



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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PROJECTS

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

ENGLAND AND WALES

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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: There is no absolute right to a physical hearing. There may be very limited circumstances in which the refusal to hold a hearing on a fully physical basis would constitute a breach of due process rights.

Scope of the tribunal's discretion to direct a remote hearing. Both domestic and international arbitration are governed in England and Wales by the Arbitration Act 1996, c.23. The Arbitration Act 1996 does not expressly provide for the right to a physical hearing in arbitration.

The Arbitration Act 1996 confers on the arbitral tribunal a wide discretion to decide on procedural and evidential matters in the arbitral reference in the absence of agreement by parties on the matter.¹ The procedural matters on which the arbitral tribunal may decide include when and where any part of the proceedings is to be held,² whether and to what extent there should be oral or written evidence or submissions,³ and if so what questions should be put to and answered by the respective parties and when and *in what form* this should be done.⁴

The broad discretion assigned to the arbitral tribunal concerning all matters of procedure and evidence⁵ in our view includes a procedural discretion to direct that the hearing be held physically or remotely, provided that parties have not agreed to the contrary. Indeed, prior to the COVID-19 pandemic, short procedural hearings were

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¹ Section 34(1) of the Arbitration Act 1996.

² Section 34(2)(a) of the Arbitration Act 1996.

³ Section 34(2)(h) of the Arbitration Act 1996.

⁴ Section 34(2)(e) of the Arbitration Act 1996.

⁵ See *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp* [1981] AC 909, where Lord Diplock at 985 described a sole arbitrator as “the master of the procedure to be followed in the arbitration” with “complete discretion” to determine how the arbitration is to be conducted, so long as the procedure adopted does not offend the rules of natural justice. That case was decided under the predecessor to the Arbitration Act 1996, the Arbitration Act 1950, c. 27.

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frequently conducted by telephone conference or on a “hybrid” basis, with evidence being given by video conference.

This breadth of discretion indicates that there is no absolute right to a physical hearing, although there may be limited circumstances in which procedural fairness would require one. Specifically, an arbitral tribunal’s power to decide on procedural and evidential matters under the Arbitration Act 1996 is subject to a duty to give each party a reasonable opportunity of putting its case and dealing with that of its opponent⁶ and to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.⁷ The arbitral tribunal must therefore comply with these due process duties when considering whether a hearing should proceed on a fully or partially remote basis.⁸

It is hard to define the circumstances in which this duty would be breached by a direction that a hearing take place on a remote basis as this will be a fact sensitive analysis. One can envisage some circumstances in which a remote hearing will deny a party a reasonable opportunity of putting its case. For example, if a key participant in the arbitral process is not able to attend remotely due to unresolvable internet access issues which arise immediately before or during a hearing. Or where there are concerns that a witness’ evidence will be compromised by the fact that the witness is giving evidence remotely. See below further examples cited by the courts of England and Wales in the context of litigation proceedings.

However, it is expected that the circumstances in which a party will not be able to put its case or deal with that of its opponent remotely will be very limited given that it is possible to conduct arbitration proceedings (including key aspects such as making oral submissions, cross-examination of witnesses, tribunal deliberations, party and counsel communications etc) on a remote basis. Indeed, the statutory duty to avoid unnecessary expense may even make it more appropriate for an arbitral tribunal to direct a remote hearing in certain circumstances.

Relevant institutional rules. Institutional rules are also frequently incorporated into the parties’ arbitration agreement. Recent changes to institutional rules frequently adopted in English-seated arbitrations now expressly contemplate a hearing being conducted on a fully remote basis. For example, the London Court of International Arbitration (“LCIA”) Rules⁹ now provide (at Article 19.2) that:

⁶ Section 33(1)(a) of the Arbitration Act 1996.

⁷ Section 33(1)(b) of the Arbitration Act 1996.

⁸ Section 33(2) of the Arbitration Act 1996.

⁹ LCIA Arbitration Rules effective from 1 October 2020, available at <<https://www.lcia.org/media/download.aspx?MediaId=837>> (last accessed 29 January 2021).

“The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)”.

Judicial consideration of remote arbitral hearings. We are not aware of any judicial consideration in England and Wales of arbitral tribunal decisions to hold hearings on a remote basis, although *obiter* comments expressly contemplate this possibility.¹⁰ However, the courts of England and Wales have themselves adopted a robust approach to hearing cases on a remote basis, making it reasonable to assume that they would apply a similarly robust approach to any challenge to an arbitral award on the basis of a decision to hold a hearing on a remote basis.

In these cases, assertions that conducting a hearing on a remote basis gives rise to due process issues have been treated with heavy scepticism. Consequently, it appears that there are very limited circumstances in which a party may successfully argue that a hearing should not take place remotely.

During the COVID-19 pandemic the default position of the courts of England and Wales has been that a hearing should be conducted with one, more than one or all participants attending remotely.¹¹ The courts have also been willing to conduct a rigorous examination of the ways in which such a hearing could be achieved consistent with justice before accepting otherwise.¹² That said, it has also been accepted that in certain cases fair resolution may not be possible in a remote hearing, albeit that the question is case-specific and involves a multiplicity of factors.¹³ For example:

(i) The ability to process with examination of witness in a fair manner. Courts have criticised technology which does not allow witnesses control over the text in front of them, and thereby not be given a chance to read the material properly.¹⁴ On the other

¹⁰ See *A v. C* [2020] EWHC 258 (Comm) per Foxton J at [40]-[41], where the Judge was content to grant an order involving a party giving evidence by video-link to the arbitration tribunal in a New York-seated arbitration, stating that “it is clearly preferable for that evidence to be given direct to the arbitral tribunal, if possible”. The order was not given since the Judge concluded that the Court had no jurisdiction to grant such an order, though this aspect of the decision was reversed by the Court of Appeal: [2020] EWCA Civ 409.

¹¹ *National Bank of Kazakhstan and Others v. Bank of New York Mellon and Others*, unrep, 19 March 2020 per Teare J.

¹² *Municipio de Mariana v. BHP Group Plc* [2020] EWHC 928 (TCC) per Judge Eyre QC at [24(iv)].

¹³ *Ibid.* at [24(v)].

¹⁴ *Invista Textiles UK Ltd v. Botes* [2019] EWHC 58 (Ch) per Birss J at [72].

hand, it has been held that in the context of a remote trial the issue can be addressed with robust testing and ought not lead to an adjournment.¹⁵

(ii) The tribunal's ability to fully assess witness evidence when that evidence is given and tested. This issue will likely turn on the extent to which live evidence and cross-examination will be necessary to resolve the dispute,¹⁶ though even in a case involving witness evidence going to issues of honesty and credibility in a family dispute a remote hearing was allowed to proceed.¹⁷

(iii) Courts have given little weight to due process objections on grounds of technological concern. The general position of the courts has been that matters such as internet connection are capable of being resolved and therefore do not give rise to concerns,¹⁸ though there are no doubts facts on which technological concerns may pose a problem.

(iv) Where litigation is between well-resourced, sophisticated parties with an equality of arms, the challenges and upsides of proceeding with a remote hearing will apply to both sides equally, avoiding any unfairness.¹⁹

Context is also important, and the courts of England and Wales have been especially careful when considering the procedural fairness of remote hearings in family proceedings and where litigants in person will play a role in the proceedings. It has been found that proceeding with lay evidence in a remote hearing is fair and meets principles of natural justice,²⁰ provided that the parties giving their evidence are able to follow the questions and are able to give their best answers notwithstanding that they are doing so remotely.²¹ Another factor is the ability of the parties (particularly lay parties) to engage

¹⁵ *Re One Blackfriars Ltd (in Liquidation)* [2020] EWHC 845 (Ch) per Judge John Kimbell QC at [50].

¹⁶ *Municipio de Mariana*, fn. 12 above, at [24(v)].

¹⁷ *Lucas v. Gatward* [2020] EWHC 3040 (Ch). See [15]-[16] and [24], per Judge Milwyn Jarman QC.

¹⁸ *Re Smith Technologies*, unrep, 26 March 2020 per ICC Judge Jones at [8] and [12]; *Re One Blackfriars*, fn. 15 above, at [37]; *Municipio de Mariana*, fn. 12 above, at [32(ii)].

¹⁹ *Re One Blackfriars*, fn. 15 above, at [53].

²⁰ By “natural justice” we are referring to the right of a person directly affected by a decision to be given a fair opportunity both to state his or her case and to know and answer the other side's case. The rules of natural justice provide a minimum standard of procedural fairness and the exact requirements will vary depending on the context. See Jonathan LAW and Elizabeth A. MARTIN, eds., *A Dictionary of Law*, 7th edn. (OUP 2014).

²¹ *A Local Authority v. A Mother* [2020] EWHC 1086 (Fam), per Lieven J at [42]-[43]. The Judge went on to add: “It is easier to do this in a live hearing because one can see more easily what the witness has in front of them, and sometimes tell by their body language if they are completely lost. However, it is perfectly possible with a little sensitivity to do the same task remotely”.

with and follow remote proceedings meaningfully.²² This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, and ability to instruct their lawyers (both before and during the hearing).

Finally, it is worth noting that slightly different considerations are in play when it comes to a partial or “hybrid” remote hearing. In one case it was held that the right to participate effectively in a hearing was not prejudiced by counsel for one party joining the proceedings remotely while the others attend physically,²³ the court considered that any disparity created by physical absence of one counsel was likely to be slight, and that the capacity for “immediate dynamic interaction” was not an indispensable element of a fair hearing.²⁴ It was further said that there is no reason to downplay the effectiveness of remote examination and cross-examination by a skilled advocate.²⁵

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: No.

No absolute right to a physical hearing can be inferred or excluded by way of interpretation of other procedural rules of the *lex arbitri* of England and Wales. See discussion in relation to tribunal powers and duties as set out above.

It is worth noting that in some circumstances a party may have a right to an oral hearing, as opposed to an arbitral tribunal determining the matter on the papers,²⁶ but it is a separate question as to whether this hearing needs to be a physical one.

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?*

²² *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 at [9(iv)].

²³ *Re C (Children) (Covid-19: Representation)* [2020] EWCA Civ 734. This was in the context of family law proceedings, but there is no reason to think that the English court would take a different approach in relation to commercial proceedings.

²⁴ *Ibid.* at [24(2)].

²⁵ *Ibid.* at [24(3)].

²⁶ See, e.g., Article 19.1 of the LCIA Arbitration Rules.

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Short answer: No absolute right to a physical hearing exists, though such a right may exist where a hearing conducted on a remote basis would breach principles of due process.

The Civil Procedure Rules 1998 (“CPR”) (which apply to proceedings taking place in the County Court, High Court and Civil Division of the Court of Appeal, save certain listed kinds of proceedings)²⁷ gives the courts of England and Wales wide powers to hold remote hearings.

The CPR provides that the court has a duty of active case management, which includes making use of technology.²⁸ Accordingly, the CPR provides the court with wide powers relating to the use of technology, including powers to give directions as to the way in which the evidence is to be placed before the court²⁹ and to hold hearings and receive evidence by telephone or any other method of direct oral communication.³⁰ Those provisions appear to confer upon the courts a general power to direct that proceedings of all type take place remotely, and the same has been assumed in all legislation or directions passed in light of the COVID-19 pandemic.³¹ Even prior to the COVID-19 pandemic, interim hearings frequently took place by way of telephone.

The use of remote hearings has accelerated as a result of the COVID-19 pandemic and resultant social distancing rules.³² However, the court’s power to direct that proceedings take place remotely remains subject to common law principles of natural justice and due process. In certain circumstances the court may find that it is

²⁷ CPR rule 2.1.

²⁸ CPR rule 1.4(2)(k).

²⁹ CPR rule 32.1(1)(c).

³⁰ CPR rule 3.1(2).

³¹ A message from the Lord Chief Justice stated that “[t]he rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything”: Lord Chief Justice, “Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts” (19 March 2020) at <<https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>> (last accessed 29 January 2021). Legislation, Protocols and Practice Directions under the CPR have since assumed that the court has the power to direct that proceedings are conducted wholly as video or audio proceedings: see, e.g., paragraph 2 of the Practice Direction 51Y, paragraph 3 of the Civil Justice in England and Wales Protocol Regarding Remote Hearings (first published 22 March 2020; updated 26 March 2020) at <https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf> (last accessed 29 January 2021) and Section 85A of the Courts Act 2003, c.39 (added by the Coronavirus Act 2020, c.7, Schedule 25, paragraph 1).

³² The first such remote trial was *National Bank of Kazakhstan and Others v. Bank of New York Mellon and Others* [2020] EWHC 916 (Comm). See comments by Teare J at [6].

inappropriate to hold a remote hearing as a result of due process concerns and will grant an adjournment or vacate a trial date in order to facilitate a physical hearing (see cases cited under sub-paragraph a.1 above).

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, but arbitral tribunals will likely take into account similar considerations.

The CPR does not apply to arbitral proceedings³³ subject to limited exceptions in relation to evidence³⁴ and courts have cautioned against drawing analogies between both types of proceedings in the context of procedural rules.³⁵

The circumstances in which a remote hearing would lead to due process concerns in arbitral proceedings is, however, likely to mirror those considerations discussed in the caselaw cited under sub-paragraph a.1 above. The principles of natural justice at common law apply in the context of arbitrations through the relevant sections of the Arbitration Act 1996 set out at sub-paragraph a.1 above, and the general principle to obtain the fair resolution of disputes.³⁶

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?*

³³ CPR rule 2.1 does not list arbitral proceedings as one of the proceedings to which the rules apply. The distinct and comprehensive procedural regime for arbitration set out in the Arbitration Act 1996 also excludes such a possibility.

³⁴ Parties to arbitral proceedings are permitted to 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: Section 43(1) of the Arbitration Act 1996. Parties may also apply to the court to exercise the same power to make order about the taking of witness evidence as the court has for the purposes of and in relation to legal proceedings: Sections 44(1) and 44(2)(a) of the Arbitration Act 1996. The court may, however, only act in the case of urgency or with where the arbitral tribunal has given permission or where both parties to the arbitration are in agreement, and in any case only to the extent that and only for so long as the arbitral tribunal has no power to act effectively: Sections 44(3)-(6) of the Arbitration Act 1996.

³⁵ *Bremer Vulkan Schiffbau und Maschinenfabrik*, fn. 5 above, per Lord Diplock at pp. 976-977.

³⁶ Section 1(a) of the Arbitration Act 1996.

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Short answer: Parties are unable to “waive” the arbitral tribunal’s duty to comply with procedural fairness, though they are able to “waive” the right to challenge an arbitral award based on a breach of that duty.

As set out above, an absolute right to a physical hearing in arbitration does not exist in England and Wales, however, there may be limited circumstances where the direction to hold a hearing on a remote, rather than a physical, basis would be a breach of due process.

Parties cannot waive their rights to due process in advance of the dispute. While the Arbitration Act 1996 provides that parties are free to determine the procedure which is to be followed in an arbitral reference,³⁷ parties’ freedom to agree is subject to such safeguards as are necessary in the public interest.³⁸

One such safeguard is the arbitrator’s duty to give each party a reasonable opportunity of putting its case or its duty to adopt suitable procedures so as to provide a fair means of resolution. That duty is contained in a “mandatory provision” of the Arbitration Act 1996 which cannot be ousted by agreement of the parties.³⁹ The parties cannot therefore effectively agree to dispense with that duty, by allowing an arbitrator to act in a way contrary to the rules of natural justice. Any agreement which, for example, provides that the arbitration hearing must be remote, will not prevent an arbitrator from adopting a procedure involving a physical hearing where this is considered necessary to provide each party with an opportunity to put its case, or where a failure to do so would constitute a procedural unfairness.⁴⁰

Such an agreement to exclude the tribunal’s discretion to direct a physical hearing must be distinguished from an agreement to expressly confer on the tribunal the discretion to order a remote hearing. For example, it is the latter position under the LCIA

³⁷ Section 34(2) of the Arbitration Act 1996.

³⁸ Section 1(b) of the Arbitration Act 1996.

³⁹ Section 4 and Schedule 1 of the Arbitration Act 1996. Parties are not, however, prevented from selecting a procedure which the parties consider complies with the general principle set out in Section 1(b) of the Arbitration Act 1996, even where the arbitral tribunal might disagree: see Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill 1996 (“DAC Report”) at §§154–163. In such a case the appropriate course may be for the arbitrator to resign.

⁴⁰ While the decision of an arbitral tribunal to direct a physical hearing where the parties have agreed a remote hearing would strictly contravene Section 34(1) of the Arbitration Act 1996, considered below at sub-paragraph c.6, if the direction was made by the arbitral tribunal in order to avoid due process concerns and pursuant to its duty under Section 33 of the Arbitration Act 1996, it is unlikely that the decision will be one which has caused or will cause “substantial injustice” giving rise to a challenge: see sub-paragraph c.6 below.

Rules (considered in sub-paragraph a.1 above). In these circumstances, the tribunal retains its discretion to direct that a physical hearing take place.⁴¹

If during the course of the arbitration the parties agree not to take issue with the arbitral tribunal's decision to proceed by remote hearing, or fail to forthwith raise an objection to such a decision (sub-paragraph d.7 below), they will have "waived" their ability to challenge the resulting award on the basis of this decision.

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. Where the parties agree on the procedure, the arbitral tribunal is not free to take an inconsistent position on an agreed procedural matter. However, legal recourse is likely to be limited as it may not be possible either to remove the arbitral tribunal or set aside a resulting award on the basis of such a decision.

The arbitral tribunal's power to decide on procedural and evidential matters is subject to the parties' right to agree otherwise.⁴² Thus, if the arbitral tribunal were to direct a remote hearing where the parties agreed on a physical hearing, there is a good argument that it is acting outside of its powers under the Arbitration Act 1996.

However, in such circumstances, the parties have limited recourse. The primary remedial routes are: (i) to apply to remove the arbitral tribunal; or (ii) challenge the resulting arbitral award.

First, while the arbitral proceedings are ongoing, the aggrieved party is entitled to apply to remove the arbitrator(s) on the basis that they refused or failed properly to conduct the proceedings.⁴³ Here, a strict test will be applied: removal of arbitrator(s) will only be ordered where there are real reasons for loss of confidence in that arbitrator, for example if the arbitrator persists in ignoring the parties' agreement after the parties have

⁴¹ If the arbitral tribunal chose instead to uphold the parties' agreement that any hearing must be remote, however, we consider that the parties could not challenge that decision. The DAC Report, fn. 39 above, at §161 states that the parties cannot, having agreed to the method of proceeding to be adopted by the tribunal, afterwards validly complain that the tribunal had by adopting that method failed in its duties. The effect of this is that where parties "waive" their right to a physical hearing by providing that any hearing is to be remote, the arbitral tribunal is at liberty to either follow the agreement or choose to depart from it in order to uphold procedural fairness (if it is required to do so).

⁴² Section 34(1) of the Arbitration Act 1996.

⁴³ Section 24(1)(d)(i) of the Arbitration Act 1996.

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pointed out the error and after guidance from the court has been obtained.⁴⁴ Substantial injustice must also have been or will be caused to the applicant.⁴⁵

Second, if any award is made in the arbitration, the parties would have the right to seek to set aside that award under Section 68 of the Arbitration Act 1996. Such a challenge will only succeed in very limited circumstances, and it would be necessary to persuade the court that substantial injustice has been caused by the decision to hold a remote hearing (see further sub-paragraph d.8 below).⁴⁶ Any right to challenge the award on this basis will be lost if an objection is not made by the aggrieved party forthwith (sub-paragraph d.7 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.

As set out above, a right to a physical hearing in arbitration does not exist in England and Wales, save arguably in limited circumstances where a remote hearing would lead to a breach of due process as previously outlined.

In such a case, if a party to the arbitration fails to raise the procedural irregularity during the arbitral proceedings, that failure would prevent the party from using it as a ground for challenging the award.

The Arbitration Act 1996 provides that parties to an arbitration lose their right to object, in later proceedings before the arbitral tribunal or a court, where they take part or continue to take part in the arbitral proceedings without making objections of certain types either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part of the Act.⁴⁷ The types of objection to which that provision applies include objections that the proceedings have been improperly conducted,⁴⁸ which would likely include any breach of a right to a physical hearing, where such a right exists.

⁴⁴ *Groundshire v. VHE Construction* [2001] EWHC 8 (TCC) per Bowsher QC at [23], [24] and [26].

⁴⁵ Thus, if, for example, the arbitral tribunal were to direct a physical hearing where the parties agreed on a remote hearing, or vice versa, the effect of that decision must be to have caused or to cause substantial injustice to the applying party.

⁴⁶ Section 68(2)(c) of the Arbitration Act 1996.

⁴⁷ Section 73(1) of the Arbitration Act 1996.

⁴⁸ Section 73(1)(b) of the Arbitration Act 1996.

The provision does not apply where the party can show that, at the time it took part or continued to take part in the proceedings, it did not know, and could not with reasonable diligence have discovered, the grounds for the objection.⁴⁹ However, given the limited circumstances in which proceeding on a remote basis may give rise to due process concerns, it is likely that these will be obvious at the time that they arise.

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: The party must prove that there has been actual prejudice in the form of substantial injustice.

As set out above, a right to a physical hearing in arbitration does not exist in England and Wales, save in limited circumstances where a remote hearing would lead to a breach of due process or it was contrary to the parties' express agreement to the contrary.

In such a case, breach of the right to a physical hearing will give rise to a ground of challenge for serious irregularity.⁵⁰ An applicant will only succeed in such a challenge where the party can persuade the court that breach of the right caused or will cause substantial injustice to the applicant.⁵¹

The threshold for a successful challenge is high; it has been said that the requirement is only satisfied in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.⁵² While no such challenges have yet been brought in the context of a remote hearing, and so there is as yet no judicial consideration of the matter, given the robust approach taken by the courts of England and Wales to the holding of remote hearings in litigation proceedings, we consider that it will be difficult to challenge an arbitral award on the basis that the hearing was conducted remotely. Special circumstances will need to arise which show not only that the decision to hold a remote hearing was a procedural irregularity but also that this fact caused substantial injustice to the applicant.

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?*

⁴⁹ Section 73(1) of the Arbitration Act 1996.

⁵⁰ Section 68(2)(a), (b) and (c) of the Arbitration Act 1996.

⁵¹ Section 68(2) of the Arbitration Act 1996.

⁵² DAC Report, fn. 39 above, at §280, cited with approval by the House of Lords in *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43, per Lord Steyn at [27].

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Short answer: Possibly, but in extremely limited circumstances.

See answer in sub-paragraph d.8 above.

e. Recognition/Enforcement

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

Short answer: Potentially, in very limited circumstances, and subject to the court's discretion.

Article V(1)(b) of the New York Convention is given effect in the law of England and Wales by Section 103(2)(c) of the Arbitration Act 1996, which provides that recognition or enforcement of the award may be refused if the party defending the enforcement claim proves that it was unable to present its case. It has been held that that provision is engaged where the procedure adopted has been operated in a manner contrary to the rules of natural justice, and that in applying those principles the court must apply its own concept of natural justice.⁵³ The court will not therefore look at whether the right to a physical hearing existed at the seat of the arbitration.

The decision to adopt a remote hearing will likely only contravene principles of natural justice in England and Wales in the very limited circumstances considered at sub-paragraph a.1 above. Outside of those instances, that provision will not be engaged by failure to hold a physical hearing.

Article V(1)(d) of the New York Convention is given effect in the law of England and Wales by Section 103(2)(e) of the Arbitration Act 1996, which provides that recognition or enforcement of the award may be refused if the defending the enforcement claim proves that the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place.

Where the applicable *lex arbitri* provides, as part of its procedural rules, for a right to a physical hearing, and that right is not excluded by the agreement of parties, then

⁵³ *Cukurova Holding AS v. Sonera Holding BV* [2014] UKPC 15 per Lord Clarke at [31]-[32].

breach of that right will constitute a ground to refuse recognition or enforcement under Section 103(2)(e).

Article V(2)(b) of the New York Convention is given effect in the law of England and Wales by Section 103(3) of the Arbitration Act 1996, which provides that recognition or enforcement may be refused if it would be contrary to public policy to recognise or enforce the award. In deciding whether such outcome would be contrary to public policy, the courts have stated that the relevant public policy is that of England and Wales.⁵⁴ The court will not therefore look at whether remote hearings contravened the public policy of the seat.

The threshold for what constitutes an outcome contrary to public policy under the law of England and Wales is so high that it is possible that a procedural irregularity does not cross the threshold to justify the refusal of enforcement of the award. It must be shown that the decision was wholly offensive to the ordinary reasonable and fully informed member of the public.⁵⁵ Thus, a failure to hold a physical hearing would have to constitute not only a procedural unfairness but one of such a gravity that it is offensive.

The court retains a discretion as to whether to refuse to recognise or enforce the award even when Sections 103(2)(c), 103(2)(e) and 103(3) are engaged. In exercising this discretion the court will also weigh the important public policy in the enforcement of arbitral awards. As a result, the court will only exercise its power to refuse to recognise or enforce the award in a clear case.⁵⁶

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: The civil courts of England and Wales responded quickly and robustly to the challenges presented by the COVID-19 pandemic by hearing the majority of their cases through a virtual platform, or in some instances in a hybrid format.

In response to the acceleration in the use of remote hearings in the civil courts resulting from the COVID-19 pandemic, a number of additional measures have been taken to ensure access to justice and compliance with principles of open justice.

⁵⁴ *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm) per Gross J at [13] and [24].

⁵⁵ See *Stockman Interhold SA v. Arricano Real Estate Plc* [2017] EWHC 2909 (Comm) per Christopher Hancock QC at [169] and *Cuflet Chartering v. Carousel Shipping Co Ltd* [2001] 1 All E.R. (Comm) 398 per Moore-Bick J at [10].

⁵⁶ *Honeywell International Middle East Ltd v. Meydan Group LLC* [2014] EWHC 1344 (TCC) per Ramsey J at [67].

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

The Lord Chancellor in a statement on 19 March 2020,⁵⁷ announced the default position in the Civil and Family Courts would be that hearings should be conducted with one, more than one or all participants attending remotely. The Lord Chancellor added that final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology, otherwise there will be no hearings and access to justice will become a mirage. As to remote hearings, the Lord Chancellor's message was to do what can be done safely.⁵⁸

New provisions have been included in the CPR addressing the issue of public access to remote hearings. A new CPR Practice Direction 51Y ("Video or Audio Hearings During Coronavirus Pandemic") provides that where the Court directs a hearing to take place remotely, it may be heard in private where necessary to secure the proper administration of justice. Hearings held in private must be recorded where practical, and on the request of any person made accessible in a court building with the consent of the court. Where a media representative is able to access proceedings remotely while they are taking place, the remote hearing will be a public proceeding. A Protocol Regarding Remote Hearings⁵⁹ provides guidance as to when hearings should be public hearings, and how this might be achieved.

Changes have also been made to procedural rules governing time limits. Practice Direction 51ZA ("Extension of Time Limits and Clarification of Practice Direction 51Y") makes provision for extensions of time necessary as a temporary measure during the COVID-19 pandemic.

⁵⁷ See fn. 31 above.

⁵⁸ This message has been reflected in extra-judicial comments by Judges of the Commercial Court. In a Commercial Court User Group Meeting in June 2020, Judges discussed the smooth transition to remote hearings, that interlocutory hearings had worked well remotely and reports from witness actions were good. It was said that practitioners should assume that the Courts will not be going back to exactly where they were before, and that judges, court staff and users were actively thinking about whether to keep remote or hybrid hearings as a default position: see Commercial Court User Group Meeting, June Meeting Minutes (15 June 2020) at <<https://www.judiciary.uk/wp-content/uploads/2020/06/CCUG-Minutes-150620-2.pdf>> (last accessed 29 January 2021).

⁵⁹ See fn. 31 above.