



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

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

NEW ZEALAND

Anna Kirk

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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 1996 (the “Act”), which applies to both international and domestic arbitrations in New Zealand, does not expressly provide for the right to a physical hearing in an arbitration.

The First Schedule to the Act (“Sch 1”) is based on the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) and applies to all arbitrations seated in New Zealand. The Second Schedule to the Act (“Sch 2”) contains a small number of additional provisions that apply to domestic arbitrations (unless otherwise agreed by the parties), but none of these provisions addresses hearings.

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: It can be excluded.

A hearing is not required in an arbitration under New Zealand law. Article 24(1) of Sch 1 to the Act provides that arbitral proceedings can be conducted “on the basis of documents”.¹ However, if a party requests an oral hearing, one must be held. The reference to “oral hearings” in Article 24(1) contrasts with a decision on the basis of the documents; there is nothing to indicate that an oral hearing must be a physical hearing, rather than a remote hearing.

New Zealand's leading arbitration text confirms that “no hearing is required unless a party seeks one” and that “if the parties have not addressed whether to hold a hearing

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¹ Art. 24 of Sch 1 reflects Art. 24 of the Model Law.

the issue is at the tribunal's discretion".² The tribunal is given discretion to determine the "place" of the hearing under Article 20 of Sch 1. There is no requirement that the "place" be a physical location and Article 20 is sufficiently broad to encompass a remote hearing location.

Although most arbitrations in New Zealand include an oral hearing, for some low value claims a documents-only process is conducted.³ A recent arbitration scheme developed by the New Zealand government to address commercial lease disputes arising out of the Covid-19 pandemic provides for a documents-only arbitration procedure to resolve such disputes.⁴

Some arbitration service providers in New Zealand offer remote hearings only.⁵

Certain provisions of the Act are deemed mandatory under New Zealand law. These include equality of treatment, a reasonable opportunity to be heard, disclosure of relevant information and sufficient notice of any hearing.⁶ Leading case law does not suggest that a hearing (physical or otherwise) is a mandatory requirement under the Act, provided each party has had the opportunity to state its case. Fisher J set out the mandatory requirements in an arbitration in *Methanex Motunui Ltd v Spellman*:⁷

"By the 1996 Act Parliament also revealed a clear intention to ensure that each party would enjoy, and where necessary be able to enforce, a minimum standard of procedural protection. Certain procedural rights in the First Schedule are inalienable – notably those relating to impartiality (art 12), opportunity to be heard (art 18), notice (art 24(2)) and disclosure (art 24(3)). Those rights have been coupled with an express power to set aside awards (art 34) or to decline to enforce them (art 36)".

Subject to mandatory natural justice requirements and to any agreement of the parties, the tribunal has a broad discretion to determine the procedure for the arbitration.⁸ The ability to direct that a hearing be held remotely where appropriate is in keeping with

² David WILLIAMS and Amokura KAWHARU, *Williams & Kawharu on Arbitration*, 2nd edn. (LexisNexis 2017) §17.6.8.

³ See, for example, the "ECA45 Arbitration Rules" of the New Zealand Dispute Resolution Centre ("NZDRC") which apply to disputes valued at less than NZ\$250,000. These Rules provide for an expedited, documents-only arbitration process.

⁴ Available at <<https://www.justice.govt.nz/tribunals/covid-19-commercial-lease-dispute-services>> (last accessed 24 January 2021).

⁵ See Complete Online Dispute Resolution ("CODR") at <<https://codr.co.nz>> (last accessed 24 January 2021), recently merged with Immediation New Zealand (at <<https://www.immediation.com/nz>>; last accessed 24 January 2021), an Australian provider of remote dispute resolution.

⁶ Arts. 18, 24(2) and 24(3) of Sch 1 to the Act.

⁷ *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 at *44.

⁸ Art. 19(2) of Sch 1.

the broad procedural flexibility provided to arbitrators under the Act. The key issue is likely to be the fairness of the process, rather than the location of any hearing (physical or otherwise).

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: Civil procedure rules have been amended to allow for remote hearings.

On 9 April 2020, the New Zealand parliament amended the High Court Rules (“HCR”) to expressly provide for remote hearings.⁹ Rule 3.4A HCR now states:

“(1) Where an emergency exists in any part of New Zealand, a Judge may make a direction as to the form of participation by counsel, parties, witnesses, and other persons at any hearing or trial conducted pursuant to these rules, by –

(a) dispensing with any requirement for a person to be physically present in the court and make provision for an alternative means of complying with any such requirement;

(b) directing particular methods of attendance at, and participation in, a hearing or trial (for example, in person, by telephone, or by audio-visual link) that will be permitted, required, or excused: [...]

(2) No direction may be made under subclause (1) that modifies any requirement imposed by another provision of these rules more than is reasonably necessary to protect the health and wellbeing of those required or compelled to attend or participate in a hearing or trial, having regard also to, –

(a) the requirements of natural justice; and

(b) the rights affirmed by the New Zealand Bill of Rights Act 1990.

(3) Subject to subclause (2), the power in subclause (1) may be exercised notwithstanding that it is contrary to any other provision of these rules, regulation, or rule of law”.

As in many jurisdictions, it has been possible for some time for some elements of court proceedings in New Zealand to be conducted via video link. For example, Rule 10.24 HCR allows for hearings by video link in certain civil matters, primarily

⁹ High Court (COVID-19 Preparedness) Amendment Rules 2020, Rule 5.

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concerning company and insolvency law.¹⁰ Interlocutory applications are also able to be heard by video link.¹¹

As explained in the answer at sub-paragraph f.11 below, jury trials and most criminal matters have been suspended during lockdown periods. In contrast, civil and appellate matters have been able to proceed in many cases via remote hearing. While the New Zealand Bill of Rights Act 1990 does not expressly guarantee a “physical hearing” in a criminal trial, it does guarantee “the right to be present at the trial and to present a defence”¹² and the right to a “public hearing”,¹³ which might indicate that a physical hearing is necessary.

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: Even if a physical hearing was required in court, this would not extend to arbitration.

The HCR do not apply to arbitration. Similarly, the strict rules of evidence do not apply to arbitration.¹⁴

The HCR form a schedule to the Senior Courts Act 2016, which regulates the High Court, the Court of Appeal and the Supreme Court of New Zealand. Section 146 of the Senior Courts Act states that the HCR apply to the practice and procedure of the High Court. The Senior Courts Act has no application to arbitral tribunals.

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

Not applicable.

¹⁰ The matters to which this section is applicable are the same as those over which an Associate Judge of the High Court has jurisdiction. They are listed in the Senior Courts Act 2016, s 20.

¹¹ Rules 7.34 and 7.37 HCR.

¹² New Zealand Bill of Rights Act 1990, s25(e).

¹³ New Zealand Bill of Rights Act 1990, s25(a).

¹⁴ Evidence Act 2006, ss 4 and 5(3); Art. 19(2) of Sch 1 to the Act.

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: The tribunal does not have the power to override the parties' agreement to hold a physical hearing, except in rare circumstances. The legal consequences of doing so are fact dependent.

Article 19(1) of Sch 1 states that "[s]ubject to the provisions of this schedule, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

This provision reflects the primacy of the principle of party autonomy. Consequently, if the parties decide that they wish to hold a physical hearing, this should be respected by the tribunal regardless of any inefficiency or delay that may result.¹⁵ The parties' ability to agree the arbitral procedure is not unfettered and must be exercised subject to the provisions of Sch 1, including each party's right to present its case and the right to equality of treatment.¹⁶

If the parties do not agree on the procedure, Article 19(2) of Sch 1 gives the tribunal a broad discretion to determine the procedure. Both Articles 19(1) and (2) of Sch 1 to the Act mirror the Model Law.¹⁷

On this basis, if the parties agree to a physical hearing (and both parties remain of that view), the tribunal does not have the power to order a remote hearing unless the parties' agreement contravenes Sch 1. It is unlikely that an agreement to hold a physical hearing would contravene any non-derogable provision of Sch 1. It is noted that there is no express duty in the Act for a tribunal to conduct the proceedings in an efficient and

¹⁵ The New Zealand Law Commission emphasized the importance of party autonomy as a founding principle of arbitration in its 1991 report, *Arbitration*, which recommended the enactment of the Arbitration Act 1996. The importance of party autonomy is also emphasized in New Zealand case law, for example, *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC) at *24 and *Methanex Motunui Limited v Spellman* [2004] 1 NZLR 95 (HC) at *49. See also D. WILLIAMS and A. KAWHARU, *Williams & Kawharu*, fn. 2 above, §2.4.1.

¹⁶ Art. 18 of Sch 1 states: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case." This is considered to be a mandatory provision of the Act from which the parties cannot derogate (see *Methanex Motunui Limited v Spellman* [2004] 1 NZLR 95 (HC) at *44).

¹⁷ Art. 19 of the Model Law. Note that Art. 19 of Sch 1 to the Act contains an additional provision not found in the Model Law – Art. 19(3) states: "Every witness giving evidence, and every counsel or expert or other person appearing before an arbitral tribunal, shall have the same privileges and immunities as witnesses and counsel in proceedings before a court".

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cost-effective manner,¹⁸ so this is not a ground on which the tribunal could override the parties' procedural agreement.

Where an agreement to hold a physical hearing was made prior to the pandemic (for example, in a contractual arbitration clause) and one of the parties no longer wishes to be bound by that agreement, the tribunal would need to consider (i) if the agreement remained binding under the relevant contractual law; and (ii) whether enforcing the agreement would result in a breach of Sch 1 (for example, whether significant delays might have the effect of depriving a party of its right to be heard).

If a tribunal ordered a remote hearing in contravention of the parties' agreement, it may make the award vulnerable to a set aside application under Article 34 of Sch 1, including on the basis that the arbitral procedure was not in accordance with the parties' agreement.¹⁹ In order to challenge the award on this ground, the parties would have to object to the remote hearing at the time.²⁰

Whether a set aside application would succeed depends upon the circumstances of the individual case. As discussed below, the courts retain a discretion whether or not to set aside an award, even if one of the grounds for doing so has been made out.²¹ It is likely that a party would have to show that the failure to hold a physical hearing had a material impact on the dispute or caused prejudice.

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.

Where a party is aware of a defect but fails to object to it promptly, that party is prevented from later challenging the award on that ground unless the defect relates to a

¹⁸ This is in contrast to the English Arbitration Act 1996, ss 1 and 33. However, Sch 2 (which applies automatically in domestic arbitrations) includes a provision that the tribunal may order a party to do "all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently" (cl 3(1)(j) of Sch 2 to the Act).

¹⁹ Art. 34(2)(a)(iv) of Sch 1.

²⁰ See sub-paragraph d.7 below.

²¹ See sub-paragraph d.9 below.

mandatory provision of the Act. As noted above, there is no mandatory right to a physical hearing under the Act.²² Article 4 of Sch 1 to the Act states that:²³

“A party who knows that any provision of this schedule from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating that party’s objection to such non-compliance without undue delay [...] shall be deemed to have waived the right to object”.

The New Zealand courts have dismissed challenges on this basis. In *Attorney-General v Tozer (No 3)*,²⁴ a challenge to an award based on excess of jurisdiction was dismissed because the applicant had not objected to the tribunal deciding the particular issue during the course of the proceedings.²⁵

A failure to promptly raise an objection to the lack of a physical hearing would mean that a party loses its right to rely on this ground in any challenge to the award under Article 34 of Sch 1.

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: If there were such a right, a party would likely need to show that the breach was material in order for the court to exercise its discretion to set aside the award.

There is no right to a physical hearing in an arbitration in New Zealand, but if there was such a right, the failure to hold a physical hearing would not of itself constitute a ground to set aside the award. As explained in the answer to sub-paragraph d.9 below, the set aside provisions under New Zealand law are similar to those contained in the Model Law. Therefore, the court retains a discretion whether or not to set aside an award, even if one of the grounds for setting aside in Article 34 of Sch 1 is established.

A party would need to demonstrate to the court that the breach fell within one of the prescribed grounds for setting aside the award and that the court should exercise its

²² See sub-paragraphs a.1 and a.2 above. See also D. WILLIAMS and A. KAWHARU, *Williams & Kawharu*, fn. 2 above, §17.4.

²³ This provision reflects Art. 4 of the Model Law.

²⁴ HC Auckland M1528-IM02, CP607/97, 2 September 2003.

²⁵ See also *Alexander Property Developments v Clarke* HC New Plymouth CIV-2004-443-89, 10 June 2004, where the High Court affirmed and applied the waiver principle, despite the case involving a mandatory provision of the Act (Art. 24(3) of Sch 1 – the requirement that all information supplied to the tribunal should be copied to the other party).

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discretion to set aside the award. In order to do so, it is likely that the applicant would need to demonstrate that the lack of a physical hearing caused the applicant some material prejudice or unfairness.

By way of example, *Kyburn Investments Ltd v Beca Corporate Holdings Ltd*²⁶ involved claims of *ex parte* communications between the arbitrator and a representative from one of the parties during an inspection of premises at issue in the arbitration. However, the Court of Appeal declined to set aside the award, despite finding that the arbitrator had breached a mandatory provision of the Act.²⁷ The Court held that while the breach was significant, it “did not [...] have any material effect on the outcome of the [...] arbitration”.²⁸ The Court observed that:²⁹

“[...] while the discretion in art 34 is of a wide and apparently unfettered nature, it must be exercised in accordance with the purposes and policy of the Act which emphasise the finality of arbitral awards and reduce the scope for curial intervention in accordance with the intentions of parties to arbitrations”.

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: Unlikely, but would depend on the circumstances.

Although there is no right to a physical hearing in an arbitration under New Zealand law, the parties do have the right to a reasonable opportunity to present their cases.³⁰ If this right is impaired, a party may apply to have the award set aside on the basis of a breach of natural justice or an inability to present its case.

²⁶ [2015] NZCA 290.

²⁷ It was alleged that the arbitrator had breached Art. 24(3) of Sch 1: “All statements, documents, or other information supplied to the arbitral tribunal by one party shall be communicated to the other party [...]”. The allegation was that, by communicating with one party’s representative in the absence of the other party, the arbitrator demonstrated bias in breach of public policy (Art. 34(2)(b)(ii) of Sch 1).

²⁸ *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] NZCA 290 at *48.

²⁹ *Ibid.* at *28(d).

³⁰ Art. 18 of Sch 1. Note that this article provides for a “full opportunity” to present one’s case, but this has been interpreted as a “reasonable” opportunity to be heard (see D. WILLIAMS and A. KAWHARU, *Williams & Kawharu*, fn. 2 above, §11.2.2). This may have particular relevance if the parties have agreed to apply *tikanga* (principles of Māori law/custom) to the arbitral procedure. Oral traditions and hearing location may be of special importance under *tikanga*.

The grounds on which an award can be set aside under New Zealand law are set out in Article 34 of Sch 1 to the Act. This Article generally reflects Article 34 of the Model Law. Grounds for setting aside an award under Article 34 include that a party was unable to present its case (Article 34(2)(a)(ii)), that the arbitral procedure was not in accordance with the parties' agreement (Article 34(2)(a)(iv)), and that the award is contrary to the public policy of New Zealand (Article 34(2)(b)(ii)).

Article 34 differs from the Model Law in one important respect. It includes a provision that clarifies the meaning of "public policy" at Article 34(6):

"For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if –

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred –
 - (i) during the arbitral proceedings; or
 - (ii) in connection with the making of the award".

Serious procedural issues are usually raised as a breach of natural justice under the public policy ground. A party seeking to set aside an award in New Zealand for a failure to hold a physical hearing would likely bring a set aside application claiming a breach of natural justice, as well as an inability to present its case.³¹

A breach of public policy on natural justice grounds is not easy to establish. The New Zealand courts interpret "public policy" narrowly.³² The principles of natural justice to be applied by a tribunal were set out by Fisher J in *Trustees of Rotoaira Forest Trust v Attorney-General*, which is frequently referred to in Article 34 cases.³³ Not every procedural error made by a tribunal will constitute a basis on which to set aside an award³⁴ and the courts generally give substantial deference to arbitral tribunals with regard to procedural decisions.³⁵ A party would likely need to show that the lack of the physical hearing resulted in some substantive unfairness to that party or an inequality between the parties of a material nature. For example, awards have been set aside in some cases due to the tribunal's refusal to adjourn a hearing to allow a party to instruct

³¹ Arts. 34(2)(a)(ii) and 34(2)(b)(ii) of Sch 1.

³² *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC). Also see discussion on *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359 at sub-paragraph e.10 below.

³³ [1999] 2 NZLR 452 at p. 463.

³⁴ *Jerling v Moss Brothers* [2013] NZHC 2893 at *59; *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at *134-142.

³⁵ In *Aspec Construction Wellington Ltd v Delta Developments Ltd* [2013] NZHC 5, the Court dismissed a set aside application based on a denial of an extension to file evidence. See also *Mackintosh v Wear* HC Auckland M786-SD01, 13 December 2001; *Asian Foods West City Ltd v West City Shopping Centre Ltd* HC Auckland CVI-2007-404-1215, 11 September 2007 and *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359.

new legal counsel or arrange for witnesses to attend the hearing.³⁶ However, such cases are highly fact-dependent.³⁷

The fact that a party can establish one of the grounds for setting an award aside does not mean the award must be set aside. The court retains a residual discretion not to set aside the award even where one of the grounds has been made out.³⁸ This discretion reflects the discretion granted to courts under the Model Law, so as to prevent awards from being set aside for technical or minor errors.³⁹ The New Zealand courts will generally exercise this discretion in accordance with the objects and purpose of the Act to encourage arbitration and facilitate enforcement.⁴⁰ Procedural issues are unlikely to constitute a ground for setting aside an award unless they are “fundamental to the procedure which [Sch 1] establishes”.⁴¹ To be successful, an applicant needs to show that “a substantial miscarriage of justice will result if the award is allowed to stand”.⁴²

The impact of a natural justice breach on the outcome of a case might also be relevant. In a case where a set aside application was made on the basis of an alleged denial of the right to be heard on a specific argument, the High Court held that “where it can be demonstrated that an argument, although tenable, is very unlikely to produce any materially different outcome on a re-argument, then that is a legitimate factor against granting relief”.⁴³

It is clear that materiality of the breach is an issue. Simply claiming that a remote hearing was held instead of a physical hearing is unlikely to be sufficient for a court to set aside an arbitral award, unless the party can demonstrate that it suffered some form of prejudice as a result of the remote hearing.

e. Recognition/Enforcement

³⁶ See *Sharma v paramount Service Ltd* HC Auckland M1544-IM99, 9 February 2000; *Overton Holdings Ltd v Owens Properties Ltd* CA114/02, 24 October 2002; *Coromoandel Land Trust Ltd v MilkT Investments Ltd* HC Hamilton CIV-2009-419-232, 28 May 2009.

³⁷ Compare with *Hi-Gene Ltd v Swisher Hygiene Franchise Corp.* [2010] NZCA 359, discussed at sub-paragraph e.10 below.

³⁸ Art. 34(2) states: “An arbitral award *may* be set aside by the High Court [...]” (emphasis added).

³⁹ See Howard M. HOLTZMANN and Joseph E. NEUHAUS, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) pp. 921-922 and 1057-1058.

⁴⁰ *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 at *41-47.

⁴¹ Law Commission, *Arbitration*, NZLC R20 (1991) at *291.

⁴² *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at *84.

⁴³ *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* HC Wellington CIV-2008-485-2816, 17 July 2009 at *80.

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Unlikely.

Recognition and enforcement of arbitral awards in New Zealand is governed by Articles 35 and 36 of Sch 1 to the Act. These Articles broadly reflect Articles 35 and 36 of the Model Law which, in turn, are closely modelled on the New York Convention. The New York Convention itself is also incorporated into the New Zealand Act in the Third Schedule. One of the stated purposes of the Act is to give effect to New Zealand's obligations under the New York Convention.⁴⁴

As is the case with set aside applications under the Act, the courts retain a discretion to recognize or enforce an award even if one of the grounds for refusing recognition or enforcement has been made out.⁴⁵ This residual discretion reflects Article V of the New York Convention and is exercised in a manner consistent with the Convention.⁴⁶ Grounds for resisting enforcement under Article 36 include that a party has been unable to present its case (Article 36(1)(a)(ii)) and that the award is contrary to the public policy of New Zealand (Article 36(1)(b)(ii)). As with Article 34, public policy specifically includes a breach of natural justice (Article 36(3)(b)).

Cases involving the enforcement of foreign arbitral awards are rare in the New Zealand courts. However, one such case, *Hi-Gene Ltd v Swisher Hygiene Franchise Corp*,⁴⁷ demonstrates the high threshold a party faces if it wishes to resist enforcement of a foreign award. In that case, Hi-Gene (a New Zealand company) applied to resist enforcement of an award issued in an international arbitration seated in North Carolina. The successful party, Swisher Hygiene (a US company), sought to enforce the award against assets located in New Zealand.

Hi-Gene argued that a breach of natural justice had occurred as it had been prevented from presenting its case because the arbitral tribunal had refused to adjourn the hearing, consequently Hi-Gene did not appear at the hearing.⁴⁸ The Court of Appeal confirmed that New Zealand follows international jurisprudence in "setting a high threshold" for

⁴⁴ Section 5(f) of the Act.

⁴⁵ Art. 36(1) states: "Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, *may* be refused only [...]" (emphasis added). This is the same discretion as found in Art. 34 of Sch 1.

⁴⁶ D. WILLIAMS and A. KAWHARU, *Williams & Kawharu*, fn. 2 above, §19.5.

⁴⁷ [2010] NZCA 359.

⁴⁸ Note that the Court was critical of Hi-Gene's engagement in the process and its failure to pursue the adjournment at an early stage.

refusal of enforcement.⁴⁹ The Court held that “a narrow reading is to be given to the public policy ground”⁵⁰ and that it required “serious grounds to intervene”.⁵¹ The Court endorsed the approach taken in *Parsons Whittemore Overseas Co v Société Générale de L’Industrie du Papier*,⁵² noting that the New York Convention was intended to remove obstacles to enforcement of arbitral awards and to apply a narrow construction (or high threshold) to all grounds for refusing enforcement.⁵³ The application was dismissed.

The approach of the New Zealand courts to enforcement under Article 36 suggests that a party seeking to resist enforcement of a foreign arbitral award has a high barrier to overcome and that a failure to provide a physical hearing would not, of itself, provide a ground for refusal of enforcement without some further evidence of serious prejudice. The Court of Appeal in *Hi-Gene* took an international approach to public policy, referring to and endorsing several decisions from other jurisdictions regarding the required standard for a breach of natural justice under Article 36. Amongst other things, the Court said that such a breach would need to be something that violates a state’s “most basic notions of morality and justice”, constitutes an abuse of process, or that “shocks the conscience of the court”.⁵⁴

This restrictive approach was confirmed in *Noe v Ratzapper Australasia Ltd*⁵⁵ where the arbitrator debarred Mr. Noe (a U.S. citizen) from attending the hearing due to his persistent and prolonged failure to comply with disclosure orders. The Court of Appeal rejected Mr. Noe’s attempts to resist enforcement, stating that the arbitrator was entitled to take the steps that he did due to Mr. Noe’s behaviour. The Court held that there had been no breach of natural justice and that, in any case, there was no indication what Mr. Noe’s defence would have been had he attended the hearing (the Court considered the case against him was unanswerable).⁵⁶

There have been no specific cases in New Zealand regarding the right to a physical hearing, but it would be open to a party to apply to resist enforcement in New Zealand on the ground that a failure to hold a physical hearing constituted a breach of natural justice or that it could not present its case. As with set aside applications, it is unlikely that a failure to hold a physical hearing would be sufficient on its own to resist

⁴⁹ *Ibid.* at *20.

⁵⁰ *Ibid.* at *21 and *23. Refer also to *Ratzapper Australasia Ltd v Noe* [2017] NZHC 2931 at *28-32; *Fiordland Discovery Ltd v Challenge Marine Ltd* [2017] NZHC 1376 at *38.

⁵¹ *Ibid.* at *24.

⁵² 508 F 969 (2d Cir 1974).

⁵³ *Hi-Gene Ltd v Swisher Hygiene Franchise Corp.* [2010] NZCA 359 at *27.

⁵⁴ *Ibid.* at *21, citing *Parsons & Whittemore Overseas Co Inc v Société Générale De L’Industrie Du Papier (RAKTA)* 508 F 969 (2d Cir 1974) at p. 974, *Soleimany v Soleimany* [1999] QB 785 at p. 800, and *Oil and Natural Gas Corp v SAW Pipe Ltd* [2003] SOL Case No 175, 17 April 2003 at *27.

⁵⁵ [2018] NZCA 597.

⁵⁶ *Ibid.* at *64-66.

enforcement without showing some form of fundamental unfairness or natural justice breach. This is so even if a physical hearing were a requirement of the *lex arbitri*.⁵⁷

Article 36(1)(a)(v) of Sch 1 mirrors the Model Law and the New York Convention in providing that a ground for refusal of enforcement is that the award is not yet binding on the parties or has been set aside or suspended by a court of the country in which the award was made. There are no cases in New Zealand where enforcement has been resisted under Article 36 of Sch 1 on the ground that the award has been set aside by a foreign court. While the New Zealand courts retain a discretion to enforce an award that has been set aside at the seat, it is suggested that the courts would most likely refuse to enforce a foreign award that had been set aside, unless the set aside procedure was itself tainted in some way.⁵⁸ Certainly, the New Zealand courts are unlikely to adopt the “delocalized” theory of arbitration, as may be seen in some civil jurisdictions.⁵⁹ *CBI NZ Ltd v Badger Chiyoda*⁶⁰ (although deciding a different issue) reflects this view that arbitration is not considered a transnational system “unconnected with any municipal system of law.”⁶¹ Therefore, absent exceptional circumstances, an award set aside at the seat of the arbitration is unlikely to be enforced in New Zealand.

Similarly, the New Zealand courts have not taken any position on whether an unsuccessful attempt to have an award set aside at the seat would affect the approach to enforcement in New Zealand. Commentary suggests that New Zealand would likely follow the Hong Kong approach, so that an unsuccessful attempt to set aside the award at the seat would not prevent a party from applying to resist enforcement on the public policy ground.⁶² Any such application would be based on public policy in New Zealand, rather than at the seat.⁶³ Nonetheless, the New Zealand courts are likely to take an international approach to public policy and will give considerable deference to the court of the seat when considering a foreign award.

Overall, a breach of a right to a physical hearing would not usually be sufficient on its own to resist enforcement under Article 36 of Sch 1, without evidence of a serious infringement of fundamental natural justice principles. While showing deference to the law of the seat, the New Zealand courts would undertake any examination of a breach of public policy by reference to the (international) public policy of New Zealand.

f. COVID-Specific Initiatives

⁵⁷ As noted at sub-paragraph d.9 above, not every procedural breach will constitute a ground upon which an award can be set aside or not enforced.

⁵⁸ See D. WILLIAMS and A. KAWHARU, *Williams & Kawharu*, fn. 2 above, §19.9.2.

⁵⁹ See *PT Putrabali Adyamulia v Société Rena Holding et Société Mongutia Est Epices* in *ICCA Yearbook Commercial Arbitration XXXII* (2007) (henceforth *Yearbook*) p. 299.

⁶⁰ [1989] 2 NZLR 669 (CA).

⁶¹ *Ibid.* at p. 694 (per Barker J).

⁶² See D. WILLIAMS and A. KAWHARU, *Williams & Kawharu*, fn. 2 above, §19.5.

⁶³ As per *Hebei Import and Export Corp v Polytek Engineering* (1999) 2 HKCFAR 111 (but note the international approach taken to due process violations, as per sub-paragraph d.9 above).

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

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 lockdowns in New Zealand have been relatively short, therefore most arbitration hearings have been able to proceed in person. However, the senior courts have issued new protocols on remote hearings and have increased their use of technology considerably.

Aside from a short period of strict lockdown from late March to May 2020, New Zealand has had relatively few restrictions that have affected arbitral hearings.⁶⁴ However, for those in New Zealand practising in international arbitration, stringent border restrictions and quarantine requirements have made (and continue to make) international travel extremely difficult. This is unlikely to change for much of 2021 (until vaccination is widespread). Therefore, a shift to remote hearings has been required for international cases.

As noted at sub-paragraph a.2 above, the government introduced a new (government-funded) arbitration scheme for commercial lease disputes involving small businesses, that arose as a result of the pandemic. This scheme is designed to give a quick result without a hearing.⁶⁵

While arbitration in New Zealand has not been significantly disrupted by the pandemic, the courts have faced more disruption, particularly regarding jury trials for criminal matters.⁶⁶ Jury trials were suspended in mid-March 2020 and did not recommence until 1 August 2020. The courts were classified as an “essential service” and continued to hear urgent matters throughout the lockdowns, so long as they did not involve witness evidence. Although in-person hearings did continue, from mid-April the courts made increasing use of remote technology and many matters were heard via remote hearings.

It is noted that (as in many jurisdictions) audio-visual technology has been used by the courts for some time. Section 7(1) of the Courts (Remote Participation) Act 2010

⁶⁴ A second lockdown of around three weeks was imposed on the Auckland region in August 2020. Note that New Zealand operates an “alert level” system, whereby levels 3 and 4 restrict non-essential work and encourage working from home. However, for most of 2020, New Zealand has been at alert level 1 or 2, where the civil courts have been able to operate either normally or with some minor restrictions.

⁶⁵ It is noted that there was a delay in introducing the scheme (it was initially announced in July 2020, but did not go live until the end of September 2020). There is no data at the moment as to use of the scheme, although it is expected that data will become available.

⁶⁶ Jury trials were suspended on 18 March 2020 and did not resume until 1 August 2020.

states that “[Audio Visual Links] may be used in a civil proceeding for the appearance of a participant in the proceeding if a judicial officer or Registrar determines to allow its use for the appearance of that participant”. Certain factors must be considered when making this decision, including access to technology and the effect on the rights of the parties.⁶⁷

However, the pandemic did cause a significant increase in remote hearings in the courts, particularly in civil matters. The Supreme Court and the Court of Appeal issued a Remote Hearing Protocol in April 2020.⁶⁸ Paragraph 1 of the Protocol states that: “The Court will notify all participants if it determines that a [remote] hearing will take place. This will not prevent those who wish to participate in person from doing so, unless the Court directs that all participants must appear by [...] remote access”.

The High Court also issued a Remote Hearings Protocol in May 2020, stating that the High Court was conducting remote hearings where appropriate and setting out guidelines for such hearings.⁶⁹

Each time New Zealand moved between various alert levels, the courts would issue a Practice Note clarifying how matters would be conducted under that particular alert level. Although the courts are currently operating normally, the Chief Justice has stated that she is “committed to ensuring the innovations and process improvements which have been forged during the health crisis could be captured and retained”.⁷⁰

Finally, it is also notable that measures had to be put in place to allow for affidavits to be sworn/affirmed electronically, which had not been done before in New Zealand. Prior to the pandemic, affidavits had to be sworn or affirmed in person, as the Contract and Commercial Law Act 2017 (which governs electronic transactions and legal documents) does not apply to affidavits and statutory declarations. On 17 April 2020, the Epidemic Preparedness (Oaths and Declarations Act 1957) Immediate Modification Order 2020 came into effect so as to allow oaths, affirmations or declarations to be taken by phone or video link.

⁶⁷ Section 5 (section 6 contains additional criteria that must be considered in criminal proceedings).

⁶⁸ A copy of the Protocol can be accessed at <<https://www.courtsofnz.govt.nz/publications/announcements/covid-19/court-protocols/supreme-court-court-of-appeal-remote-hearings>> (last accessed 24 January 2021).

⁶⁹ A copy of the Protocol can be accessed at <<https://www.courtsofnz.govt.nz/publications/announcements/covid-19/court-protocols/high-court/remote-hearings-protocol>> (last accessed 24 January 2021).

⁷⁰ The Right Honourable Dame Helen Winkelmann, Chief Justice of New Zealand, Te Tumu Whakawā o Aotearoa, *Media Statement* (8 June 2020) available at <<https://www.courtsofnz.govt.nz/assets/8-May-Media-Release-CJ-v2.pdf>> (last accessed 24 January 2021).