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

PAKISTAN

Hassan Ali

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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: Pakistan's *lex arbitri* does not expressly provide for a right to a physical hearing.

Pakistan's *lex arbitri* is contained in three legislations: (i) the Arbitration Act 1940¹ (the "1940 Act"); (ii) the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011² (the "Foreign Arbitration Act"); (iii) the Arbitration (International Investment Disputes) Act 2011³ (the "Investment Arbitration Act"). None of these legislations expressly provides for a right to a physical hearing in arbitration.

The 1940 Act applies to domestic and international arbitration proceedings seated inside Pakistan.⁴ The 1940 Act is outdated colonial-era legislation that governs almost all aspects of arbitration proceedings, among other things, from the interpretation of arbitration agreement to its enforcement; from the appointment of arbitrators/arbitral tribunal to their challenges and removal; from powers of arbitrators to powers of courts concerning arbitration proceedings; and from challenges of arbitral awards to their enforcement. It is essential to note that the 1940 Act does not explicitly provide for a right to hearing at all. Neither does it explicitly deal with the conduct of the hearing in an arbitration proceeding.

The Foreign Arbitration Act applies to international arbitrations seated outside Pakistan.⁵ The Foreign Arbitration Act was enacted to implement the 1958 Convention

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¹ The Arbitration Act 1940 (Act X of 1940) is available at <<http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-cJab-sg-jjjjjjjjjjjj>> (last accessed 20 November 2020).

² The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (Act XVII of 2011) is available at <<http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2FsaJg%3D-sg-jjjjjjjjjjjj>> (last accessed 20 November 2020).

³ The Arbitration (International Investment Disputes) Act 2011 (Act IX of 2011) is available at <<http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2FsaJs%3D-sg-jjjjjjjjjjjj>> (last accessed 20 November 2020).

⁴ See *Orient Power Co. (Pvt) Ltd vs. Sui Northern Gas Pipelines Ltd* (reported as PLD 2019 Lahore 607).

⁵ *Ibid.*

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on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Unlike the 1940 Act, it does not contain provisions governing the arbitration proceedings. Instead, it deals with the recognition and enforcement of foreign arbitration agreements and foreign arbitral awards. It will be correct to state that the scheme of the Foreign Arbitration Act suggests that the arbitration proceedings be governed by the *lex arbitri* of the seat of the arbitration.

The Investment Arbitration Act applies to international investment arbitrations conducted under the 1965 Convention for the Settlement of Investment Disputes between States and nationals of the other States (the “ICSID Convention”). It exclusively provides for the registration and enforcement of the ICSID awards. Unlike the 1940 Act, it does not contain provisions governing the arbitration proceedings. It will be correct to state that the scheme of the Investment Arbitration Act suggests that the arbitration proceedings be governed under the ICSID Convention, and the rules framed thereunder.⁶

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction’s lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: It is highly unlikely that a right to a physical hearing in arbitration can be inferred from Pakistan’s *lex arbitri*.

There are no such reported cases in Pakistan. It is unlikely that Pakistani courts would read the requirement of granting the parties a hearing – to the extent such provisions exist in the arbitration agreement or the context of the principle of natural justice – as requiring a physical hearing. The main issue under Pakistan’s *lex arbitri* is not whether the hearing is remote or not, but whether it is conducted in such a way as to grant the parties fundamental fair proceedings, which includes providing a reasonable opportunity to the parties to prove their case.⁷ Pakistani courts have generally held that subject to the party’s agreement, the arbitral tribunal has broad discretion to regulate the procedure of arbitration proceedings (including how the hearing will be conducted).⁸ Thus, it will be

⁶ The analysis of whether a right to a physical hearing exists under the Investment Arbitration Act is out of the scope of this report.

⁷ In the case titled *Messrs Hafeez Construction Co. vs. Messrs Javedan Cement Limited* (reported as 1989 CLC 885), the Sindh High Court held that: “Even within the scope of their reference they [arbitrator] have not to conduct the proceedings in such a manner which may amount to mishandling of the Arbitration as is likely to cause some substantial miscarriage of justice”.

⁸ In the case titled *Managing Director, Karachi Fish Harbour Authority vs. Messrs Hussain (Private) Limited* (reported as 2014 CLC 1519), the Sindh High Court held that: “Insofar as

correct to state that the arbitral tribunal's discretion includes the power to hold a remote hearing subject to the condition that the parties are provided with a reasonable opportunity to prove their case.

As noted above, the 1940 Act does not expressly provide for a right to a hearing at all. It is essential to mention that Section 43 of the 1940 Act empowers the court to issue processes to the parties and witnesses whom the arbitrator desires to examine.⁹ Section 43 of the 1940 Act is not interpreted in a manner to infer the party's right to a hearing in an arbitration proceeding. Similarly, Section 43 of the 1940 Act cannot be taken to mean that the parties or witnesses are required to be present physically before the arbitral tribunal in the same room.

Further, under the 1940 Act, the arbitral tribunal has been empowered (unless a different intention is expressed in the party's agreement) to administer the oath to parties and/or witnesses appearing before it in the arbitration proceedings.¹⁰ This again cannot be interpreted to require the physical presence of the parties or the witnesses before the arbitral tribunal.

The 1940 Act, by upholding the principle of party autonomy, allows the parties to agree on the procedure for arbitration proceedings. Unless a contrary intention appears from the party's agreement, the provisions of the First Schedule of the 1940 Act are implied in the arbitration agreement.¹¹ The First Schedule of the 1940 Act is also silent

the other objections raised by the learned counsel for the appellant are concerned, we are of the view that the learned Sole Arbitrator has the authority to regulate its own procedure, and is not bound to follow any specific procedure, subject to the condition that the parties are allowed to lead their evidence as well as opportunity to contest the claims".

⁹ Section 43 of the 1940 Act ("Power of Court to issue processes for appearance before arbitrator") is reproduced herein: "(1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it. (2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, of guilty or any contempt to the arbitration or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offices in suits tried before the Court. (3) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents".

¹⁰ Section 13 of the 1940 Act ("Powers of arbitrator") is reproduced herein: "The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to: (a) administer oath to the parties and witnesses appearing; (b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court; (c) make the award conditional or in the alternative; (d) correct in an award any clerical mistake or error arising from any accidental slip or omission; (e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary".

¹¹ Section 3 of the 1940 Act ("Provisions implied in arbitration agreement") is reproduced herein: "An arbitration agreement, unless a different intention is expressed therein, shall be

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on the right to a hearing in an arbitration proceeding.¹² Entry No. 6 of the First Schedule requires the parties to submit themselves (if required by the arbitral tribunal) to be examined by the arbitral tribunal on oath.¹³ Once again, this provision cannot be interpreted to mean that the parties are required to be physically present before the arbitral tribunal in the same room.

The Pakistani courts have repeatedly held that the arbitral tribunal is entitled to decide the procedure for conducting the arbitration proceedings unless the parties agree differently.¹⁴ However, the procedure so applied by the arbitral tribunal should conform to the principle of “natural justice” and must be fair to the parties.¹⁵

deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference”.

¹² As explained above, First Schedule provides for the terms that are implied in the arbitration agreement, if there is no agreement between the parties after the arbitration agreement or the arbitration agreement is silent.

¹³ Entry No. 6 of the First Schedule of the 1940 Act is reproduced herein: “The parties to the reference and all persons claiming under them shall subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators, or umpire may require”.

¹⁴ For reference, see fn. 8 above. Further, in the case titled *Province of Balochistan vs. Messrs Tribal Friends Company* (reported as PLD 1986 Quetta 321), the Balochistan High Court held that: “There is no cavil to the proposition of law that arbitrator can adopt his own procedure and is not bound by technicalities, or cumbersome procedure applicable for the disposal of case before judicial forums. At the same time, it cannot be assumed, that arbitrator would merely grope in the dark, or would decide by which guess or toss”.

¹⁵ In the case titled *Haji Tayyab and others vs. Eastern Textile Mills Limited, Chittagong and others* (reported as PLD 1970 Karachi 357), the Sindh High Court held that: “Although the arbitrator is allowed considerable latitude in the procedure to be followed by him at the bearing, it is his paramount duty to afford the parties a reasonable opportunity to know the case against them. He cannot condemn a party without letting him know the case. If he makes an award without complying, with this elementary principle of natural justice, he does so at the risk and peril of award being set aside on grounds of misconduct. It has been repeatedly held that unless the terms of reference dispense with holding an enquiry, the right of hearing is to be presumed. In any case, the arbitrator cannot hold secret enquiries behind the back of the parties and if he does so the award will be vitiated”. In the case titled *Sh. Saleem Ali vs. Sh. Akhtar Ali and others* (reported as PLD 2004 Lahore 404), the Lahore High Court held that: “Though not bound by the technical rules of evidence, but if an arbitrator acts arbitrarily or unreasonably, the award will be invalid. If the procedure adopted by any arbitrator is opposed to natural justice, inasmuch as he does not hear both the parties fairly, or records evidence in the absence of either party, the Award will be a nullity in the eye of law”. In the

According to the judgements of Pakistani courts, the principle of natural justice applies to all proceedings, whether judicial, arbitral, or administrative.¹⁶ In the context of arbitration, the principle of natural justice has been interpreted to mean (i) providing a party with a reasonable opportunity of proving its case (ii) before an impartial and independent tribunal.¹⁷ As per Pakistani Courts, “providing a party a reasonable opportunity to prove its case” means that the hearing in an arbitration proceeding has to be presumed unless the parties agree otherwise.¹⁸ This again does not mean that the physical hearing has to be presumed. The mode, manner and the stage of the hearing will be determined by the arbitral tribunal.¹⁹

Having said that, it is worth mentioning that the Pakistani courts have upheld (in case the arbitration agreement provided expressly so) those arbitral awards based only on documentary evidence, without having held an evidentiary hearing at all.²⁰

The fairness of the procedure so adopted by the arbitral tribunal will also depend on the circumstances of each case. In this regard, it has been held that the arbitral tribunal

case titled *Chairman Wapda and another vs. Messrs Syed Bhais (Private) Limited* (reported as 2011 CLC 841), the Lahore High Court held that: “Record shows that the normal procedure was followed by the arbitrator and all the pleas and objections raised by the parties were considered and answered accordingly. Neither there was any violation of any principle of natural justice nor was any conclusion drawn in a hasty manner. The arbitrator in the circumstances had not acted capriciously or arbitrarily”.

¹⁶ In the case titled *Gemal to Middle East FZ-LLC vs. Federation of Pakistan* (reported as 2020 CLD 151), the Islamabad High Court held that: “In all proceedings by whomsoever held, whether judicial or administrative, the principle of natural justice has to be observed if the proceedings resulted in consequences affecting the person or property or other rights of the parties concerned. Without participation of a party affected by an order or a decision amounts to an action without lawful authority. The requirement of audi alteram partem is not confined to proceedings before Courts but extends to all proceedings by whomsoever held which may affect a person or property or other rights of the parties concerned in the dispute. The principles of natural justice must be read into each and every statute unless and until it is prohibited by the statute itself”. The same principle has been upheld by the Pakistani courts in the cases reported as 2017 CLD 1483, 2016 CLC 1805, PLD 2014 Lahore 167, 2014 YLR 1331, 2011 YLR 2710, 2001 CLC 820. For further reference, please see fn. 14 above.

¹⁷ For reference, see fn. 14 and fn.15 above.

¹⁸ For reference, see fn. 14 above.

¹⁹ In the case titled *Zeeshan Ur Rehman vs. Ghulam Ishaq Khan Institute of Engineering and Technology* (reported as 2011 YLR 2710), the Peshawar High Court held that the “mode, manner and the stage of providing an hearing [under the principle of natural justice] would depend on the circumstances of each case”.

²⁰ In the case reported as PLD 1968 Dhaka 913, the Dhaka High Court refused to set aside an arbitral award on the ground that the rules for conducting the arbitration expressly provided that the dispute could be settled without taking into account the oral evidence or holding any hearing.

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cannot record evidence in the absence of the other party.²¹ Further, the arbitral tribunal is not allowed to conduct the arbitration proceedings in a manner that might result in “substantial miscarriage of justice”.²² In the context of holding a physical hearing or not, it can be reasonably assumed that the arbitral tribunal may be required to take into consideration certain factors. These factors may include the party’s access to reliable modern communication technologies, the potential delay caused if the hearing is held physically, the comparison of costs for holding a remote hearing as opposed to a physical hearing, and the risk of arbitral tribunal’s inability to assess the credibility of the witness or expert evidence given remotely.

From the aforesaid, it will be correct to state that mere non-holding of a physical hearing (and mere holding of a remote hearing) will not likely be deemed a violation of the principle of natural justice. The party, challenging the arbitral award on the ground of non-holding of a physical hearing, has to prove the prejudiced caused to it which deprived it of proving its case.

As far as the Foreign Arbitration Act is concerned, the scheme of the law suggests that the arbitration proceedings will be governed by the *lex arbitri* of the seat of the arbitration. Therefore, the Pakistani Courts (as discussed in more details hereinbelow) will mostly like recognise and enforce arbitral awards if the arbitration proceedings conform to the *lex arbitri* of the seat of arbitration.

From the aforesaid analysis, it is highly unlikely that a right to physical hearing can be inferred from Pakistan’s *lex arbitri*.

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: Maybe, but to the extent such right exists, it is subject to significant exceptions.

Pakistan’s civil procedure is governed primarily by the Code of Civil Procedure, 1908 (the “CPC”), and hearing is considered an integral part of the civil procedure in Pakistan. While the CPC does not expressly provide a right to a physical hearing, it is commonly understood that hearings in civil procedure are to be held physically in a

²¹ In the case reported as PLD 1971 AJ&K 127, the Supreme Court of Azad Jammu & Kashmir held that if the evidence is recorded in the absence of a party, then the award is liable to be set aside on the ground of the misconduct of the proceedings.

²² For reference, see fn. 7 above.

courtroom.²³ On the other hand, the recent trend shows that the Pakistani courts have allowed remote hearings (especially the evidentiary hearings) in certain circumstances to be held through video link (*via* Skype).²⁴ In this regard, Pakistani courts have relied on Section 164 of the 1984 Qanoon-e-Shahadat Order, i.e., Pakistan’s evidence law, which empowers the courts to record evidence through modern devices.²⁵ Therefore, it

²³ For example, Order XVIII (“Hearing of the Suit and examination of witnesses”) Rule 3 of the CPC states that: “The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge”.

²⁴ The Supreme Court of Pakistan, in the case titled *Naimatullah Khan Advocate and others vs. the Federation of Pakistan* (reported as 2020 SCMR 513), conducted the hearing through video-link. Further, the Lahore High Court, in the case titled *Salman Ahmad Khan vs. Judge Family Court, Multan and Others* (reported as PLD 2017 Lahore 698), denied a challenge to the order passed by the Family Court to record the evidence through video-link of a particular witness residing outside Pakistan. In this case, the Lahore High Court sought guidance from Section 164 of the 1984 Qanoon-e-Shahadat Order (Order No. X of 1984) which provides the Pakistani law that regulates, *among other things*, the admissibility and recording of evidence by the Courts. In addition to the civil law cases, there are many reported criminal law cases wherein the Pakistani Courts have conducted hearing (and recorded witness’ testimony) through video-link. Holding of the remote hearing, through video-link, in criminal cases by the Pakistani Courts shows that there is no fundamental requirement in the Pakistani legal system to hold the hearing physically. In the criminal law context, the Supreme Court of Pakistan, in the case titled *Salman Akram Raja and another vs. Government of Punjab and others* (reported as 2013 SCMR 203), held that in appropriate cases the evidence of rape victims can be recorded through video-link. The Lahore High Court, in the case titled *Munawar Hussain and another vs. the State* (reported as 2020 PCrLJ 1184), not only allowed the recording of witness testimony through the video-link, but also laid down the protocols to be followed for the conduct of such hearing. The Court, among other protocols, held that “the court must not make direction for examining a witness through video-link if (a) the necessary facilities are not available or cannot reasonably be made available, or (b) the Court is satisfied that the evidence can more conveniently be given or made in the courtroom, or (c) the Court is satisfied that the direction would be unfair to any party to the proceedings, or (d) the Court is satisfied that the person in respect of whom the direction is sought would not give evidence or make the submission”. There is only one reported case titled *Waheed Shah and others vs. Shahzad and others* (reported as 2020 YLR 718) in Pakistan (and that too in criminal law context) wherein the Peshawar High Court refused to give permission for recording of evidence through video-link on the ground that the criminal procedural law does not expressly grant the court power to allow recording of evidence through video-link.

²⁵ Section 164 of the 1984 Qanoon-e-Shahadat Order states that: “In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques”.

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is unclear whether a right to a physical hearing exists in Pakistan.²⁶ To the extent it exists, it will be correct to state that it comes with significant exceptions allowing for remote hearings in exceptional circumstances.

The most significant development in this regard took place in the month of May 2019 when the Supreme Court of Pakistan for the first time heard an entire case through video-link.²⁷ During the current COVID19 pandemic, the Supreme Court of Pakistan has extensively held hearings through video-link.²⁸ In addition to the Supreme Court of Pakistan, the Islamabad High Court and the District judiciary in Islamabad have also been hearing cases during the pandemic through video-link.²⁹

Before the Supreme Court of Pakistan initiated a hearing through video-link, from 2016 onwards, several courts were established throughout the province of Punjab to enable witnesses to record their evidence through video-link.³⁰

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

²⁶ Recently, the Governor of the Punjab promulgated the Punjab Commercial Courts Ordinance 2021 (Ordinance No. XIX of 2021) through which specialized Commercial courts (having jurisdiction over commercial matters) were established. Section 9 of the aforementioned Ordinance authorizes the Government of Punjab (in consultation with Chief Justice of the Lahore High Court) to frame rules for “filing of pleadings and written submissions and hearing of parties including recording of evidence” through electronic means. No such rules have been framed so far. However, this provision can be used to corroborate the argument that a right to physical hearing is not recognised under the Constitution of Pakistan.

²⁷ Supreme Court of Pakistan, “E-Court System Successfully Launched in Supreme Court”, Press Release No. 24/2019 (27 May 2019) at <<https://www.supremecourt.gov.pk/e-court-system-successfully-launched-in-supreme-court/>> (last accessed 20 November 2020).

²⁸ Supreme Court of Pakistan, “Address by Mr. Justice Gulzar Ahmed Hon’ble Chief Justice of Pakistan at the Opening Ceremony of the New Judicial Year 2020-21 of the Supreme Court of Pakistan Held on 14th September, 2020 at the Supreme Court Building, Islamabad” (2020) available at <<https://www.supremecourt.gov.pk/address-by-mr-justice-gulzar-ahmed-honble-chief-justice-of-pakistan-at-the-opening-ceremony-of-the-new-judicial-year-2020-21-of-the-supreme-court-of-pakistan/>> (last accessed 20 November 2020).

²⁹ Islamabad High Court, “E-Court Facility in Islamabad High Court”, Circular No. 252.ARJ (11 June 2020) at <http://mis.ihc.gov.pk/frmDetail.aspx?Id=213&fbclid=IwAR1DRND0msu7HGmoOo89QJ2N5Y4n_-mdK5ryvHIV1wQWUO0qJYY96afW3zs> (last accessed 2 May 2021). For more information, see Saqib BASHIR, “E-Courts Start Hearings in Islamabad”, The Express Tribune (14 May 2020) at <<https://tribune.com.pk/story/2221021/1-e-courts-start-hearings-islamabad>> (last accessed 20 November 2020).

³⁰ See Malik ASAD, “E-Courts to Make Justice More Accessible”, Dawn (9 July 2016) at <<https://www.dawn.com/news/1269640>> (last accessed 20 November 2020).

Short answer: No.

The Pakistani courts have repeatedly held that the rules of civil procedure do not apply to the arbitration proceedings.³¹

Having said that, it is worth mentioning that the holding of remote hearing by the Pakistani courts can be used to corroborate the proposition that remote hearings do not violate any fundamental requirements set by the Pakistani legal system for hearings in general and are, therefore, fully compatible with Pakistan's *lex arbitri* in particular.

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 noted above, the right to a physical hearing in arbitration does not exist in Pakistan. Assuming that it does exist, the parties at any stage of the arbitration would be free to agree to waive such right. They can further agree to hold hearings remotely (also by adopting institutional rules that allow remote hearings).

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: According to Pakistan's *lex arbitri*, if the arbitral tribunal acts contrary to the parties' agreement, then the arbitral award is liable to be set aside.

The Pakistani courts have consistently upheld the principle of party autonomy. Pakistan courts have regularly held that arbitration is a matter of the contract, and the arbitration agreement is required and will be enforced according to its terms. This rule stands true for both the substantive and procedural matters provided in the arbitration agreement. Suppose the arbitration agreement (either expressly or by reference to arbitration rules) provides a physical hearing in all circumstances. In that case, the

³¹ In the case titled *Premier Insurance Co. (Pakistan) Ltd. Karachi vs. Ejaz Ahmed Khawaja and others* (reported as 1981 CLC 311), the Sindh High Court held that: "The proceedings before the Arbitrators or the Umpire are in the nature of proceedings before a domestic Tribunal and strict compliance of procedural law or the Law of Evidence cannot be insisted upon in such proceedings". For further reference, see fn. 13 above.

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arbitral tribunal could not order for the hearing to be held remotely. Any such order would be considered as misconducting the arbitration proceedings by the arbitral tribunal and could lead to the setting aside of the arbitral award under Section 30 of the 1940 Act.³²

However, if the arbitration agreement is silent or ambiguous on whether the hearing will be physically held, the arbitral tribunal has the discretion to determine to hold one remotely. The Pakistani courts will most likely accept the arbitral tribunal's decision to hold a hearing physically or not and its conduct unless it was fundamentally unfair.

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 noted above, Pakistan's *lex arbitri* does not expressly provide a right to a physical hearing. Assuming that such a right is recognized (as an extension of the "principle of natural justice") for a specific case, a party would have to object during the arbitration proceedings to preserve its objection as a ground for setting aside the arbitral award. Pakistani courts usually refuse to set aside an arbitral award or a challenge to the enforcement of the arbitral award if the resisting party did not raise the impugned arbitral conduct during the proceedings.³³

³² In the case titled *Eckhardt & Co. vs. Muhammad Hanif* (reported as PLD 1993 SC 42), the Supreme Court of Pakistan held that: "In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or *would amount to forcing the plaintiff to honour a different contract*, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business". The same rule was followed by the Islamabad High Court in the case titled *Ovex Technologies (Private) Limited vs. PCM Pak. Limited* (reported as PLD 2020 Islamabad 52). In the case titled *Abdullah Contractor vs. the Water and Power Development Authority* (reported as 2006 YLR 589), the Sindh High Court held that "the failure of the arbitrator in not giving effect to the terms of the contract also constitutes an error apparent on the face of the award".

³³ In the case titled *Karachi Cooperative Housing Societies Union Limited vs. Safia Bai and others* (reported as PLD 1970 Karachi 379), the Sindh High Court held that "the jurisdiction of an arbitrator cannot be completely divorced from the nature of the source which is the agreement of the parties and that a party cannot be allowed to let things drift in the hope of deriving an advantage from them and then ultimately turn round and try to undo all that has happened on coming to know that the hope of getting the benefit has been lost".

Suppose a party fails to object the non-holding of a physical hearing during the arbitral proceedings. In that case, such failure prevents that party from using the non-holding a physical hearing by the arbitral tribunal as a ground for challenging the award under Pakistan's law.

8. *To the extent that your jurisdiction recognises 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 noted above, Pakistan's *lex arbitri* does not expressly provide a right to a physical hearing. Assuming that such a right is recognized in a specific case under the general principle of natural justice, the party seeking to set aside an award must establish a violation of such right *per se*, and the violation of such right prejudices its case.³⁴

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: Highly fact dependant.

A failure to conduct a physical hearing by the arbitral tribunal could constitute a ground for setting aside the award, but only if the hearing was organized and conducted in such a way as to deprive a party of a fundamentally fair proceeding or if the parties had agreed to hold a physical hearing.

The list of grounds for setting aside an arbitral award (having its seat inside Pakistan) is provided in Section 30 of the 1940 Act. Section 30 of the 1940 Act provides that the arbitral award can be set aside if the arbitral tribunal has misconducted itself or the

³⁴ In the case titled *Humayoon Mahmood Khan and another vs. the Province of Sindh* (reported as 2009 CLC 1473), the Sindh High Court with regard to the right of (both physical and remote) hearing, held that: "It is now well-settled principle of law that there is a clear distinction between the two situations, one where the right of such hearing is statutory and the other where' such right is claimed on the basis of principles of natural justice. In the former case the right is absolute and its violation makes the order illegal and not sustainable under law, while in later case, it is not so and exclusion of such right could be expressed or implied and whenever a violation of principles of natural justice is alleged, the court may call upon the party to establish prejudice caused to it before striking down the order".

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arbitration proceedings.³⁵ The Pakistani courts have interpreted the term “misconduct of arbitration proceedings” by arbitral tribunal as adopting a procedure in the arbitration that is “either not warranted by facts or opposed to the principles of natural justice, and implies a breach of duty and non-observance of common rules of justice”.³⁶ The Pakistani courts have further held that the arbitration proceedings are mishandled when the procedure so adopted results in “substantial miscarriage of justice” or are fundamentally unfair to one of the parties.³⁷ The Pakistani courts have further clarified this by holding that, among other things, the arbitral tribunal has misconducted the arbitration proceedings (i) if a party has not been allowed a reasonable opportunity of proving its case, or (ii) if the evidence is recorded in the absence of any party, or (iii) if the irregularities in the proceedings are proved to amount to no proper hearing of the matter of dispute, and are contrary to the principle of equity and good consciousness.³⁸

As noted above, as per the Pakistani courts, “providing a party with a reasonable opportunity to prove its case” means that the hearing in an arbitration proceeding is presumed unless the parties agree otherwise.³⁹ This does not mean that the hearing must be held physically, requiring the parties and witnesses to be in the same room with the arbitral tribunal. In the context of the physical hearing, the Pakistani courts will likely interpret the term “a reasonable opportunity to prove its case” by taking into consideration the facts and the circumstances of that particular case.⁴⁰ In this regard, the Pakistani courts will like to consider, among other things, the factors such as the party’s access to reliable modern communication technologies, the potential delay caused if the hearing is held physically, the comparison of costs in both situations, and the risk of arbitral tribunal’s inability to assess the credibility of the witness or expert evidence given remotely. After this, the Pakistani courts will also likely consider if the remote hearing was conducted in a fundamentally unfair manner or resulted in “substantial miscarriage of justice”.

It is worth mentioning here that the burden to prove (that a party has been deprived of a reasonable opportunity to prove its case in arbitration proceedings by holding a remote hearing) will be on the party seeking to set aside the arbitral tribunal. As noted above, under Pakistan’s *lex arbitri*, the party seeking to set aside an award must not only

³⁵ Section 30 of the 1940 Act (“Grounds for setting aside award”) is reproduced herein: “An award shall not be set aside except on one or more of the following grounds, namely: (a) that an arbitrator or umpire has misconducted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35; (c) that an award has been improperly procured or is otherwise invalid”.

³⁶ For reference, see the judgement of the Balochistan High Court titled *Province of Balochistan and another vs. Malik Hail Gul Hassan* (reported as PLD 1982 Quetta 52).

³⁷ For reference, see fn. 7 above.

³⁸ For reference, see fn. 19 above.

³⁹ For reference, see fn. 14 above.

⁴⁰ For reference, see fn. 18 above.

establish a violation of such right *per se* but such right prejudice its case as to deprive it of a fundamentally fair hearing.⁴¹

From the aforesaid analysis of Pakistan’s *lex arbitri*, it is correct to state that with regard to non-holding of a physical hearing in arbitration proceedings, Pakistani Courts will consider two questions: (i) whether the arbitration agreement has expressly provided for the hearing to be held physically; (ii) whether the remote hearing was held or conducted in a manner that is fundamentally unfair to a party and has caused “*substantial miscarriage of justice*”. Therefore, it is unlikely that the mere non-holding of a physical hearing in arbitration proceedings will result in setting aside the arbitral award.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to 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: Likely not.

It is unlikely that a breach of a right to a physical hearing, if such a right is deemed to exist under the case’s particular circumstances, would lead a Pakistani court to exercise its discretion to refuse enforcement.

When presented with opposition to recognition and enforcement, Pakistani courts will conduct a preliminary review of the issues raised by the party. Further, in reviewing awards, Pakistani courts largely adopt a “pro-enforcement bias”, conducting an extremely “narrow interpretation” of the grounds provided in Article V of the New York Convention.⁴²

There is no reported Pakistani judgement wherein the court has been asked to refuse recognition and enforcement of a foreign arbitral award based on Article V(1)(b) (right of the party to present its case) or Article V(1)(d) (irregularity in the procedure) of the New York Convention.

As far as Article V(2)(b) of the New York Convention is concerned, Pakistani courts have held that refusing recognition and enforcement of the foreign arbitral award on violation of public policy is limited to exceptional circumstances that affect the most fundamental values of a state. As per the Pakistani courts, “the public policy exception allows a Contracting State to safeguard its core values and fundamental notions of

⁴¹ For reference, see fn. 32 above.

⁴² See *Orient Power Co. (Pvt) Ltd vs. Sui Northern Gas Pipelines Ltd*, reported as PLD 2019 Lahore 607.

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morality and justice which may change over time”.⁴³ Because Pakistani courts have itself held hearings remotely, it is highly unlikely that Pakistani courts will refuse recognition and enforcement of the foreign arbitral award under the public policy exception for mere non-holding of a physical hearing.

At this stage, it is worth mentioning that Pakistani courts have held that, to strive for uniformity in the interpretation of the New York Convention, the court should consider the case-law developed by the courts of the other contracting states.⁴⁴ Therefore, it is reasonable to assume that if the recognition and enforcement of an arbitral award are resisted based on non-holding of physical hearing by an arbitral tribunal (by arguing a violation of Article V(1)(b) or Article V(1)(d) or Article V(2)(b) of the New York Convention), the Pakistani courts can seek guidance from the case-law developed in other contracting states.

Additionally, the Pakistani courts can also apply the interpretation of the term “providing a party with a reasonable opportunity to prove its case” made in the context of arbitral awards having their legal seat inside Pakistan to foreign arbitral awards having their legal seat outside Pakistan. As noted above, in this regard, Pakistani courts may likely consider two questions: (i) whether the arbitration agreement has expressly provided for the hearing to be held physically; (ii) whether the remote hearing was held or conducted in a manner that is fundamentally unfair to a party and has caused “substantial miscarriage of justice”.

Therefore, it is correct to state that it is highly unlikely that mere non-holding of a physical hearing may result in the refusal of recognition and enforcement of foreign arbitral awards.

However, it is also probable that Pakistani courts may refuse recognition and enforcement of the foreign arbitral award in Pakistan if the *lex arbitri* provides a right to a physical hearing.

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

⁴³ For reference, see fn. 40 above.

⁴⁴ In the case titled *Abdullah vs. Messrs Cnan Group CPA* (reported as PLD 2014 Sindh 349), the Sindh High Court held that: “It is of course now well recognized that national courts should strive for uniformity in the interpretation of a treaty such as the Convention, and therefore the case-law developed in other jurisdictions can and ought to be taken into consideration by the courts of the States party to such treaty: see, e.g., *Deep Vein Thrombosis and Air Travel Group Litigation* (8 actions) (formerly 24 actions) [2005] UKHL 72, [2006] 1 All ER 786 (at [55] per Lord Mance). The ready availability of material from various jurisdictions in respect of the Convention facilitates this approach, which I respectfully endorse”.

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COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: No significant development, however, the extensive use of video-link by the Pakistani courts to conduct hearing have paved the way forward for establishing e-courts in Pakistan.

As noted above, during the COVID19 pandemic, the Pakistani courts have extensively held remote hearing through video-link (*via* Skype). During this time, there was also a significant increase in the voices asking for the establishment of e-courts (with permission to electronic filing of submission, sending electronic summons, and conducting hearing through video-link). Further, the limitation period for filing submissions was extended in the litigation.⁴⁵ Certain other initiatives were taken to ensure social distancing within the court's premises.⁴⁶

⁴⁵ For reference, see fn. 26 above.

⁴⁶ For reference, see fn. 26 above.