



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA  
PROJECTS

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

**UNITED ARAB  
EMIRATES**

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## UNITED ARAB EMIRATES

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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 the United Arab Emirates (“UAE”), Federal Law No. 6 of 2018 on Arbitration (the “UAE Federal Arbitration Law”) governs arbitrations seated in so-called “onshore” UAE (i.e., arbitrations seated in the UAE other than in the so-called “offshore” financial free zones discussed below).<sup>1</sup> The UAE Federal Arbitration Law became effective on 16 June 2018 and is based on the UNCITRAL Model Law. It repealed Articles 203-218 of the UAE Civil Procedures Code No. 11 of 1992 (“CPC”), which previously governed arbitration in the UAE.

As noted above, the UAE Federal Arbitration Law does not apply to arbitrations seated in two financial free zones located in the UAE: the Dubai International Financial Centre (“DIFC”) and the Abu Dhabi Global Market (“ADGM”). The DIFC and ADGM have adopted their own arbitration laws, namely the DIFC Arbitration Law, DIFC Law No. 1 of 2008 (“DIFC Arbitration Law”)<sup>2</sup> and the ADGM Arbitration Regulations 2015

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<sup>1</sup> Available in English at <<https://www.tamimi.com/crm-media-uploader/fileupload/server/php/files/UAE%20Arbitration%20Law%20-%20Federal%20Law%20No%20%206%20of%202018.pdf>> (last accessed 22 April 2021).

<sup>2</sup> Available in English at <[https://www.difc.ae/files/9014/5449/8249/DIFC\\_Arbitration\\_Law\\_2008\\_0\\_1.pdf](https://www.difc.ae/files/9014/5449/8249/DIFC_Arbitration_Law_2008_0_1.pdf)> (last accessed 22 April 2021).

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as amended on 23 December 2020 (“ADGM Arbitration Regulations”),<sup>3</sup> respectively. The DIFC Arbitration Law is largely based on the UNCITRAL Model Law and applies to arbitrations seated in the DIFC. The ADGM Arbitration Regulations are also based on the UNCITRAL Model Law and apply to arbitrations seated in the ADGM.

The UAE Federal Arbitration Law, DIFC Arbitration Law, and ADGM Arbitration Regulations do not expressly provide for a right to a physical hearing in arbitration proceedings. Broadly speaking, unless the parties agree otherwise, in an arbitration seated in the UAE, a tribunal has the discretion to decide whether to hold a physical or remote hearing for the presentation of legal arguments or evidence or whether the proceedings are to be conducted on the basis of documents only.<sup>4</sup>

Notably, the UAE Federal Arbitration Law and the ADGM Arbitration Regulations specifically acknowledge in multiple instances that “modern means of communication and electronic technology” may be used in arbitration proceedings. The foregoing laws are amongst a few national arbitration laws to expressly address the ability of an arbitral tribunal to use technology to conduct hearings.

In this regard, Article 28 of the UAE Federal Arbitration Law, which is entitled “Place of Arbitration”, provides that, “unless otherwise agreed by the parties”, a tribunal may “hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology”.<sup>5</sup> Article 28 corresponds to Article 20 of the

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<sup>3</sup> Available in English at <[https://en.adgm.thomsonreuters.com/sites/default/files/net\\_file\\_store/ADGM1547\\_19075\\_VER231220.pdf](https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_19075_VER231220.pdf)> (last accessed 22 April 2021).

<sup>4</sup> UAE Federal Arbitration Law, Article 33(2): “Subject to any contrary agreement by the Parties, the Arbitral Tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. The Arbitral Tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party”; DIFC Arbitration Law, Article 31(1): “Subject to any contrary agreement by the parties, the Arbitral Tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, 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 so requested by a party”; ADGM Arbitration Regulations, Article 43(2): “The arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument; whether the hearing is to be conducted, in whole or in part, in person, by video conference, telephone or other communication technology; or whether the proceedings shall be conducted on the basis of documents and other materials”.

<sup>5</sup> UAE Federal Arbitration Law, Article 28(2): “The Arbitral Tribunal may, unless otherwise agreed by the Parties: (a) hold arbitration hearings at any place it considers appropriate to conduct any of the arbitral proceedings, while providing the Parties sufficient advance notice of the hearing. (b) hold arbitration hearings with the Parties and deliberate by modern means

UNCITRAL Model Law on the seat of the arbitration but appears to expand the notion contained therein that a tribunal “meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties” to make clear that such hearing can occur through technological means.<sup>6</sup>

Other provisions of the UAE Federal Arbitration Law are even broader. Article 33, which is entitled “Hearings and Written Proceedings”, provides that “[h]earings may be held through modern means of communication without the physical presence of the Parties at the hearing”.<sup>7</sup> Article 35, which is entitled “Witness Testimony”, similarly provides that “[t]he Arbitral Tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing”.<sup>8</sup> Neither of these provisions contains the caveat that they are subject to the agreement of the parties like in Article 28; however, as discussed below, such a caveat may nevertheless apply to Articles 33 and 35.

The application of these provisions is also subject to the principle of equality and the right to be heard. Article 26 of the UAE Federal Arbitration Law, which mirrors Article 18 of the UNCITRAL Model Law, provides that parties must be treated with equality and must be provided a fair and full opportunity to present their cases.<sup>9</sup>

A similar legal landscape is found in the ADGM. The ADGM has recently amended the ADGM Arbitration Regulations 20215 on 23 December 2020, which now incorporate the possibility of conducting hearings, in whole or in part, remotely.<sup>10</sup> In this regard, Article 43 of the ADGM Arbitration Regulations provides that the tribunal shall decide whether to hold oral hearings and whether the hearing is to be conducted in person, by video conference, telephone or other means of technology. Articles 43(2) and

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of communication and electronic technology. The Arbitral Tribunal shall deliver or communicate the minutes of hearing to the Parties”.

<sup>6</sup> UNCITRAL Model Law, Article 20(2).

<sup>7</sup> UAE Federal Arbitration Law, Article 33(3): “Hearings may be held through modern means of communication without the physical presence of the Parties at the hearing”.

<sup>8</sup> UAE Federal Arbitration Law, Article 35: “The Arbitral Tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing”.

<sup>9</sup> UAE Federal Arbitration Law, Article 26: “The Parties shall be treated with equality and each party shall be given a full opportunity to present its case”.

<sup>10</sup> ADGM Arbitration Regulations, Article 34(5): “In exercising its discretion under subsection (4), the arbitral tribunal shall consider the use of technology in order to enhance the efficient and expeditious conduct of the arbitration including, as appropriate, for: (a) the submission, exchange or communication of documents by electronic means; (b) the use of electronic signatures for documents submitted, exchanged or communicated; (c) documents being provided in electronic searchable form; (d) the use of an electronic document review system for disclosure or document production; (e) the use of an electronic document management system for hearings; (f) the use of an online case management platform; (g) conducting hearings, in whole or in part, by video conference, telephone or other communication technology; or (h) enhancing by the use of any other technology the efficient and expeditious conduct of the arbitration”.

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(3) confirm that the tribunal is obliged to hold an oral hearing, subject to any contrary agreement between the parties, where one party requests it.<sup>11</sup>

Article 43(3) extends the use of technology to witness evidence. It confirms that a party may request the tribunal to allow its fact or expert witnesses to attend the hearing by video conference, telephone or other communication technology.<sup>12</sup>

The application of Article 43 is likewise subject to the principle of equality and the right to be heard. Article 33 of the ADGM Arbitration Regulations provides that the parties must be treated equally and be given a “reasonable” opportunity to present their cases.<sup>13</sup>

As in onshore UAE, the use of remote hearings during the COVID pandemic was welcomed, as discussed further in sub-paragraph f.11 below.<sup>14</sup>

Turning to the DIFC, unlike the UAE Federal Arbitration Law and the ADGM Arbitration Regulations, the DIFC Arbitration Law does not contain any express provisions on the use of “modern means of communication and electronic technology” or some permutation thereof. Article 31(1) of the DIFC Arbitration Law does provide that “[s]ubject to any contrary agreement by the parties, the Arbitral Tribunal shall decide whether to hold *oral hearings* for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and

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<sup>11</sup> ADGM Arbitration Regulations, Article 43(2): “The arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument; whether the hearing is to be conducted, in whole or in part, in person, by video conference, telephone or other communication technology; or whether the proceedings shall be conducted on the basis of documents and other materials”; ADGM Arbitration Regulations, Article 43(3): “Unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings (whether in person, or by video conference or telephone or other communication technology) at an appropriate stage of the proceedings, after consulting the parties. If a hearing is held in person, a party shall be free to apply to the arbitral tribunal for one or more of its fact or expert witnesses to attend the hearing by video conference or telephone or other communication technology”.

<sup>12</sup> See fn. 11 above.

<sup>13</sup> ADGM Arbitration Regulations, Article 33: “The parties shall be treated fairly and each party shall be given a reasonable opportunity to present its case”.

<sup>14</sup> See, e.g., ADGM Arbitration Center, “Consultation Paper No. 8 of 2020: Proposed Amendments to the ADGM Arbitration Regulations 2015” (25 November 2020) at <<https://www.adgm.com/documents/legal-framework/public-consultations/2020/consultation-paper-no-8/consultation-paper-no-8-of-2020--adgm-arbitration-regulations.pdf>> (last accessed 20 April 2021) para. 20: “The approach adopted in the Regulations is intended to give parties greater comfort that technology-related solutions are part of ADGM’s arbitration DNA”.

other materials”.<sup>15</sup> To date, however, courts and tribunals have not provided guidance on whether the term “oral hearing” in Article 31(1) requires a physical hearing. The prevailing view among practitioners is that no right to a physical hearing would be implied here.<sup>16</sup> Indeed, as discussed further below, the courts and arbitral tribunals and institutions in the DIFC have embraced the use of remote hearings during the COVID pandemic.

It also bears noting in this regard that Article 19 of the Arbitration Rules of the DIFC-LCIA Arbitration Centre<sup>17</sup> (“DIFC-LCIA Arbitration Rules”), entitled “Oral Hearing(s)”, provides in broad terms that “[a]ny party has the right to a hearing before the Arbitral Tribunal on the parties’ dispute at any appropriate stage of the arbitration (as decided by the Arbitral Tribunal), unless the parties have agreed in writing upon a documents-only arbitration”.<sup>18</sup> Article 19 goes on to clarify that “[a]s to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)”.<sup>19</sup> This would seem to suggest that the concept of a “oral hearing” in the DIFC – at the very least in arbitrations governed by the DIFC-LCIA Arbitration Rules – is not limited to a physical hearing.

Like in onshore UAE and the ADGM, the application of the foregoing DIFC provisions is subject to the principle of equality and the right to be heard. Article 25 of the DIFC Arbitration Law provides that parties must be treated with equality and must be provided a full opportunity to present their cases.<sup>20</sup>

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 inferred. However, not clearly excluded by way of interpretation of other procedural rules of the UAE’s *lex arbitri*.

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<sup>15</sup> DIFC Arbitration Law, Article 31(1) (emphasis added). Article 31(1) goes on to provide that “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 so requested by a party”.

<sup>16</sup> Neil A.F. POPOVIC and James FAZIO, “Insisting on Live, In-person Arbitration Hearings During The Pandemic”, Lexology (2021) available at <<https://www.lexology.com/library/detail.aspx?g=634d0286-07d1-42e0-9494-c2ec75535451>> (last accessed 20 April 2021).

<sup>17</sup> The DIFC-LCIA Arbitration Centre is a joint venture between the DIFC Arbitration Institute (“DAI”) and the London Court of International Arbitration (“LCIA”).

<sup>18</sup> DIFC-LCIA Arbitration Rules, Article 19.1.

<sup>19</sup> DIFC-LCIA Arbitration Rules, Article 19.2.

<sup>20</sup> DIFC Arbitration Centre, Article 25: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.

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The UAE Federal Arbitration Law, DIFC Arbitration Law, and ADGM Arbitration Regulations allow the parties to agree on the procedure to be followed by the tribunal in conducting the proceedings.<sup>21</sup> The UAE Federal Arbitration Law also provides parties the right to subject the procedure to the rules of any arbitration association or institution in the UAE or abroad.<sup>22</sup>

If the arbitration agreement is silent or ambiguous on the requirements of a hearing, either expressly or by reference to arbitration rules, the tribunal has the discretion to adopt the procedure it considers appropriate, which would include whether to hold

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<sup>21</sup> UAE Federal Arbitration Law, Article 23: “(1) Subject to Article 10-2 of this Law, the Parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings, including their right to subject such procedure to the rules in force of any arbitration association or institution in the State or abroad. (2) Where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is party”; DIFC Arbitration Law, Article 26: “(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings. (2) In the absence of such agreement, the Arbitral Tribunal may, subject to the provisions of this Law, conduct the Arbitration in such manner as it considers appropriate. The power conferred upon the Arbitral Tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”; ADGM Arbitration Regulations, Article 34: “(1) The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) The parties are free to agree to adopt, in whole or part, the ADGM Arbitration Centre Arbitration Guidelines, regardless of the seat or the applicable rules of procedure. (3) In the absence of an agreement on the procedure to be followed, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. (4) In all cases, the arbitral tribunal must adopt procedures which are suitable to the circumstances of the particular case, avoid unnecessary delay and expense, and facilitate fair, efficient and expeditious conduct of the arbitration. (5) In exercising its discretion under subsection (4), the arbitral tribunal shall consider the use of technology in order to enhance the efficient and expeditious conduct of the arbitration including, as appropriate, for: (a) the submission, exchange or communication of documents by electronic means; (b) the use of electronic signatures for documents submitted, exchanged or communicated; (c) documents being provided in electronic searchable form; (d) the use of an electronic document review system for disclosure or document production; (e) the use of an electronic document management system for hearings; (f) the use of an online case management platform; (g) conducting hearings, in whole or in part, by video conference, telephone or other communication technology; or (h) enhancing by the use of any other technology the efficient and expeditious conduct of the arbitration”.

<sup>22</sup> UAE Federal Arbitration Law, Article 23(1). See fn. 21 above.

physical hearings.<sup>23</sup> In the case of onshore arbitrations in the UAE, the UAE Federal Arbitration Law provides that “[u]nless otherwise agreed by the Parties, the hearing of witnesses, including experts, shall be conducted under the laws of the State”,<sup>24</sup> while also providing that “[t]he Arbitral Tribunal is afforded discretion to determine the rules of evidence to be followed”.<sup>25</sup> As discussed later, the former stipulation does not suggest that a physical hearing is required for the hearing of witnesses.<sup>26</sup>

It is unlikely that any requirement (e.g., in institutional rules) granting the parties the right to an “oral” hearing would be construed as a requirement to conduct a physical hearing (as discussed above in the previous section). The key principle is for the tribunal to ensure equal treatment and the parties’ right to present their case regardless of whether the hearing is conducted physically or remotely.

#### **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.

The CPC governs the general rules of civil procedure in the UAE, i.e., those relating to UAE court proceedings, including arbitration-related cases (e.g., the challenge or enforcement of an arbitration agreement or an arbitration award) to the extent that those procedures are not covered by the UAE Federal Arbitration Law.

In general, court proceedings in UAE civil matters are largely based on written pleadings, with no oral advocacy.<sup>27</sup> Parties are, however, required to attend a hearing

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<sup>23</sup> UAE Federal Arbitration Law, Article 23(2); DIFC Arbitration Law, Article 26; ADGM Arbitration Regulations, Article 34. See fn. 21 above.

<sup>24</sup> UAE Federal Arbitration Law, Article 33(7).

<sup>25</sup> UAE Federal Arbitration Law, Article 33(8). Article 33(8) goes on to provide that “the admissibility, relevance or weight of evidence adduced by any of the Parties in relation to facts or expert opinion. The Arbitral Tribunal may also specify a time limit, method, and form for the exchange of such evidence between the Parties and a method for its submission to the Arbitral Tribunal”.

<sup>26</sup> See sub-paragraph b.3 below.

<sup>27</sup> Bashir AHMED, Chatura RANDENIYA and Mevan K. BANDARA, “Litigation and enforcement in the United Arab Emirates: overview”, Thomson Reuters Practical Law (2019) available at <[https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=(sc.Default)&firstPage=true)> (last accessed 14 April 2021).



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before the UAE courts. The court hearings are usually short and administrative in nature and generally provide the parties the opportunity to submit written pleadings.<sup>28</sup>

The hearing of witness testimony in judicial proceedings is governed by Federal Law No. 10 of 1992 on Evidence (the “Evidence Law”). The Evidence Law provides that the testimony of a witness shall be oral.<sup>29</sup>

Traditionally, a right to a physical hearing in the UAE courts was inferred from the requirement for a court hearing (or “session”). This changed, however, with Federal Decree No. 10 of 2017, which amended the provisions of the CPC and introduced the use of remote communication technologies in UAE civil proceedings. Federal Decree No. 10 of 2017 now permits videoconferencing in civil court trials at every stage of the proceedings to facilitate trial procedures, though the parties retain the right to request the court to hold physical hearings during any stage of the proceedings (which does not mean that the court is bound by such request).<sup>30</sup> Thus, the UAE courts have themselves moved away from any requirement for a physical hearing.

The CPC does not apply to the DIFC and ADGM. The Rules of the DIFC Courts 2014 (“DIFC Court Rules”) govern the general rules of civil procedure in the DIFC, and the ADGM Court Procedure Rules 2016 (“ADGM Court Rules”) govern the general rules of civil procedure in the ADGM. The DIFC Court Rules and the ADGM Court Rules provide that the court may require parties to attend a hearing.<sup>31</sup> However, both sets of rules are silent on the 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.

As noted above, the CPC no longer governs arbitral proceedings in the UAE. Thus, to the extent that a right to a physical hearing may be construed to exist in the general rules of civil procedure (which, as discussed above, is likely not the case), such a right would not extend to arbitral proceedings in the UAE.

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<sup>28</sup> Jennifer PAGE, “An Overview of UAE court procedure”, Al Tamimi & Company (December 2014/January 2015) at <<https://www.tamimi.com/law-update-articles/an-overview-of-uae-court-procedure/>> (last accessed 14 April 2021).

<sup>29</sup> Evidence Law, Article 44(2). Article 44(1) provides: “The judge presiding the session or any of its members and the delegated judge, as the case may be, shall directly address to the witness the questions he deems useful to reveal the truth”. This presupposes a physical hearing (or “session”).

<sup>30</sup> Civil Procedures Law, as amended, Articles 334 and 337.

<sup>31</sup> DIFC Court Rules, Articles 30.51 and 30.67; ADGM Court Rules, Articles 31 and 128.

Similarly, any right to a physical hearing that may be construed to exist in the general rules of civil procedure of the DIFC and ADGM would likely not extend to arbitral proceedings in the DIFC and ADGM, respectively.

**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

As explained above, there likely is no right to a physical hearing in an arbitration conducted in the UAE, DIFC, or ADGM.

With that said, the principle of party autonomy is enshrined in the UAE Federal Arbitration Law, DIFC Arbitration Law, and ADGM Arbitration Regulations. The parties could, out of an abundance of caution, agree to dispense with the need for a physical hearing and record this agreement in their arbitration agreement or during the course of the arbitration proceedings.<sup>32</sup> Likewise, the parties may agree to adopt institutional rules that empower the tribunal to conduct a remote 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: It depends.

The UAE Federal Arbitration Law, DIFC Arbitration Law, and ADGM Arbitration Regulations all provide that the parties are free to agree on the procedure to be followed by the tribunal in conducting the arbitration proceedings and that *in the absence of any such agreement* the tribunal may conduct the arbitration in the manner it considers appropriate, subject to the provisions of the respective arbitration law.<sup>33</sup> Accordingly, if the arbitration agreement requires the parties to conduct a physical hearing or the parties have expressly agreed to hold a physical hearing, either expressly or by reference to arbitration rules, the tribunal ought not order a remote hearing contradicting the parties'

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<sup>32</sup> This assumes that there is no right under UAE law to a physical hearing in arbitral proceedings; it is generally not permissible for parties to waive their legal rights in advance (save where provided under UAE law).

<sup>33</sup> UAE Federal Arbitration Law, Article 23; DIFC Arbitration Law, Article 26; ADGM Arbitration Regulations, Article 34. See fn. 21 above.

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agreement so as to avoid the possibility of set aside or non-enforceability.<sup>34</sup> However, if the arbitration agreement is silent or ambiguous on whether a hearing will be *physically* held, the tribunal has the discretion to determine to hold one remotely. Further, it is arguable that if the parties' agreement would delay the conclusion of the arbitral proceedings beyond the statutory time limit under UAE law<sup>35</sup> – for example, as a result of restrictions on travel of parties, witnesses or counsel – the tribunal could order a remote hearing in order to timely complete the proceedings.

### 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.

As explained above, there likely is no right to a physical hearing in an arbitration seated in the UAE, DIFC, or ADGM. Moreover, the tribunal has the discretion to decide whether to conduct a hearing at all; the only instance where this discretion would largely be overridden is where the parties (clearly) agree that a physical hearing is to be held.

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<sup>34</sup> Refer to the answers in paragraphs d and e below. The grounds for setting aside an award include (some permutation of) a breach of due process under all three arbitral regimes in the UAE. Article 53(1)(d) of the UAE Federal Arbitration Law provides that a party seeking to set aside an award must establish a circumstance where the party “fails to present its case [...] because the Arbitral Tribunal breached due process [...]”. Article 53(1)(g) goes on to provide that an award can be set aside where “the proceedings were marred by irregularities that affected the award”. Article 41(2)(a)(ii) of the DIFC Arbitration Law provides that an award can be set aside if a party was “unable to present its case”. Article 53(2)(iii) of the ADGM Arbitration Regulations provides for the same.

<sup>35</sup> UAE Federal Arbitration Law, Article 42: “(1) The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. Failing agreement on a specific time limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension. (2) The Arbitral Tribunal and either Party may, if no arbitral award is issued within the time period provided for in paragraph 1 of this article, request the Court to issue a decision extending the time period for issuing the arbitral award or terminating the arbitral proceedings, as necessary. The Arbitral Tribunal may extend such period under such conditions as it shall deem appropriate and its decision in this regard shall be final, unless otherwise agreed by the Parties. (3) Where the Court has issued a decision terminating the arbitral proceedings, either party may bring an action before the court originally competent to entertain it”.

In circumstances where the parties have agreed to hold a physical hearing, but a physical hearing is not held, any party wishing to object must do so in a timely manner during the arbitral proceedings. If a party fails to do so, that party may be precluded from using it as a ground for challenging the award at a later stage.<sup>36</sup>

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 explained above, there likely is no right to a physical hearing in an arbitral proceeding seated in the UAE.

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 likely only on narrow grounds.

As explained above, there likely is no right to a physical hearing in an arbitral proceeding seated in the UAE, DIFC, or ADGM. A party could seek to argue that denying the parties a physical hearing should be regarded as a breach of due process, but

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<sup>36</sup> UAE Federal Arbitration Law, Article 25: “A party who knows that [...] any requirement under the Arbitration Agreement has not been complied with and yet does not state its objection to such non-compliance within the time limit agreed upon, or within seven days of becoming aware of the non-compliance in the absence of such agreement, shall be deemed to have waived its right to object”; DIFC Arbitration Law, Article 9: “A party who knows that [...] any requirement under the Arbitration Agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object”; ADGM Arbitration Regulations, Articles 10(1): “A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner, or if a time limit is provided in any applicable arbitration rules, within such period of time, shall be deemed to have waived its right to object to such irregularity”, and 10.2: “An objection to an irregularity under subsection (1) shall include any objection (a) that the tribunal lacks substantive jurisdiction, (b) that the proceedings have been improperly conducted, (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or (d) that there has been any other irregularity affecting the tribunal or the proceedings”.

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such an argument would be unlikely to succeed unless the parties have specifically and clearly agreed to hold a physical hearing.

The grounds for setting aside an award include (some permutation of) a breach of due process under all three arbitral regimes in the UAE. Article 53(1)(d) of the UAE Federal Arbitration Law provides that a party seeking to set aside an award must establish a circumstance where the party “fails to present its case [...] because the Arbitral Tribunal breached due process [...]”. Article 53(1)(g) goes on to provide that an award can be set aside where “the proceedings were marred by irregularities that affected the award”. Article 41(2)(a)(ii) of the DIFC Arbitration Law provides that an award can be set aside if a party was “unable to present its case”. Article 53(2)(iii) of the ADGM Arbitration Regulations provides for the same.

Accordingly, a party would have to argue that the denial of a physical hearing rose to a level of a breach of due process sufficient to meet the provisions set forth above. Such a showing would be difficult to meet under the UAE Federal Arbitration Law and the ADGM Arbitration Regulations given the provisions on the use of modern means of communication (unless a party could credibly demonstrate that it was precluded from availing itself of such means, which seems highly unlikely in the case of a commercial arbitration).

Despite the absence of any express provisions in the DIFC Arbitration Law, the DIFC courts would be unlikely to conclude that a breach of due process occurred if a physical hearing was not held.

A potential exception would be where the parties have agreed that a physical hearing is to be held. As discussed above, the UAE Federal Arbitration Law, DIFC Arbitration Law, and ADGM Arbitration Regulations all provide as a baseline rule that the parties are free to agree on the procedure to be followed by the tribunal in conducting the arbitration proceedings and that a tribunal may only conduct the arbitration in the manner it considers appropriate in the absence of any such agreement. If a tribunal were to hold a remote hearing notwithstanding the parties’ agreement to hold a physical hearing, then a breach of due process could arguably be said to have occurred (subject to the caveat noted above).

### **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: Possibly, but likely only on narrow grounds.

By way of general background, the onshore UAE courts recognize and enforce foreign awards in accordance with the provisions of international conventions on enforcement of foreign awards to which the UAE is a signatory, including the New York Convention.<sup>37</sup> Cabinet Resolution No. 57 of 2018 (the “Cabinet Resolution”) also governs the enforcement and recognition of foreign arbitral awards in the UAE.<sup>38</sup> The Cabinet Resolution does not derogate from the provisions of the New York Convention.<sup>39</sup> Similarly, the DIFC and ADGM courts recognize and enforce foreign awards in accordance with the provisions of international conventions on enforcement of foreign awards to which the UAE is a signatory, including the New York Convention. If no treaty applies, the courts will rely on common law principles for the recognition and enforcement of the foreign award.<sup>40</sup>

Article V(1)(b) of the New York Convention states that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party provides proof that “[t]he party against whom the award is invoked [...] was [...] unable to present his case”.<sup>41</sup> As discussed above, a party could seek to argue that denying the parties a physical hearing should be regarded as a breach of its right to present its case, but such an argument would be unlikely to succeed given the absence of an established right to a physical hearing unless the parties have specifically and clearly agreed to a physical hearing. A party would have to argue that the denial of a physical hearing rose to a level of a breach of due process. This would be difficult to

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<sup>37</sup> Federal Decree No. 43 of 2006, Article 1: “It has been agreed that the United Arab Emirates joins the convention of New York for Recognition and Enforcement of Foreign Arbitral Awards, the text of which is hereto attached”.

<sup>38</sup> Cabinet Resolution No. 57 of 2018 replaced the provisions of the Executive Regulations of the Civil Procedure Law No. 11 of 1992 (the “Executive Regulations”). The Cabinet Resolution introduced a new expedited regime that governs the enforcement of foreign arbitral awards in the UAE. The Cabinet Resolution confirms that the rules shall be without prejudice to the provisions of conventions between the UAE and other countries in relation to enforcement of foreign awards (including the New York Convention).

<sup>39</sup> Susie ABDEL-NABI, “Enforcement of judgments and arbitral awards in the United Arab Emirates: overview”, Thomson Reuters Practical Law (2021) available at <[\(https://uk.practicallaw.thomsonreuters.com/0-619-4431?transitionType=Default&contextData=\(sc.Default\)\)](https://uk.practicallaw.thomsonreuters.com/0-619-4431?transitionType=Default&contextData=(sc.Default))> (last accessed 14 April 2021).

<sup>40</sup> DIFC Court Rules, Article 24(1)(a); ADGM Arbitration Regulations, Article 55.

<sup>41</sup> New York Convention, Article V(1)(b).

meet under the UAE Federal Arbitration Law because of the provisions on the use of modern means of communication.<sup>42</sup>

Despite the absence of any express provisions in the DIFC Arbitration Law, the DIFC courts would also be unlikely to conclude that a breach of due process occurred if a physical hearing was not held.

Article V(1)(d) of the New York Convention states that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party provides proof that “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”. Here again, no enforceability issues would likely arise unless the arbitral tribunal acted in disregard of the parties’ clear and specific agreement to hold a physical hearing (absent some compelling legal justification).

Arguably, under the New York Convention, there is discretion for UAE courts to refuse to enforce a foreign award if a tribunal does not hold a physical hearing in circumstances where the party had a right to one under the law of country. This may give rise to two grounds for refusing recognition and enforcement of the award under the New York Convention. First, a party may request the court under Article V(1)(b) of the New York Convention to refuse recognition and enforcement of a foreign award on the basis that it was unable to present its case.<sup>43</sup> Second, a party may request the court pursuant to Article V(1)(d) of the New York Convention to refuse recognition and enforcement of a foreign award on the basis that the arbitral procedure was not in accordance with the law of the country where the arbitration took place.<sup>44</sup> While Article V(1)(d) references the applicable law for the alleged violation, Article V(1)(b) does not. Thus, the issue of whether UAE courts would consider refusing enforcement of a foreign award in this scenario would largely depend on which of the two grounds a party relies.

Finally, Article V(2)(b) of the New York Convention states that recognition and enforcement of an arbitral award may be refused if the court finds that “[t]he recognition or enforcement of the award would be contrary to the public policy of that country”.<sup>45</sup> This is also covered under Article 85(2)(E) of the Cabinet Resolution, which governs the recognition and enforcement of foreign awards in the UAE. It is unlikely that the absence of a physical hearing would be considered as a breach of public policy for the purpose of refusing the recognition and enforcement of a foreign award.<sup>46</sup>

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<sup>42</sup> For the avoidance of doubt, the scope of the UAE Arbitration Law does not extend to foreign awards (UAE Arbitration Law, Article 2).

<sup>43</sup> New York Convention, Article V(1)(b).

<sup>44</sup> New York Convention, Article V(1)(d).

<sup>45</sup> New York Convention, Article V(2)(b).

<sup>46</sup> In general, the UAE law provides that “[p]ublic order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual

**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 UAE has been proactive in responding to the challenges presented in relation to physical hearings during the COVID pandemic.

The UAE responded quickly to the challenges posed by the COVID pandemic. In the context of the judicial system, while the Dubai courts initially postponed all court hearings between 22 March and 16 April 2020,<sup>47</sup> they announced on 19 April 2020, that all court hearings would be conducted electronically *via* the Microsoft Teams videoconferencing software.<sup>48</sup> The Abu Dhabi courts similarly issued an administrative decision providing that all court hearings were to be conducted through electronic means.<sup>49</sup>

Shortly thereafter, the UAE Union Supreme Court issued a judgment on 27 April 2020 that may have significance for matters relating to physical hearings in the context of court and arbitral proceedings (even though it was decided outside those contexts).<sup>50</sup> In this judgment, the court concluded that sessions of the UAE Federal National Council, which is the parliamentary body of the UAE, could be held remotely *via* online communications consistent with the UAE Constitution, at least during the COVID pandemic.<sup>51</sup>

Prior to the COVID pandemic, the DIFC Courts had offered an e-bundling platform for the submission of documents to the court. During lockdowns in the UAE, the e-bundling platform allowed the parties to continue filing and submitting documents. In addition, court hearings were held remotely.

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ownership and the other rules and foundations on which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari‘a” (Article 3 of the UAE Civil Code). However, the foregoing is not an exhaustive list. The UAE courts have tended to take a relatively broad view of what constitutes public policy.

<sup>47</sup> Dubai Courts Resolution No. 30/2020, dated 17 March 2020.

<sup>48</sup> Dubai Courts, Government of Dubai, “Dubai Courts resume judicial sessions via video call system” (19 April 2020).

<sup>49</sup> Abu Dhabi Courts Administrative Decision No. 61/2020.

<sup>50</sup> Union Supreme Court, Case No. 2/2020.

<sup>51</sup> The Authors are not aware of any further developments in the UAE and DIFC at the time of writing. The Authors are not aware of any UAE, DIFC or ADGM court cases, in which parties have contested the scope of remote hearings to date. This may be a testament to the fact that remote hearings are sufficient and welcome.



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

The ADGM Courts similarly offer an eCourts platform for the delivery of civil and commercial judicial dispute resolution services. While this feature was launched prior to the pandemic, it proved particularly useful during the pandemic.

Arbitral institutions responded quickly as well. Arbitral institutions in the UAE remained active during the pandemic but encouraged parties to submit documents electronically and to hold remote hearings.<sup>52</sup>

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<sup>52</sup> See, e.g., Dubai International Arbitration Centre, Press Release (26 March 2020) at <<http://www.diac.ae/ideas/resource/Saved.pdf>> (last accessed 22 April 2021).