (3), PT Ventures SGPS SA and Vidatel LTD). The inability of a party to present its case is a ground for refusing enforcement under section 86 (2 (c)) of the Arbitration Act 2013.

²⁶ *Cukurova Holdings S.A. v Sonera Holding B.V.*, BVIHCVAP 20 (2012), Court of Appeal, British Virgin Islands.

²⁷ *Germany GmbH v. Ferco Steel Ltd.*, Colman, J (1999), CLC 647.

²⁸ The 1996 Arbitration Act, governing arbitrations in England, Wales and Northern Ireland.

²⁹ For the meaning of natural justice, see Halsbury's Laws of England. Judicial Review (Volume 61A (2018)). Natural justice and fairness: "there are two basic rules of natural justice. First, that no person is to be a judge in his or her own cause (*nemo iudex in causa sua*). Second, that no one is to be condemned unheard (*audi alteram partem*). These rules govern the way in which a decision is taken rather than its correctness; although one of the purposes of procedural fairness at common law is that procedurally fair decision-making is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. The rules of natural justice must be observed by courts, tribunals, arbitrators and all those having the duty to act judicially".

³⁰ See also *Adams and others v Cape Industries plc and another* (1990) Ch 433; *Al-Mehdawi v Secretary of State for the Home Department* (1990) 1 AC 876; *Lloyd and others v McMahon* (1987) AC 625; *Stevenson v United Road Transport Union* (1977) 2 All ER 941; *Ridge v Baldwin and others* (1964) AC 40.

*Violation of public policy (NYC, Art. V(2)(b)).*³¹ In *Cukorova*³² it was also clarified that the public policy ground is commonly considered to be a ground of last resort.³³ The Judge referred to *Schachtbau-Und Tiefbohrergesellschaft G.m.b.h. v. Ras Al Khaimah National Oil Co*³⁴ by which it was established that considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. In this regard, in *Richardson v Mellish*,³⁵ Burrough J remarked that “it is never argued at all, but when other points fail”. He further observed that in order to successfully argue the violation of public policy it has to be shown that there is some element of illegality, or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

*Irregularity in the procedure (NYC, Art. V(1)(d)).*³⁶ There is English authority to the effect that a failure by arbitrators to act in accordance with the principles of natural justice will amount to a serious irregularity in the procedure.³⁷ Whether there was a breach of the principle of the natural justice (i.e., substantial injustice) will largely depend on the facts.³⁸

As mentioned previously, in the majority of cases the potential procedural prejudice to the parties and the risk of non-enforcement of the arbitral award can largely be mitigated by a carefully drafted procedural order.

e. COVID-Specific Initiatives

³¹ Section 86(3)(b) of the Arbitration Act 2013.

³² *Cukurova Holdings S.A. and Sonera Holding B.V.*, (2012) BVIHCVAP 20. Court of Appeal, British Virgin Islands.

³³ In *Minmetals Germany GmbH v Ferco Steel Ltd*, 1 All E.R. 315 (1999); C.L.C. 647 (1999) an award issued by the China International Economic and Trade Arbitration Commission, brought to be enforced in England, was challenged on public policy grounds. The court reaffirmed the position established in *IPCO* and it stated five considerations when assessing English public policy as a barrier to enforcement. They are: “(1) the nature of the procedural injustice; (2) whether the enforcer has invoked the supervisory jurisdiction of the seat of the arbitration; (3) whether a remedy was available under that jurisdiction; (4) whether the courts of that jurisdiction have conclusively determined the enforcer’s complaint in favour of upholding the award; and (5) if the enforcer has failed to invoke that remedial jurisdiction, for what reason and in particular whether he was acting unreasonably in failing to do so”.

³⁴ Sir John Donaldson MR in *Deutsche Schachtbau-Und Tiefbohrergesellschaft G.m.b.h. v. Ras Al Khaimah National Oil Co and Another*, (1987) 2 Lloyd’s Rep (246).

³⁵ *Richardson v Mellish* (1842) 2 Bing. 229 (252).

³⁶ Section 86 (e (1), (2)) Arbitration Act 2013.

³⁷ *Rustal Trading Ltd v Gill & Duffus SA*, 1 Ll Rep 14 (2000) and *Ledwood Construction v Kier Construction*, (1996) 68 Con LR 96.

³⁸ *Ibid.*

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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: N/A

On 24 March 2020, the ECSC issued its COVID-19 Emergency Guidelines and a COVID-19 Emergency Measures Practice Direction. These establish a number of measures to minimise the risks associated with the pandemic.³⁹

The direction contains a detailed regulation of remote hearings including electronic filing (which was previously in use in the BVI Commercial Court), service and preparation of electronic files of documents for hearing. It strongly encourages remote hearings with physical hearings being allowed in exceptional circumstances (where the Judge has deemed the matter fit for such hearing during this period).

Being used as guidance also in a number of commercial arbitrations seated in the BVI, the Practice Direction facilitated a non-disruptive run of commercial arbitration and litigation proceedings in this jurisdiction.

The BVI IAC recently ran a live virtual hearing webinar to show the use of various technological tools assisting in remote hearings in real time (such as live transcripts and electronic exhibits).⁴⁰

³⁹ ECSC, “Practice Direction No. 5 of 2020 – COVID-19 Emergency Measures (3rd Re-issue)” (2020) available at <COVID-Emergency-Measures-Practice-Direction-3rd-Re-issue-Final-5.pdf> (last accessed 9 March 2021).

⁴⁰ F. LASSALLE, “Procedural orders 2.0 for international arbitration”, fn. 15 above, p. 79.