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

HONG KONG

James Rogers
Annie Birch
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.

In Hong Kong, arbitration is governed by the Arbitration Ordinance (Cap 609) (the “Ordinance”).

It should be noted that, as a Special Administrative Region, Hong Kong is, in most respects, a legally distinct jurisdiction from the People’s Republic of China. The Ordinance is therefore a Hong Kong law and limited in application to Hong Kong. It applies to all arbitrations where the place of arbitration (i.e., the legal seat) is Hong Kong.¹

There is no provision in the Ordinance which provides for a physical in-person hearing.

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, a right to a physical hearing can neither be inferred nor excluded based on an interpretation of the procedural rules of the *lex arbitri*; but those rules do support the parties’ right to agree to exclude any hearing, including a physical hearing, and the tribunal’s discretion to determine how any hearing is held.

The Ordinance largely adopts the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”). Sections 47, 48 and 52 of the Ordinance adopt Article 19 (“Determination of rules of procedure”), Article 20 (“Place of arbitration”) and Article 24 (“Hearings and written proceedings”) of the Model Law,

---

* James Rogers is a partner of Norton Rose Fulbright LLP, focusing on international arbitration.

** Annie Birch is an associate at Norton Rose Fulbright Hong Kong.

¹ Section 5(1) of the Ordinance.
with some amendment. One such amendment is at Section 46 of the Ordinance which does not adopt Article 18 (“Equal treaty of the parties”) of the Model Law, replacing it with similar requirements of equality, fairness and expediency. Although adopted with some amendments, it is fair to suggest that the spirit of these provisions of the Model Law is largely maintained.

Article 19(1) of the Model Law confirms that “the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”. This provision was adopted by Section 47(1) of the Ordinance and supplemented by Section 47(2), which in turn provides that if “there is no such agreement of the parties, the arbitration tribunal may, subject to the provisions of this Ordinance, conduct the arbitration in the manner that it considers appropriate”. Accordingly, in summary, the parties are free to agree upon the procedure to be followed in the conduct of proceedings, failing which questions of procedure fall to the discretion of the tribunal.

Article 24(1) of the Model Law (which has been adopted in full at Section 52 of the Ordinance) further provides that, unless the parties have agreed otherwise, the tribunal will have the discretion to determine whether an oral hearing shall be held for the presentation of evidence or for oral argument, or if the case will be decided solely on the basis of written submissions and documentary evidence. However, Article 24(1) of the Model Law also incorporates the qualification that “unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party”.

The Ordinance therefore expressly recognises the parties’ rights to agree that no hearings of any type (i.e., without distinguishing between the type of hearing: oral, physical or remote) shall be held – a right to a physical hearing may therefore be excluded by agreement.

The corollary of this is that, if the parties have not already agreed that no hearings shall be held, a party may request a hearing which the tribunal is obliged to hold at an appropriate stage.

As mentioned, the Ordinance does not however distinguish between an in-person, physical hearing and any other type of hearing. Indeed, when Article 24 is considered in the context of the other Articles referred to above relating to procedural matters, it is clear that the tribunal has a wide procedural discretion to determine where and how to take testimony and hear oral argument. The discretion whether to hold a hearing therefore arguably extends to whether that hearing is a remote, non-physical hearing or an in-person, physical hearing. A right to a hearing of some sort can therefore be inferred, but the parties have no right to insist that any hearing should be a physical hearing.

There are no reported cases in Hong Kong which suggest that a right to an in-person physical hearing can be inferred from the Ordinance.

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.

In Hong Kong, there is no express provision in either the High Court Ordinance (Cap. 4) or the Rules of the High Court (Cap. 4A) which requires court hearings (in circumstances where a hearing is necessary) to be held with the parties or their representatives in physical attendance. Nor can such a right be generally implied into the rules of civil procedure.

In Hong Kong, the Rules of the High Court empower the courts to make orders of their own motion, as well as on application by the parties. Judges are in charge of their own court, subject to certain constitutional guarantees, and this applies to all hearings, not just trials (in which the taking of witness evidence by video conference is already common practice). Therefore the court can of its own motion order a remote hearing, and Order 1A rule 4(2)(j) and (k) and Order 1B rule 3 of the Rules of the High Court and the Rules of the District Court (Cap. 336H) apply.

In practice, unless the parties make an application for a remote hearing, before ordering a remote hearing the court will propose a remote hearing to the parties or make an order nisi to that effect. If the parties disagree with the court’s proposal or nisi order for a remote hearing, they may make submissions in writing, copied to the other parties, stating what other proposal they put forward as more appropriate. After considering the matter, the court will make a determination as to the method of dealing with the hearing, and will give all necessary and appropriate directions.

In making a case management decision as to which hearings will be dealt with remotely, the court will take into account the views of the parties, the availability of video conferencing equipment, the subject-matter of the proceedings or relevant part of the proceedings and all other material circumstances, including in particular whether the proposed use of video conferencing equipment is likely to promote the fair and efficient disposal of proceedings (including through the avoidance or reduction of delay) and/or to save costs.²

In the last year, as a result of the COVID-19 pandemic, there have been various high court decisions where the issue of remote hearings have been considered through which it has been confirmed that there is no right to a physical hearing in litigation.

In the first of these, in February 2020, the Court of First Instance confirmed that procedural hearings can take place by telephone without the physical presence of the

---

parties or their legal representatives (*Cyberworks Audio Video Technology Ltd (in compulsory liquidation)*). In this case, a directions hearing was held by teleconference and the court determined that this would allow the parties to be “heard” (where otherwise they could not be heard without significant delay as a result of the General Adjournment Period of the Hong Kong courts due to the COVID-19 pandemic). Mr Justice Coleman began by stating that there was no express provision in the High Court Ordinance or the Rules of the High Court which required court hearings to be held with physical attendance of parties or their representatives and found that whilst there were references to the “places” of hearings or trials which might indicate physical gatherings, this was as a result of historical norms rather than mandating physical attendance. He then stated that the Court has “wide case management powers in balancing the [underlying objectives] against healthcare concerns, with the support of technology” and focussed on the need to promote the fair and efficient disposal of proceedings. Mr Justice Coleman went further and commented that the “current Covid-19 crisis is actually an opportunity for the Courts and parties to litigation to reassess how cases can best be actively managed in furtherance of the underlying objectives”. It remains to be seen whether the courts will take up Mr Justice Coleman’s view that there is a “strong argument for moving matters in a similar way beyond the end of the crisis”.

Following the *Cyberworks* case, the issue of remote hearings was considered by the Court of Appeal in April 2020 (*CSFK v HWH*). In this case, the entire substantive hearing was held via video conferencing (rather than just a procedural directions hearing as in the *Cyberworks* case). The Court of Appeal commenced its decision by dealing with the circumstances of the hearing and confirmed that conducting remote hearings using video-conference was both “permissible and lawful […] under the existing statutory frameworks governing civil proceedings” (i.e., the High Court Ordinance). The Court of Appeal noted that Section 28(1) of the High Court Ordinance, provides that the High Court shall sit at such places as the Chief Justice shall appoint. Furthermore, Section 34B, which governs the exercise of its civil jurisdiction by the Court of Appeal refers to hearing or determining matters and arguments before the court. The Court of Appeal found that, so long as the judges are sitting in the High Court, there is no specific provision restricting the mode of receiving submissions and evidence of the parties and that “whilst normally a hearing will take place with all participants physically present in the courtroom, there is no rule prohibiting other modes of hearings if the dual requirements for fairness and openness are satisfied.” The Court of Appeal thus confirmed that there is no right under the existing statutory frameworks for a physical hearing, stating that the physical presence of the parties or their legal representatives in a civil courtroom is not indispensable.

---

3 [2020] HKCFI 347.
4 [2020] HKCA 207.
As noted above, the Court of Appeal focussed on the requirements of “fairness and openness” (concepts which are enshrined in Hong Kong’s Bill of Rights Ordinance). Whilst this may leave the door open to parties in future to argue that the circumstances of their case mean that their constitutional right to fairness would not be satisfied without a physical hearing, this is unlikely to be a successful argument now that the Court of Appeal has stated that remote court proceedings can satisfy the need for fairness, provided the parties have adequate opportunities to participate and be heard. The Court of Appeal found that remote hearings allow parties to address the Court as effectively as if they were at a physical hearing. Furthermore, the Court noted that it was still possible to maintain an official and accurate record of the hearing and the principles of open justice could still be observed (although this right needed to be balanced against the public interest in maintaining social distancing).

It should also be noted that it is well-established in Hong Kong that in certain circumstances, evidence can be taken through video conference. The rules governing this process are contained in Practice Direction 29 of the High Court Rules. Where the procedural rules envisage that a video conference is appropriate for the purpose of evidence taking, it is difficult to see that there is an argument for not allowing remote hearings for other purposes.

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

---

5 See Article 10 Bill of Rights Ordinance, Cap 383 which is given constitutional effect by Article 39 of Hong Kong’s Basic Law which provides: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

6 See Chow Shun Yung v Wei Pih [2003] 6 HKCFAR 299 at [37], for examination of the nature of the right to a hearing. Further discussion can also be found in ST v Betty Kwan [2014] 4 HKLRD 277, at paras 22-29.

7 On this point, the Guidance Note issued by the Chief Judge of the High Court on 2 April 2020 stated at paragraph 10 that: “Insofar as the conduct of remote hearings might impact the open justice principle, it is settled law that different balances may be struck with regard to different aspects of open justice being subject to restrictions when other competing fundamental rights are engaged. The court will be astute to ensure the appropriate balance is struck, for example by the continued public dissemination of reasoned decisions”.
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

As set out in our response to sub-paragraph b.3 above, there is no right to a physical hearing in Hong Kong civil litigation. Even if there were such a right in civil litigation, arbitrations in Hong Kong are governed by the Ordinance and the civil procedure rules for the courts have no application to arbitration proceedings.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?

Short answer: N/A

As set out in our response to sub-paragraphs a.1 and a.2 above, there is no express right to a physical hearing in the Ordinance and one cannot be inferred from the *lex arbitri*.

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: Arguably.

It is generally accepted that arbitration is a matter of contract between the parties and the parties to a dispute are free to agree on how the dispute should be resolved. This principle is confirmed in Hong Kong by Section 3(2)(a) of the Ordinance. Moreover, as mentioned above, this guiding principle of party autonomy is reflected in Article 19(1) of the Model Law as adopted by Section 47(1) of the Ordinance, which confirms the parties are free to agree on the procedural rules that are to be followed. Moreover, Section 47(2) of the Ordinance supplements Article 19(1) of the Model Law confirming that “the arbitration tribunal may [...] conduct the arbitration in the manner that it considers appropriate” only “if or to the extent that there is no such agreement of the parties”.

Arguably, the tribunal’s other duties to ensure fairness and to avoid delay and expense might appear therefore to be secondary to the tribunal’s obligation to follow any procedural agreement between the parties. In this line of thinking, where the parties have expressly agreed that a physical hearing should be held, the arbitral tribunal’s award could be set aside if it were to insist upon a remote hearing.

That said, some commentary on Hong Kong arbitration law suggests that the parties’ freedom to determine the procedure of the arbitration remains subject to the overriding
requirements of fairness and expediency reflected in Section 46 of the Ordinance. This is because Section 46 of the Ordinance replaces Article 18 of the Model Law with the following language:

“[…]
(2) The parties must be treated with equality.
(3) When […] exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required –
(a) to be independent;
(b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
(c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate” (emphasis added).

Accordingly, the powers conferred on the tribunal by the parties (i.e., including an instruction to hold a physical hearing) are subject to the requirements that the arbitrator be independent, act fairly and use expedient procedures. This means that the tribunal should not sacrifice all efficiency in order to accommodate unreasonable procedural demands, even if such demands are made by way of an earlier agreement of the parties. This allows some procedural flexibility to tribunals if faced by an unreasonable demand by one of the parties to hold a physical hearing based on an earlier agreement in circumstances where a physical hearing is no longer possible due to, for example, COVID-related travel restrictions.

If the tribunal has failed to follow the parties’ express agreement without this being justified on the grounds of fairness and expediency, the tribunal’s resulting award may therefore be subject to challenge and ultimately the award may be set aside. Section 81 of the Ordinance incorporates Article 34 of the Model Law and sets out the grounds for setting aside an arbitral award. These grounds for challenge include incapacity of a party (34(2)(a)(i)), inability of a party to present its case (34(2)(a)(ii)), and the failure of the tribunal to follow the procedure agreed (34(2)(a)(iv)). An award may also be challenged on the basis of Hong Kong public policy (34(2)(b)(ii)).

This has not been tested in the Hong Kong courts in respect to a refusal to follow an agreement to hold physical hearings.

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

As noted above, there is no express or implied provision for a right to a physical hearing in Hong Kong. Such a right, however, may be the subject of an express agreement between the parties. If that right is not recognised and the non-defaulting party fails to raise a breach of that right during the arbitral proceedings (i.e., at the time a remote hearing was ordered) and continues to participate in the non-physical hearing, this may prevent the party from challenging the award on that basis. It is generally accepted that where a party attacking an award has kept silent about a procedural irregularity during the arbitration proceedings, the irregularity will be considered to have been waived and the Court will likely uphold the award.8

8. To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?

Short answer: N/A

As noted above, there is no express provision for, or implied right to, a physical hearing in Hong Kong.

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, but increasingly unlikely.

As explained above, Hong Kong arbitration law does not provide for a right to a physical hearing in arbitration. However, the question may still arise as to whether the arbitrator’s order to hold a remote hearing nevertheless constitutes a basis for setting aside the arbitral award. In Hong Kong, the grounds for setting aside an arbitral award are set out in Section 81 of the Ordinance which incorporates Article 34 of the Model Law (see sub-paragraph c.6 above for detail of the various grounds). An applicant may argue that the failure to hold a physical hearing has led to it not being able to “present his case” (Article 34(2)(a)(ii) of the Model Law). The conduct complained of must be “serious or even egregious”, before a court could find in favour of a party in respect of this violation. The burden of proof will be on the applicant to show that it had been or might have been prejudiced by the failure to have a physical hearing.

A party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process, and therefore, in situations where remote hearings are becoming increasingly common, it may be difficult to establish there is an inability to present one’s case merely as a result of the absence of a physical hearing. Even if a party has established that it was prejudiced by being unable to present its case as a result of the absence of a physical hearing, the court may refuse to set aside the award if the court is satisfied that the arbitral tribunal could not have reached a different conclusion in the circumstances. It is therefore unlikely that a party could successfully challenge an award on this ground alone.

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: Unlikely.

---

It is unlikely that the breach of a right to a physical hearing alone, if such right is deemed to exist under the specific circumstances of that case, would lead a Hong Kong court to exercise its discretion to refuse enforcement.

The Hong Kong courts approach New York Convention Awards from a pro-enforcement stance. With rare exceptions, the court will be inclined to exercise its discretion in favour of enforcement. The discretion will be exercised in this manner unless the rights of the party seeking to resist enforcement can be shown to have been violated in a material way. The grounds for refusing to enforce Convention Awards are set out in Section 89 of the Ordinance. They are narrow, exhaustive and strictly applied. The objective is to discourage opposition to enforcement based on unmeritorious technical points and to uphold Convention Awards except where complaints of substance can be made good.

In general, when presented with an Article V application to resist recognition and enforcement, the courts will be concerned to ensure that the proceedings were fundamentally fair. It is unlikely that the courts would view a failure to hold a physical hearing to be a ground for satisfying an Article V defence.

In particular, in respect of the ground of violation of public policy, the Hong Kong courts treat this as a very limited ground for refusing the enforcement of a Convention Award and will only refuse to enforce a Convention Award on this ground if failing to do so would violate Hong Kong’s most basic notions of morality and justice. Furthermore, it has been held that the public policy ground may not be employed to deal with any conceivable type of procedural error made by the tribunal. The Hong Kong courts would therefore be unlikely to refuse to recognise an award for failure to hold a physical hearing on the ground of public policy.

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: N/A

As set out in the response to sub-paragraph b.3 above, the Hong Kong courts have broadly welcomed a move towards remote hearings, in particular encouraging telephone conferences for short procedural and directions hearings and commenting that this time can be used as an opportunity to rethink how court hearings are run. However, several steps remain to fully modernise the process (for example, Hong Kong courts do not yet accept e-filings).

Similarly, the Hong Kong International Arbitration Centre (“HKIAC”) issued its own Guidelines for Virtual Hearings on 15 May 2020 and provides a number of services for remote hearings, in part or in full. The guidelines cover conference call setup, witness participation, confidentiality and security issues, and documentation, transcription and interpretation services, among other things and serve to encourage parties to adapt to remote hearings where convenient.