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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

SOUTH AFRICA

Sarah McKenzie

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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.

In South Africa, domestic and international arbitrations are distinguishable and governed by separate pieces of legislation, namely, the Arbitration Act 42 of 1965, which governs domestic arbitrations, and the International Arbitration Act 15 of 2017 ("the South African International Arbitration Act" or "the Act"), which governs international arbitrations.

Together with giving effect to the New York Convention, the Act provides the legal framework for the conduct of international commercial arbitration proceedings in South Africa. The Act incorporates the UNCITRAL Model Law with certain modifications, as shown in Schedule 1 to the Act.

The Act does not expressly provide for a right to a physical hearing in arbitration. Article 24 of Schedule 1 to the Act ("Hearings and written proceedings") provides that, subject to any contrary agreement reached by the parties, the tribunal shall have discretion to determine whether an oral hearing shall take place or whether the arbitration will be decided solely on the basis of documents and other materials. The Act, however, qualifies this by providing that, "unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party". This provision, however, does not expressly require the hearing to take place physically.

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: Likely not.

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The provisions of the Act relevant to rules of procedure have not, as yet, been considered by the South African courts and it is unlikely that the South African courts would read the requirements of granting the parties an oral hearing on request (in the absence of agreement to the contrary) as requiring a physical hearing in all instances.

Article 18 of the Act ("Equal treatment of parties") requires that the parties be treated with equality and that each party be given a reasonable opportunity of presenting his or her case. Although the Act does not give content to the terms "equality" or "reasonable opportunity", it is possible that parties may argue that this requirement should be interpreted to incorporate a requirement for a physical hearing, at least in certain circumstances.

Whether such an interpretation can be sustained would need to be evaluated in the context of Article 19 of Schedule 1 to the Act ("Determination of rules of procedure"), which provides that the parties to an arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings; and, failing any such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.[1]

The wide discretion afforded to the tribunal in Article 19 is given specific content in relation to hearings in Article 24(1) ("Hearings and written proceedings"), where the proviso in Article 24(1) that "unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party" still does not provide any express requirement for a physical hearing.

Given that the Act makes it clear that the tribunal may even forego a hearing altogether, it is unlikely that the courts would find that the parties are entitled to a physical hearing unless it is clear that, in the specific circumstances of the case in question, some inequality would result from, or one of the parties would not be afforded a reasonable opportunity to present its case in, a remote hearing.

In considering any question relating to this, the South African courts would be guided by the Constitution of the Republic of South Africa Act, 1996 ("the Constitution"), which is the supreme law of the Republic.[2] The Constitution contains a Bill of Rights, providing for certain fundamental constitutional rights. The Constitutional Court of South Africa, which is the highest, or apex, court in the South African judicial system,

[1] Subject to the provisions of the Act.

[2] In interpreting any legislation the South African courts are enjoined to promote the spirit, purport and objects of the Bill of Rights. See, e.g., *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras. 22-6.

has held that there is an implied term of every arbitration agreement that it be procedurally fair.[3]

The Constitutional Court jurisprudence on procedural fairness in arbitrations provides an indication that fairness in the constitutional context would not dictate a requirement of a physical hearing. Indeed, in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* ("*Lufuno* case"),[4] the Court held as follows:

> "[W]hat constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument".

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: The South African rules of civil procedure do not provide for such right.

Section 34 of the Constitution ("Access to courts") provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Furthermore, section 165 of the Constitution ("Judicial authority") provides that the various organs of the state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court. Finally, section 173 of the Constitution provides that each court of South Africa (being the Constitutional Court, the Supreme Court of Appeal and the High Courts of South Africa) has the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.

The Judiciary is bound by the provisions of the Bill of Rights and is, therefore, under a constitutional obligation to ensure the availability of the courts to those who seek

[3] *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* 2009 (4) SA 529 (CC) at paras. 188 and 221.
[4] *Ibid* at para. 223.

access to them.[5] The words ''public hearing'' and ''accessibility'' in this context arguably refer, in a narrow sense, to the physical accessibility of the courts. There is, however, a broader and purposive reading of the relevant provisions of the Bill of Rights that would support the ability of litigants to bring legal proceedings and to access justice in an expeditious manner, without undue delay.[6] It, therefore, does not appear that a remote hearing or trial by way of video conferencing would necessarily be at odds with the constitutional right of access to court, provided that a litigant has access to justice (whether via a physical hearing or otherwise) in the form of a fair, independent and expeditious hearing.

In this regard, and insofar as the right to a ''public hearing'' is guaranteed, this too is not incompatible with a public remote hearing. In fact, the Constitutional Court, in response to the challenges presented by the COVID-19 pandemic, has made provision for a public (but not physical) hearing in its Protocol for Online Hearings,[7] which provides that hearings will be livestreamed via the Constitutional Court YouTube channel (for attorneys, clients, interested parties and/or the public who may not themselves be connected to the videoconferencing link). The livestream link is also made available on the Constitutional Court's website and social media (Twitter) prior to the hearing to promote public access.

However, even before the COVID-19 pandemic, the South African rules of civil procedure have contemplated a remote hearing (or at least part thereof). The Uniform Rules of Court (which are the Rules regulating the conduct of proceedings in the High Court) provide for a judicial case management procedure in terms of which a Judge is empowered to intervene in the management of a case so as to control the pace of litigation and ultimately ensure that it is ready for hearing as soon as reasonably possible. In terms of Rule 37A(10) ("Judicial case management") of the Uniform Rules of Court, one of the matters which a party should address at a pre-trial meeting is the possibility of the taking of evidence by video conference. Moreover, in terms of Rule 39(20) ("Trial"), if it appears convenient to do so, a court may, at any time, make any order regarding how the trial is to be conducted, and vary any procedure laid down by Rule 39. In this regard, in the case of *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie*,[8] which dealt with an application for the giving of evidence via videolink, the Judge, in granting the application, stated, *inter alia*, as follows:

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[5] Malcolm J.D. WALLIS, "Physical access to courts and public proceedings" in Willem A. JOUBERT and Mandy KUHNE, eds., *The Law of South Africa*, vol. 10, 3rd edn. (2017) 4 at para 464.

[6] *Ibid*.

[7] See Constitutional Court Directions, 26 August 2020, at pp. 1 and 3.

[8] 2017 (1) SA 236 (GJ).

"[3] Obviously, each application for the use of video linkage to procure the evidence of witnesses who are not available to a trial court must rely upon its own particular facts and circumstances […] My experience is that the approach of both South African courts and courts in other jurisdictions must continuously try to be relevant to and keep pace with rapidly changing demands placed upon judicial practice.

[…]

[24 & 25] We rightly expect and prefer that viva voce evidence in both civil and criminal proceedings be given in a courtroom at the seat of the court in the presence of the parties and their representatives and the judicial officer and the public. The reasoning is obvious. The court buildings and personnel and the procedures therein are dedicated to the process of litigation. Anyone may attend. The legitimacy of the process derives, in part, from this dedication. Yet […] we have no difficulty in recognising the need for accommodating witnesses to meet the interests of justice. We utilise many different ways of procuring evidence because both the Constitution and the High Court Rules permit development of appropriate procedures. We do so because we recognise that court procedures and the Rules which regulate such practices are devised to administer justice and not hamper it. Evidence is received on affidavit; closed circuit television regularly allows for evidence to be given in one room and transmitted to a courtroom; inspections in loco take place and judges or nominated persons take evidence on commission. The test to be applied by the court in exercising its discretion is whether or not 'it is convenient or necessary for the purposes of justice'.

[…]

[33] The Constitution and the Rules enjoin us to make the necessary developments on a case-by-case and era-by-era basis.

[…]

[35] It is now almost trite that video conferencing 'is an efficient and an effective way of providing oral evidence both in chief and in cross examination' and that this is 'simply another tool for securing effective access to justice' (see para 10 of the speech of Lord Carswell in Polanski v Conde Nast Publications Ltd [2005] UKHL 10). This process has been utilised in numerous South African courts''.

While it is evident that the South African rules of civil procedure and the courts have contemplated the concept of a remote hearing, the onset of the COVID-19 pandemic has accelerated its use tremendously. In this regard, the Judge Presidents of numerous provincial Divisions of the High Court are empowered, in terms of the section 8(4)(b) of the Superior Courts Act 10 of 2013 to issue directives pertaining to the conduct and proceedings of each division of the High Court. By way of example, the Judge President

of the Gauteng Division of the High Court issued certain directives relating to the administration of matters pending and to be instituted in the Gauteng Division of the High Court during the continuing state of disaster (declared in terms of the Disaster Management Act 57 of 2002 to manage the COVID-19 pandemic). In terms of the latest consolidated directive issued on 18 September ("the Consolidated Directive"), all pleadings and documents in the High Court must be uploaded in all matters to CaseLines (a digital platform for legal documents) and matters on paper may not, except where directed otherwise by the Judge seized with the matter, enjoy an oral hearing in open court, but rather must be dealt with by way of video conferencing.

It is notable that the Gauteng Division of the High Court had issued a directive on 10 January 2020 (prior to the issuing of the Consolidated Directive) mandating the use of the CaseLines platform.[9] The CaseLines platform was birthed from the Judiciary's "Online Project" aimed at relieving backlogs in the overburdened South African justice system through the modernisation of court processes. In this way, the CaseLines and Consolidated Directive are complementary and thus, while it remains unclear as to whether those portions of the Consolidated Directive allowing for hearings by way of video conferencing will outlast the pandemic, such possibility cannot be ruled out entirely.

Insofar as matters requiring oral evidence to be adduced, the Consolidated Directive provides that, subject to certain conditions, such matters may be conducted in open court or some other public forum. However, even if parties agree to an open court hearing, the Judge nevertheless retains the discretion to pronounce on the mode of hearing. In this regard, where the Judge holds the view that an open court hearing poses a risk of infection, the Judge shall determine an appropriate alternative mode of hearing, which may include receiving evidence on affidavit or the utilisation of video conferencing. In addition, a Judge may, where good cause is shown that a remote hearing will be inadequate to achieve a fair trial, order a wholly or partially open court hearing; or, where considerations of the interests of justice are concerned, postpone the hearing until such time that an open court hearing may become appropriate.

It accordingly appears that the South African rules of civil procedure contemplate remote hearings and appear only to guarantee a physical hearing in circumstances in which it would be in the interests of justice to do so, or where to have a hearing other than a physical hearing in open court, would violate the constitutional imperatives of independence, impartiality, dignity, accessibility and effectiveness of the court and the right to fair public hearing. In the context of COVID-19, the various directives issued by the Courts, in fact, mandate that it does so (subject to a few exceptions discussed above).

[9] Gauteng Division of the High Court, Judge President's Practice Directive 1 of 2020, "Re: Implementation of the CaseLines System in the Gauteng Division of the High Court, Pretoria and Johannesburg" (10 January 2020) at <https://www.ppv.co.za/wp-content/uploads/2020/01/Judge-President%E2%80%99s-Practice-Directive-1-of-2020.pdf> (last accessed 27 January 2021).

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.

As set out above, the Constitution, and specific provisions thereof (such as section 34, "Access to courts"), have a bearing on the general rules of civil procedure in South Africa and may require, in certain circumstances, that a physical hearing be held.

However, whether section 34 of the Constitution necessarily applies to a private arbitration, considered a "process built on consent, in that the parties agree that their disputes will be settled by an arbitrator",[10] is a question which the South African courts have grappled with.

In this regard, in the *Lufuno* case,[11] the Constitutional Court considered whether section 34 of the Constitution applies to private arbitration. In a majority judgment, O'Regan ADCJ held that section 34 of the Constitution does not have direct application to private arbitration,[12] and that the effect of a person choosing private arbitration for the resolution of a dispute does not constitute a waiver of the person's right of access to courts, but is rather a choice to use another forum in which to ventilate the dispute in issue.[13] The Constitutional Court held further, that although parties are entitled to determine, *inter alia*, what matters are to be arbitrated, the identity of the arbitrator and the process to be followed in the arbitration, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution or otherwise, the arbitration agreement will be null and void to that extent.[14] This is consistent with the Constitutional Court's findings in *Lufuno* that there is an implied term of every arbitration agreement that it be procedurally fair.

In this regard, the Court found that when interpreting an arbitration agreement:

> "[I]t should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair […] Of course, as this Court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As

[10] *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* 2009 (4) SA 529 (CC).
[11] *Ibid*.[12] *Ibid* at para 214.
[12] *Ibid* at para 214.
[13] *Ibid* at para 216.
[14] Also that in determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance. *Ibid* at paras. 219-220.

such the proceedings may be adversarial or investigative and may dispense with pleadings, with oral evidence, and even oral argument".

It, therefore, appears clear that the right to a physical hearing, to the extent that it is required by the Constitution in particular court proceedings, does not, as a matter of course, apply to arbitrations in South Africa. We note, however, that similar constitutional prescripts requiring fairness and affording parties real opportunities to present their case would apply to an analysis of whether a physical hearing is required in either court or arbitral proceedings.

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.

Arbitration is a consensual process and the parties may agree, *inter alia*, on the manner of the proceedings. In this regard, the parties may expressly agree to waive any right to a physical hearing or could do so tacitly in the form of agreeing to a remote hearing protocol; or adopting other institutional rules which allow remote hearings. Such express or tacit agreement could take place in advance of, or during, the dispute.

In this regard, in terms of Article 4 of the Act ("Waiver of right to object"), a party who knows that any provision of the Act 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 objection to such non-compliance without undue delay or within any time limit provided for, will be deemed to have waived his or her right to object. Accordingly, to the extent that any right to a physical hearing exists, a party would need to specifically object to such a hearing not taking place physically, without undue delay. If they did not do so, they would be deemed to have waived their right to such a hearing.

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: Probably not.

The answer to this question may depend on the timing of the decision and the context within which it is made. The very foundation of arbitration is based on consent and agreement. If the parties expressly agree that a hearing should take place by way of a physical hearing, an arbitral tribunal may be exceeding its powers, if it makes an order of its own volition that a remote hearing must be held. In this regard, and in terms of Article 34(2) of Schedule 1 to the Act, where the arbitral procedure adopted is contrary to the agreement between the parties, or if the award is in conflict with the public policy of South Africa, either of the parties may apply to the relevant division of the High Court of South Africa for the arbitral award to be set aside.

South African courts, however, are reluctant to set aside arbitration awards easily and have construed the statutory requirements for setting-aside awards quite strictly in the context of private arbitration.[15] In this regard, the Constitutional Court stated in the *Lufuno* case[16] that:

> "Given the […] international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) [of the domestic Arbitration Act, which governed both domestic and international arbitrations at the time that the judgment was handed down] in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration".

Therefore, if an arbitration agreement does not specifically contemplate a physical hearing, it is unlikely that the court will interfere with the arbitral tribunal's discretion to conduct the arbitration in such manner as it considers appropriate, unless the tribunal has acted unfairly and such conduct has caused, or will cause, substantial injustice to one of the parties

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[15] *Ibid*. See also *Total Support Management (Pty) Ltd and Another V Diversified Health Systems (Sa) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA).

[16] Although this judgment was in the context of setting aside an award under South Africa's domestic arbitration legislation – the Arbitration Act 42 of 1965 – and was before the International Arbitration Act of 2017 had been enacted, the ratio appears to be relevant in the context of any legislation dealing with the setting aside of awards (including the International Arbitration Act).

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: Possibly.

In terms of Article 4 of the Act ("Waiver of right to object"), a party who knows that any provision of the Act 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 objection to such non-compliance without undue delay or within any time limit provided for, will be deemed to have waived his or her right to object.

As such, the question will turn, in the first instance, on whether the parties have agreed to a physical hearing. If they have (in the absence of any other procedural unfairness), then objection to a remote hearing would need to be made without undue delay to avoid an inference of waiver. If, however, a right to a physical hearing arises from the circumstances of the case in that a party will not be afforded a fair opportunity to present its case in a remote hearing, there is a possibility of an argument that the Article 4 limitation should not apply as the inherent fairness of the proceedings is a requirement that the parties cannot derogate from.

In terms of Article 34(3) of the Act ("Application for setting aside as exclusive recourse against arbitral award"), an application for the setting aside of an arbitral award may not be made once three months have elapsed from the date on which the party making that application had received the award. While the South African courts have not, as yet, dealt with this provision, there may be an argument that it may be contrary to public policy to incorporate a tacit time-bar from Article 4 of the Act that would operate to prevent a party from exercising its statutory rights to challenge an award within three months of such award being handed down in the case of procedural unfairness.

As such, under the Act, should a party assert that a remote process was procedurally unfair and has resulted in an injustice, a party likely has a period of three months to raise the relevant grounds challenging the award. Such grounds include circumstances where the arbitral procedure adopted was not in accordance with the agreement between the parties, or that the award is in conflict with the public policy of the South Africa. An award will be in conflict with the public policy of the Republic if: (i) there was a breach of the arbitral tribunal's duty to act fairly in connection with the making of the award which *has caused or will cause* substantial injustice to the party advancing an application to set aside the award; or (ii) the making of the award was induced or affected by fraud or corruption.

Parties would, however, be well-advised to object as soon as the remote hearing is contemplated in either event.

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: The party alleging an unfair process would be required to prove this.

Although there is no express right to a physical hearing in South African law, there may be instances where a right arises because there would otherwise be a material violation of public policy and/or the due process principle. In such a case, the party alleging that circumstances justifying such a conclusion exist, would be required to prove these.

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: Possibly but only in very narrow circumstances.

As noted above, the Act provides that an arbitral award may be set aside if, *inter alia*, the arbitral procedure was not in accordance with the agreement of the parties, or if the award is in conflict with the public policy of the South Africa. Therefore, if the parties specifically agree that the hearing should take place physically and, at the instance of the arbitrator, without the parties' consent, a physical hearing was not held or the arbitral tribunal's failure to conduct a physical hearing resulted in one of the parties not receiving a fair hearing, which, in turn, resulted in "substantial injustice" to that party, then there may be a basis for the setting aside of an award.

With regards to the "fairness" ground, it would likely only be in exceptional circumstances that a remote hearing would result in a hearing so unfair as to result in substantial injustice. In fact, provided that the remote hearing allows both parties to effectively and equally participate in the proceedings (which will require that certain minimum basic requirements, including a stable internet connection, are met) and the arbitral tribunal postpones the hearing where the principles of justice and fairness would direct that it does so (for example, where technical difficulties render the proceedings no longer fair), it would be difficult to demonstrate "substantial injustice" and to set aside any award on this ground alone.

It should also be noted that, in terms of Article 34(4) of the Act, a court, when asked to set aside an award, may, where appropriate and as requested by a party, suspend the setting aside proceedings for a period of time in order to give the arbitral tribunal an

opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

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: As noted above, there is no general express right to a physical hearing in South Africa. If a right is constituted by agreement, or the existence of circumstances in which a remote hearing would result in a hearing so unfair as to result in substantial injustice, the breach of this right may give rise to a ground for refusing the recognition and enforcement of a foreign arbitral award in terms of the provisions of the Act (which substantially ratifies the relevant provisions of the New York Convention).

The Act incorporates the provisions of Article V of the New York Convention, albeit that these provisions are subject to certain adaptions. In this regard, in terms of Article 18 of the Act ("Refusal of recognition or enforcement"), a court may only refuse to recognise or enforce a foreign arbitral award if, *inter alia*: (i) The recognition or enforcement of the award is contrary to the public policy of the Republic (ratification of *Article V(2)(b) of the New York Convention*); (ii) The party did not receive the required notice regarding the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise not able to present his or her case (ratification of *Article V(1)(b) of the New York Convention*); and (iii) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place (ratification of *Article V(1)(d) of the New York Convention*).

It appears that, on an ordinary reading of the above provisions, should an arbitral tribunal not allow a physical hearing to take place contrary to the agreement between the parties, or should it be established that the hearing was unfair to one of the parties, and that tribunal subsequently makes an award pursuant to such a hearing which caused or will cause "substantial injustice" to a party, a court may decline to recognise or enforce such an award.

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: Remote hearings are being conducted in both litigation and arbitration in South Africa.

The South African courts have issued various directives, including the Consolidated Directive mentioned above,[17] which contemplate remote hearings ("the Directives"). The Directives set out fairly extensive requirements and procedures for remote hearings. Under the auspices of these Directives, the courts have embraced the technology required to ensure that such hearings run smoothly and in a manner that is fair to each party (including the use of relevant video-conferencing applications such as MS Teams and Zoom; the use of YouTube and social media for purposes of live streaming certain hearings) and full trials are successfully being run in South Africa via video-conferencing with the relevant measures in place for the advancement of witness evidence and oral argument in a fair and equal manner.

Furthermore, the use of CaseLines, a digital platform for legal documents, which was piloted during the course of 2019, has been accelerated by the pandemic, such that the use of CaseLines is now compulsory in High Court proceedings.

A number of international arbitrations have successfully been run remotely and the Arbitration Foundation of Southern Africa ("AFSA") has developed a detailed Remote Hearing Protocol ("Protocol"), for the conduct of remote hearing arbitrations. While the Protocol is not, in itself, binding in nature, it does constitute a guideline which parties to AFSA arbitrations, or indeed any arbitration, may adopt, to ensure that arbitration hearings are run in a pragmatic and efficient manner during the COVID-19 pandemic and beyond.

[17] See also Supreme Court of Appeal, "Practice Direction – Video or Audio Hearings During Covid-19 Pandemic" (29 April 2020) at <https://www.judiciary.org.za/images/Directives/Directives_-_April_2020/Supreme_Court_of_Appeal/Practice_Direction_-_Supreme_Court_of_Appeal_Video_or_Audio_Hearings_During_COVID-19_Pandemic.pdf> (last accessed 27 January 2021) and Constitutional Court of South Africa, Directions dated 26 August 2020, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiUqt26vLzuAhUMPuwKHf2dDXIQFjABegQIAhAC&url=https%3A%2F%2Fwww.concourt.org.za%2Fimages%2FDirections_Protocol_For_Online_Hearings_2020.docx&usg=AOvVaw2TGkTJOjt_OrOBMPIxijTA> (last accessed 27 January 2021).