ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

MAURITIUS

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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.

Neither the Mauritian International Arbitration Act 2008 (the "IAA"), which governs international arbitrations seated in Mauritius, nor the Civil Procedure Code, which governs domestic arbitrations, expressly provides 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, but it can be excluded.

In international arbitrations, unless parties have agreed otherwise, the arbitral tribunal is required to decide whether the presentation of evidence and/or submissions of arguments shall be made on the basis of documents and materials only, or by way of oral hearing (section 26(1)(a) of the IAA). The IAA adds that, unless otherwise agreed by the parties, the arbitral tribunal shall hold "a hearing" at an appropriate stage of the proceedings, if so requested by a party (section 26(1)(b) IAA). Thus, if the parties agree or if an arbitral tribunal decides, that evidence and/or arguments shall be presented exclusively in writing for one or more hearings, the parties will not have a right to a physical hearing. If the parties agree or if the arbitral tribunal orders that the evidence and/or submissions shall be presented by way of hearing or oral hearing, this will not, in our view, preclude the arbitral tribunal from ordering that one or more hearings be conducted remotely. This is consistent with the duty of the arbitral tribunal under section 24(1)(b) IAA to adopt procedures that are suitable to the circumstances of the case, avoiding unnecessary delay and expenses, so as to provide a fair and efficient means for the resolution of the dispute between the parties. Indeed, costs, lockdown, border

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closure, sanitary risks and delay, may constitute valid reasons not to hold a physical hearing, so long as the remote process used for the hearing does not adversely affect the parties' right to be treated equally and to have a reasonable opportunity to present their case under section 24(1)(a) of the IAA. There are no cases on section 26(1)(a) or (b) that assist in its application in the context of the COVID-19 pandemic.

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: In principle yes, but there are exceptions.

Until lockdown was imposed in Mauritius in March 2020, oral hearings in court litigation were in principle required to be conducted by way of physical appearance. Hearings by way of video link were allowed only if expressly provided in the law. Accused persons in bail applications,[1] complainants in sexual offence trials, and witnesses in maritime piracy matters were accordingly allowed to give evidence by way of video link at the discretion of the Magistrate, subject to the right to a fair hearing being complied with.[2] However, these laws made it impossible for the courts to administer justice when Mauritius went into total lockdown in March 2020. Accordingly, Parliament amended the law to allow the Chief Justice to call or hear a matter remotely by telephonic means, and by such other electronic or any other communication facility as he may approve in writing,[3] as well as to implement rules of practice and procedure that he may deem appropriate to administer justice, during the COVID-19 period and during any other period as he/she may determine.

In addition, under the Mauritius Constitution,[4] the general rule is that all court proceedings have to be held in public. During lockdown, to ensure compliance with this requirement, some members of the legal profession and of the media were invited to follow hearings held online. These legislative measures were significant innovations in the administration of justice in Mauritius.

[1] Section 20 of the Bail Act 1999.
[2] Section 161B of the Courts Act 1945.
[3] Section 9 of the Covid-19 (Miscellaneous Provisions) Act 2020 inserting a new section 197H(2) in the Courts Act 1945.
[4] Section 5(4)(e), section 10(9) of the Mauritius Constitution.

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: It depends on whether the arbitration is domestic or international.

Litigation civil procedure rules do not apply to international arbitration, as the legal framework for the latter is expressly stated and is intended to be disconnected from court litigation procedure.[5] However, domestic arbitration is governed by a different set of rules, which provide that in matters of procedure, time periods and matters of form must follow those applicable to court litigation, unless agreed otherwise by the parties. There are no reported cases on the point and it may be argued that "matters of form" includes the manner in which a hearing is held.[6] If this is the case, then domestic arbitration would need to follow the principles applicable to court litigation which require that in principle, and subject to the exceptions discussed above, a hearing must be held physically. As regards the discretion now accorded to the Chief Justice to allow cases to be held remotely, this is unlikely to be interpreted as meaning that such a decision is required before an arbitrator in a domestic arbitration may validly order a hearing to be held remotely. Indeed, the practice in domestic arbitration is to give arbitral tribunals flexibility in the conduct of their case, and ordering a remote hearing is most likely to be viewed as being within the arbitral tribunal's powers without the need for the intervention of the Chief Justice.

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

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: Yes, in certain circumstances.

The principle of party autonomy is at the root of international arbitration in Mauritius. Accordingly, an arbitral tribunal will generally uphold the will of the parties if the parties have agreed to a physical hearing. However, we believe that there are limits to party

[5] Article 2C of the IAA.
[6] Article 1118 of the Mauritius Code of Civil Procedure.

autonomy in the IAA as the arbitral tribunal has what we believe to be an overriding duty to ensure that parties are treated equally and are given a reasonable opportunity to present their case (section 24(1)(a)), although there is no case law on this point in the context of a remote hearing or otherwise.

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.

The right to a physical hearing does not exist in our laws. Such a right can therefore only arise out of the parties' agreement. Article 2D of the IAA provides that if a party knows, or could with reasonable diligence have known, that any requirement under the arbitration agreement has not been complied with, but proceeds with the arbitration proceedings without objecting to the non-compliance within a reasonable time or such time as may have been agreed upon by the parties, that party shall be deemed to have waived its right to object. Consequently, in our view, a challenge of the award based on non-compliance with such a right arising out of the parties' agreement, will not be successful.

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

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: It depends on the facts of the case but, of itself, it is unlikely.

Not conducting a physical hearing could in principle lead to the setting aside of an award if it can be shown that it constituted, in the circumstances of the case, a breach of natural justice under section 39(2)(b)(iv) of the IAA and resulted in the rights of a party being substantially prejudiced. These circumstances are likely to be exceptional, but

could exist in our view, if for instance, holding a hearing remotely resulted in the breach of a party's right to be treated equally or to have a reasonable opportunity to present its case. There are, however, no cases on this point.

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 necessarily.

There are no cases in Mauritius dealing with a party's objection to the enforcement of an arbitral award based on Article V(1)(b) (right to present its case), or Article V(1)(d) (irregularity in the procedure) of the New York Convention. The cases dealing with the public policy ground (Article V(2)(b)) are not relevant.

A breach of a right to have a physical hearing is unlikely to be considered as being part of public policy, but it would, in our view, be covered in principle by the right to present one's case and could potentially be covered by the ground relating to irregularity in the procedure. There is however little guidance on this point, absent any Mauritian case law dealing with Articles V(1)(b) and V(1)(d).

If the objection has already been raised as a ground to set aside the award at the seat, and it has been unsuccessful, the Supreme Court would in our view follow the approach taken in *Cruz City 1 Mauritius Holdings v. Unitech Limited and Anor*.[7] In that case, the Supreme Court was asked to enforce an award made in England, which had been set aside by the English Court on the ground that the arbitral tribunal did not have jurisdiction. The Supreme Court decided, by reference to Article V(1)(c) of the New York Convention (awards rendered ultra vires), that this provision entitled it to undertake a full review of the arbitral tribunal's finding on jurisdiction, but that it would not normally undertake such a review on a question of jurisdiction, where that issue had already been considered and rejected by the supervisory court of the seat, absent exceptional circumstances. Accordingly, the Supreme Court would not reopen the question of breach of the right to a physical hearing, unless there are exceptional circumstances, if this issue has already been dealt with at the seat in setting aside proceedings. If there have been setting aside proceedings at the seat and the objection was not raised in those proceedings, the Supreme Court would be reluctant to refuse enforcement as it would expect a party whose rights are alleged to have been

[7] [2014] SCJ 100.

substantially prejudiced, to have raised it promptly, failing which that party would be deemed to have waived its right to raise such an objection at such a late stage.

Finally, the Supreme Court, being very supportive of arbitration, would not in our view refuse to enforce an award if there has been a breach of a right to a physical hearing, unless such a breach resulted in the rights of the party being substantially affected.

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

Already dealt with above.