BARBADOS

Tammi C. Pilgrim
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.

   Barbados has a dual legal framework governing arbitration proceedings. International arbitration proceedings are governed by the International Commercial Arbitration Act, Chapter 110B (“ICAA”) and the Arbitration (Foreign Arbitral Awards) Act, Chapter 110A (“FAA”). The ICAA largely adopts the UNCITRAL Model Law as of 2006 and does not define the word “hearing.” The Arbitration Act, Chapter 110, which governs domestic arbitrations is not applicable. Neither the FAA nor the ICAA expressly grants a right to a physical hearing. The ICAA contains provisions which give the tribunal the power to meet as it considers appropriate for the hearing of witnesses, experts or the parties (section 33, “Place of arbitration”) and requires the tribunal to decide whether an oral hearing is necessary for the presentation of evidence or for oral argument, or whether the proceedings may be conducted on the basis of documents and other materials (section 37(1), “Hearings and written proceedings”). Further, section 37(2) of the ICAA provides that unless the parties have agreed that no hearings shall be held, the tribunal shall hold hearings at an appropriate stage of the proceedings, “if so requested by a party”.

   The hearings contemplated by section 33 and section 37(1) of the ICAA, i.e., held by the tribunal *sua sponte*, are expressly subject to any agreement by the parties. The hearings contemplated in section 37(2) of the ICAA, i.e., upon request of a party, are not mandatory but permissive.

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:** Not likely.

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* Tammi C. Pilgrim is an international arbitration and dispute resolution specialist, and the lead partner for arbitration at Lex Caribbean.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

There are no reported cases in Barbados on this question. Neither the provisions of section 33 nor section 37 of the ICAA stipulate requirements for in-person meetings to hear witnesses, experts or the parties, although in an ordinary sense, a meeting usually requires parties’ physical presence.

Section 37(1) of the ICAA does not speak of physical hearings, but of “oral” hearings. The phrase “oral hearing” is not specifically defined in the ICAA and there is no reported relevant case law.

Given the lack of limiting language in these provisions of the ICAA, it is likely that a Court considering this question may interpret these sections broadly and inclusively to mean that a tribunal may hold oral arguments and presentation of evidence (including witness and expert testimony) via remote meeting platforms, or require parties to be physically present. However, this is always subject to the parties’ agreement.

As a result, it is not likely that a Court would consider that these sections demand that the hearings be conducted in person or exclude a right to a physical hearing altogether.

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: No.

The general rules of civil procedure, contained in the Supreme Court (Civil Procedure) Rules, 2008 (“BCPR”) are not generally applicable to international arbitrations seated in Barbados, and do not seem to provide for a right to a physical hearing in any event. As arbitration is based on parties’ agreement, it would be possible – though highly improbable – for parties to agree the use of the BCPR for arbitration proceedings. The BCPR supports the use of technology in litigation by providing that a 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 (BCPR Rule 2.6(3)). Since the onset of the COVID-19 pandemic, for the most part, court hearings and court-annexed mediation sessions have been conducted remotely.

The Constitution of Barbados, rather than the BCPR, seems to imply a minimum constitutional requirement of holding an oral hearing in public for cases involving civil rights and obligations (including commercial and contractual claims). Sections 18(8) and 18(9) of the Constitution state as follows:
“(8) Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other tribunal, the case shall be given a fair hearing within a reasonable time.

(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other tribunal, including the announcement of the decision of the court or other tribunal, shall be held in public”.

Arguably, these provisions of the Barbados Constitution have not been interpreted as granting the parties an absolute right to a physical hearing in Court. This is clearly reflected in the approach taken by the Courts in interpreting the BCPR (noted above), which seeks to ensure access to the Court through the use of technology rather than demand the parties’ physical presence.

However, even if these provisions were to grant a fundamental right to a physical hearing, the Barbados High Court has found that section 18(8) cannot be enforced in international arbitration proceedings seated in Barbados. In AGI v Alvarez,¹ the Barbados High Court rejected an application for constitutional remedies on the basis that they do not apply to private arbitrations. This was an action brought by AGI under the Barbados Constitution against arbitrators (in an international arbitration) for breach of the section 18(8) right to a fair hearing within a reasonable time by an independent and impartial court or authority established by law. The Court rejected the applicant’s request because the powers, duties and functions of the private arbitration tribunal were derived from the arbitration agreement in question, rather than from statutory authority, and were not of a public character or nature.

In Barbados, therefore, procedural rules applicable to courts do not automatically apply to arbitrations seated in Barbados and do not require physical hearings in 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

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?**

¹ BB 2013 HC 39.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Short answer: N/A

Barbados law does not, expressly or impliedly, grant a right to a physical hearing.

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: Yes, but at risk of annulment of the award.

A tribunal’s failure to conduct the arbitration procedure in accordance with the parties’ agreement can provide grounds for annulling an award (section 47(2)(a)(v) ICAA).

Arbitration is a consensual process, rooted in the parties’ agreement. The Barbados High Court has held that an arbitration agreement gives the arbitral tribunal its fundamental authority and demarcates the scope of that authority.2

Subject to the provisions of the ICAA, parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings (section 32(1) ICAA). Where the parties fail to agree on the procedure, again – subject to the provisions of the ICAA – the tribunal has discretion to conduct the arbitration in the manner it considers appropriate (section 32(2) ICAA).

As noted above (sub-paragraphs a.1 and a.2), the provisions in the ICAA which might be flexible enough to permit a remote hearing are expressly subject to the parties’ agreement. The parties’ agreement on certain procedural issues serves as a limitation on the tribunal’s discretion under section 32(2).

Thus, if the parties’ arbitration agreement is silent on whether a physical hearing is required, it is likely that a tribunal will have discretion to hold a remote hearing, since such a proceeding is not prevented under the ICAA. Conversely, where the arbitral tribunal decides to proceed with a remote hearing that is not in accordance with the agreement of the parties, any resulting award might be exposed to challenge, as violating the parties’ agreement is one of the bases for setting aside an award under the ICAA.

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: N/A

2 Ibid. at [71], [72].
As mentioned previously, neither the FAA nor the ICAA provide that arbitration hearings must be physical.

Generally, however, a party’s failure to object to a procedure might be considered to constitute a waiver of its right to raise an objection to that procedure after the award has been rendered. Since the legal system in Barbados is based on English common law, common law concepts of waiver and/or estoppel in contract scenarios are likely to form the basis of argument that a later objection should not be entertained.

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

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: Highly fact-dependent, but of itself likely not.

As discussed above, a tribunal has wide discretion to determine the conduct of proceedings, subject to the parties’ agreement (see sub-paragraph c.6 above). Proceeding with a physical hearing in contravention of the parties’ agreement could provide grounds to set aside an award.

Where no agreement exists, a court is likely to give a high degree of deference to the arbitral tribunal’s procedural decision. First, section 8 of the ICAA stipulates that no court shall intervene except where so provided in the ICAA and Barbados courts have respected the boundary established thereby. Further, Barbados courts have found that they have very limited jurisdiction to intervene in questions of arbitration procedure, since (apart from any relevant statutory requirements) an arbitrator in a private arbitration controls the procedure to be followed, so long as such procedure does not offend the rules of natural justice.

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3 See, generally, Auto-Guadeloupe Investissement SA v Columbus Acquisitions Inc and others (2012) 84 WIR 40 (refusing an injunction to prevent the arbitral tribunal from ruling on its jurisdiction).
Principles of natural justice represent the imposition of certain procedural safeguards on adjudicators, which are based on notions of fairness. Consistent with notions of fairness, the ICAA contains certain procedural guarantees, such as a party’s right to be treated equally and to be given a full opportunity to present its case (section 31), as well as to be heard by a tribunal that is independent and impartial (section 15). A party can therefore enforce these guarantees by applying to set aside an award on any one of the several grounds provided in section 47(2), including where the applicant can demonstrate that: (i) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case; (ii) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the ICAA from which the parties cannot derogate, or failing such an agreement, was not in accordance with the ICAA; or (iii) the award conflicts with the public policy of Barbados.

It is not possible to describe every scenario in which a Barbados court hearing an application to set aside an award might find that procedural unfairness existed. However, in litigation proceedings, the Barbados courts have generally criticised judges for granting injunctive relief without affording the opposing party the opportunity to have a hearing at all. Applied to the private arbitration context, a Barbados court might be persuaded to set aside an award as procedurally unfair if the tribunal’s failure to conduct a physical hearing deprived a party of having a hearing at all. But courts are unlikely to be persuaded if the party opposed the virtual hearing simply because it preferred to have it in person.

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: Unknown.

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6 Clico International Life Insurance Ltd v Parris; Branlee Consulting Services Inc. and Estate of David Thompson, BB 2016 HC 7, [61].
The FAA ratified and gave effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Thus, Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and V(2)(b) (violation of public policy of the country where enforcement is sought) are given the force of law in sections 6(2)(c), 6(2)(e) and section 3, respectively, of the FAA.

While Barbados courts tend to be non-interventionist (see sub-paragraph d.9 above), there are no reported Barbados cases nor any legal scholars addressing the question of whether a breach of a right to a physical hearing would constitute a ground for refusing recognition and enforcement of a foreign award by a Barbados court.

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: Some initiatives have been implemented.

The COVID-19 pandemic was the catalyst for the implementation of several technological initiatives that had been proposed or available previously but not accomplished.

As mentioned above (see sub-paragraph b.3), the BCPR permits the use of technology by Barbados courts to provide access to hearings. Teleconferences and video conferences were used exceptionally prior to the pandemic, but have since become the norm, with remote hearing guidelines having been issued\(^7\) and court hearings (including trials) now taking place across various video-conferencing platforms. This practice has now also extended to court-annexed mediations.\(^8\) Use of email communication with the court has increased, but electronic filing – while pending – has yet to be implemented as of the date of writing.

\(^7\) Supreme Court of Barbados, Practice Direction No. 3 of 2020, Guidelines for Electronic or Other Remote Hearings.