JAMAICA

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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:** No.

The Jamaican Arbitration Act 2017 (the “JAA”) governs both domestic arbitration and international commercial arbitration proceedings seated in Jamaica. The JAA does *not* expressly provide for the right to a physical hearing in arbitration proceedings.

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:** A right to a physical hearing cannot be inferred from the JAA. While it cannot be conclusively excluded, it is unlikely that such a right would be found to exist.

The JAA is based on the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”)\(^1\) and contains provisions that are virtually identical to Article 18 (“Equal treatment of parties”), Article 19 (“Determination of rules of procedure”), Article 20 (“Place of arbitration”) and Article 24 (“Hearings and written proceedings”) of the Model Law.\(^2\)

The Jamaican courts have yet to address the question of whether there is an implied right to a physical hearing under the JAA, or under Jamaican law more generally.

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\(^2\) JAA, ss. 33-35 and s. 39, respectively.
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However, for the reasons set out below, it is unlikely that any such right would be found to exist.

The JAA provides that, unless the parties agree otherwise, the tribunal has the discretion to decide whether to conduct oral hearings or whether to determine the case solely on the basis of written submissions and documentary evidence. The JAA also provides that “unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party”. As such, the general position under the JAA is that oral hearings are not mandatory in arbitral proceedings. Further, the JAA does not stipulate that hearings should be held physically. The fact that the legislation provides for “oral hearings” cannot be read as implying a right to physical hearings. Legal arguments and evidence are heard orally during physical hearings as well as in remote hearings, with “the mere difference that the latter uses communication technologies to transmit the audio and/or video.”

When all relevant provisions of the JAA are read together (including section 35 of the JAA, which vests the tribunal with the residual discretion to determine where to take evidence and hear oral arguments), it is clear that a court would have no basis to interpret the legislation as granting parties a legal right to a physical hearing.

One question, which came to the fore in the wake of the COVID-19 pandemic, is whether the right to due process under the Jamaican Constitution implies a right to a physical hearing. The relevant legal provision in this context is section 16(3) of the Charter of Fundamental Rights and Freedoms, which provides that “[a]ll proceedings of every court and proceedings relating to the determination of the existence or the extent of a person’s civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public” (emphasis added). Many have debated whether or not this constitutional provision operates to bar remote court or arbitral hearings.

As the question pertains to arbitration, the answer depends on whether an arbitral tribunal may be considered an “authority” having the power to determine “the existence or the extent of a person’s civil rights or obligations”, within the meaning of the Charter of Fundamental Rights and Freedoms. Existing case law suggests that the answer to that question is – no.

The issue of the constitutional status of arbitral tribunals was addressed in the decision of Auto-Guadeloupe Investissement SAS v Alvarez & Ors, in which the court found that international commercial arbitration does not fall under the regulatory

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3 JAA, s. 39(1).
4 JAA, s. 39(1).
6 Based on Article 20 of the Model Law.
7 Auto-Guadeloupe Investissement SAS v Alvarez & Ors (2014) 84 West Indian Reports 49.
purview of the Constitution (even if the arbitration is seated in the jurisdiction). The court found that arbitrators’ powers and authority derive directly from the parties’ contractual arbitration agreement, and as such arbitral tribunals are not public authorities, whose exercise of power is governed by the Constitution. The court also confirmed that the fact that international arbitration is regulated by legislative rules under the *lex arbitri* does not change the inherent private law character of arbitration.8 It would follow, therefore, that the constitutional requirement of a “public hearing” does not apply to arbitral proceedings. Even if it were to apply, there are of course questions as to how the term “public hearing” would apply in the context of a confidential private arbitration.

In any event, it is by no means clear that the constitutional guarantee of a “public hearing” is contravened merely because a hearing is conducted remotely by technological means. If the recent practice of live/internet streaming of Investor-State arbitration hearings has established anything, it is that remote hearings can be far more “public” and accessible than physical hearings.

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: There is no right to a physical hearing in the general rules of civil procedure.

The rules of civil procedure applicable in domestic litigation are contained in the Jamaica Civil Procedure Rules 2002 (“CPR 2002”). Rule 39.2(1) of the CPR 2002 provides that, as a general matter, hearings are to be held in public. However, there is no indication either expressly or by inference that the requirement for “public hearings” means that individuals have a right to a physical hearing.

In fact, it is clear that virtual court proceedings are envisaged by the CPR 2002. This is clear, for example, in rule 2.7, which vests the courts with the discretion to determine where, when and how it should deal with cases. Specifically, the court may

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8 In so holding, the court cited the decision of the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co. Ltd. v The Judges of the Federal Court of Australia* [2013] HCA 5, in which the claimant sought to challenge the constitutionality of the Australian Arbitration Act on the basis that it resulted in the “impermissible vesting of judicial power in arbitral tribunals”. There, the court emphasised the private law character of the agreement by the parties to submit to arbitration and held that “[t]he determination of a dispute by an arbitrator does not involve the exercise of the sovereign power of the State to determine or decide controversies”.

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order that all or part of the proceedings should be conducted via “telephone conference call, video-conference or any other form of electronic communication”.

The rules also empower the court to give directions to facilitate the conduct of a hearing “by the use of any electronic or digital means of communication […] or any other technology it considers appropriate”.

The CPR 2002 also contemplates that witness testimony may be adduced remotely through electronic means. For example, rule 29.3 permits the court to allow “a witness to give evidence without being present in the courtroom, through a video link or by any other means”.

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 CPR 2002 does not apply to arbitration.

Rule 2.2 provides an exhaustive list of proceedings to which the CPR 2002 applies. The CPR 2002 applies to domestic court proceedings, including litigation raising “questions connected with or arising from commercial arbitrations”. This includes, for example, court proceedings regarding interim measures in support of arbitral proceedings, enforcement of arbitral awards and the set-aside of arbitral awards. However, the CPR 2002 does not apply to arbitral proceedings.

Even if the CPR 2002 did apply to arbitration proceedings, since the CPR 2002 neither expressly nor impliedly provides a right to a physical hearing, one could not extend such a right to arbitration through the application of the civil procedure rules.

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 a 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 explained in paragraphs a and b above, there is no right to a physical hearing in Jamaica. Parties are free to agree in advance of the dispute that hearings can be

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9 CPR 2002, r. 2.7(3).
10 CPR 2002, r. 2.7(4).
11 CPR 2002, r. 71.3(1).
12 JAA, s. 34(1) provides: “Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”.
conducted remotely, or to adopt institutional rules that permit remote or virtual arbitral hearings.

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. Imposing a remote hearing contrary to the parties’ express agreement would contravene the JAA and provide grounds for set-aside or non-enforcement of the award.

As noted earlier, there is no right to a physical hearing in arbitral proceedings under Jamaican law. Parties to arbitration are, however, “free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”, in so far as such procedure does not contravene mandatory rules under the JAA. As such, parties may stipulate in their arbitration agreement that all hearings are to be conducted in person/physically, either through express contractual provisions or by reference to specific arbitration rules. The Jamaican courts will strive to uphold any such agreement by the parties, in line with “the key principle of party autonomy”.

If the parties have failed to agree on a point of procedure (e.g., where the arbitration agreement or arbitral rules are silent on the specific issue), the JAA provides that the tribunal may “conduct the arbitration in such manner as it considers appropriate”. This broad procedural discretion arguably includes the power to order that hearings should be conducted remotely.

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13 JAA, s. 34(3) provides: “Where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refers to agreement of the parties, such agreement includes any arbitration rules referred to in that agreement”.
14 JAA, s. 3(2) provides: “Where a provision of this Act, except section 43, leaves the parties free to determine certain issues, the freedom includes the right of the parties to authorize a third party, including an institution, to make that determination”.
15 JAA, s. 35(1) provides: “The parties are free to agree on the place of arbitration but failing agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties”.
16 JAA, s. 34(1) provides: “Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”.
17 See JAA, s. 55 (2)(a)(iv), which confirms that the parties’ freedom to establish arbitral procedure is subject to the non-derogable provisions of the Arbitration Act.
19 JAA, s. 34(2) provides: “Failing an agreement under subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate”.

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However, if, despite the parties’ agreement to have a physical hearing, an arbitral tribunal were to convene a remote hearing, that would constitute a breach of the *lex arbitri*, including the “key principle of party autonomy”, which is central to arbitration law in Jamaica. Specifi
cally, disregard for the parties’ agreed procedure could provide a basis for a Jamaican court to set aside the award on the grounds that “the arbitral procedure was not in accordance with the agreement of the parties.” A party could also seek to challenge recognition and enforcement of the award under Article V(1)(d) of the New York Convention (as incorporated in the JAA), on the ground that “the arbitral procedure was not in accordance with the agreement of the parties.” The set-aside and non-enforcement of awards are discussed in further detail below.

d. Set-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: It depends on the circumstances of the case.

Given that parties do not have a general or mandatory right to a physical arbitral hearing under Jamaican law, the fact that a tribunal has ordered a remote hearing will not *per se* constitute a basis for setting aside an award. The position will be different if the remote hearing was imposed contrary to the agreement of the parties, or if the conduct of the hearing otherwise engaged one of the recognised grounds for set-aside proceedings under the JAA (all of which are based on the grounds enumerated in the Model Law).

The JAA provides that, where a party is aware that a requirement of the JAA has not been complied with, and yet proceeds with the arbitration without raising an objection, that party will be “deemed to have waived his right to object”. Accordingly, if a party fails to raise or object to a procedural irregularity regarding a remote hearing, that party may be deemed to have waived its right to challenge the award on that basis.

This principle of implied waiver does not apply in all circumstances. There can be no waiver of mandatory/non-derogable provisions of the JAA. Thus, for example, there can be no waiver (implied or express) of the legal requirement that the parties “be treated with equality”; and therefore a party’s failure to object to a breach of the

21 See JAA, s. 55 (2)(a)(iv).
22 See JAA, s. 47(i)(a)(iv), which is identical terms to Article V(1)(d) of the New York Convention.
23 See JAA, s. 7.
equality of arms principle will not preclude a subsequent challenge to an award on that basis.\textsuperscript{24} Therefore, if a party alleges that the conduct of a virtual hearing contravened a mandatory principle under the JAA, a failure to raise an objection is unlikely to constitute an implied waiver of the right to object, or otherwise operate to preclude a challenge to the award.

Quite apart from the mandatory/non-derogable provisions of the JAA, regional courts have established that fundamental rules of public policy cannot be waived in arbitral proceedings,\textsuperscript{25} because “those principles and standards […] are so sacrosanct as to require courts to maintain and promote them at all costs and without exception”.\textsuperscript{26} As such, it is highly unlikely that the Jamaican courts would apply the doctrine of implied waiver to preclude a challenge, which is advanced on public policy grounds.

There is no exhaustive list of rules as to what constitutes public policy under Jamaican law. Public policy rules are articulated by the courts on a case by case basis. The courts have established, for example, that it is contrary to public policy “to enforce a foreign arbitral award where the foreign proceedings violated […] principles of natural justice”.\textsuperscript{27} Therefore, if a party were to challenge an award on the grounds that the conduct of a virtual hearing contravened the principles of natural justice, the courts are unlikely to find that such a challenge is precluded by an implied waiver.

Having said all the above, the courts have been astute to limit the scope of public policy arguments, lest they be used to justify undue interference in arbitral proceedings. The courts have emphasised that they retain only a residual responsibility for guaranteeing the integrity of the arbitral process by ensuring, for example, the application of the principles of natural justice.\textsuperscript{28} As a result, “[t]he margin of judicial discretion to intrude into an arbitral award is exceedingly narrow”.\textsuperscript{29}

8. \textit{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

Parties do not have a general right to a physical hearing under Jamaican law.

\textsuperscript{24} See, JAA, s. 33.
\textsuperscript{25} See BCB Holdings and Belize Bank \textit{v} Attorney General of Belize [2013] CCJ 5 (AJ).
\textsuperscript{26} [2013] CCJ 5 (AJ), para. 59.
\textsuperscript{27} Cukurova Holding A.S (Appellant) \textit{v} Sonera Holding B.V [2014] UKPC 15, para. 32.
\textsuperscript{28} Belize Natural Energy Ltd \textit{v} Maranco Ltd [2015] CCJ 2 (AJ), para. 17.
\textsuperscript{29} \textit{Ibid.}
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, depending on the circumstances.

Given that parties do not have a general right to a physical hearing under Jamaican law, the fact that an arbitral tribunal has ordered virtual proceedings will not *per se* constitute a ground for a challenge. As noted above, where the parties have failed to agree on the applicable arbitral procedure, arbitral tribunals have fairly broad discretion as to how the proceedings should be conducted.

However, the failure of a tribunal to convene a physical hearing may provide grounds for a challenge if the remote hearing is imposed contrary to the agreement of the parties, or if the hearing is conducted in such a way as to offend mandatory rules or otherwise engage one of the recognised grounds for set-aside under the JAA (which are largely reflective of the grounds in Article 34 of the UNCITRAL Model Law). One such situation would be, for example, where due to imbalances in the position of the parties, a remote hearing does not afford equality of arms or natural justice rights.

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:** The mere fact that a remote hearing was imposed, without more, is unlikely to result in the refusal of recognition or enforcement of an award.

Parties to arbitration are only guaranteed a *right* to a physical hearing under Jamaican law, in so far as they have made an agreement to that effect. Therefore, if a remote hearing is imposed contrary to the agreement of the parties, there would be grounds for the courts to refuse recognition and enforcement of the award. Jamaica has ratified the New York Convention and incorporated its provisions into domestic law. As such, a party may seek to challenge recognition and enforcement of an award if it can show that a tribunal’s conduct of a remote hearing engages any one of the grounds enumerated under Article V of the New York Convention.

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30 JAA, ss. 56 and 57.
Given the position under Jamaican law, a party would find it difficult to argue that merely because a remote hearing was imposed, it was (without more) “unable to present his case” (per Article V(1)(b) of the New York Convention). As with other cases in this area, the court will be focused on the question of whether substantive fairness was achieved in the arbitration.

In determining whether a party was “unable to present his case” the court will start from the position that “the enforcing court must apply its own concept of natural justice” – i.e., the concept of natural justice as understood and applied in Jamaica. Given the provisions for remote hearings in the domestic civil procedure rules, and the fact that the JAA does not expressly or impliedly preclude remote hearings, the Jamaican courts are unlikely to find that the imposition of a remote hearing is per se contrary to natural justice.

Further, given the courts’ “pro-enforcement” approach and general non-interventionism in arbitration cases, the standard for establishing a breach of due process in this context is relatively high. The complaining party must establish that it was “prevented from presenting its case by matters outside its control”. The courts will examine the substantive effect of the procedure that was adopted by the arbitral tribunal, and will ask itself whether the party had a proper opportunity to respond to the case against it. In short, the courts are unlikely to find that Article V(1)(b) of the New York Convention was engaged unless a party was found to have been deprived of “substantial justice”. Therefore, failing some serious irregularity in the conduct of a remote hearing, it is difficult to see how the fact that a hearing was conducted remotely would justify the non-recognition of an award under Jamaican law.

Where a remote hearing is imposed contrary to the parties’ agreement, recognition and enforcement of the award may be challenged under the JAA, if it can be established that “the arbitral procedure was not in accordance with the agreement of the parties” (per Article V(1)(d) of the New York Convention). Provided such a ground can be established, the courts will strive to uphold the parties’ agreement in line with “the key principle of party autonomy”.

Finally, a party may seek to challenge recognition and enforcement of an award where the conduct of the remote hearing offends considerations of public policy (per Article V(2)(b) of the New York Convention). As noted above in sub-paragraph d.7, the fact that an arbitral hearing has been convened remotely is unlikely to offend notions of due process and open justice under Jamaican law, and therefore will not be found ipso facto to be contrary to public policy.

Consistent with the ethos behind the New York Convention, the public policy exception to non-recognition and enforcement is construed very narrowly under

32 Ibid. para. 33.
33 GOL Linhas Aereas AS v Matlinpatterson Global Opportunities Partners (Cayman) II LP & Ors CICA (Civil) Appeal 12 of 2019.
34 Ibid. para. 140.
Jamaican law. The courts have stated that an expansive construction of the public policy defence would “vitiate the Convention’s attempt to remove pre-existing obstacles to enforcement”.

As such, the public policy ground will only be engaged where there is a breach of “the most basic notions of morality and justice”.

Further, where enforcement of a foreign or Convention award is being considered, the courts will “apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario […] [and] eschew a uniquely nationalistic approach to the recognition of foreign awards”. They will seek to balance the public policy issue raised in the challenge, with the competing policy of upholding international arbitral awards. As the Jamaican Supreme Court stated in one of its key decisions on arbitral enforcement, “it is a matter of public policy that the Jamaican courts should recognize awards of foreign arbitral tribunals unless the awards are contrary to conceptions of morality and fairness”.

The most likely public policy issue to arise in connection with a remote hearing is the issue of due process. The courts have affirmed that it is contrary to public policy “to enforce a foreign arbitral award where the foreign proceedings violated […] principles of natural justice”. However, for the reasons outlined above, the courts are unlikely to find that a due process breach justifies refusing enforcement, unless a party can establish that it was deprived of substantial justice in the course of the proceedings. Such a situation is only likely to arise where there is some serious irregularity in the conduct of a remote hearing, such as where a party has been “prevented from presenting its case by matters outside its control”.

This would be the case, for example, where, due to persistent difficulties with internet connectivity or the virtual hearing platform, a party is prevented from presenting substantial arguments orally and is not afforded an opportunity to address those arguments in post-hearing briefs.

f. COVID-Specific Initiatives

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41 GOL Linhas Aereas AS v Matlinpatterson Global Opportunities Partners (Cayman) II LP & Ors, CICA (Civil) Appeal 12 of 2019, para. 140.
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

Like most other jurisdictions, commercial dispute resolution in Jamaica suffered serious disruptions after the onset of the COVID-19 pandemic. However, the legal community has shown itself to be resilient in the face of these challenges, including by shifting filings and hearings to online platforms. This process was largely facilitated by the judiciary, including through the institution and publication of practice directions/guidelines on the conduct of virtual hearings and filings.

The Authors are unaware of any specific measures or initiatives that have been adopted in relation to international arbitration.