



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

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

JAPAN

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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 Arbitration Act (Act No. 138 of 2003) (hereinafter “Arbitration Act”) governs both domestic and international arbitration proceedings seated in Japan. The Arbitration Act, based primarily on the 1985 UNCITRAL Model Law without the subsequent amendments,¹ does not expressly provide for a right to a physical hearing in arbitration.

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.

Article 32(1) of the Arbitration Act, based on Article 24(1) of the 1985 UNCITRAL Model Law, provides for a right to “oral hearings”, so long as a party requests one. Article 32(3) of the Arbitration Act states that, where oral hearings are to be held, the arbitral tribunal “shall notify the parties of the date, time and *place* of the oral hearing” (emphasis added).

Due to its specific reference to “place” of the oral hearing, it is arguable that the Arbitration Act requires oral hearings to be conducted physically pursuant to Article 32(3). While the reference to “place” of hearing might create room for such

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¹ The Arbitration Act is currently in the process of being amended to, *inter alia*, reflect certain aspects of the 2006 UNCITRAL Model Law, including sections on interim relief and their enforcement in Japanese courts.

interpretation, the better view is that a right to oral hearings does not equate to a right to a physical hearing *per se* for the following reasons.

First, the specific reference to “place of the oral hearing” should not carry much weight in interpreting whether a right to oral hearings equates to a right to a physical hearing. The drafters of the Arbitration Act in 2003 intended Article 32(3) (tribunal’s obligation to notify the parties of the date, time and place of the oral hearing) to substantially reflect Article 24(2) of the 1985 UNCITRAL Model Law (parties’ right to receive advance notice of hearings and meetings) which has no reference to “place” of hearing.² The drafters specifically included “the date, time and place of the oral hearing” only to ensure that parties would receive a proper notice that would enable them to prepare for the same.³

Second, the Authors of this report take the view that emphasis should not be placed on the drafters’ comments that an oral hearing is to be conducted at a “specific venue”. These observations were made in 2003 and likely under heavy influence of the standard court practice in Japan at that time. The drafters explained that “oral hearings” mean oral proceedings where the arbitral tribunal and all the parties would meet together at a “*specific venue*” for the parties to present their respective cases to the tribunal and for the tribunal to question the parties and examine evidence.⁴

The series of comments made by the drafters on oral hearings suggests that while the drafters might have anticipated oral hearings to be conducted physically, their choice of term (“place of the oral hearing”) should not be interpreted as equating a right to an oral hearing to a right to a physical hearing. Interestingly, the drafters further noted that an “oral hearing” does not imply that it should be a public hearing. It is clear from this comment that the drafters were influenced by the practice of oral arguments in court proceedings which are required to be made public.⁵ Further, it is not surprising that the drafters might have assumed in 2003 that oral hearings should be conducted physically, particularly given that they were primarily made up of members from the judiciary, ministries and academia who tend to be more familiar with and heavily influenced by the standard court practice of 2003.⁶ It is worth highlighting that the drafters had

² Masaaki KONDO et. al., *Arbitration Act, Commentary* (Shojihomu 2003) (henceforth “*Kondo Commentary*”) p. 168-169.

³ *Kondo Commentary*, p. 171.

⁴ *Kondo Commentary*, p. 170.

⁵ Article 87 of the Code of Civil Procedure (Act No. 109 of 1996).

⁶ *Kondo Commentary*, Preface. The Japan International Dispute Resolution Center (“JIDRC”) Virtual Hearing sub-committee introduced the view that the statement in the *Kondo Commentary* that could be interpreted to require a physical hearing in international arbitration should not be given too much weight in light of the circumstances at the time when videoconferencing technologies were less developed. JIDRC, “Report and Proposal on Virtual Hearings” (2020) available at <https://idrc.jp/wp-content/uploads/2020/11/reportandrecommendation_webhearing.pdf> (last accessed 5 May 2021; Japanese only).

intended to replicate the 1985 UNCITRAL Model Law as much as possible in the Arbitration Act.⁷ In the circumstances, the drafters' assumption that oral hearings equated to physical hearings should not be adopted as that was not contemplated under the UNCITRAL Model Law. As such, the drafters had not unequivocally intended for the Arbitration Act to provide a right to a physical hearing.

Finally, in 2003, when the Arbitration Act was enacted, the notion and use of remote hearings was not common practice even in international arbitration. In the present-day era in which the use of videoconferencing and other tools to conduct remote hearings has gained global adoption, however, a "specific venue" as referenced by the drafters may well encompass a virtual venue.

In sum, there is no right to a physical hearing to be inferred from the Arbitration Act.

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

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

Short answer: Yes, unless certain requirements are met.

The civil procedure laws in Japan require a physical hearing to be held in court for oral arguments and witness examination, unless exceptional requirements are met. The civil procedure laws are currently under review to make use of IT in court proceedings, so as to increase the availability of remote hearings.⁸

Under Article 87 of the Code of Civil Procedure (Act No. 109 of 1996) ("Code"), parties to a litigation in Japanese courts are required to conduct oral arguments physically before the court unless otherwise provided in the Code. Under Article 190 of the Code and Article 109 of the Rules of Civil Procedure (Rules of the Supreme Court No. 5 of 1996) ("Rules"), a witness in litigation is required to physically appear before the court to give his or her testimony.

The requirement of holding a physical hearing for oral arguments and witness examinations is derived from the principle of "directness" underpinning the civil procedure laws of Japan.⁹ The principle of directness requires the judges of the court in charge of the case to be directly engaged in hearing oral arguments of the parties and examination of evidence, including witnesses. This principle of directness in the context

⁷ *Kondo Commentary*, Preface.

⁸ The Japanese Ministry of Justice (MOJ) submitted an "Interim proposal on the amendment of Code of Civil Procedure (IT related)" for public consultation on February 19, 2021. Available at <http://www.moj.go.jp/shingi1/minji07_00178.html> (last accessed 5 May 2021; Japanese only).

⁹ Article 249(1) of the Code of Civil Procedure (Act No. 109 of 1996).

of witness examination has been construed to require judges to examine witnesses in person at a physical hearing because such manner of examination enables judges to form a well-rounded impression of the witness evidence by taking into account their voice inflections, facial expressions, demeanour and so forth.¹⁰ This principle, however, is not absolute as judges in Japan are periodically rotated to courts in different districts even while cases are ongoing. Thus, newly assigned judges replacing the previous ones inevitably have to decide a case at least partly based on the written record of oral arguments and witness examinations. To balance the principle of directness and the efficacy of the proceedings, given the importance of witness examinations, a party may request an examination of a witness who had already been examined by the previously assigned judge(s) if a single judge or the majority of a panel of judges has been replaced.¹¹

The principle of directness is sometimes encroached upon to facilitate witness examination in court proceedings. Under exceptional circumstances, a witness may testify through a videoconference connected to the courts' network. Exceptional circumstances enumerated in the law are (i) when a witness is resident in a distant location that makes it unnecessarily burdensome to physically testify in the court in charge of the case, or (ii) if the nature of the case, physical or mental conditions of a witness or relationship between a witness and a party or counsel might create undue pressure to a witness and/or adversely affect his or her mental wellbeing if required to testify in person in the court in charge of the case.¹² Under the current law, however, such witness is still required to physically attend at a court to have access to the court's standalone videoconferencing system.

A serious breach of the principle of directness would entitle a party to have the judgment vacated on appeal.¹³

This principle of directness that inhibited the use of remote hearings was further revisited when the Japanese government launched a project to introduce IT into court proceedings in 2017¹⁴ to enhance efficiency and accessibility of the judiciary.

¹⁰ Legislative Counsel (MOJ), "Supplementary explanation on the interim proposal on the amendment of Code of Civil Procedure (IT related)" (19 February 2021) at <<http://www.moj.go.jp/content/001342958.pdf>> (last accessed 5 May 2021; Japanese only) p. 78.

¹¹ Article 249(2) of the Code of Civil Procedure (Act No. 109 of 1996).

¹² Article 204 of the Code of Civil Procedure (Act No. 109 of 1996). This concept of conducting witness examination through audio and visual transmissions was introduced in 2007.

¹³ Article 312(2)(i) and 338(1)(i) of the Code of Civil Procedure (Act No. 109 of 1996).

¹⁴ Legislative Council (MOJ), "Summary report on IT transformation of court proceedings – to achieve three e's" (30 March 2018) at <<https://www.kantei.go.jp/jp/singi/keizaisaisei/saiban/pdf/report.pdf>> (last accessed 5 May 2021; Japanese only) p. 3.

As part of the government initiatives, a committee made up of private practitioners, scholars, business representatives and consumer representatives issued a report in 2018 setting out a recommended roadmap for Japanese courts to expand the use of IT in civil proceedings in three phases (“three e’s” – e-filing, e-case management, e-court).¹⁵ Phase 1, which had begun in February 2020, introduces the use of web or videoconferences for case management sessions to sort out procedural issues and matters relating to evidence. For Phase 2, the civil procedure laws will be amended to enable preparatory proceedings and oral arguments in hearings to be conducted remotely. In Phase 3, the civil procedure laws will be amended to introduce online filings and online case management.

With the development of remote conferencing technologies, the need to require a witness to physically appear in court has substantially reduced even in view of the principle of directness. The Legislative Council behind the above recommendation proposed to remove the requirement for a witness to attend at a court to access the court videoconferencing system.¹⁶ Instead, the Legislative Council recommended that a witness should be allowed to testify remotely using a videoconference system via the Internet outside of a court, subject to a protocol to be set by the court to uphold the integrity of proceedings. Such protocol would include the prohibition of a witness testifying at a venue where only one party is present or restricting any communication with a witness during his or her examination. Nevertheless, in light of the principle of directness, the Legislative Council maintains that remote witness examination should remain as an exception, even if the exceptional circumstances are to be broadened.¹⁷

In light of the above, while the civil procedure laws in force as of the date of this publication provide for a right to a physical hearing, the underlying principle of directness and how it should be effected in practice has changed in light of the development of IT and other competing considerations of efficiency and accessibility. Once the proposed IT reforms are fully implemented, the right to a physical hearing will likely look very different, and subject to other considerations.

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: Not likely.

The right to a physical hearing under the civil procedure laws provides limited guidance to arbitration proceedings seated in Japan. This is because Japanese courts have

¹⁵ Legislative Council (MOJ), “Summary report on IT transformation of court proceedings – to achieve three e’s”, March 30, 2018.

¹⁶ Legislative Council (MOJ), “Interim proposal”, fn. 8 above, pp. 79-80.

¹⁷ The Legislative Council recommended as follows: (i) so long as it is not particularly challenging for a witness to appear in the court in charge, remote examination should be permitted and the close physical distance of a witness’s residence to the court in charge is not a factor against remote examination or (ii) remote witness examination should be permitted when the court considers it appropriate in the absence of parties’ objections.

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recognized that arbitrations are intended to provide more procedural flexibility than litigation cases, and neither the Code nor the Rules apply to arbitration proceedings seated in Japan.¹⁸ In fact, a provision stipulating that the “arbitral procedure shall be subject to the statutory rules for civil litigation to the extent not incompatible with its nature” in the law governing arbitration prior to the enactment of the Arbitration Act¹⁹ was not incorporated into the Arbitration Act.

In addition, the rationale behind requiring physical hearings for oral arguments and witness examinations in litigation was to ensure a fair and public trial,²⁰ the latter of which is not applicable to arbitrations. Furthermore, nothing suggests that a remote hearing cannot ensure a fair trial for the parties so long as proper protocols are in place and complied with. In fact, as set out above in sub-paragraph b.3, given that even Japanese courts have moved towards hearing oral arguments and witness testimony remotely when appropriate to enhance efficiency and accessibility of the judiciary, there is no compelling reason for a right to a physical hearing to be extended from Japan’s civil procedure laws to arbitration.

Thus, it is unlikely that an arbitral tribunal seated in Japan would accept a party’s objection to a remote hearing solely based on the principle of directness or a right to a physical hearing under the civil procedure laws of Japan.

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: Yes.

As explained in sub-paragraph a.2 above, the Authors consider that the better view is that a right to a physical hearing is neither provided for in, nor to be inferred from, the Arbitration Act in Japan. However, even if the right to an oral hearing in Article 32(1)

¹⁸ *X v. Y*, High Court of Tokyo, Case No. 2018 (Ra) 817, 1 August 2018, para. 2 (3); see TANIGUCHI, “National Report Japan (2019 through 2020)” in ICCA *International Handbook on Commercial Arbitration* (henceforth “*Handbook*”) p. 44.

¹⁹ Article 1 of the Act on Public Notification Procedure and Arbitral Procedure (Act No. 29 of 1890).

²⁰ As of now certain court sessions can be conducted via teleconference or video conference. However, proceedings for oral arguments and cross-examination must still be conducted physically, partly in order to meet public trial requirement set forth in the Japanese Constitution. The Legislative Council has proposed that the constitutional requirement for a public trial should be met by streaming online hearings at a court room or by other means. Legislative Counsel (MOJ), “Supplementary explanation”, fn. 10 above, p. 38.

of the Act was considered to equate to a right to a physical hearing, such right could be waived in accordance with Article 32(2). A party may be regarded as having waived the right to a physical hearing by agreeing to institutional rules that empower the arbitral tribunal to decide the manner of the hearing.

For instance, by referring a dispute to the Japan Commercial Arbitration Association (“JCAA”) arbitration, regardless of which of the three sets of rules applies, the parties are considered to have waived their rights to a physical hearing in arbitration. The JCAA offers three sets of arbitration rules: (i) UNCITRAL Arbitration Rules (2010) and Administrative Rules for UNCITRAL Arbitration (2019), (ii) Commercial Arbitration Rules (2019), and (iii) Interactive Arbitration Rules (2019). The Commercial Arbitration Rules apply as the default rules, unless the parties specifically agree that the Interactive Arbitration Rules or UNCITRAL Arbitration Rules shall apply.

Article 50.3 of both the Commercial Arbitration Rules and Interactive Arbitration Rules expressly provide that the arbitral tribunal has the discretion to select the appropriate means for holding a hearing, including by video conference or other methods. As for the UNCITRAL Arbitration Rules, Article 17.1 vests the arbitral tribunal with the power to “conduct the arbitration in such manner as it considers appropriate”, and Article 28.4 goes a step further to expressly allow arbitral tribunals to direct that fact and expert witnesses be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

In sum, it is possible for parties to waive their right to a physical hearing in advance of a dispute either expressly or by agreeing to refer any disputes to be determined under the JCAA or similarly drafted arbitration rules.

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: It depends on the totality of circumstances, including those that lead the arbitral tribunal to decide to hold a remote hearing over parties’ objections and the impact of the remote hearing on the parties and grounds for objections.

Article 26(2) of the Arbitration Act²¹ provides the arbitral tribunal wide discretion to decide the manner in which an arbitration is conducted in the absence of the parties’ agreement. If the parties have agreed to hold a physical hearing, in principle, the tribunal must follow that agreement.²²

Many updated institutional rules, however, have bestowed upon arbitral tribunals broader discretion to decide procedural matters, including (explicitly or implicitly) whether to conduct hearings physically or remotely. Whether the tribunal may override the parties’ agreement in exercising its discretion should be first considered with

²¹ This corresponds to Article 19(2) of the 1985 UNCITRAL Model Law.

²² Article 26(1) of the Arbitration Act.

reference to the applicable institutional rules, which the Authors understand is outside the scope of this project. The following discussion focuses on the consequences of an arbitral tribunal ordering a remote hearing contrary to the parties' agreement and where the institutional rules adopted by the parties do not expressly allow the arbitral tribunal to override such an agreement.

If an arbitral tribunal conducts a remote hearing despite the parties' joint request for a physical hearing, depending on the circumstances (which include (i) the balancing of the reasons behind the tribunal's decision and the parties' objections, (ii) the actual manner in which the remote hearing is conducted and (iii) whether the tribunal's decision caused any prejudice to the parties),²³ the tribunal could be found in breach of Article 26(1) of the Arbitration Act.²⁴ Such breach could be a ground to set aside or refuse recognition of an arbitral award.²⁵

Whether a Japanese court would set aside or refuse recognition and enforcement of an award is highly dependent on the facts. Even if the grounds are made out, the court can still decide not to set aside an award or decide to recognize and enforce an award.²⁶ This is in line with Article V of New York Convention.

The Japanese courts have consistently taken a conservative approach in setting aside and refusing recognition and enforcement of arbitral awards. Even when the court had found that the tribunal was in breach of applicable arbitral rules, the court has refused to set aside the award due to the inconsequential nature of the breach and untimely objection by a party.²⁷

²³ These factors are gleaned from the reasoning of the Kobe District Court in *Yamashita Kaiun v. Tomishima Yuso*, Case No. 1517 Hanrei Jiho 128, 29 September 1993 (discussed further in fn. 27 below).

²⁴ Article 26(1) of the Arbitration Act provides that: "The rules of an arbitration procedure which the Arbitral Tribunal should observe shall be as provided by the agreement of the parties; provided, however, that such rules shall not violate the provisions concerning public order provided in this Act".

²⁵ Pursuant to Articles 44(1)(iv) and (vi), and 45(2)(iv) and (vi) of the Arbitration Act, arbitral awards may be set aside or refused recognition or enforcement if the arbitration procedure is in violation of the Arbitration Act, the parties' agreement on procedure, or if the parties' right to be heard was violated.

²⁶ Article 44(6) states that the court "may" set aside the arbitral award if the grounds in Article 44(1)(i)-(vi) are made out; Article 46 states that the court "may" dismiss the enforcement petition if the grounds in Article 45(2)(i)-(vii) are made out.

²⁷ *Yamashita Kaiun v. Tomishima Yuso*, Kobe District Court, Case No. 1517 Hanrei Jiho 128, 29 September 1993. The Kobe District Court refused to set aside an arbitral award despite the arbitrator's refusal to disclose the record of the interrogation of a witness, the non-disclosure of which was in breach of Article 29 of the Japan Shipping Exchange ("JSE") arbitration rules. The court considered that, because the award did not appear to rely on the interrogation, the party was not materially prejudiced by the arbitrator's refusal to disclose the interrogation record in breach of the procedure agreed by the parties. While this decision

The court will also consider the totality of the circumstances when assessing the breach of the parties' agreement. For instance, where the parties had only agreed to the venue of the hearing (e.g., the Japan International Dispute Resolution Center), but a remote hearing had to be considered due to unforeseen extenuating circumstances (such as the COVID pandemic), an arbitral tribunal's decision to hold a remote hearing would be assessed taking into account the nature of the case and any real prejudice caused to the party opposing the remote hearing. In this regard, the focus of the court's analysis would be on whether the order for a remote hearing would result in a serious or material violation of a party's due process rights and/or right to be heard.

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.

Article 27 of the Arbitration Act provides that the right to object to procedural irregularities not related to public policy is waived unless an objection is raised in a timely manner. The failure by a party to raise a breach of such right during the arbitral proceeding prevents that party from using it as a ground for challenging the award in Japan.²⁸ In the judgment dated 29 September 1993 mentioned in sub-paragraph c.6 above,²⁹ the Kobe District Court also held that the party opposing the recognition and enforcement could not rely on the arbitrator's breach of the arbitration procedure as the right to objection was deemed to have been waived when it failed to object timely during the arbitration proceedings to the arbitrator's refusal to disclose the interrogation record in breach of the applicable arbitration rules.

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: No, a violation of public policy or due process must be material or have caused actual prejudice to constitute a ground for setting aside.

was issued prior to the enactment of Arbitration Act, the court has consistently respected arbitral awards in this manner.

²⁸ See TANIGUCHI, "National Report Japan (2019 through 2020)" in *Handbook*, pp. 44-45.

²⁹ *Yamashita Kaiun v. Tomishima Yuso*, Kobe District Court, Case No. 1517 Hanrei Jiho 128, 29 September 1993.

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Assuming that a right to a physical hearing was recognized in a specific case, case law suggests that a party must prove that such breach has translated into a material violation of the due process principle or has caused actual prejudice to constitute a ground for setting aside. Thus, the focus is on whether a party's due process rights have been undermined by using a remote hearing as opposed to a physical one. The court will take into consideration the totality of the circumstances, including the reasons for objections, the real risk of prejudice to each party, and the realistic feasibility of a physical hearing.

In a judgment dated 28 July 2009, the Tokyo District Court interpreted Article 44(1)(iv) of the Arbitration Act (which provides for the inability of a party to present its case as a ground for setting aside) restrictively, holding that it only covered situations where there was a serious breach of, or material defect in, due process.³⁰ Further, in a judgment dated 1 August 2018, the Tokyo High Court ruled that a party's right to present its case may be breached if an arbitral tribunal blatantly treated such party unfairly by actively impeding its ability to present its case, but a party's mere complaint about the time limit set by the tribunal to present its case did not entitle it to set aside the award under Article 44(1)(iv) of the Arbitration Act.³¹

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: Not likely.

The failure to conduct a physical hearing by the arbitral tribunal in and of itself is unlikely to constitute a basis for setting aside the award, unless the circumstances were to amount to a breach of Article 44(1)(ii), (iii), (iv) and/or (vi) of the Arbitration Act, i.e., the arbitral tribunal had exceeded the mandate and powers given to it by the parties' agreement or had failed to follow the parties' procedural agreements, or a serious or material breach of due process rights has occurred.

³⁰ *X v. American International Underwriters*, Tokyo District Court, Case No. Heisei 20 Chu 3, 28 July 2009, para. 1(4); see Koji TAKAHASHI, "Country Report: Japan" in Franco FERRARI, Friedrich ROSENFELD and Dietmar CZERNICH, eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020) p. 251 at p. 255; see Yoshimi OHARA and Shuji YANASE, "Japan" in Michael MOSER and John CHOONG, eds., *Asia Arbitration Handbook* (Oxford University Press 2012) para. 1.209.

³¹ *X v. Y*, High Court of Tokyo, Case No. 2018 (Ra) 817, 1 August 2018, para. 2(4); see TAKAHASHI, "Country Report: Japan", fn. 30 above, pp. 254-255.

Further, as explained in sub-paragraph d.7 above, if a party does not raise a timely objection to the failure to conduct a physical hearing, that party would not be able to challenge the award on the basis of Article 44(1)(vi) of the Arbitration Act either, due to the deemed waiver of the right to object under Article 27.

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: Not likely.

The same analyses provided in sub-paragraphs d.8 and d.9 above apply here, and a breach of a right to a physical hearing is unlikely to constitute a basis for refusing recognition and enforcement of a foreign award, unless the circumstances were to amount to a breach of Article 45(2)(ii), (iii), (iv) and/or (vi) of the Arbitration Act, i.e., the arbitral tribunal had exceeded the mandate and powers given to it by the parties' agreement or had failed to follow the parties' procedural agreements, or a serious or material breach of due process rights has occurred.

A refusal of recognition and enforcement under Article 45(2)(iv) of the Arbitration Act mirrors the same ground under Article V(1)(b) of the New York Convention. A refusal of recognition and enforcement under Article 45(2)(vi) of the Arbitration Act mirrors Article V(1)(d) of the New York Convention.

With regard to Article V(2)(b) of the New York Convention, in Japan, it is understood that a restrictive application of public policy is generally applied. However, as of April 2021, there have been no reported cases where the ground of public policy was genuinely at issue in the enforcement of any foreign award.³²

Article 45(2)(ix) of the Arbitration Act, equivalent to Article V(2)(b) of the New York Convention and Article 34(2)(b)(ii) of the UNCITRAL Model Law, refers to "the public policy or good morals of Japan" as a ground for refusal of recognition and enforcement. Such expression originates from a provision of the Japanese Civil Code (Article 90) and has been widely used in Japanese legislation. The term "good morals" should not be of concern to foreigners – the language was adopted in the Arbitration Act only to conform to the language adopted in all other laws. In practice, it simply means public policy.³³

³² See TANIGUCHI, "National Report Japan (2019 through 2020)" in *Handbook*, p. 39.

³³ See TANIGUCHI, "National Report Japan (2019 through 2020)" in *Handbook*, p. 39. The Authors caveat that there is a Tokyo High Court judgment (that was upheld by the Supreme

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There is a significant number of commentators in Japan that believe that the term “public policy” in Article 34(2)(b)(ii) of the UNCITRAL Model Law includes the procedural dimension of public policy. The Japanese courts hearing setting aside or enforcement applications have thus been called on to interpret public policy in Japan to include the “procedural dimension of public policy”,³⁴ which entitles a Japanese court to scrutinize the arbitral procedure for compliance with public policy ideals. However, nothing in the limited number of cases on this topic suggests that the mere fact that a right to a physical hearing that existed at the seat was breached would automatically constitute a breach of public policy in Japan.

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 relevant institutions in Japan have been adapting their facilities to remote hearings.

Despite the ongoing COVID pandemic, the Japan International Dispute Resolution Center (“JIDRC”) launched its newest hearing facility in Toranomon, the centre of Tokyo, on 30 March 2020. Since its opening, JIDRC-Tokyo has been boosting its virtual hearing capabilities with videoconferencing platforms including Teams, Meets, Webex and Zoom.³⁵ The JIDRC has published a sample protocol for remote hearings³⁶ to assist in parties’ discussions on the use of its facilities to meet the needs of facilitating dispute resolution proceedings in the midst of the global pandemic.

Court) that had set aside an arbitral award pursuant to Article 44(1)(viii) by holding that the award was in breach of the “procedural” public policy of Japan. Although it was clear from the Petitioner’s allegations (duly submitted in accordance with the arbitration procedure) that the parties were in dispute as to the nature of a certain payment made by the Petitioner, the award had held that it was an undisputed fact between the parties. The High Court found that the disputed fact was important and would have had an impact on the conclusion of the award. The Authors understand that the disputed factual issue which was erroneously found undisputed in the prevailing party’s favor by the tribunal involved a potential violation of anti-trust law.

³⁴ See TAKAHASHI, “Country Report: Japan”, fn. 30 above, p. 262.

³⁵ See Yoshimi OHARA, “Japan”, in Global Arbitration Review, *The Asia-Pacific Arbitration Review 2021* (Law Business Research 2020).

³⁶ The sample protocol for virtual hearings is available at <<https://idrc.jp/wp-content/uploads/2020/11/draftagreementonvirtualhearing.pdf>> (last accessed 5 May 2021; Japanese only).