

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

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

THE BAHAMAS

Theominique D. Nottage

THE BAHAMAS

[Theominique D. Nottage*](#)

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* right to a physical hearing in arbitration in The Bahamas.

In The Bahamas, the *lex arbitri* or the law that relates to the governing of arbitration proceedings (where the seat of the arbitration is in The Bahamas)¹ may be largely found in (i) the Arbitration Act 2009 (“AA”), (ii) the Arbitration (Foreign Arbitral Awards) Act 2009 (“FAA”) and to a limited extent in (iii) Order 66, Rules of Supreme Court 1978, Chapter 53 (Subsidiary Legislation), Statute Laws of the Commonwealth of The Bahamas (“RSC 1978”) which provides for matters for a judge in court, such as applications to remit an award, remove an arbitrator or set aside an award.² At the moment, there is no legislative distinction between domestic and international arbitration, however, there is proposed legislation that would (i) seek to incorporate the UNCITRAL Model Law on International Commercial Arbitration³ and (ii) provide separate legislative regimes for domestic arbitration and international arbitration respectively.⁴ The AA, the FAA and Order 66 of the RSC 1978 do not expressly provide for a right to a physical hearing in arbitration.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex*

* Theominique D. Nottage, MCI Arb is an Arbitration Consultant to the Government of The Bahamas, based in Nassau, and a current Young ICCA Co-Chair.

¹ Section 4(1) of the AA provides that its provisions apply where the seat of arbitration is in The Bahamas and Section 2(1) of the AA defines the seat of arbitration as the juridical seat designated by the parties, an arbitral institution or arbitral tribunal as authorized by the parties to the arbitration.

² See *Therapy Beach Club Incorporated v RAV Bahamas Limited and Another* [2018] 1 BHS J. No. 46 at [Paragraph 7].

³ UNCITRAL, Model Law on International Commercial Arbitration, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> (last accessed 4 May 2021).

⁴ The Government of The Bahamas, Ministry of Financial Services, Trade & Industry and Immigration, “Public Notice: The International Commercial Arbitration Bill 2018 & The Arbitration (Amended) Bill 2018” (24 January 2019).

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

arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: Yes, a right to a physical hearing can be inferred or excluded by way of interpretation of the *lex arbitri*, depending on the circumstances of the proceedings.

If one takes a broad approach of also considering those parts of the *lex arbitri* that govern *court proceedings* relevant to arbitration, then a right to a physical hearing can be inferred or excluded based on the interpretation of certain legislative provisions. For instance, section 22 of the AA provides that court proceedings under the AA must be conducted in public except in certain circumstances, i.e., unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.⁵ Indeed, section 24 of the AA provides that applications under section 22 of the AA must consider *inter alia* (i) the open justice principle and (ii) any other public interest considerations. As another example, section 54 of the AA empowers the court to use its powers to secure the attendance of witnesses in an arbitration, “[...] a party to arbitral proceedings may use the *same court procedures* as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence” (emphasis added).⁶

Besides the aforementioned legislative provisions, in the current circumstances (COVID-19 global pandemic), the Court has provided directions that state that the Judge will have discretion to determine the disposition mode of a matter and can decide whether there is a form of physical hearing or the matter can be decided by an “Application on the Papers” which means that the Court will decide the matter on the documents filed in respect of the application and the written submissions of the parties without a hearing.⁷ As such, by virtue of the *lex arbitri*, while there is no express right to a physical hearing in arbitration, a right to a physical hearing may be inferred or excluded by way of interpretation of the relevant legislative provisions and civil procedural rules, including by analogy those applying to litigation involving arbitration, and always subject to consideration of the overriding principle of natural justice (which is discussed further below).

⁵ Section 22 of the AA.

⁶ Section 54(1) of the AA; see discussion at sub-paragraph b.3.

⁷ The Office of the Chief Justice, Judiciary of The Bahamas, “Notice #13: The Court Coronavirus Mitigation Protocols 6.0” (22 November 2020) at <https://mcusercontent.com/b856273e2ad3a9c4789204dd2/files/43febaa0-4b71-4fb0-a3a2-e3ec855ac357/Protocols_NOTICE_13._22_November_2020..pdf> (last accessed 23 November 2020).

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 depends.

The RSC 1978 governs the rules of civil procedure in The Bahamas. There is no express provision in the RSC 1978 that provides for a right to a physical hearing in litigation. To an extent, it can be inferred that there is a right to a physical hearing in instances where there is a matter of public interest,⁸ however, there are also instances where an application to the Court can be decided solely based on the documents and written submissions before the Court, i.e., an application for substituted service,⁹ an application for summary judgment,¹⁰ etc. In the context of arbitration related proceedings before the Court, Order 66, RSC 1978 sets out the civil procedure rules applicable to arbitration proceedings that require referral to the Bahamian Supreme Court in circumstances where it is necessary to remit an award, remove an arbitrator or umpire, or set aside an award. Order 66, rule 1, RSC 1978 provides for matters for a judge *in Court* and Order 66, rule 2, RSC 1978 provides for matters for a judge *in Chambers* or Registrar. This can infer a right to a physical hearing depending on interpretation. However, as stated above, the Court has recently provided directions that state that the Judge will have the discretion to determine the disposition mode of a matter and can decide whether there is a form of physical hearing or the matter can be decided by an "Application on the Papers" which means that the Court will decide the matter on the documents filed in respect of the application and the written submissions of the parties without a hearing.¹¹ Ultimately, it would depend on whether the mode of disposition would affect procedural fairness, that is to say, would it breach the principles of natural justice and cause injustice to a party by affecting their right to be heard, make representations, etc.

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: Not necessarily.

⁸ For instance, an application for judicial review under Order 53, RSC 1978.

⁹ Order 61, rule 4 RSC 1978.

¹⁰ Order 14, RSC 1978.

¹¹ The Office of the Chief Justice, Judiciary of The Bahamas, "Notice #13", fn. 7 above.

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

The RSC 1978 is only applicable to arbitration proceedings insofar as Order 66, RSC 1978 allows and the provisions of Order 66, RSC 1978 do not expressly extend a right to a physical hearing. However, there is some reference to the general rules of civil procedure in the *lex arbitri*, and it could guide those procedures by analogy. For instance, in the context of remote witness testimony, in litigation, there is no express provision that bars witness testimony from being given remotely. In fact, civil procedure rules provide judicial officers with the discretion to allow for remote witness testimony.¹² This same approach may be applied to arbitrations in The Bahamas by analogy, for example.

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: In theory yes but only in as much as such waiver does not run afoul of the general duty of the arbitral tribunal, so that a waiver in advance is unlikely to be enforceable in practice.

For the purposes of clarification and as stated in sub-paragraphs a.1 and a.2 above, there is no express and conclusive right to a physical hearing in arbitration, although it can be inferred or excluded depending on the circumstances. However, section 3(b) of the AA provides that, “[...] the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”. This indicates that if there was such an express right to a physical hearing, parties can waive such a right (whether such right can be inferred or otherwise) and decide the dispute in the manner they wish, e.g., absent a physical hearing. However, this would not be possible if it were to compromise procedural fairness or due process as those principles form part of the arbitral tribunal’s general duties under sections 44 and 45 of the AA. Thus, if a physical hearing were necessary in the circumstances, then a party could not waive its right to a physical hearing and certainly not in advance of the dispute.

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

Short answer: No, and the consequence could be the possible removal of the arbitrator or setting aside of the award.

¹² Order 31A, RSC 1978.

By virtue of section 44 of the AA, the arbitral tribunal has a general duty to act fairly and impartially and to adopt procedures suitable for the circumstances of the particular case. However, section 45(1) of the AA provides that, “[i]t shall be for the tribunal to decide all procedural and evidential matters, *subject to the right of the parties to agree any matter*” (emphasis added). While Section 45(2) of the AA states that procedural and evidential matters include “[...] (a) when and where any part of the proceedings is to be held [...]”. Thus, if the parties agreed to a physical hearing, it would not be for the arbitral tribunal to decide to hold a remote hearing, whether it be more suitable or otherwise. Thus, should the arbitral tribunal act contrary to the agreement of the parties, then as a legal consequence, the parties could, by agreement, seek to revoke the arbitrator’s authority,¹³ or where there is no agreement between the parties to revoke the arbitrator’s authority, one party could apply to the Court to have the arbitrator removed on the basis that he has refused or failed to properly conduct the proceedings.¹⁴ There may also be other consequences in terms of an application to the court, for example, to set aside the award (as discussed below).

d. Setting Aside Proceedings

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

Short answer: Yes.

For the purposes of clarification and as stated above, there is not a conclusive right to a physical hearing in The Bahamas. However, if the parties should agree to a physical hearing and that physical hearing does not occur by decision of the arbitrator(s), section 90(1) of the AA provides that, “[a] party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the Court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award”. Section 90(2) of the AA defines serious irregularity as, *inter alia*, failure by the tribunal to comply with section 44, exceeding its powers (other than exceeding its substantive jurisdiction) and *failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties*. If the serious irregularity is established as affecting the tribunal (i.e., a substantial injustice has been established), the proceedings or the award, the court may remit the award to the tribunal in whole or in part for reconsideration, set the award aside in whole or in part or declare the award to be of no effect, in whole or in part.¹⁵ In the recent Privy Council decision on the proper

¹³ Section 34 of the AA.

¹⁴ Section 35(1)(d)(i) of the AA.

¹⁵ Section 90(3) of the AA.

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

interpretation of section 90 of the AA,¹⁶ the Court remitted part of the award (quantum of damages) to the arbitrator for reconsideration of the quantum of damages. An award that has been set aside no longer has the force of law and an award declared to be of no effect means that it is not final and binding as between the parties and cannot be enforced.

An application under section 90 of the AA can be made by a party at any point and that party does not necessarily have to wait for the award. In fact, on the basis of section 95 of the AA, it is best to make the objection as soon as the ground for the objection arises. Section 95 of the AA expressly provides for a loss of right to object in circumstances where a party to arbitral proceedings takes part, or continues to take part in proceedings without making any objection within a reasonable time that there has been *inter alia* a failure to comply with the arbitration agreement, i.e., an agreement to a physical hearing or there has been any other irregularity affecting the tribunal or the proceedings.¹⁷ As such, if a party fails to raise a breach of the right to physical hearing (as could possibly be inferred by interpretation of the *lex arbitri* or if said right was expressly agreed between the parties) it is prevented, as a result of said failure, from using it as a ground for challenging the award.

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: No, if the right is found to exist then the breach must have caused a substantial injustice.

As previously stated, Bahamian law does not recognize an express right to a physical hearing in arbitration, although it is possible to infer, based on a broad interpretation of certain provisions (e.g., section 54 of the AA) that there may be said right. Therefore, as there is no express right and it cannot be conclusively said that there is such a right, it would not be reasonable to determine that any breach of any such indeterminable right

¹⁶ *RAV Bahamas Ltd. And Another (Appellants) v Therapy Beach Club Inc. (Respondent) (Bahamas)* [2021] UKPC 8.

¹⁷ Section 95 of the AA; *RAV Bahamas Limited and Another v Therapy Beach Club Incorporated* [2018] 1 BHS J. No. 11 at paragraphs 9-11, the learned Winder J briefly discussed this provision and found that the only exception was when, at the time of the irregularity and/or misconduct, the party took part or continued to take part in the arbitral proceedings due to the party not knowing and could not with reasonable diligence have discovered the grounds for the objection.

could constitute *per se* a ground for setting aside as a violation of public policy or of the due process principle. However, to the extent that a right to a physical hearing does exist (for example under sections 44 and 45 where the arbitral tribunal has determined a physical hearing necessary), then a breach of the right could constitute grounds for setting aside if a substantial injustice has been established.

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: Yes.

See explanation above at sub-paragraph d.7.

e. Recognition/Enforcement

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

Short answer: It depends on the circumstances of the case.

Section 88(5) of the AA provides for the recognition of an arbitral award as binding irrespective of the country in which it was made and mandates enforcement subject to the FAA whether or not an award under the New York Convention. The FAA, in turn, incorporates the New York Convention into Bahamian law. Section 6(2)(c) of the FAA incorporates Article V(1)(b) and provides that, “[e]nforcement of a convention award may be refused if the person against whom it is invoked proves that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”. Section 3 of the FAA incorporates Articles V(2)(a) and V(2)(b) and provides that, “[e]nforcement of a convention award may also be refused if the award is in respect of a matter that is not capable of settlement by arbitration or if it would be contrary to public policy to enforce the award”. Section 6(2)(e) incorporates Article V(1)(d) and provides that, “[e]nforcement of a convention award may be refused where it is proved that the composition of the arbitral tribunal or the arbitral procedure, was not in accordance with the agreement of the parties or, failing such agreement, with the law of the state where the arbitration took place”. There is no precedent under Bahamian law to indicate how the Bahamian Court would apply Articles V(1)(b), V(1)(d) and V(2)(b) in the context of whether a right to a physical

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

hearing existed. However, Bahamian Courts have considered the principles which underpin Articles V(1)(b), V(1)(d) and V(2)(b).

In a recent decision from the Judicial Committee of the Privy Council, where there was an appeal concerning the proper interpretation of section 90 of the AA (challenging the award on the grounds of serious irregularity), the Court *inter alia* determined that due to the sole arbitrator's failure to allow the Appellant to make representations on the issue of the quantum of damages, a serious irregularity occurred which resulted in a substantial injustice against the Appellant.¹⁸ This relates to the principle of procedural fairness, which would also be relevant in the context of recognition and enforcement. Furthermore, Bahamian Courts do refer to the concept of due process and accept the principles of natural justice in other contexts, so it is highly likely that the same protections would be assured to parties in the context of arbitration proceedings.¹⁹ In the context of public policy, as an example, Bahamian courts typically will not recognise / enforce a foreign judgment where the cause(s) of action are not recognizable under Bahamian law and therefore repugnant/contrary to public policy.²⁰

Insofar as it relates to the law of the seat of arbitration, the Bahamian Court may consider the *lex arbitri* to the extent that that law provides for a right to a physical hearing, but the Bahamian Court is more concerned with ensuring that the award is consistent with the principles of natural justice and/or public policy. The Bahamian Courts will apply the New York Convention whether the award is a Convention award or not. Where there are *lacunae* in Bahamian law, in the context of arbitration proceedings, it would be reasonable to rely on English jurisprudence as it has been stated that, the AA is similar in structure to the 1996 English Arbitration Act and, “[i]t was common ground that the policy underlying the two Acts was similar and that it was appropriate to have regard to the English law authorities when interpreting materially identical provisions”.²¹

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?*

¹⁸ *RAV Bahamas Ltd. And Another (Appellants) v Therapy Beach Club Inc. (Respondent) (Bahamas)* [2021] UKPC 8.

¹⁹ *Aarin Bain v Ayse Rengin Dengizer Johnson and Another* [2019] 1 BHS J. No. 76 at para 38.

²⁰ *Cablevision Systems Development Co. v Sharpe* [1986] BHS J. No. 41 at para 6.

²¹ *RAV Bahamas Ltd. And Another (Appellants) v Therapy Beach Club Inc. (Respondent) (Bahamas)* [2021] UKPC 8 at para 26.

Short answer: Yes.

The Court has provided directions that state that the Judge will have discretion to determine the disposition mode of a matter and can decide whether there is a form of physical hearing (e.g., in-person or remote hearings) or the matter can be decided by an “Application on the Papers” which means that the Court will decide the matter on the documents filed in respect of the application and the written submissions of the parties without a hearing.²² The Bahamian Judiciary has also moved toward the incorporation of automated procedures for the e-delivery of Court documents and for the assignment of hearing dates through the Listing Office, which prior to the COVID-19 pandemic, was not possible. That is to say, prior to the onset of the COVID-19 global pandemic, it was not possible for counsel to request dates for a hearing through an online portal nor to upload court documents through an online portal.

²² The Office of the Chief Justice, Judiciary of The Bahamas, “Notice #13”, fn. 7 above.