NIGERIA

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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 Arbitration and Conciliation Act (2004) Cap A18 Laws of the Federation of Nigeria (“ACA”),¹ which is the federal arbitration statute,² the Lagos State Arbitration Law 2009,³ nor the Arbitration Ordinance of 1914 (the “Ordinance-based Law”) which has been adopted and operated by some other States in the Federation⁴ expressly

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¹ The ACA was originally enacted as a Decree by the Federal Military Government in 1988. Section 315 of the 1999 Constitution of the Federal Republic of Nigeria preserved the 1988 Decree as an existing law, which is now the ACA.
² Section 57 of the ACA provides that “arbitration”, as referred in the statute, “means a commercial arbitration whether or not administered by a permanent arbitral institution”. Neither the Lagos State Arbitration Law nor the Ordinance-based Law contain a similar definition.
⁴ Nigeria is a federation and most of the federating States still retain the Ordinance-based Law, which was based on the English Arbitration Act of 1889 and applicable in the whole of Nigeria prior to the enactment of the ACA and the Lagos State Arbitration Law. The ACA is an adaptation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (“Model Law”). The Lagos State Arbitration Law is also an adaptation of the Model Law 2006 with additional provisions and some revisions. See Adedoyin Rhodes Vivour, *Commercial Arbitration Law and Practice in Nigeria through the Cases* (LexisNexis 2016) pp. 14-18. A desire to promote the resolution of disputes in Lagos State by arbitration and other forms of ADR and the intention of updating the ACA or remedying some lapses perceived in the ACA are some of the reasons that led to the enactment of the Law in 2009. See Obosa Akpata and Olusola Adegbonmire, *The Nigerian Arbitration Law in Focus*, 2nd edn. (West African Book Publishers 2019) p. 17. The Lagos State Government also enacted, on the same date as the Arbitration Law, the Lagos Court of Arbitration Law Cap (L1) LLS 2015 establishing the Lagos Court of Arbitration (“LCA”), a private sector driven independent centre according to Section 1(2) of said Law. The LCA is an international centre for the resolution of commercial disputes through arbitration and other forms of alternative dispute resolution (ADR). In comparison with other State arbitration statutes and the ACA, Lagos law is an important
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provides for a right to a physical hearing in arbitration. Parties are at liberty to choose the manner in which arbitration proceedings are to be conducted and in the absence of such agreement, the arbitral tribunal will decide.⁵

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: Not likely to be inferred.

Under Nigerian law, no right to a physical hearing in arbitration may be inferred. Section 20(1) of the ACA, provides that:

“*Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted- (a) by holding oral hearings for the presentation of evidence or oral arguments; or (b) on the basis of document or other materials; or (c) by both holding oral hearings and on the basis of documents or other materials as provided in paragraphs (a) and (b) of this subsection, and unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested so to do by any of the parties*” (emphasis added).

It is noteworthy that Section 16(1) of the ACA requires the tribunal to consider the circumstances of the case and the convenience of the parties in deciding the place of the proceedings and Section 16(2) provides that the tribunal may meet any place it deems appropriate. The Lagos Arbitration Law on the other hand has a similar provision, on improvement, governing arbitrations within the territory of Lagos State except where the parties have expressly directed otherwise. Lagos is the commercial nerve of Nigeria, and indeed West Africa, home to 65% of Nigeria’s businesses and 70% of Nigeria’s total industrial investment (available at <https://lagosstate.gov.ng/about-lagos/>, last accessed 3 March 2021). The Lagos State Law was enacted by the Lagos State Legislature, pursuant to the authority granted to it by the Constitution. It does not apply to arbitrations which are governed by the ACA.

⁵ For instance, the language of Section 20 of the ACA is: “*Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted (a) by holding oral hearings for the presentation of evidence or oral arguments; (b) on the basis of documentary or other materials; or (c) by both holding oral hearings and on the basis of documents or other materials as provided in paragraphs (a) and (b) of this subsection*. 


the tribunal’s power to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties or for the inspection of documents, goods or other property but modified slightly to allow the tribunal determine the date and time of the arbitral proceedings. Furthermore, one of the guiding principles of the Lagos Arbitration Law is that the parties, the tribunal, arbitral institutions, appointing authorities and the court shall do all things necessary for the proper and expeditious conduct of the proceedings. Under the Ordinance-based Law, unless a contrary intention is expressed or the parties raise an objection to the procedure, it shall be deemed that the parties shall in relation to the dispute submit to be examined by the arbitrators, produce documentation within their possession which may be required or called for, and do all other things which may be required by the arbitrators or umpire during the proceeding.

Therefore, the determination of whether, how and where the evidentiary hearing may be conducted or the arbitral proceeding is to be held will be primarily based on the agreement made by the parties. The Parties may agree to conduct a physical hearing or opt for a remote hearing, and neither the arbitral tribunal nor the courts can vary, contradict or add on to such terms in determining the conduct of the arbitration proceeding.

In the absence of agreement between the parties, the ACA, the Lagos Arbitration Law and the Ordinance-based Law all give wide discretionary powers to the arbitral tribunal for the conduct of the arbitration proceedings. Section 15 of the ACA is broadly worded and only requires the arbitral tribunal to conduct the proceedings in a manner it considers appropriate so as to ensure fair hearing. The ACA at Section 20 provides guidance on the method of taking evidence, i.e., through a hearing or the use of documents, but is otherwise silent on whether the hearing should be conducted via any particular medium. Therefore, the ACA may be read to permit the arbitral tribunal to conduct the proceedings by any means, including through a remote hearing, provided that the tribunal considers it “appropriate” to preserve the principles of fair hearing and it is consistent with the applicable rules of evidence.

6 See Section 33 of the Lagos Arbitration Law.
7 See for instance the provisions of Sections 2, 4 and paragraph 5 of the Arbitration Law of Delta State CAP. A13 LDS on the interpretation of submissions and provisions implied in submissions.
9 This will often be the IBA Rules on the Taking of Evidence in International Arbitration. The 2011 Nigerian Evidence Act is expressly excluded from application in arbitration proceedings (see Section 256(1)). It is to be noted that the 2020 revision to the IBA Rules adopted in December 2020 and released on 17 February 2021 provides for remote hearings and should be an improvement on the 2010 edition of the Rules which by default provides for physical attendance of witnesses at the hearing. The IBA Rules on the Taking of Evidence in International Arbitration are available at <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice> (last accessed 8 March 2021).
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Under the Nigerian Constitution, a fair hearing must be held in public. Following the outbreak of the COVID-19 pandemic, safety measures were put in place by the Federal and State Governments of Nigeria, and Practice Directions were issued by the heads of courts for the conduct of remote hearing for lawsuits during the pandemic. A controversy arose in Nigerian legal circles on the constitutionality of remote court hearings. In two non-arbitration specific decisions, the Supreme Court of Nigeria affirmed the constitutionality of remote hearings in response to applications by the Attorneys-General of the States of Lagos and Ekiti. In the first case the Lagos State Government sought a determination whether remote hearings of any kind in the aid of hearing, and determination of cases in general, was unconstitutional, while in the second case, the Ekiti State Government challenged the constitutionality of the directive of the Attorney-General of the Federation and the Federal Minister of Justice to the heads of courts to adopt remote hearings. The Supreme Court of Nigeria held that remote court hearings are not unconstitutional and that the Chief Judges that had issued Practice Directions for remote hearings in court proceedings should enforce them. These decisions by the Nigerian highest court confirm that the Nigerian court systems are receptive to the adoption of remote proceedings and the contemporaneous reliance on technology for such purposes necessitated by the current circumstances. Although the need for remote hearings arose due to the pandemic, it has been well received by most of the legal community in Nigeria. This reception indicates that remote hearings may outlive the pandemic and remain an acceptable alternative on their own or to supplement physical hearings in Nigeria.

Thus, not only it is not possible to infer that a right to physical hearing exists under the provisions of the ACA, the Lagos Arbitration Law and the Ordinance-based Law, but in the absence of agreement by the parties, the arbitral tribunal has wide discretion to determine the conduct of the proceedings, which can be inferred to mean that the tribunal may elect to hold a remote or a physical hearing contingent on what it deems appropriate to ensure a fair hearing.

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


10 The Constitution of the Federal Republic of Nigeria 1999 § 36(1), (3) and (4).

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, but this may have changed after the pandemic.

As the ACA, the Lagos Arbitration Law and the Ordinance-based Law all confer jurisdiction to the State High Courts and/or the Federal High Court for arbitration-related judicial proceedings, the civil procedure rules of those courts are relevant for the purpose of this answer.\(^{12}\)

Under the Federal High Court (Civil Procedure) Rules 2019,\(^{13}\) evidence to be proved or relied on at trial must be in the form of written deposition and oral examination of witnesses in open court and exhibits must be tendered from the bar, i.e., the portion of the court room where counsel sit and usually address the court from. A similar provision is contained in High Court Rules. For instance, in the High Court of Lagos,\(^{14}\) any fact alleged at trial shall be proved by deposition and oral examination of witnesses in open court. The use of “open court” and “the bar” can be interpreted to imply a right to a physical hearing for court hearings or trials.

The introductory provision preceding the evidence rules subjects the rules to the enactment of legislation relating to evidence. This suggests that the right to a physical hearing contained therein is not mandatory, as it was made subject to any other legislation which contains a contrary provision, such as the practice directions permitting remote hearings in both courts.

Although a right to physical hearing may have existed under Nigerian civil procedure, as stated above, however, the special circumstances warranted by the outbreak of the pandemic have prompted the heads of courts in Nigeria to adopt express provisions for the adoption of remote proceedings and the contemporaneous reliance on technology for such purposes, which have been upheld by the Nigerian Supreme Court.\(^{15}\)

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\(^{12}\) The ACA defines “court” at Section 57, for the purposes of setting aside an award, as the High Court of a State, the High Court of the Federal Capital Territory or the Federal High Court. Both under the Ordinance-based Law and the Lagos State Arbitration Law, “court” means the High Court of the State. See for instance, Section 2 of the Arbitration Ordinance Cap 13 Laws of the Federation and Lagos 1958 and Section 63 of the Lagos State Arbitration Law.

\(^{13}\) Order 20(1)(2).

\(^{14}\) Order 36(1) the High Court of Lagos State (Civil Procedure) Rules 2019.

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However, as stated under sub-paragraph a.2 above, remote hearings are being embraced by the legal community and should outlast the pandemic. Remote hearing are being perceived as complementary or a flexible alternative to physical hearings. This suggests that there may no longer be a right to a physical hearing.

4. If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?

Short answer: No.

There may be a right to physical hearing in the general rules of civil procedure in Nigeria – though the Supreme Court has recently upheld the use of remote hearings in certain circumstances. However, those rules do not apply to international arbitration. 

Arbitration is regarded as distinct from civil proceedings and governed by its own body of laws including the ACA, the Lagos Arbitration Law or the Ordinance-based Law as well as the Rules issued under them.

In the absence of specific rules for the conduct of an arbitral proceeding, all those statutes appear to accord discretion to the arbitral tribunal to conduct the proceedings in an appropriate manner to ensure a fair hearing.

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.


17 Section 15 of the ACA, for instance provides that: “(1) The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act; (2) Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected with a particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate to ensure a fair hearing”.

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Having the right to choose how their arbitration proceedings may be conducted, parties may in advance of any disputes agree not to have a physical hearing. They can also adopt institutional rules that allow remote hearings. Such institutional rules include those of the Lagos Chamber of Commerce International Arbitration (“LACIAC”), whose Article 35(4) provides that: “The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference”).

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 arbitral tribunal cannot act contrary to the agreement of the parties in this regard, as that would be acting outside its jurisdiction. Should a tribunal disregard the parties’ agreement, any resulting award or order may be set aside. Unless the agreement of the parties is in conflict with a mandatory provision of the ACA or the Lagos State Law, failure to follow the procedure set forth in the agreement falls under one of the express grounds upon which an award may be set aside under both laws. However, under the Lagos State Arbitration Law, the court is not to set aside an award in whole or in part, unless it is satisfied that it would be inappropriate to remit the matter in question to the tribunal for consideration.

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.

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Section 33 of the ACA and Article 30 of the Arbitration Rules issued under the ACA provide that a party who knows that any requirement under the Arbitration Act, the ACA Arbitration Rules or the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection within the time limit provided is deemed to have waived his right to object to the non-compliance. In *Mekwunye v. Imuokhue*, the Supreme Court of Nigeria held that in arbitration proceedings, if a party fails to raise an objection to a non-compliance with the Arbitration Law or the arbitration agreement in a timely manner during the arbitration, that party is deemed to have waived its right to object later.

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*

As mentioned above, neither the ACA, the Lagos Arbitration Law nor the Ordinance-based Law provide a right to physical hearing in international commercial arbitration. However, should such a right exist, its breach would *per se* constitute a ground for setting aside the award. It will generally be regarded as misconduct by the tribunal, which includes irregularity in the procedure.

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.*

As stated in sub-paragraphs a.1 and a.2 above, there is no right to a physical hearing in international arbitration under Nigerian law. A failure to conduct a physical hearing could, however, amount to a failure to act fairly towards the parties. Thus, where the

20 A similar provision is contained in Section 58 of the Lagos State Arbitration Law.
22 See Section 55(2)(vi) of the Lagos State Law of Arbitration and Sections 48 and 29 of the ACA. By virtue of Section 30 of the ACA, the provisions of Section 29 of the ACA which deals with setting of aside domestic awards also apply to international commercial arbitration awards. Misconduct by an arbitrator or improper procurement of an award by a party are grounds for setting aside an award in international arbitration.
tribunal proceeds to conduct remote proceedings against the objection of one of the
denied its full opportunity to present its case, the award could potentially be set aside.
This is because both the ACA and the Lagos State Arbitration Law impose on the
tribunal the duty to ensure that the parties are each accorded equal treatment and given
a full opportunity of presenting their case.

The fair treatment of the parties is a basic principle of justice and the parties’ right to
a fair hearing by an independent and impartial tribunal is one of the most fundamental
rights recognized as a common standard for all nations irrespective of their legal or
cultural backgrounds. The right to a fair hearing in judicial proceedings is an overriding
mandatory principle of Nigerian procedural law of constitutional importance. Any
breach of the right to fair hearing will per se vitiate such proceedings in Nigeria and all
the courts recognize and enforce this principle.

In Kenon v. Tekam the Supreme Court of Nigeria Per Ayoola, J.S.C held that:

“Unfairness of a trial comes in two broad categories. One is procedural unfairness
that arises where the court or tribunal adopts a procedure which does not ensure that
one or both of the parties are not put at a disadvantage. The commonest forms are
where a party had been deprived of an opportunity of a hearing or where there is no
procedural equality between the parties. Substantive unfairness arises where the
Judge approaches his adjudicative function with a mind closed or a mind influenced
by considerations other than facts in evidence before him or facts on which the parties
are in agreement or is influenced by factors extraneous to his proper role as an
umpire. The latter aspect of unfairness is often described as bias or real likelihood of bias”.

The above principles extend to and are akin to the fairness and impartiality
requirements in arbitration. A breach of the principles of fairness and impartiality, which
grant parties the right to be heard, may entitle a party to challenge an arbitral award.

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

23 Section 14 of the ACA and Section 34(a) of the Lagos State Law of Arbitration.
24 Universal Declaration of Human Rights proclaimed by the United Nations General
Assembly in Paris on 10th December 1948; see also Article 6 of the European Convention on
Human Rights.
26 See Fabian AJOGWU SAN, Commercial Arbitration in Nigeria Law & Practice
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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: Yes.

Section 52 of the ACA is based on Article V of the New York Convention. Furthermore, by virtue of Section 54(1) of the ACA, the New York Convention applies whenever the recognition and enforcement of any award arising from an international commercial arbitration is sought in Nigeria, provided that the contracting State has reciprocal legislation recognizing enforcement of arbitral awards made in Nigeria and the differences arise out of legal contractual relationships.

A Nigerian court may therefore refuse enforcement of a foreign award where a right to a physical hearing has been breached on the basis of Articles V(1)(b), V(1)(d) and/or V(2)(b) of the New York Convention which are reflected in Sections 52(2) (a) (iii); (vi); and (vii) of the ACA.

Under Section 52(2) of the ACA, the court would have to make a finding as to whether a right to physical hearing exists at the seat and whether it was breached. In such case, the ACA empowers the court to refuse enforcement of the foreign award without any further showing.

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.

Section 52(2) of the ACA provides: “The court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognise or enforce any award- (a) if the party against whom it is invoked furnishes the court proof- […] (iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or […] (vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or (vii) where there is no agreement within the parties under sub-paragraph (vi), that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place” (emphasis added).
On May 7, 2020 the National Judicial Council in Nigeria issued Guidelines for Court Sittings and Other Related Matters in the Pandemic Period. The Guidelines were intended to aid the various courts to conduct proceedings remotely in order to meet the ends of justice, particularly in respect of time sensitive cases, urgent cases and the delivery of judgments and rulings. Those Guidelines apply in addition to the Rules of Court and the existing Practice Directions. The Guidelines make provisions for electronic filing of court processes and electronic service of court processes; electronic payment of filing fees; and remote sittings.\textsuperscript{28}

The Infectious Diseases (Emergency Prevention) Regulations 2020 was made by the Lagos State Government to ratify all governmental acts geared at curtailing the spread of the Coronavirus before the enactment of the Regulations and to prevent and curtail the spread of the diseases within the defined area. The legislation among others, provided for the power of the Governor of Lagos State to restrict the conduct of trade, business and commercial activities as may be deemed necessary.

The President of the Federal Republic of Nigeria pursuant to the Quarantine Act 1926 issued the Covid-19 Regulations 2020 which commenced on 20 March 2020 restricting movement in Lagos State, Ogun State and the FCT Abuja and this led to the closure of all non-essential businesses including courts and arbitral institutions. In compliance with the Regulations, persons found to have violated these Regulations and who did not fall into the category of exempted workers and first responders were arrested by law enforcement officers and prosecuted. During the period of movement restriction prescribed by the Regulations, certain legal practitioners were also arrested for violating the restrictions and for not being part of the exempted category of workers providing “essential services”. However, in a recent decision of the Federal High Court\textsuperscript{29} the Federal High Court decided that legal services within the context of this Regulation are an essential service.

\textsuperscript{28} See fn. 13 above.