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

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Parties’ Right to a Physical Hearing in the \textit{Lex Arbitri}

1. \textit{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 Chapter 49 Laws of Kenya (“Kenyan Arbitration Act”) which applies to both domestic and international proceedings and has its roots in UNCITRAL, steers clear of doing so. Under Sections 20 and 25, although parties have a right to an oral hearing, that right does not expressly extend to a physical hearing. In the absence of the parties’ consensual direction in this regard, the tribunal has a free hand to conduct the proceedings as deemed fit.

Section 20 of the Kenyan Arbitration Act reads as follows:

“(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.
(2) Failing an agreement under subsection (1), the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.
(3) The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.
(4) Every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court.
(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation and may for that purpose administer or take the necessary oath or affirmation”.

Section 25 (“Hearing and written representations”) of the Arbitration Act, Chapter 49 Laws of Kenya provides for the conduct of Arbitration proceedings as follows:

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“(1) Subject to any agreement to the contrary by the hearing parties, the arbitral Tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials furnished under section 24.

(2) 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 required by a party.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.

(4) All statements, documents or other information furnished to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidential document on which the arbitral tribunal may rely in making its decisions shall be communicated to the parties.

(5) At any hearing or meeting of the arbitral tribunal of which notice is required to be given under subsection (3), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice”.

In addition to the provisions of the Kenyan Arbitration Act, the Rules of the Chartered Institute of Arbitrators, Kenya Branch 2020 (an update from the 2012 version and released during, but not as a result of, the Covid season) provide that the arbitration may be conducted through a physical hearing, virtually or through documents only. Such Rules, commonly used in domestic arbitrations, stipulate that the arbitral proceedings shall be conducted in a manner so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ disputes.

Rule 45 of those Rules expressly contemplates the conduct of virtual proceedings and provides that:

“Unless otherwise agreed by the parties and bearing in mind the overriding objective of conducting the arbitration proceedings in an expeditious and cost-effective manner, the tribunal may, on the application of either party or on its own motion direct the conducting of a virtual and/or hybrid arbitral hearing where it is not possible to hold a face-to-face hearing of for any other reason to be stated and approved by the tribunal after hearing the parties on the question of virtual and or hybrid proceedings”.

Rule 47 of these Rules specifically provides that unless the parties agreed that the proceedings shall be on documents only, or the arbitral tribunal determined the proceedings shall be on documents only after hearing the parties on this question, the arbitral tribunal shall hold oral hearings.
2. If not, can a right to a physical hearing in arbitration be infered 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: Excluded by inference.

Indeed, it is easily inferable from Sections 20 and 25 as well as other provisions of the Kenyan Arbitration Act that a right to a physical hearing is excluded by virtue of the use of words such as “oral hearing”, “any hearing or meeting” and also “whether the proceedings shall be conducted on the basis of documents and other materials”. No explicit reference is made to “physical hearing” in the Kenyan Arbitration Act which is quite conclusive in this regard.

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.

Whereas the right to be heard is expressly provided for under Article 50 of the Constitution of Kenya 2010 (which provides for the right to a fair hearing), that right does not extend to a “physical hearing”. The Article categorically states: “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”. The Civil Procedure Act together with the Civil Procedure Rules incorporate and give effect to this right as envisaged by the Constitution. However, the word “physical” does not expressly appear in the latter.

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: Yes, the right to be heard extends to arbitration.

In view of the fact that the Constitution is the paramount law of the Republic, the right to be heard extends to arbitration (“an independent and impartial tribunal” as per Article 50 set out above). Witness testimony is not, however, barred from being given remotely. As noted earlier, the statute governing the conduct of arbitration is the Kenyan Arbitration Act. As a point of departure, Section 19 of the Act provides that the parties
in any arbitral proceedings shall be treated with equality and each party shall be given a fair and reasonable opportunity to present their case. This is a codification of the Rules of Natural Justice.

For the record, unless made applicable by consent of the parties, although frowned upon, the Civil Procedure Act and Rules do not apply to arbitrations in Kenya.

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:** No such right exists.

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.

The consent of the parties remains paramount under the *lex arbitri* of Kenya. Section 20 of the Kenyan Arbitration Act permits the tribunal to dictate the procedure of the arbitration (“Master of Procedure” as local practitioners would say) only in the absence of party consent. Accordingly, if the parties have agreed to a physical hearing, the tribunal must comply with such an agreement. If the tribunal fails to do so, the parties could move swiftly to challenge the tribunal or otherwise seek the tribunal’s removal under the provisions of the Act (Sections 14 and 15) during the course of the arbitration or, in the event the tribunal proceeds to issue an award, an aggrieved party has the option to appeal to have the award set-aside under Section 35(2)(a)(v) which reads:

“(2) An arbitral award may be set aside by the High Court only if—
(a) the party making the application furnishes proof—
[…]
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
[…]”

**d. Setting Aside Proceedings**

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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.

Section 5 of the Kenyan Arbitration Act is explicit in stating that a party who fails to raise an objection to non-compliance with some feature of the arbitration agreement without undue delay or within the time stipulated will be deemed to have waived such right to object.

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 breach would not constitute per se a ground for setting aside nor is there any requirement to prove as our Act, under Section 35 (set out below) gives very limited grounds upon which a party may set-aside, and this is not one of them.

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: No.

The Kenyan Act gives very limited grounds upon which one may apply to set aside an award in Section 35 and challenge to conduct a physical hearing does not fall amongst these. A litigant may try to challenge an award based on the conduct of a remote hearing under Section 35(2)(a)(iii) in fine – “[...] or was otherwise unable to present his case” (set out in full below). In our view, however, such objection is bound to fail as a remote hearing does not per se prevent a party from presenting their case. Having said that, if a party is able to prove that the failure to conduct a physical hearing by the arbitral tribunal is against the public policy of the Republic of Kenya (as defined below), a court may set aside the award. As a parallel, although no court has addressed this point, in the case of a documents only arbitration, the parties may, by consent, insist on having an oral hearing, even over the objection of the arbitral tribunal. As remote hearings are quite a novelty in the Republic on account of the Covid-19 pandemic, it remains to be seen whether Kenyan courts will consider that holding remote hearings was and is consistent
with the requirements of the Arbitration Act or the Constitution. The fact that the courts themselves are holding remote hearings may well sound a death knell to any application in this regard.

Section 35(2) of the Kenyan Arbitration Act states that:

“An arbitral award may be set aside by the High Court only if—
(a) the party making the application furnishes proof:
(i) that a party to the arbitration agreement was under some incapacity; or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption”.

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: No.

Section 36(2) of the Kenyan Arbitration Act, which provides for the recognition and enforcement of foreign arbitral awards, expressly incorporates the provisions of the New York Convention (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the General Assembly of 10 June 1958), to which
Kenya acceded on 10 February 1989, subject to a reciprocity reservation. Section 36(2) provides: “An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards”.

The Kenyan courts follow the dictates of the Convention and Kenya’s Constitution of 2010, in which the Rules of Natural Justice have been embedded. Accordingly, as no party may be condemned unheard, where an award debtor can establish to the High Court of Kenya that during the arbitral proceedings that took place at the foreign seat, he or she was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his/her case (Article V(1)(b)), the High Court may refuse to enforce the foreign arbitral award.

In the event the award debtor invokes a violation of the right to a fair hearing under Article V(1)(b) of the New York Convention, the Kenyan courts will examine the manner in which the hearing was conducted, including whether there was equal treatment of parties as required by Section 19 of the Kenyan Arbitration Act. Whether the hearing was conducted remotely or physically, it would be expected that the customary and common rules of arbitration practice and procedure for the conduct of a physical hearing would have been followed to the letter at the seat. In respect of remote hearings, Kenyan arbitral tribunals have borrowed the procedure and rules of conducting a physical hearing. The only distinguishing factor between a physical and a remote hearing in Kenya is the platform whereby remote hearings are conducted, whether via Zoom, Microsoft Teams et al. Therefore, a Kenyan court would apply the same rules of arbitration practice and procedure to both modes of hearing to ascertain whether a party’s right to a fair hearing was violated. As earlier noted in this commentary, the fact that Kenyan courts are themselves conducting remote hearings would, in all probability, spell doom to any application under Article V(1)(b) to resist enforcement of a foreign award based on the fact that the hearing was remote.

However, the court would not undertake an analysis of whether actual prejudice has occurred but rather treat it as a violation per se.

In Kenya, adherence to public policy is of paramount importance and this is evident from numerous rulings, in which courts have found several pieces of legislation unconstitutional on the ground of public policy.

In the High Court of Kenya case of Christ for all Nations vs. Apollo Insurance Company Limited, Ringera J stated that:

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya or (c) contrary to justice and morality”.

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Accordingly, it is clear that the Kenyan courts can set aside an arbitral award on the ground of public policy as envisaged under Article V(2)(b) of the New York Convention.

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: Yes.

Courts in Kenya have “gone virtual” in a bid to facilitate access to Justice during the Covid-19 pandemic. A virtual mode of operation in the administration of justice has been adopted wholly by the courts in Nairobi City County (meaning that proceedings are conducted online through the Microsoft Teams Virtual Platform, for the most part) with virtual proceedings to be rolled out gradually to the rest of the country due to Internet accessibility challenges. To this end, the Judiciary has issued Practice Directions to be followed by Court Officers and Tribunals in the Administration of Justice. Indeed, in view of the ease with which the courts in Kenya have transitioned into the use of remote hearings as a result of the pandemic, there is no reason to believe that in the event courts are asked to give an interpretation of the meaning of “oral hearing” under the Kenyan Arbitration Act, they would conclude an “oral hearing” implies a right to a physical hearing.

As already noted, the 2020 Rules of the Kenya Branch of the Chartered Institute of Arbitrators specifically allow for remote hearings, the inclusion of which is a direct consequence of the Covid-19 pandemic.