



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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PROJECTS

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

DENMARK

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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 Danish Arbitration Act¹ (henceforth “DAA”) does not provide an express right to a physical hearing. The DAA was enacted in 2005 based on the UNCITRAL Model Law (1985)² (henceforth the “Model Law”), and thus contains many of the same provisions as the Model Law, with only minor differences.

Like the Model Law, the DAA primarily consists of non-mandatory provisions, leaving the conduct of the proceedings to be decided by the parties and the tribunal save for certain mandatory provisions.³ This is reflected in section 19 of the DAA,⁴ which states that the parties are free to agree on the procedure to be followed by the tribunal and that the tribunal, in the absence of such agreement, may conduct the arbitration in the manner it considers appropriate.

It follows from section 24(1) of the DAA⁵ that the tribunal may decide whether to have an oral hearing or whether the case should be decided based on documents only. However, the tribunal is compelled to arrange an oral hearing if a party so requests.⁶ Whether the right to an *oral* hearing entails a right to a *physical* hearing is elaborated

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¹ Law No. 553 of 24 June 2005.

² UNCITRAL, Model Law on International Commercial Arbitration (1985) at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf> (last accessed 30 January 2021). See also Niels SCHIERSING, *Voldgiftsloven med kommentarer*, 1st edn. (Jurist- og Økonomforbundets Forlag 2016) p. 37.

³ The non-mandatory character of the DAA follows from section 2(1) of the DAA.

⁴ Section 19 of the DAA is equivalent to Article 19 of the Model Law.

⁵ Section 24(1) of the DAA is equivalent to Article 24(1) of the Model Law.

⁶ See further N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, p. 340 ff.; Ulrik RAMMESKOW BANG-PEDERSEN, Lasse HØJLUND CHRISTENSEN and Clement SALUNG PETERSEN, *Den civile retspleje*, 5th edn. (Hans Reitzels Forlag 2020) p. 632.

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under sub-paragraph a.2 below. However, it should be noted that this is not a mandatory provision.⁷

The only mandatory provision regarding the conduct of the arbitral proceedings is contained in section 18 of the DAA. This section states that the parties shall be treated equally and each party shall be given a full opportunity to present its case.⁸ These requirements are (under Danish law) interpreted as a right to have access to all documents in the case, as well as having the opportunity to respond to the opponent's claims (the principle of adversarial proceedings).⁹ It also follows from the DAA's sections on setting aside and recognition and enforcement of arbitral awards, which is also known from the Model Law, that an award may be set aside or refused recognition and enforcement if deemed to have been in conflict with due process pursuant to sections 37(2)(1)(d) and 39(1)(1)(d) of the DAA. However, historically the provisions under the DAA on the setting aside or refusing the recognition and/or enforcement of an award have been interpreted rather strictly.¹⁰ It is therefore unlikely that the courts would set aside or refuse the recognition of an award merely based on the fact that the hearing was held remotely, especially given that an arbitration may be decided on the basis of written submissions only.¹¹

As such, both the parties and the tribunal are generally afforded a wide discretion as to whether to conduct the hearing in a written, remote or physical form, as long as the fundamental procedural requirements under section 18 of the DAA are observed.¹²

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*

⁷ This follows from section 2 of the DAA. See also N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, p. 342.

⁸ Section 18 of the DAA is equivalent to Article 18 of the UNCITRAL Model Law. Its mandatory character follows from section 2(1) of the DAA.

⁹ See further N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, p. 296.

¹⁰ *Judgment of Eastern High Court of 3 July 2020* (U 2020.3312) – a lawyer was not deemed to have acted negligently by omitting to advise on the possibility of getting an award set aside based on public policy, as there was very slight to no chances that an application to set aside the award based on public policy would result in the setting aside of the award. *Judgment of Eastern High Court of 30 June 2017* (U 2017.3124 V) – an arbitral award was not set aside as fundamental procedural rights had not been violated. Similar in *judgment of the Supreme Court of 28 January 2016* (U 2016.1558/2).

¹¹ See section 24(1) of the DAA.

¹² See also sub-paragraph a.2 below. Jakob JUUL and Peter FAUERHOLDT THOMMESEN, *Voldgiftsret*, 3rd edn. (Karnov 2017) pp. 48-49. U. RAMMESKOW BANG-PEDERSEN, L. HØJLUND CHRISTENSEN and C. SALUNG PETERSEN, *Den civile retspleje*, fn. 6 above, p. 631.

allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: A right to a physical hearing may neither be inferred nor excluded.

As explained above, the tribunal may in the absence of an agreement between the parties pursuant to section 24(1) of the DAA, decide whether to organise an oral hearing or conduct the proceedings solely based on the documents and other materials submitted by the parties. Should a party request an oral hearing, however, the tribunal is obliged to organise one.

The non-mandatory character of the DAA's section 24 means that the parties may deviate from the above either by agreeing that the hearing *shall* take place – thereby excluding the tribunal's discretion to determine the case solely by documents or other materials submitted by the parties – or by agreeing that no hearing should take place at all.¹³ The DAA does not contain any specific instructions as to *how* to conduct an oral hearing.¹⁴ It follows from section 19(2) of the DAA that the conduct of the oral hearing, absent the parties' agreement to the contrary, is left to the discretion of the tribunal.

It is unsettled whether a right to a physical hearing may be inferred from the concept of a party's right to request an oral hearing in section 24 of the DAA. Witnesses have been allowed to give testimony remotely.¹⁵ However, case law has yet to be published on the question of the entire hearing being held remotely, and it is therefore uncertain how the courts would approach the issue. Moreover, the preparatory works of the DAA do not contain guidance as to the interpretation of the concept of what constitutes an oral hearing.

Case law preceding the current DAA may give some guidance as to how courts would approach the issue of remote hearings.¹⁶ In a *Judgment of the Supreme Court of 15 February 1910*¹⁷ the Supreme Court upheld an arbitral award despite the award being made without oral statement of arguments. Similarly in a *Judgment of the Maritime and Commercial High Court of 10 May 1921*¹⁸ the Court stated that: "There has not in the

¹³ The non-mandatory character of section 24 follows from section 2(1) of the DAA. See also U. RAMMESKOW BANG-PEDERSEN, L. HØJLUND CHRISTENSEN and C. SALUNG PETERSEN, *Den civile retspleje*, fn. 6 above, p. 631.

¹⁴ U. RAMMESKOW BANG-PEDERSEN, L. HØJLUND CHRISTENSEN and C. SALUNG PETERSEN, *Den civile retspleje*, fn. 6 above, p. 632.

¹⁵ Steffen PIHLBLAD and Julie ARNTH JØRGENSEN, "Bevisoptagelse i voldgiftssager – med fokus på Dansk Forening for Voldgifts regler om bevisoptagelse", *Erhvervsjuridisk tidsskrift* (2013).

¹⁶ The cases were all decided when the arbitration law in Denmark consisted only of a single section of the *Danske Lov* (the "Danish Code" – a Danish statute book from 1683), DL 1-6-1. However, the present DAA is based mainly on principles developed through case law preceding the act.

¹⁷ U 1910.240 H.

¹⁸ U 1921.816 SH, p. 818.

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arbitration agreement been specified rules as regarding the arbitral procedure to be followed by the Tribunal. It is thus left to the decision of the arbitrators to decide on this matter, the only condition being that both parties are provided with equal access to present their case”.¹⁹ A later case, *Judgment of the Eastern High Court of 2 December 1966*,²⁰ concerned a request to have an award set aside by reference to the conduct of the arbitral proceedings. During the arbitral proceedings, the tribunal had held separate meetings with the parties. No hearing had taken place with both parties present. The losing party brought the case before the courts with a request that the award be set aside with reference to the absence of a joint hearing. The Eastern High Court did not find that the award should be set aside. The Court reasoned that neither party had made a request for a joint meeting, and the tribunal’s neglect in organising such meeting could therefore not constitute sufficient grounds for setting aside the award. Although the separate meetings with the parties took place in a physical setting, it demonstrates that the courts are pragmatic in their interpretation of the concept of a hearing. The focus is not on the format of the hearing but on the requirements that the parties should have had a full opportunity to be heard.

This reflects the principle still present in the DAA that the DAA does not determine *how* the oral hearing should be conducted; the tribunal’s discretion is subject only to the requirement that the parties should be treated equally and be provided with a full opportunity to present their respective cases. The courts have also generally allowed wide discretion to arbitral tribunals. This opens the possibility for a tribunal to decide that the oral hearing should take place remotely.

On the basis of the above, it is not possible to conclude either that a right to a physical hearing may be inferred, nor that it may be excluded. It can only be said that the tribunal has wide discretion, absent the parties’ agreement to the contrary, in determining whether or how a hearing should take place as long as the parties are provided with an equal and full opportunity to present their respective cases.

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: Not expressly, to the extent that this might be inferred, it is subject to exceptions.

¹⁹ Free translation by the Author.

²⁰ U 1967.728 Ø.

Section 65 of the Danish Constitution²¹ states that the administration of justice should be *public* and *oral* to the greatest extent possible. The principle of an oral hearing follows from the principle that the hearing should be public, as the idea is to provide public access to an oral hearing and thereby ensure that the courts assess the case based on legitimate concerns.²² However, the principles that the administration of justice should take place publicly and orally are not absolute, and it is thus possible to deviate from them.²³ Such is for instance the case in arbitration, which is not public and therefore strictly speaking does not need to be oral.

The principles contained in the Constitution should be seen as a framework for what has later been implemented in the Danish Administration of Justice Act²⁴ (henceforth “AJA”). The principle of a public hearing is expressed in section 28a, according to which all court meetings are public.²⁵ The principle of orality is expressed in section 148(1) of the AJA, according to which a case should be heard orally and that a document-only procedure should only be used to the extent that it is provided for by the law.

That the hearing should be public and oral does not in and of itself necessitate a *physical* hearing. As has been seen in several jurisdictions, live streaming of court meetings could be a means for accommodating these principles. However, the AJA seems to be built on a preconception of an oral hearing, likely owing to the relics of being written before the advent of modern technology. It is therefore – contrary to the DAA – possible to infer a requirement of a physical hearing from the AJA. This is especially seen in the requirements for a party having to appear in court. Although preparatory court meetings are normally held remotely as telephone meetings,²⁶ the starting point in the AJA for hearings is that parties should appear physically unless excused by the court to appear “by means of telecommunication”.²⁷ Whether a party may be excused to appear remotely is based on the courts’ assessment of whether this

²¹ Law No. 169 of 5 June 1953.

²² Henrik ZAHLE, *Grundloven – Danmarks Riges Grundlov med kommentarer*, 2nd edn. (Jurist- og Økonomforbundets Forlag 2006) p. 407; Bernhard GOMARD and Michael KISTRUP, *Civilprocessen*, 8th edn. (Karnov 2020) p. 479; U. RAMMESKOW BANG-PEDERSEN, L. HØJLUND CHRISTENSEN and C. SALUNG PETERSEN, *Den civile retspleje*, fn. 6 above, p. 125.

²³ See also H. ZAHLE, *Grundloven – Danmarks Riges Grundlov med kommentarer*, fn. 22 above, p. 407.

²⁴ Consolidated Act No. 1445 of 29 September 2020.

²⁵ This follows in so far as nothing else has been decided by law or in accordance with the AJA, as also stated in section 28a. See also B. GOMARD and M. KISTRUP, *Civilprocessen*, fn. 22 above, p. 479; Jonas BERING LIISBERG and Marcus RUBIN, *Offentlighed i retsplejen*, 1st edn. (Jurist- og Økonomforbundets forlag 1995) p. 31.

²⁶ Section 353(6) of the AJA.

²⁷ See section 365(4) of the AJA (free translation by the Author). See also section 32c in the AJA according to which a person should be considered to have attended a court meeting, even if having participated remotely.

would be inappropriate.²⁸ There are also different thresholds for letting a party appear in court remotely, depending on whether the party has a representative (typically the party's lawyer) appearing physically in court. Thus, according to section 365(4) of the AJA the court may permit a party, who is represented (physically) in court by someone else, to appear remotely as long as such participation is not "inappropriate".²⁹ More difficult to fulfil is the requirement under section 365(5) of the AJA, according to which a party who does not have a physical representative in court may only appear remotely if such participation "for special reasons is to be considered appropriate".

If permitted to appear remotely, the party should be considered to have appeared in the court hearing. This is supported by section 32c of the AJA, which contains a provision according to which a person should be considered to have attended a court hearing even if joined remotely in so far as this has been approved by the court.³⁰ Failure to appear in court may thus cover both a failure to appear physically or remotely, such as via telephone meeting or videoconference.³¹

Greater leniency is found in how the courts handle witnesses. As a starting point, a witness should testify "orally" at the competent court subject to section 174(2) of the AJA. However, it follows from the same provision that the court may decide whether to allow the witness to testify remotely, for instance via videoconference. The court may even allow witness testimony to be given without video if considerable difficulty is associated with videoconferencing.³² Whether the court will allow remote testimony will depend on the specific circumstances of the case.³³ A relevant factor may be that the

²⁸ Section 365(4) of the AJA.

²⁹ See also the travaux préparatoires in LFF 2006-03-01 No. 168, p. 164.

³⁰ The section was introduced to the AJA by Law No. 538 of 8 June 2006, and relates to the specific provisions by which the courts may allow attendance by videoconference (sections 174, 354, 365, 378, 386 a, 398, 506, 748, 831, 854, 916, 917, 937 and 972 of the AJA). See also the travaux préparatoires hereto, LFF 2006-03-01, No. 168, p. 89.

³¹ U. RAMMESKOW BANG-PEDERSEN, L. HØJLUND CHRISTENSEN and C. SALUNG PETERSEN, *Den civile retspleje*, fn. 6 above, p. 406. For instance, in *Judgment of the Eastern High Court of 21. December 2010* (U 2011.950 Ø) in which the court found that a party had failed to appear (in a telephone meeting) by not having appeared 10 minutes into the telephone meeting and consequently refused to hear the case subject to section 360(1) of the AJA.

³² This follows from section 174(3) of the AJA. See also Jens MØLLER, *Kommenteret retsplejelov og Bruxelles I forordning*, 10th edn. (DJØF 2018) pp. 485-486.

³³ See also the travaux préparatoires in LFF 2006-03-01 No. 168 regarding Section 174, p. 7. Prior case law in which remote testimony has been allowed includes *Judgment of the Eastern High Court of 23. August 2018* (U 2018.3658 Ø) – testimony allowed to be given remotely as the witness at the time of the hearing was abroad on a holiday, as this had only come to their awareness shortly before the hearing. However, in the same case the court rejected witness testimony to be given remotely as regards another witness; *Judgment of the*

witness is not physically situated near to the court (for instance, the witness may be situated in the opposite end of the country or abroad), but regard is also had to the significance of the witness evidence.³⁴

A recent case considered the relevance of these provisions in light of COVID-19. In the *Judgment of Eastern High Court of 15 July 2020*³⁵ a court was faced with the question of whether to allow a witness in the identified risk group for COVID-19 to testify remotely. The Eastern High Court found that the special concerns relating to people in the COVID-19 risk group entailed that the witness could testify remotely via videoconference, as there were no other grounds on which this could be seen as improper or indefensible. Thus, the courts demonstrated a willingness to accommodate the unusual circumstances surrounding COVID-19 and the need for a hearing to take place remotely, at least partially.

In summary, the rules of civil procedure do not expressly state a right to a physical hearing, but it may be inferred that a hearing is expected to take place physically and that a failure to appear in court may lead to adverse consequences, if the party has not been permitted to appear remotely.

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.

An arbitration agreement entails a derogation from the ordinary rules of civil procedure contained in the AJA.³⁶ The arbitrators are therefore not bound by the general rules of civil procedure, even to the extent that a right to a physical hearing might be inferred. As such, it would also be inappropriate to make use of the provisions contained in the AJA – as well as related case law – in the interpretation of whether parties would have a right to a physical hearing under the DAA.

Certain principles are common to both arbitration and the general rules of civil procedure, e.g., the principle of adversarial proceedings.³⁷ However, rules as to how to

Eastern High Court of 28. June 2013 (U 2013.2930 Ø) – two witnesses allowed to testify remotely, as they were residing in the US and their testimony was of a modest scope. Case law *not* allowing for remote testimony includes *Judgment of the Western High Court of 4. April 2012* (U 2012.2428 V) – remote witness testimony not allowed as there had not been provided adequate certainty that the witness could testify in Spain under reassuring circumstances.

³⁴ See also the travaux préparatoires in LFF 2006-03-01, No. 168, p. 90.

³⁵ U 2020.3140 Ø.

³⁶ B. GOMARD and M. KISTRUP, *Civilprocessen*, fn. 22 above, p. 893; S. PIHLBLAD and J. ARNTH JØRGENSEN, “Bevisoptagelse i voldgiftssager”, fn. 15 above.

³⁷ See sections 18 and 37(2)(1)(d) of the DAA.

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conduct a hearing are left entirely to the discretion of the parties and the tribunal, including whether to have a physical or remote hearing.³⁸

c. **Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

Not applicable. As mentioned above, there is no express right to a physical hearing in arbitration under the DAA.

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: Uncertain.

If parties to an arbitration agreement explicitly agreed, either prior to the arbitration or during the arbitration, to conduct the hearing physically, such agreement is *binding* on the tribunal.³⁹ Often parties will not have expressly agreed on the hearing being held physically prior to the dispute (at least before COVID-19), and the question would then be whether the parties implicitly had agreed, i.e., both had been of the expectation, that the hearing was to take place in a physical setting.

It follows from section 19(1) of the DAA that the parties may agree on how to conduct the proceedings. Thus, the tribunal is considered bound by the parties' agreement as to the conduct of the arbitral proceedings irrespective of whether the tribunal would find such agreement inexpedient.⁴⁰ Absent an agreement that the parties wish to have a physical hearing, the tribunal would have discretion not to have a physical hearing pursuant to section 19(2) of the DAA, which states that the tribunal is able to conduct the arbitration in the manner that it deems appropriate.⁴¹

³⁸ See also sub-paragraph a.1 above.

³⁹ See also N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, p. 342.

⁴⁰ B. GOMARD and M. KISTRUP, *Civilprocessen*, fn. 22 above, p. 893; N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, pp. 342-343.

⁴¹ See also sub-paragraphs a.1 and b.1 above.

If the tribunal does not comply with the parties' agreement to have a physical hearing, this could result in the setting aside of the award, or non-recognition or non-enforcement of the award. It follows from section 37(2)(1)(d) of the DAA that an award may be set aside if the arbitral procedure was not in accordance with the parties' agreement. It also follows from section 39(1)(1)(d) of the DAA that the courts can refuse to recognise or enforce an award if the parties' agreed procedure is not followed.

However, the courts are generally quite hesitant to set aside arbitral awards (or refuse their recognition/enforcement). This follows from the implicit requirement in the DAA that the ground upon which setting aside or non-enforcement is based should have had a "significant impact on the award".⁴² This requirement is (partly) a relic of the previous 1972 Arbitration Act⁴³ which in section 7(2) contained the express requirement that the setting aside of an award due to it not being in accordance with the applicable rules of procedure "had a significant impact on the award".⁴⁴ Partly it also follows from the introduction of a pro-arbitration regime with the new Model Law-based DAA, which moves the burden of proof to the party objecting to the award and thus provides the award with presumptive validity. Thus, not any mistake on behalf of the tribunal may result in the setting aside of the award, as long as the fundamental principles found in section 18 of the DAA are observed.⁴⁵ Courts may thus exercise discretion in terms of whether it would be proportional to set aside an award considering factors such as the resources available to the tribunal, the complexity and value of the dispute, etc. One must therefore ultimately ask whether a tribunal's decision to have a remote hearing could significantly impact the award.

Case law has yet to be developed on this issue, and it is, based on the above, uncertain what the courts would decide. However as long as fundamental principles of law, such as the right to respond to the other's claims and equal treatment is observed, courts have wide discretion in determining whether the issue would have been of sufficient importance to significantly impact the award. However, it is certain that an arbitral tribunal would be very hesitant to disregard the parties' agreement regarding a physical hearing as it could result in the setting aside or non-recognition/enforcement of the award pursuant to section 37(2)(1)(d) or section 39(1)(1)(d) of the DAA.

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.

⁴² B. GOMARD and M. KISTRUP, *Civilprocessen*, fn. 22 above, p. 893; J. JUUL and P. FAUERHOLDT THOMMESEN, *Voldgiftsret*, fn. 12 above, p. 294.

⁴³ Law No. 181 of 24 May 1972.

⁴⁴ Free translation by the Author.

⁴⁵ See sub-paragraph a.1 above.

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As mentioned in sub-paragraph a.1 above, the DAA does not contain an express right to a physical hearing. However, if such a right were assumed or in case the parties had made an agreement regarding a physical hearing, it follows from section 3 of the DAA⁴⁶ that a party who positively knows that a provision of the DAA or the arbitration agreement has been breached, and who nevertheless participates in the arbitration without making any objection to it, will be prevented from using the situation as a ground for challenging the award. Such objection should be made without hesitation or, if a time limit is set, within that time limit. A failure to raise a timely objection may prevent a party from relying on the breach in a subsequent challenge to the award.⁴⁷

However, an objection to a breach that relates to a mandatory provision of the DAA cannot be waived under section 3 of the DAA.⁴⁸

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 mentioned in sub-paragraph a.1 above, the DAA does not contain a right to a physical hearing. However, if such a right were assumed, it would likely not *per se* be a ground for the setting aside of proceedings as a violation of public policy under section 37(2)(a) or the due process principle.

To qualify as a violation of public policy it is insufficient for the violation to be a violation of mandatory law, it would have to be a violation of fundamental principles of law (for instance bribery, fraud or similar violations).⁴⁹ The Supreme Court confirmed this position in a *Judgment of 28 January 2016*⁵⁰ where it found that public policy could only be a basis for setting aside an award in very grave or extraordinary violations, and

⁴⁶ Section 3 of the DAA is identical to Article 4 of the Model Law.

⁴⁷ *Judgment of the Supreme Court of 16 December 2019* (U 2010.802 H) – Despite an arbitrator not being deemed impartial and independent, the Supreme Court upheld the award as the objection to the arbitrator had been raised too late in the proceedings.

⁴⁸ N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, pp. 80 ff.

⁴⁹ N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, p. 504. See also the travaux préparatoires in LFF 2005-03-15 No. 127, p. 58.

⁵⁰ U 2016.1558/2 H (“Taewoong judgment”).

that a breach of mandatory law in itself would not be sufficient to find a violation of public policy.⁵¹

To qualify as a violation of due process, a party would have to prove that the violation of a right to a physical hearing had a significant impact on the outcome of the award⁵² or deprived it of equal treatment or a full opportunity to present its case.⁵³

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: Likely not as a separate ground for setting aside an award.

The grounds for setting aside awards pursuant to section 37 of the DAA are exhaustive,⁵⁴ and therefore the failure to conduct a physical hearing does not (in and of itself) constitute a ground for setting aside an arbitral award.

Thus, setting aside an arbitral award due to the failure to conduct a physical hearing requires that the failure to conduct a physical hearing was against the parties' agreement pursuant to section 37(2)(1)(d)⁵⁵ or that it was against public policy pursuant to section 37(2)(2)(b). Both of these situations have been discussed above in sub-paragraphs d.7 and d.8.

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, if due process has been observed.

⁵¹ This has later been affirmed by *Judgment of the Maritime and Commercial High Court of 1 September 2020* (Case No. BS-12270/2019-SHR, unpublished), which reaffirms that the setting aside due to violation of public policy is reserved for extraordinary circumstances.

⁵² See also sub-paragraph c.6 above.

⁵³ Corresponding to section 18 of the DAA. See also sub-paragraph a.1 above.

⁵⁴ The exhaustiveness follows from section 37(1) of the DAA.

⁵⁵ See also sub-paragraph c.6 above.

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The recognition and enforcement of an arbitral award is subject to the general pro-enforcement regime found in the New York Convention, which is also incorporated in the DAA by way of adopting the provisions of the Model Law.⁵⁶

When deciding whether to enforce an arbitral award, the courts will review the ground for refusing recognition or enforcement of the award. The party objecting to the recognition and/or enforcement of the award bears the burden of proof.⁵⁷

It is unlikely that the breach of a right to a physical hearing by itself would amount to a ground for refusing the recognition and enforcement pursuant to Articles V(1)(b) and V(2)(b) for the reasons set out above⁵⁸ regarding setting aside, pursuant to sections 37(2)(1)(b) and 37(2)(2)(b) of the DAA, which correspond to the reasons for refusing recognition or enforcement of arbitral awards in section 39(1)(1)(b) and 39(1)(2)(b) of the DAA. However, it is possible that an award would be refused recognition or enforcement if the denial of a physical hearing prevented a party from having a full opportunity to present its case, as also discussed above.⁵⁹

If Danish courts were to refuse the recognition or enforcement of an award by reference to the breach of a right to a physical hearing, it is most likely that it would take place as a reference to the tribunal not acting in accordance with the parties' agreement pursuant to Article V(1)(d) of the New York Convention, which is equivalent to section 39(1)(1)(d) of the DAA on the recognition and enforcement of arbitral awards. This has also been elaborated above as regards the setting aside of proceedings pursuant to 37(2)(1)(d) of the DAA, which is the equivalent to section 39(1)(1)(d) of the DAA.⁶⁰

In case the award has been set aside by a court at the seat, the general starting point is that the award should also be refused enforcement by the Danish courts subject to section 39(1)(1)(e) of the DAA and article V(1)(e) of the New York Convention.⁶¹ In certain jurisdictions it has been seen that an award set aside at the seat has nevertheless been enforced. It has yet to be seen how Danish courts would handle such situations, although it would be expected that they would be hesitant to enforce such an award.⁶²

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

⁵⁶ See also N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, pp. 527-528; J. JUUL and P. FAUERHOLDT THOMMESEN, *Voldgiftsret*, fn. 12 above, pp. 315-316.

⁵⁷ Section 39(1). See also N. SCHIERSING, *Voldgiftsloven med kommentarer*, fn. 2 above, p. 528.

⁵⁸ See sub-paragraph c.6 above.

⁵⁹ See sub-paragraph a.2 above.

⁶⁰ See sub-paragraph c.6 above.

⁶¹ N. SCHIERSING, *Voldgiftsloven med kommentarer* fn. 2 above, p. 549.

⁶² *Ibid.*, p. 553.

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

Short answer: Yes, but to a limited extent.

The Danish courts have been exempted from the ban on assemblies and enacted emergency operations due to the COVID-19 lockdown in March. This meant that all non-critical cases were postponed. Although most preparatory work and submissions of writs and documents take place remotely, COVID-19 has not resulted in remote hearings before the courts. However, as mentioned above, there have been examples of exempting witnesses from testifying in court if they are at risk.⁶³

Arbitrations take place outside the courts and so have not been affected by the courts' emergency operations. However, most arbitrations with hearings scheduled in the spring of 2020 have been postponed.

The Building and Construction Arbitration Board⁶⁴ (henceforth "BCAB") created a Guidance for the completion of remote meetings or hearings due to the COVID-19 pandemic.⁶⁵ The Guidance includes advice that preparatory meetings should include discussion on the use of digital platforms and that the parties are responsible for their own witnesses' knowledge of the chosen digital platform. Invitation to the digital platform is sent by the BCAB. The BCAB has also allowed for partial remote hearings by providing screens either at its location or at the location of the hearing if elsewhere.

⁶³ See also U 2020.3140 Ø referenced in sub-paragraph b.3 above.

⁶⁴ Voldgiftsnævnet for Byggeri og Anlæg.

⁶⁵ Voldgiftsnævnet for Byggeri og Anlæg, "Vejledning for afholdelse af digitale møder ved Voldgiftsnævnet" (23 October 2020) at <<https://voldgift.dk/wordpress/wp-content/uploads/2020/10/Vejledning-for-afholdelse-af-digitale-m%C3%B8der-ved-Voldgiftsn%C3%A6vnet-oktober-2020.pdf>> (last accessed 30 January 2021).