SCOTLAND

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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, but the parties acting in unison can amend the rules to compel the tribunal to allow a physical hearing, even after the arbitration has commenced.

The *lex arbitri* in Scotland is the Arbitration (Scotland) Act 2010 (the “Act”). The Act applies to all arbitrations seated in Scotland, domestic and international. The Act does not have an express provision conferring a right to a physical hearing. Indeed, there is no express right to a hearing of any sort. The Scottish Arbitration Rules\(^1\) provide at Rule 28 (“Procedure and Evidence”) that it is for the tribunal to determine the procedure to be followed in the arbitration. Paragraph (2)(f) of that rule provides that the tribunal may determine the extent to which the arbitration is to proceed by way of hearings for the questioning of parties and written and oral evidence. The Act contains no equivalent of Article 24(1) of the Model Law\(^2\) requiring the tribunal to consent to a request from a party to hold a hearing.

It should, however, be noted that Rule 28 is a default rule,\(^3\) and that it is open to parties to change it by, for example, incorporating a set of institutional rules that provides a right to a physical hearing, or a bespoke clause with that effect, and that such a change in the rules can be agreed by the parties even after the commencement of the arbitration.\(^4\)

So whilst there is no right to a physical hearing *per se*, and whilst one party cannot compel the tribunal to allow a physical hearing under the default rules, if both parties (or

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\(^1\) The Scottish Arbitration Rules are contained in Schedule 1 to the Arbitration (Scotland) Act 2010.


\(^3\) The Scottish Arbitration Rules contain default rules and mandatory rules. Mandatory rules apply to any arbitration seated in Scotland regardless of any agreement by the parties to the contrary, and are effectively part of the *lex arbitri*. Default rules apply to arbitrations seated in Scotland unless the parties have otherwise agreed. They may agree to amend or not apply any default rule, or part of it, in the arbitration agreement, or by other means at any time before or after the arbitration begins. See Sections 7-9 of the Act.

\(^4\) Section 9(3) of the Act.
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all parties as the case may be) agree to change Rule 28 so that the tribunal is compelled
to grant a physical hearing, then the tribunal should allow it.

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 probably be excluded, except to the extent that the parties may
agree to change the default position.

It is clear from the default rule\(^5\) that the tribunal is the master of procedure, and may
determine the extent to which the arbitration is to proceed by way of hearings for the
questioning of parties, and written or oral arguments.

The question arises whether, in a case where the tribunal has permitted questioning
of parties/witnesses and/or oral argument, the hearing must be a physical one. This is
not a question that has been addressed by the Scottish courts. Two factors may influence
the answer. The first is the obligation of the tribunal to treat the parties fairly, which
includes an obligation to give each party a reasonable opportunity to put its case and
deal with the other party’s case.\(^6\) The second is the tribunal’s duty to conduct the
arbitration without unnecessary delay and without incurring unnecessary expense.\(^7\)
These are both mandatory rules, and cannot be altered by the parties. Unlike default
rules, mandatory rules in the Act prevail over any inconsistent provision of the
agreement to arbitrate, whether that provision is express, or implied as a result of the
adoption of institutional rules.

It is easy to see how a party might try to construct an argument that it would be unfair
to deny a physical hearing in circumstances where, for example, the case turns on
credibility of a witness, and that would be better assessed in person. Is that a good
argument, and if so, how is it balanced against the obligation to conduct the arbitration
without unnecessary delay and expense?

The Scottish courts considered the question of whether the tribunal can be required
to allow an evidential hearing, under the common law, long before the current legislation
came into force.\(^8\) The court determined that where the matter can be determined on a
point of law, the tribunal need not allow an evidential hearing. It follows that if a matter
can only be determined by having an evidential hearing, then it is appropriate to have
one. That does not however answer the question of whether such a hearing can be held

\(^5\) Rule 28(2)(f).
\(^6\) Section 1(a) of the Act, Rule 24(1)(b) and 24(2).
\(^7\) Rule 24(c).
\(^8\) Mowbray v Dickson (1848) 10 D 1102.
remotely or must be held in person. Ultimately, it seems likely that the courts would treat
this as a question of fairness, to be balanced with considerations of cost and delay as
noted.

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.

   Civil procedure in Scotland’s higher court, the Court of Session, is governed by the
   Rules of the Court of Session,9 and in its lower court, the Sheriff Court, by the Sheriff
   Court Rules.10 It is a feature of litigation in the Scottish courts that the court may
determine a matter on the basis of relevancy by way of debate, in some circumstances
on a motion for summary decree. In such cases, the pleadings are taken pro veritate, and
the law applicable to the pleaded facts is considered. If there is no relevant legal case
disclosed in the claim, the action is dismissed. If there is no relevant legal claim disclosed
in the defence, decree may be granted without further inquiry. Whilst it is relatively rare
for a case to be disposed of at the debate stage, irrelevant parts of a claim or defence
may also be excluded in this way. In this way, evidential hearings can be restricted or
excluded by the court.

   Whilst evidential hearings have, pre-pandemic, almost always taken place in open
court (subject only to orders for confidentiality), there is no absolute right to an
evidential hearing.

   More or less all court business was suspended when the pandemic hit, but the courts
have adapted to the new reality with much greater use of electronic lodging of
documents, and with procedural hearings taking place remotely, often by telephone.
Substantive hearings such as legal debates and “proofs” (evidential hearings) are also
taking place remotely using video conferencing and the courts have issued guidance on
such hearings.11

   Having adapted to new technologies rapidly in response to the pandemic, the courts
are not showing any appetite to revert to the old ways when the crisis is over. On the
contrary, in a statement, Lord Carloway, the Lord President of the Court of Session, the
head of the Judiciary in Scotland stated:

10 Act of Sederunt (Sheriff Court Ordinary Cause Rules) SI 1993 No.1956.
11 Court of Session Practice Note No. 1 of 2020.
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“It is a misconception to regard the court as a building. It is not just a physical space. It is a public service. Virtual courts and online services should, and now will, be viewed as core components of the justice system, rather than short-term, stopgap alternatives to appearances in the courtroom”.

It is to be expected that in the future, after the return to normal business, there will be no automatic right to a physical hearing, and that physical hearings within a courtroom may even be the exception rather than the rule.

Against the backdrop of the Lord President’s stance on the use of technology and remote hearings, it seems unlikely that the courts would imply an absolute right to a physical hearing in an arbitration, which is generally regarded as less formal and more flexible than litigation, even where the tribunal has allowed an evidential 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: N/A

Not applicable.

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.

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, but to order a remote hearing in these circumstances may constitute a serious irregularity opening the award to challenge if it is held to cause substantial injustice.

It is open to the parties, in the arbitration agreement, or by other means before or after the arbitration has commenced, to alter the rule conferring control of the procedure on the tribunal. They may, therefore, by agreement confer a right to a physical hearing or decide that a physical hearing is to take place.

A failure to conduct the arbitration in accordance with the arbitration agreement or any other agreement by the parties relating to the conduct of the arbitration would constitute a serious irregularity, which if the irregularity causes substantial injustice to a party provides a ground for challenge to the award.

Challenges to an award are made to the Outer House (court of first instance) of the Court of Session. A single judge considers the challenge. It is important to note that the irregularity must be “serious” and must result in “substantial injustice” before the court will intervene. It is also important to note that the court has a range of options open to it when faced with a serious irregularity challenge and may confirm the award, order reconsideration of the award (or part of it), or where the court considers reconsideration to be inappropriate, set the award (or part of it) aside.

To date, there are no Scottish cases dealing specifically with a tribunal’s failure to conduct the arbitration in accordance with a procedure agreed by the parties. It is necessary to look at the wider principles applicable to serious irregularity challenges. As with most provisions of the Scottish legislation, it is useful to consider the equivalent provisions in the Arbitration Act 1996 which applies in the rest of the United Kingdom. Decisions of the English courts are not binding in Scotland but are likely to be persuasive where the underlying wording is substantially the same. There is a large body of authority on the application of the serious irregularity provisions under the Arbitration Act 1996.

In context, the question is whether a failure to allow a physical hearing is a “serious” irregularity, and whether such failure has caused “substantial injustice”. Necessarily, each case is considered on its own facts. It is not possible to say that by refusing a physical hearing and insisting on a remote one (in which both parties participate) the tribunal will necessarily have caused substantial injustice. On the contrary, given the success of remote hearings during the pandemic and the adoption of remote proceedings by the courts, not just in Scotland but all over the world, it seems unlikely that a Scottish

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13 Section 9(3) of the Act.
14 Rule 68(2)(a)(i) and (iii).
15 Rule 68(3).
16 In the first published decision under the Act, Arbitration Application No. 3 of 2011, 2012 SLT 150, Lord Glennie said: “Since the Act was closely and unashamedly modelled on the English Act, and reflects the same underlying philosophy, authorities on the that Act (and its predecessor, the Arbitration Act 1979) in relation to questions of interpretation and approach will obviously be of relevance. There is no point in re-inventing the (arbitration) wheel”.
court would hold a tribunal’s refusal to allow a physical hearing in defiance of the parties agreement to have caused substantial injustice per se. The challenging party would have to demonstrate that the virtual format had somehow put them at a material disadvantage. Conceivably, if a party did not have access to sufficiently technologically advanced equipment, or an adequately fast internet connection to participate fully in the hearing, a risk of substantial injustice might arise. That must, however, be increasingly rare given the advances in remote hearing technology and internet availability around the world.

However, in practical terms, a tribunal that refuses to hold a physical hearing in the face of a direct agreement and instruction from the parties is taking a risk, not just in respect of the validity of the award, but also in respect of its fees, and may wish to avoid those consequences.

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: Generally, yes.

The right to challenge may be lost if an objection is not made timeously. Rule 76, a mandatory rule, provides that a party who participates in an arbitration without making a timeous objection on the ground that the arbitration has not been conducted in accordance with the arbitration agreement, or any other agreement by the parties relating to the conduct of the arbitration, may not raise the objection later before the tribunal or the court.

The rule provides that an objection is made timeously if it is made as soon as reasonably practicable after the circumstances giving rise to the ground of objection first arise unless the arbitration agreement, the rules or the other party allow a later date, or the tribunal considers that circumstances justify a later objection. There is an exception to this general rule where the party did not object because it did not know that the

17 Rule 68(4) provides that where the court decides a serious irregularity challenge (otherwise than by confirming the award) on the ground that the tribunal failed to conduct the arbitration in accordance with the arbitration agreement, the rules, or any other agreement by the parties relating to the conduct of the arbitration, or that an arbitrator has not been impartial and independent or has not treated the parties fairly, it may make such an order as it thinks fit about any arbitrator’s entitlement (if any) to fees and expenses and may provide for the repayment of fees or expenses already paid to the arbitrator.

18 Rule 76(1).

19 The equivalent rule in the Arbitration Act 1996 (applicable in the rest of the UK), Section 73, requires an objection to be made “forthwith” so the wording is slightly different.
grounds for objection existed, but that is unlikely to be relevant in the case of a physical hearing being refused in spite of an agreement by the parties to have one.

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

The default position is that there is no right to a physical hearing, so the question does not arise.

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: Yes, in certain circumstances.

If the parties have expressly agreed in the arbitration agreement that there ought to be a physical hearing, or if they have adopted rules that provide for a physical hearing, or have otherwise agreed that there ought to be a physical hearing (and whether before or after commencement of the arbitration), and the tribunal fails to comply with that agreement, there is a possibility, as outlined above, that a court may hold that there has been a serious irregularity that has caused substantial injustice. In practical terms, given the widespread acceptance of remote hearings, it is difficult to envisage circumstances where the denial of a physical hearing, by itself, will be held to have caused “substantial injustice” although the possibility remains.

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: Probably not.

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20 See sub-paragraph c.6 above and Rule 78.
Scotland is (at least at the time of writing) part of the United Kingdom of Great Britain and Northern Ireland, and the United Kingdom is a party to the New York Convention (the “Convention”).

Article V of the Convention is incorporated into the law of Scotland by Sections 18 to 22 of the Act. The equivalent of Article V(1)(b) so far as it deals with a party being unable to present its case is Section 20(2)(c)(ii). Article V(1)(d) is mirrored in Section 20(2)(d), and Article V(2)(b) in Section 20(4)(b). There have been no Scottish cases dealing directly with these provisions, but as noted before, the Scottish courts are likely to have regard to decisions of the English courts on the equivalent provisions under the 1996 Arbitration Act 21 (which are Sections 103(2)(c), 103(2)(d) and 103(4)(b) respectively of that Act).

Whilst the point has not arisen to date, it seems likely that the Scottish courts would consider the question of whether a right to a physical hearing existed at the seat of the arbitration to be a relevant factor, on the basis that by choosing a seat with such a right, the parties have impliedly agreed that a right to a physical hearing is to apply.

Equally, the failure of the tribunal to comply with the express agreement of the parties to an entitlement to a physical hearing would give a ground of challenge.

On the other hand, it seems unlikely that the Scottish courts would allow a challenge on public policy grounds given that, as discussed above, there is no right to a physical hearing in an arbitration seated in Scotland.

A party may well establish a right to challenge, either because there was a right to a physical hearing (and the challenge proceeds under Article V(1)(b)) or because parties have specifically agreed to such a right (and there has therefore been an irregularity in the procedure within the meaning of Article V(1)(d)). On the face of it, in either case, the court is likely to find that there has been a violation of the relevant article. However, the court is not obliged to allow a challenge to succeed, and it retains a discretion. Therefore, in the opinion of the Author, the court is likely to approach the question on the basis of whether there has been material prejudice to the party making the challenge, or substantial injustice, rather than on the basis that there has been a technical breach.

If, as a matter of fact, the challenging party was unable to present its case in the face of the tribunal’s insistence on a remote hearing (perhaps because of a lack of adequate technology or a technology failure), a court might find that persuasive and find that there has been a failure of due process. 22 If, on the other hand, the party simply feels that its

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21 Arbitration Application No. 3 of 2011, fn. 16 above.
22 If the challenging party has been unable fully to present its case because of factors outside of its control (such as a technology failure) the court is more likely to support a challenge than if, for example, the party has refused to participate in the remote hearing because of the agreement or right to have a physical one. In those circumstances, the challenging party may be held to have failed to take advantage of the opportunity to present its case. See for example the decision of Colman J in Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 All E.R.
evidence would have come across better in a physical hearing, such that it believes it would have prevailed on the merits, it is difficult to see how a court might be able to take a view on that, and it seems unlikely that such a challenge would succeed.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: The challenge has been addressed by holding remote hearings.

Whilst there have been remote (generally telephone) hearings in some cases for years, the Scottish courts took some time to respond to the COVID-19 crisis, with certain types of hearings grinding to a halt. However, it is clear that the courts, under the leadership of the Lord President, are taking the opportunity of the pandemic lock down to push the adoption of remote hearings.23 A wholesale return to the old ways is not going to happen.24

Whilst it is fair to say that not all practitioners are comfortable with the new normal,25 the arbitration and wider dispute resolution communities have taken to remote hearings even more quickly than the courts and with great enthusiasm. It is clear that we now have proof of concept for remote hearings, and whilst physical hearings will certainly feature after restrictions on travel and gatherings are lifted, tribunals are inevitably going to give much more weight to considerations of cost and delay when deciding whether or not to insist on physical hearings.

(Comm.) 315 in which a challenge under the equivalent ground in the Arbitration Act 1996 (Section 103(2)(c)) was refused because the challenging party failed to present its case despite having been given “every opportunity to do so” (at 318).


24 In the Lord President’s speech at the opening of the Legal Year on 28 September 2020, he said: “Even after a vaccine is developed, when sports stadia are full and the pubs are open after 10.00pm, courts and tribunals will not return to the way things were”. The speech is available online: Judiciary of Scotland, “Opening of the Legal Year” (28 September 2020) at <https://www.judiciary.scot/home/media-information/media-hub-news/2020/09/28/opening-of-the-legal-year> (last accessed 30 April 2021).