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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ZIMBABWE

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the* lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Arbitration Act (Chapter 7:15), which came into operation on 13 September 1996, is the principal national arbitration statute in Zimbabwe.[1] Through Section 2 of the Arbitration Act, Zimbabwe adopted with minor modifications the 1985 UNICTRAL Model Law, and included it as a Schedule to the Act. All arbitrations in Zimbabwe must be conducted in accordance with the provisions of the Model Law. The Model Law applies to both domestic and international arbitration.

Article 24(1) of the Model Law provides that:

> "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".

Pursuant to this Article, although arbitral tribunals in Zimbabwe have the discretion to determine whether oral hearings are required, the tribunals must hold oral hearings at appropriate stages of the proceedings "if so requested by a party", unless the parties have agreed that no hearings shall be held.

Whilst the aforementioned Article does not expressly provide for a physical hearing, the consistent practice in Zimbabwe has been to convene a physical hearing whenever an oral hearing is required. Given that the practice of virtual hearings has been non-existent in Zimbabwe to date, an oral hearing has become synonymous with a physical hearing. As a practical matter, virtual hearings would currently be difficult to conduct in

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[1] Official Gazette, Acts, pp. 59-80. Current version available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/45807/122048/F-1571038578/ZWE45807%202006.pdf> (last accessed 5 May 2021).

Zimbabwe because of power outages, poor internet connections, the high costs of internet use, and the absence of other technological, legal, and security requirements.

That said, the Model Law does not preclude virtual hearings. In fact, according to the Supreme Court's interpretation of Article 24(1) in *OK Zimbabwe ltd v Admbare Properties (Pvt)Ltd*, the parties, and absent the parties' agreement, the tribunal, are free to fashion the arbitral proceedings "within the bounds of procedural and substantive fairness":[2]

> "My reading of Articles 19 and 24, taken together, is that the primary determinants of arbitral procedure are the consensus and convenience of the parties themselves. However, where the parties are unable to agree or silent on the matter, the arbitrator or tribunal is at large, within the bounds of procedural and substantive fairness, to conduct the arbitration in such manner as he or it considers appropriate".

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 yes.

A right to a physical hearing could be inferred by way of interpretation within the current Zimbabwean context.

As mentioned in sub-paragraph a.1 above, it is impossible as a practical matter to hold virtual hearings in Zimbabwe at the moment, so the right to an oral hearing established under Article 24(1) of the Model Law is arguably a right to a physical hearing. Pursuant to that Article, it can be inferred that until it is practically feasible to hold virtual hearings in Zimbabwe, a party has a right to a physical hearing, unless the parties have agreed that no hearings shall be held.

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: Yes.

[2] SC55/2017.

The Zimbabwean High Court Rules grant courts broad discretion with regard to hearings. Rule 158, for example, provides that where "there is a conflict of evidence and the matter cannot be decided without the hearing of oral evidence, the court *may*" order oral hearings or make other orders "as the court considers are most conducive to the speedy and inexpensive determination of the matters in issue".[3] Nevertheless, the High Court Rules establish a qualified right to the hearing of evidence. According to Rule 408, "the witnesses at the trial of any action *shall* be examined *viva voce* and in open court, but the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit".[4]

In addition, Rule 408 establishes that parties enjoy the right to cross-examine the witnesses of the other party:

> "Provided that where it appears to the court that the other party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit".

While theoretically, the above provisions of Rule 408 could be understood as providing a right to any oral hearing – whether physical or virtual – the impossibility of holding virtual hearings in Zimbabwe to date, permits the inference that for the time being, the qualified right to an oral hearing established under the High Court Rules in fact establishes the right to a physical hearing.

A recent High Court judgment, *Simalu Mining & Others v. Sibanda*,[5] recognized that parties have the right to an oral hearing to resolve material disputes of fact when it agreed with the respondents' argument that material disputes of fact could only be resolved "by leading *viva voce* evidence". The court emphasized that "serious and material disputes of fact […] cannot be dealt with without oral 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 a general matter, judicial rules of procedure do not extend to arbitration in Zimbabwe. Pursuant to Article 19 of the Model Law, parties are free to agree on the procedure to be adopted in an arbitral proceeding, and failing such agreement, arbitrators enjoy the discretion to develop the procedure they deem appropriate, subject to the

[3] Emphasis added.

[4] Emphasis added.

[5] *Simalu Mining (Pvt) Ltd & Others v Sibanda & 13 Others* (HB 47-20, HC 325/20) [2020] ZWBHC 47 (12 March 2020). See also *Mackintosh (Nee Parkinson) v Mackintosh* (SC 37/18, Civil Appeal No. SC 433/16) [2018] ZWSC 37 (15 June 2018); *Zimbabwe Bonded Fibreglass 1981 (Pvt) Ltd v Peech 1987* (2) ZLR 338 (S).

provisions of the Model Law. The High Court of Zimbabwe has recognized that arbitrators are generally not bound by judicial rules of procedure, holding that unlike arbitrators, "courts are strictly guided, in their application of the law by both substantive law and procedural law rules".[6]

Thus, to the extent that a qualified right to a physical hearing exists in Zimbabwean courts, such right does not extend to arbitration.

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.

As previously noted, Article 24(1) of the Model Law allows the parties to agree not to have an oral hearing. This is also reflected in the rules of the two arbitral institutions in Zimbabwe, the Commercial Arbitration Centre, Harare and the African Institute of Mediation and Arbitration ("AIMA").

AIMA's Rules, which are modelled on the 2010 UNCITRAL Arbitration Rules, make explicit mention of the possibility of virtual hearings. Article 36(4) provides that:

> "The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing".

Article 20(3) of AIMA's Rules also suggests that the parties can agree not to hold an oral hearing:

> "With the agreement of the parties or, if at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials placed before it".

[6] *ZETDC (Private) Limited v Masawi t/a Masawi & Partners Legal Practitioners* (HH 404-20, HC 7501/19) [2020] ZWHHC 404 (17 June 2020).

The decision concerning the need for an oral hearing is typically made after the parties have exchanged pleadings. It is usually only then that they will know whether the matter can be resolved on the basis of the documents filed only.

6. To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

Short answer: No.

It is widely accepted in Zimbabwe that an arbitral tribunal derives its powers from the following:[7] (i) the arbitration agreement; (ii) the agreement of the parties subsequent to the arbitration agreement; (iii) the Arbitration Act; (iv) the common law; and (v) the arbitration rules, if any, governing the arbitration.

Thus, an arbitral tribunal cannot act contrary to the parties' agreement. Where the parties have agreed to a physical hearing, the arbitral tribunal cannot unilaterally decide to hold a remote hearing. Doing so would risk having the award set aside pursuant to Article 34(2)(iv) of the Arbitration Act for contravening the parties' agreement on the arbitral procedure.

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: Likely yes.

A party that fails to raise a breach of the right to a physical hearing during the arbitral proceedings would generally be understood to have waived their right to challenge the award on that ground.

Article 4 of the Model Law specifically establishes the waiver of the right to object:

> "A party who knows that any provision of this Model Law 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 his objection to such noncompliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived the right to object".

[7] Davison KANOKANGA, *Commercial Arbitration in Zimbabwe* (Juta 2020) p. 87.

This is consistent with the law on waiver, which was settled in 1997 in *Chidziva and Others v Zimbabwe Steel Co Ltd*[8] where the court held that:

> "When a person entitled to a right knows that it is being infringed, and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it".

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: It depends.

The principles of natural justice are not a set of rigid, fixed and invariable rules. Although natural justice principles seek to ensure that there is fundamental fairness, an oral hearing is not always required in order to achieve fairness.[9]

Zimbabwean courts have established a high bar for setting aside an award on the basis of a violation of public policy. In *Peruke Investms (Pvt) Ltd v. Willoughby's Investms (Pvt) Ltd*, the Supreme Court observed that "the courts are generally loath to invoke this ground except in the most glaring instances of illogicality, injustice or moral turpitude".[10] Nevertheless, in *Diamond Mining Corporation v Forster Mukwada & 2 Others*,[11] the Labour Court of Zimbabwe set aside an arbitral award on the basis that it was grossly irregular for the arbitrator to have proceeded to issue the award without an oral hearing. The court specifically noted that the absence of a hearing had prejudiced the appealing party, and explained how:

> "An oral hearing was clearly necessary as applicant *in casu* had not had an opportunity to respond to the alleged evidence. The prejudice suffered was evident at the appeal hearing as respondents led evidence from the bar and were clearly unsure of who of the alleged replacements had replaced which respondent and who the other unnamed replacements were and whom they had been employed in place of. This should have happened at the oral hearing. If it had, then the facts would have

[8] *Chidziva and Others v Zimbabwe and Steel Co Ltd 1997* (2) ZLR 368.
[9] See *Crow v Detained Mental Patients Special Board 1985* (1) ZLR 202 (H); Section3(1) and (2) of the Administrative Justice Act (Chapter10:28).
[10] *Peruke Inv. (Pvt) Ltd v Willoughbys Inv. (Pvt) Ltd & Another* (Civil Appeal No. SC 208/14) [2015] ZWSC 11 (18 March 2015).
[11] *Diamond Mining Corporation v. Foster Mukwada and 2 Others* [2014] ZWLC 16.

been clearly before the court. I believe that it was grossly irregular for the arbitrator to proceed to issue the award without the oral hearing, or at least an explanation as to why it was not necessary in the circumstances".

If, however the terms of an arbitration agreement require the holding of an oral hearing, then the tribunal is obliged to hold such a hearing.[12]

Whether or not a breach of a right to a physical hearing constitutes *per se* a ground for setting aside an award will depend on the facts of each case. Where the right is clearly stated in the parties' agreement, and is breached, such a breach will *per se* constitute a basis for setting aside. Absent such clear language requiring a physical hearing, one would have to show that the failure to have a physical hearing prejudiced the complaining party in order to set aside the award.

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: N/A

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: Yes.

The grounds for refusing recognition or enforcement of an award are set out in Article 36 of the Model Law. Pursuant to Article 36(1)(b)(ii) of the Model Law, recognition or enforcement of an arbitral award may be refused if the court finds that recognition or enforcement of the award would be contrary to the public policy of Zimbabwe or there was a breach of the rules of natural justice in connection with the making of the award.

Article 36(3) of the Model Law provides that:

"For the avoidance of doubt and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if:

(a) the making of the award was induced or effected by fraud or corruption; or

[12] See *Machiya v BP Shell Marketing Services (Pvt) Ltd 1997* (2) ZLR 473 (H).

(b) a breach of the rules of natural justice occurred in connection with the making of the award".

As indicated in sub-paragraph d.8 above, Zimbabwean courts have observed that natural justice principles seek to ensure fundamental fairness, and depending on the circumstances, an oral hearing can be required to achieve that.[13]

It should also be noted that Article 36(1)(a)(ii) is also relevant in that it establishes that recognition or enforcement of an award may be refused if the party against whom the award is invoked was unable to present its case. This ground for refusal of recognition or enforcement has rarely been relied upon in Zimbabwe.

f. COVID-Specific Initiatives

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

Short answer: Yes.

Upon the advent of the COVID-19 pandemic, the Chief Justice of Zimbabwe issued Practice Direction No. 1 of 2020 to give directions on the filing of pleadings, process and handling of cases before the courts from 30 March 2020 to 19 April 2020, the period during which the nation was on lockdown.

Pursuant to this Practice Direction, the filing of new cases, process and pleadings was suspended for the duration of the national lockdown. Only initial remands, urgent applications and bail applications could be entertained.

The time limits set by any rule for the filing of process and or pleadings were suspended for the duration of the national lockdown.

Moreover, any event which would have been due within the remaining period of a dies induciae (the timeframe for filing pleadings) that overlapped with the lockdown became due within the same remaining period of the dies induciae, calculated from the first business day after the last day of the lockdown.

All civil cases were deemed to have been postponed as follows: (i) for the Magistrates Court, matters were deemed to have been postponed to the first business day following the last day of the lockdown; (ii) for the Constitutional Court, Supreme Court, High Court, Labour Court and Administrative Court, the matters were deemed to have been postponed to the first day of the second term; (iii) all criminal cases on remand were automatically rolled over for a period of at least 21 calendar days.

All sales in execution were stayed for the duration of the lockdown.

[13] See *Crow v Detained Mental Patients Special Board 1985* (1) ZLR 202 (H).

During Level 2 of the lockdown, instituted on 4 May 2020, the Chief Justice issued Practice Direction No. 3 of 2020, pursuant to which: (i) all courts became operational with effect from 11 May 2020; (ii) registries were open for litigants, legal practitioners and the public on weekdays between 0800 hours and 1500 hours; (iii) the Sheriff was to serve all other process and orders, but was not to carry out evictions, executions or conduct sales in execution for the duration of the lockdown period; (iv) entry into courtrooms was limited to litigants, their legal practitioners, witnesses and members of the press; (v) litigants and other court users were at all times to be subjected to temperature checks and sanitisation of hands at entrances, wear faces mask, avoid person to person contact and maintain social distancing of at least one meter apart.

The Government of the Republic of Zimbabwe published the Presidential Powers (Temporary Measures) (Deferral of Rent and Mortgage Payments During National Lockdown) Regulations[14] granting tenants occupying rented accommodation for residential purposes, a deferral of the obligation to pay their rent during the lockdown as well as protecting them from being subjected to any legal proceedings for the eviction or ejectment from the rented land or premises, the payment of damages in respect of the occupation or purported trespass of the land or premises constituting the rented accommodation during the lockdown period.

The aforesaid statutory instrument also granted a deferral of the obligation to make mortgage repayments for the duration of the national lockdown (and any extension thereof). No mortgagor was to be subject to any legal proceedings for (nor was any court to make any order for) the foreclosure of a mortgage bond or other action for the taking of possession of a mortgaged property or the eviction or ejectment from the land or premises constituting the mortgaged property during the lockdown.

On 31 May 2020, the High Court (Commercial Division) Rules were published. These were established in order to improve the ease of doing business in Zimbabwe, rather than as a result to the COVID-19 pandemic. The said Rules provide that the Commercial Court will be a "fully paperless court" starting on 1 June 2020. However, the Rules do not cater for virtual hearings.

Thus far, no virtual hearings have taken place in Zimbabwe. Oral hearings which involve physical attendance are still the order of the day. Matters which used to be heard in Chambers are now being heard in open court as a result of the pandemic.

[14] Statutory Instrument No. 96 of 2020.