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PROJECTS

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

BANGLADESH

Sharif Bhuiyan
Tanim Hussain Shawon

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[Sharif Bhuiyan*](#)

[Tanim Hussain Shawon**](#)

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

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

Short answer: No.

The Arbitration Act, 2001 (Act No. I of 2001) of Bangladesh (the “Bangladesh Arbitration Act” or the “Act”) regulates both international commercial arbitration and domestic arbitration,¹ where the place of arbitration is within Bangladesh territory.² Except for a few deviations,³ the Act is substantially based on the UNCITRAL Model Law.⁴

According to Section 30(1) of the Bangladesh Arbitration Act, the parties can agree on the method by which the arbitration proceedings are to be conducted, and where there is no such agreement, the arbitral tribunal is to decide whether to hold oral hearings for the presentation of evidence or for argument, or whether the proceedings are to be conducted on the basis of documents and other materials. Unless the parties have agreed that no oral hearing will be held, the tribunal is required to hold oral hearings, at an appropriate stage of the proceedings, either on a request by a party, or of its own motion. While these provisions deal with an oral hearing and presentation of oral evidence, there is no express requirement that the hearing has to take place physically, as opposed to remotely.

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*

* Dr. Sharif Bhuiyan is a Partner and Deputy Head at Dr. Kamal Hossain and Associates.

** Tanim Hussain Shawon is a Senior Associate at Dr. Kamal Hossain and Associates.

¹ *Project Builders Ltd. v. China National Technical Import and Export Corporation and others*, Manupatra LEX/BDHC/0210/2016.

² *Southern Solar Power Ltd. and another v. Bangladesh Power Development Board and others*, 2019(2) 16 Apex Law Report (HCD) p. 91 at para. 38.

³ For present purposes, Articles 18 (“Equal treatment of parties”), 19 (“Determination of rules of procedure”), 20 (“Place of arbitration”), and 24 (“Hearings and written proceedings”) of the Model Law are not among those deviations.

⁴ See HOSSAIN, BHUIYAN and SHAWON, “National Report Bangladesh” in ICCA *International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 1-2.

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allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: A right to a physical hearing can be excluded.

An arbitral tribunal has a general obligation to give each party a reasonable opportunity to present its case orally, or in writing, or both.⁵ If the parties have agreed to all or any procedural and evidentiary matters in conducting the arbitration proceedings, the tribunal, subject to the provisions of the Act, must follow the agreed procedure.⁶ The procedural and evidentiary matters on which the parties may agree include⁷ submission or presentation of oral or documentary evidence and adducing written or oral evidence as to the admissibility, relevance and weight of any materials. Where there is no agreement between the parties, the arbitral tribunal may determine these matters.⁸

Section 30(1) of the Act, referred to above, states that the parties to arbitration are at liberty to agree that there will not be any oral hearing and that the arbitration may be on the basis of documents and materials only. However, if the parties do not agree that the arbitration will be on documents only, the arbitration tribunal cannot conduct the proceedings on the basis of documents and materials only, but rather must hold oral hearings at an appropriate stage.

Since the parties have the right to agree on all or any procedural and evidentiary matters, it follows that they can agree to hold a physical hearing only and not to have any remote hearing. If such an agreement exists, the arbitral tribunal will have to give effect to the agreement. In the absence of such a specific agreement between the parties, the arbitral tribunal has the authority to determine the time and location for holding the arbitral proceeding. The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for deliberation, for hearing witnesses, experts or the parties.⁹ This may be interpreted to include the tribunal's power to decide that all or some of the hearings will be conducted remotely rather than physically so long as the parties are given sufficient advance notice of the hearing.¹⁰

Following the COVID-19 pandemic, international commercial arbitrations have taken place in Bangladesh, both *ad hoc* and under institutional arbitration rules, where the hearing has been conducted remotely.

⁵ Section 23(1)(a) of the Bangladesh Arbitration Act.

⁶ Section 25(1) of the Bangladesh Arbitration Act.

⁷ Section 25(3) of the Bangladesh Arbitration Act.

⁸ Section 25(2) of the Bangladesh Arbitration Act.

⁹ Section 26(3) of the Bangladesh Arbitration Act.

¹⁰ Section 30(2) of the Bangladesh Arbitration Act.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Yes, although subject to recent legislative developments in the context of COVID-19.

The general rules of civil procedure are contained in the Code of Civil Procedure, 1908 (the "CPC"). The provisions of the CPC contemplate that a civil proceeding can be conducted only physically in a courtroom. It provides that the evidence of the witnesses in attendance "shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge".¹¹ There are certain limited circumstances in which a civil court may direct that the oral evidence of a person, who is either exempt from attending the court or is unable to attend the court due to sickness or infirmity, be obtained by "issuing a commission", i.e., by sending someone to obtain the evidence.¹²

The provisions of the CPC which deal with hearings and examination of witnesses have not been reformed to take into account modern, in particular technological, developments. Accordingly, they do not provide for the proceedings of a civil case to be conducted remotely, e.g., through video-link or over online platforms.

Following the COVID-19 outbreak, the Use of Information Technology by the Courts Ordinance, 2020 and the Use of Information Technology by the Courts Act, 2020 (the latter statute replaced the former) were enacted to allow remote hearings in courts through "virtual attendance" (this is discussed further in sub-paragraph f.11 below).

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 provisions of the CPC do not apply to arbitration proceedings. Section 24 of the Bangladesh Arbitration Act provides that an arbitral tribunal shall not be bound to follow the provisions of the CPC in dealing with a dispute under the Act. Under the CPC, a civil court may, on the application of the parties to a civil case, refer the matter to arbitration. The CPC provides that arbitration proceedings in case of such a referral

¹¹ Order XVIII, Rule 4 of the CPC.

¹² Section 75 and Order XXVI, Rules 1 to 8 of the CPC.

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are to be conducted under the Bangladesh Arbitration Act. Accordingly, a right to a physical hearing in arbitration cannot be derived from the provisions of the CPC.

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: Not applicable, since the right to a physical hearing in arbitration does not exist.

The Bangladesh Arbitration Act does not confer a right to a physical hearing in arbitration, nor can the parties derive such right from the general law on civil procedure. Unless the parties have an agreement to the effect that the arbitral proceedings are to be conducted on the basis of a physical hearing, the arbitration tribunal can determine, pursuant to the provisions of the Act, whether the hearing will be physical or remote or a mixture of both. Since there is no legally provided right to a physical hearing, the question of waiver of such right cannot arise.

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, the arbitral tribunal cannot decide to hold a remote hearing if the parties had agreed to a physical hearing and doing so could constitute grounds for setting aside.

There is no caselaw on this specific issue. According to the Bangladesh Arbitration Act, an arbitral tribunal has a general obligation to act fairly and impartially in conducting an arbitration proceeding, including in deciding procedure, taking evidence and exercising other powers conferred on it.¹³ The Act provides that if the parties have agreed to all or any procedural and evidentiary matters in conducting the arbitration proceedings, the tribunal, subject to the provisions of the Act, must follow the agreement.¹⁴ Therefore, if the parties have a specific agreement that only a physical hearing will be conducted in an arbitration, the tribunal will have to give effect to the agreement. There is no provision in the Bangladesh Arbitration Act that indicates that

¹³ Section 23(3) of the Bangladesh Arbitration Act.

¹⁴ See fn. 6 above.

an arbitral tribunal can act contrary to the parties' agreement in respect of procedural matters. Accordingly, a tribunal will not have the authority to hold a remote hearing if to do so would require disregarding the parties' agreement to hold a physical hearing.

There are uncertainties with regard to the recourse that a party can have if an arbitral tribunal acts beyond its authority on procedural matters. Section 19 of the Act provides that a party can raise an objection before an arbitral tribunal to the effect that the tribunal has exceeded the scope of its authority, and such objection is to be raised as soon as the matter arises. There is no elaboration in the Act as to whether "authority" in this context covers procedure in addition to substance. There is also no judicial interpretation of the term "authority" as used in Section 19.

According to Section 20 of the Act, a party can apply to the High Court Division for determination of any question as to the jurisdiction of an arbitral tribunal. There is a lack of clarity in the statutory provisions regarding the interrelation between Sections 19 and 20 of the Act. In one case the High Court Division observed that a party aggrieved by a decision under Section 19 can apply to the High Court Division under Section 20.¹⁵ It may also be possible to raise a jurisdictional issue directly before the High Court Division without first raising an objection before an arbitral tribunal, provided the party raising the objection satisfies the conditions set out in Section 20.¹⁶

Like Section 19, in respect of Section 20, it is not clear whether the High Court Division can entertain a jurisdictional challenge where the matter concerns procedural issues as opposed to substantive jurisdiction of an arbitral tribunal. If a tribunal decides to hold a remote hearing disregarding the parties' agreement, the decision would essentially be a procedural matter. It is not entirely clear from the language of Section 19 or Section 20 as to whether such a matter may be raised under either of those Sections. However, the High Court Division has entertained applications under Section 20 by a party aggrieved by a procedural order passed by an arbitral tribunal.¹⁷ Therefore, it may be possible to have recourse under Section 19 or Section 20 if an arbitral tribunal decides to hold a remote hearing disregarding the parties' agreement to the contrary.

Once the arbitral award is issued, a party may seek to have the arbitration award set aside by the court under Section 43 of the Bangladesh Arbitration Act on the ground that the procedure followed by the arbitral tribunal was not in accordance with the

¹⁵ *Joinal Abedin Jamal and others v. Noor Afza*, 63 Dhaka Law Report (2011) p. 432 at para. 11.

¹⁶ Section 20(2) of the Bangladesh Arbitration Act sets out the following conditions: "No application under this section shall be taken into account, unless the High Court Division is satisfied that: (a) the determination of the question is likely to produce substantial savings in costs; (b) the application was submitted without any delay; and (c) there is good reason why the matter should be decided by the Court" (free translation by the Authors).

¹⁷ In *Ghulam Mohiuddin v. Rokeya Din and others*, 71 Dhaka Law Report (2019) p. 577, the High Court Division entertained an application where one of the parties was aggrieved by the tribunal's interim order allowing one of the respondents to jointly operate a bank account during the pendency of the arbitration.

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agreement of the parties¹⁸ (this is discussed further in sub-paragraphs d.7 and d.8 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: Possibly yes.

A party can claim to have a right to a physical hearing only if there is a clear agreement between the parties that the arbitration proceedings will be conducted by a physical hearing. Deviation from such agreed procedure may be a ground for setting aside the arbitral award. However, the omission of a party to make an earlier challenge under the relevant provisions of the Act may be taken into consideration by the court in deciding the setting aside application.¹⁹ Section 6 of the Bangladesh Arbitration Act provides that a party, who knows that a 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, shall be deemed to have waived the right to so object. This provision would pose additional difficulties for a party in challenging an arbitral award on the ground of breach of its right to a physical hearing, unless the issue is raised promptly during the arbitral proceedings.

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?*

¹⁸ According to Section 43(1)(a)(v), one of the grounds for setting aside an arbitral award is that the procedure of the arbitration was not in accordance with the parties' agreement.

¹⁹ In *Joinal Abedin Jamal and others v. Noor Afza*, 63 Dhaka Law Report (2011) p. 432, the parties participated in the arbitration proceedings before a court-appointed sole arbitrator. After the arbitrator issued the award, the unsuccessful party filed proceedings for setting aside the award mainly on the ground that the appointment of the sole arbitrator was in violation of the arbitration agreement. The court held that the award appeared to be otherwise valid and there had not been any failure of justice in issuing the award. The award could not be interfered with or set aside on the ground of technicality or that the arbitrator exceeded his authority or had no jurisdiction to pass the award or arbitrate the dispute when the complaining party did not make any protest at the earliest stage of the hearing (para. 16).

Short answer: A clear breach of a contractual right to a physical hearing is likely to constitute a ground for setting aside an arbitral award.

As noted above, a right to a physical hearing cannot be asserted on the basis of the provisions of the Bangladesh Arbitration Act, unless the parties have an agreement requiring there to be physical hearings. If such an agreement existed between the parties and the arbitral tribunal acted contrary to the agreement and issued an arbitral award, the departure from the agreed procedure may be invoked for setting aside the arbitral award. Section 43(1)(a)(v) of the Bangladesh Arbitration Act provides that an arbitral award may be set aside if the party making the application furnishes proof that the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of the Act. In appropriate circumstances, the applicant may also be able to argue that the deviation from the agreed procedure caused an inability of the party to present his case, and accordingly, provides an additional ground for setting aside the award under Section 43(1)(a)(iii).

If the court is able to arrive at a conclusion on the basis of one or more specific grounds for setting aside an arbitral award, such as a serious departure from the agreed procedure or a party's inability to present its case, a finding based on the general principle of public policy may not be necessary.²⁰ Although there is no analogous case law on which to rely, the general principles of natural justice and due process may be considered by the court in the context of assessing whether the breach of a right to physical hearing resulted in the inability of a party to present its case before the arbitral tribunal.

In adjudicating an application for setting aside an arbitral award, a court is likely to be stringent in applying the grounds for setting aside. The party challenging the award would be required to establish that the alleged irregularity was of such a serious nature that it had affected the validity of the award.²¹ Furthermore, it will be relevant whether the conduct of the party amounts to waiver under Section 6 of the Act or whether it has invoked other remedies that were available under the Act, for example, those under Sections 19 and 20 (this aspect is discussed in sub-paragraph d.7 above).

²⁰ In *Chittagong Port Authority v. Ananda Shipyard and Slipways Ltd.*, LEX/BDHC/0045/2010 the High Court Division has made the following observation on setting aside an arbitral award on the basis of public policy: "Public policy of Bangladesh means the principles and standards regarded by the legislature or by the court as being of fundamental concern to the state and whole of the society. Thus, an award is to be refused, as being contrary to public interest, if it is contrary to: (i) Fundamental policy of Bangladesh law; (ii) Interest of Bangladesh; (iii) Justice or morality; (iv) In addition, if it is patently illegal" (para. 37).

²¹ *Bangladesh Water Development Board v. M/S. Titas Prokaushali Limited*, LEX/BDHC/0115/2006 at para. 42.

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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: No, unless the parties have an agreement to hold a physical hearing and that has been disregarded, or if the use of a remote hearing results in establishing one of the other bases for setting aside.²²

Sub-paragraph d.8 above discusses this issue.

e. Recognition/Enforcement

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

Short answer: Yes.

Bangladesh is a party to the New York Convention. The Bangladesh Arbitration Act reflects the provisions of the New York Convention in relation to grounds for refusing recognition and enforcement of foreign arbitral awards. Section 46(1)(a)(iii)

²² According to Section 43(1) of the Act, the bases for setting aside an arbitral award are as follow: (i) a party to the arbitration agreement was under some incapacity; (ii) the law under which the parties entered into arbitration agreement was not a valid law; (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable cause to present his case; (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitrators; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, was not in accordance with the provisions of this Act; (vi) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh; (vii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh; (viii) the arbitral award is opposed to the public policy of Bangladesh; or (ix) the arbitral award is induced or influenced by fraud or corruption.

of the Act, which deals with the right of a party to present its case, is similar to Article V(1)(b) of the New York Convention; Section 46(1)(a)(v), which deals with deviation from the agreed procedure, is similar to Article V(1)(d) of the New York Convention; and Section 46(1)(b)(ii), which deals with violation of public policy of Bangladesh, is similar to Article V(2)(b) of the New York Convention.

If a foreign arbitral award is sought to be enforced in Bangladesh, an application is required to be filed in the Court of the District Judge, Dhaka (the “Court”), which is to execute the foreign award under the CPC in the same manner as if it were a decree of that Court.²³

If, during the execution proceedings, the respondent is able to establish before the Court that a right to a physical hearing existed under the law of the jurisdiction where the arbitration took place and the award was passed in breach of such right, the Court will have the discretion not to recognize and enforce the foreign arbitral award on the basis of Sections 46(1)(a)(iii) and/or 46(1)(a)(v). Similar to setting aside proceedings, as discussed above,²⁴ although there is no case law directly on point, the Court may not be inclined to make any finding in respect of violation of public policy if it is able to arrive at a conclusion on the basis of one or more specific grounds for non-recognition of the foreign award in Section 46(1)(a) of the Act.

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: For the first time in Bangladesh, a legal framework has been put in place in the context of the COVID-19 pandemic that allows courts to hold hearings remotely.

Detection of the first COVID-19 case in Bangladesh was declared on 8 March 2020. As a part of the emergency measures, a general holiday was declared in all courts with effect from 29 March 2020. With the exception of bail hearings in urgent cases, no other hearing took place in any court during the general holiday. In order to address the situation and enable courts to resume their functions without compromising health and safety, the Use of Information Technology by the Courts Ordinance, 2020²⁵ (the “Ordinance”) was passed on 9 May 2020.

Pursuant to Section 5 of the Ordinance, the Supreme Court of Bangladesh (the “Supreme Court”) issued a “special practice direction” on 10 May 2020 allowing bail-

²³ Sections 45(1) and 45(3) of the Bangladesh Arbitration Act.

²⁴ See sub-paragraph d.8 above.

²⁵ Article 93 of the Constitution of Bangladesh allows the government to issue an “Ordinance” at a time when the Parliament is not in session but circumstances exist which render immediate action necessary.

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related matters to be heard remotely, i.e., through video-conferencing over online platforms. The courts that would hear such matters remotely were named “virtual courts”. The Supreme Court issued a directive on 30 May 2020 that expanded the scope of the virtual courts stating that “very urgent” matters could be heard remotely by using video-conferencing technology.

After the Parliament resumed its sessions, the Use of Information Technology by the Courts Act, 2020 (the “Use of IT Act”) was passed on 9 July 2020 with similar provisions as in the Ordinance, and the Ordinance was repealed.

Since 5 August 2020, all courts of the subordinate judiciary have been allowed to resume physical hearings. Since 12 August 2020, about one-third of the benches of the High Court Division of the Supreme Court have been holding physical hearings,²⁶ while the rest of the benches have been continuing to hold remote hearings. The Appellate Division of the Supreme Court, which is the highest court, has been holding only remote hearings since the pandemic began.

Remote hearings can be accessed by any member of the public through the video-conferencing link, because the log-in details can be obtained from public sources. The presiding judge has a discretion to prevent any person from attending the proceedings.

The Use of IT Act lays down a general, i.e., not COVID-19 specific, legal framework for conducting remote hearings. However, there are indications that the provisions of the statute will be applied during the existence of the pandemic. It is unlikely that remote hearings will continue once the pandemic is under control.

²⁶ Some of these benches hold both physical and remote hearings.