



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA PROJECTS

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

NORWAY

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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 Norwegian *lex arbitri*, Act of 14 May 2004 No. 25 relating to arbitration (hereinafter the “Norwegian Arbitration Act” or the “Arbitration Act 2004”), applies to domestic and international arbitrations alike.¹ The act is built upon the UNCITRAL Model Law,² and although the Arbitration Act 2004 contains certain modifications, Norway is considered a Model Law jurisdiction.³ The Arbitration Act 2004 does not expressly provide for a right to a physical hearing in arbitration.

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 uncertain, and there are good arguments supporting both views.

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¹ Section 1, first paragraph, of the Arbitration Act 2004. See also Helge J. KOLRUD, Kristin BJELLA, Giuditta CORDERO-MOSS and Anders RYSSDAL, *Voldgiftsloven Kommentarutgave* (Universitetsforlaget 2007) p. 25.

² From the Arbitration Act 2004's *travaux préparatoires* (Ot.prp. no. 27 (2003–2004) Om lov om voldgift): “The ministry proposes that the law, both in terms of systematics and in terms of content, is based on United Nations Commission on International Trade Law's (UNCITRAL) model law for international arbitration [...]. The law shall regulate both national and international arbitration” (free translation by the Authors).

³ UNCITRAL, “Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006”, available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> (last accessed 30 April 2021).

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Any party to an arbitration proceeding may, pursuant to Section 26 first paragraph of the Norwegian Arbitration Act, require that an “oral hearing” be held.⁴ The question then becomes whether or not the right to an oral hearing must be interpreted as a right to a physical hearing.

The Arbitration Act 2004’s regulation of the arbitration proceeding itself is rather limited. By way of example, according to Section 21 the arbitral tribunal shall “conduct the arbitration in such manner as it considers appropriate within the limits prescribed in the arbitration agreement and this Act” (free translation by the Authors). In the event that oral hearings are held, and barring any contrary regulation in the arbitration agreement, one would under normal circumstances expect a tribunal to consider it “appropriate” to have physical hearings in Norway. This is not, however, tantamount to a right to physical hearings, and as the COVID pandemic has illustrated, it might be equally expedient, for instance, to conduct the hearing remotely by use of videoconferencing and other similar technology.

Even though the Arbitration Act 2004 does not explicitly regulate the issue, the traditional view amongst Norwegian legal scholars has been that a right to a physical hearing in arbitration exists under Norwegian law.⁵ This view might stem from the fact that arbitration, whether domestic or international, historically has been handled as an extension of court proceedings.⁶ Consequently, whenever a procedural question arose during the course of an arbitration, it was very often resolved by conferring with the general rules for civil procedure.⁷ This practice, combined with the fact that physical oral hearings have been an integral part of the Norwegian civil procedure,⁸ made the case for a right to a physical hearing during the arbitration proceedings quite compelling.

However, a number of factors have changed since the days when the rules of regular civil procedure unofficially functioned as a gap filling *lex arbitri* in Norwegian law.

⁴ Section 26, first paragraph, of the Arbitration Act 2004: “The arbitral tribunal shall decide whether to hold oral hearings or whether the case shall be decided on the basis of written proceedings. A party may request an oral hearing, which hearing shall then be held at an appropriate stage of the proceedings” (free translation by the Authors).

⁵ See, e.g., Geir WOXHOLTH, *Voldgift*, 1st edn. (Gyldendal Norsk Forlag AS 2013) p. 612: “Oral hearing must, however, satisfy that condition that the parties and the members of the tribunal meet physically [...]” (free translation by the Authors).

⁶ Amund B. TØRUM, “‘Best practice’ i norsk og nordisk voldgift og NOMAs Guidelines” in Henrik UDSEN, Jan S. CHRISTENSEN, Jesper L. HANSEN and Torsten IVERSEN, eds., *Festskrift til Mads Bryde Andersen*, 1st edn. (Jurist-og Økonomforbundets Forlag 2018) p. 287.

⁷ *Ibid.* p. 288. Generally, on the relationship between domestic courts and arbitration in Norway, see Ola Ø. NISJA, “Arbitration and Domestic Courts in Norway: Sibling Rivalry”, 63 *Scandinavian Studies in Law* (2017) p. 261.

⁸ Anna NYLUND, “Civil Procedure in Norway and Covid-19: Some Observations” in Bart KRANS, Anna NYLUND, et al., *Civil Justice and Covid-19* (Septentrio Academic Publishing 2020) p. 39 at p 40.

Firstly, the Norwegian Arbitration Act was enacted in 2004 and came into force on 1 January 2005, and with it, Norway became a Model Law country. The consequence of this enactment is that international sources of arbitration law will have to play, and indeed have played, a far greater role in Norwegian Arbitration practice.⁹ Secondly, the ongoing COVID pandemic has challenged the right to a physical hearing even in the ordinary court system.¹⁰

These developments make the question of whether there exists a right to a physical hearing much more uncertain.¹¹ It is also an interesting point that from an international perspective, the legal status appears clear, i.e., while Article 24 of the UNCITRAL Model Law does give a right to an oral hearing, it does not entail any prohibitions against remote hearings.¹²

If one, however, shifts focus from the international legal sources, and instead looks at the Norwegian sources in a vacuum, one may argue that there indeed does exist a right to a physical hearing under Norwegian arbitration law. Firstly, Section 26, second paragraph of the Norwegian Arbitration Act stipulates that both parties shall be given sufficient notice “of any oral hearing and of any meeting which the parties are entitled to attend”. The term “meeting” is also used in Article 24 of the Model Law, but only in connection with “inspection of goods, other property or documents”.¹³ Read in conjunction, the terms “oral hearing” and “meeting” clearly implies a physical hearing.

⁹ Case law from the Supreme Court illustrates this point. In Rt-2008-1623 the Appeal Committee of the Supreme Court observed: “ICA has in its appeal strongly argued that the interpretation of the Arbitration Act 2004 must be conducted in light of how the Model Law's provisions have been interpreted in other states where it serves as national law. The Appeal Committee agrees that one must rely on non-Norwegian legal sources when interpreting the Arbitration Act 2004. However, the interpretation of the Arbitration Act 2004 must be conducted with the Norwegian legal system as the starting point” (free translation by the Authors). See also HR-2017-1932-A, where the court relied heavily on international scholar Gary Born and a decision from the English House of Lords in the interpretation of Norwegian arbitration rules.

¹⁰ See *Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv 2020*, which is an interim act allowing the court to hold digital hearings in both civil and criminal procedures.

¹¹ It is, at any rate, far too simplistic to merely assert that a right to a physical hearing follows from the right to an oral hearing, as done by G. WOXHOLTH, *Voldgift*, fn. 5 above, p. 612.

¹² See for instance Hyun LIM and Lars MARKERT, “Rethinking Virtual Hearings”, *Kluwer Arbitration Blog* (19 July 2020) at <<http://arbitrationblog.kluwerarbitration.com/2020/07/19/rethinking-virtual-hearings/>> (last accessed 30 April 2021): “Most of the national arbitration laws found in modern states, while specifying the requirement to hold a hearing absent a contrary agreement by the parties, have no specific prohibition against holding these hearings through means of telephone calls or videoconferencing (see, e.g., UNCITRAL Model Law, Art. 24)”.

¹³ Article 24(2) of the Model Law: “The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents”.

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In addition, the Act of 17 June 2005 No. 90 relating to mediation and procedure in civil disputes (hereinafter the “Disputes Act 2005”), which governs the regular rules of civil procedure, distinguishes between a “meeting” and a “remote meeting”.¹⁴

Secondly, even though the right to a physical hearing has been restricted in the ordinary court system, this is merely a temporary change and one that was enacted through a COVID pandemic specific law. As discussed below, there exists no equivalent law for arbitration. Thus, the state of the law with regard to arbitration is likely to be the same now as pre-COVID.

In summary, the Norwegian sources and legal tradition indicate that there exists a right to a physical hearing in arbitration, whereas the international legal framework – upon which the Arbitration Act 2004 is built – suggests otherwise. In considering the relationship between the Arbitration Act 2004 and international legal sources, one cannot ignore that the Act’s *travaux préparatoires* stipulate that the Act to “the highest degree possible should correspond to the Model Law in terms of content and systematics”.¹⁵ Importantly, however, there cannot be complete alignment between the Model Law and the Act – rather, it is only to the highest degree possible. Given the importance of physical hearings in the Norwegian legal tradition, one could make the argument that alignment on this issue is impossible. On the other hand, a perhaps equally compelling counterargument would be that even if this has been the case in the past, the COVID pandemic and the adjustments made to the ordinary civil procedure rules, demonstrate that this traditionalist argument is not a complete barrier to alignment. Moreover, the drafters of the Arbitration Act 2004 clearly assumed that arbitral proceedings would offer a high degree of flexibility,¹⁶ further strengthening the argument that one party should not be able unilaterally to veto a remote hearing in instances where that procedure is considered adequate and clearly preferable.

We believe, at any rate, that the case for there being a right to a physical hearing has been weakened, first, by the COVID pandemic and the associated changes made to the ordinary civil procedure rules and, further, by the widespread use in practice of remote hearings and remote witness testimony. Whether or not it has been weakened to the point that it no longer exists, is a more uncertain question. The uncertainty is illustrated by the fact that even though some scholars have argued for increased use of remote hearings in arbitral proceedings during the ongoing pandemic, the general advice continues to be that practitioners should err on the side of caution and not impose them on unwilling parties, *inter alia* with reference to the possibility of the award being set aside.¹⁷

¹⁴ Section 13-1 of the Disputes Act 2005; see also the Act’s *travaux préparatoires* which also draw the distinction between the terms in NOU 2001: 33 at p 98.

¹⁵ Ot.prp. nr. 27 (2003-2004) at p. 25 (free translation by the Authors).

¹⁶ *Ibid.* p. 100.

¹⁷ Giuditta CORDERO-MOSS, “Covid-19 og tvisteløsning: Er voldgift mer effektivt enn domstolsbehandling?”, 59 Lov og rett (2020) p. 389 at p. 390. Cordero-Moss stresses that it “probably would take a lot” (free translation by the Authors) for an award to be set aside

The honest, albeit perhaps unsatisfactory, answer is that the legal status is uncertain until we have clarification from either Parliament or the Supreme Court. If the Supreme Court was presented with the question, it is likely that international sources – such as case law from other Model Law countries – would play a role in resolving how to interpret the Arbitration Act 2004. This is the case because one of the rationales for the Act was to make Norway a Model Law country and also, from a practical standpoint, it is not desirable that Norwegian *lex arbitri* drifts too far away from that of comparable legal systems. Whether or not the strong physical hearing tradition of Norway would outweigh these arguments premised on international precedents, at a time when the right to physical hearings in the ordinary court system has temporarily been suspended, continues to be an open question.

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: Ordinarily yes, but not during the ongoing COVID pandemic.

The Disputes Act 2005 regulates the general rules for civil procedure. According to the Act “[t]he parties’ submissions to and communications with the court shall take place at court hearings if they are not made in pleadings”.¹⁸ The term “court hearing” is defined *a contrario* in the second and third paragraph by reference to the term “distance meeting”. The Act further stipulates that “[a] distance meeting is a meeting at which not all participants are present in person, but participate using remote communication technology”,¹⁹ and that court hearings may be held as distance meetings in whole or in part when it is specifically provided, or when the parties consent to the court hearing being held as a distance meeting.²⁰ From this, one can infer that a “court hearing” is a hearing for the court where all the participants are physically present. Hence, a physical

solely on the ground that it was held remotely by electronic means. We agree with this stance, but a precondition to even start discussing the setting aside of an award on a certain ground, is that the relevant ground by implication is regarded as a procedural error. As we will return to below, the failure to hold a physical hearing requested by one of the parties would be a procedural error, but not one that in isolation merits the setting aside of the award.

¹⁸ Section 13-1, first paragraph, of the Disputes Act 2005 (free translation by the Authors).

¹⁹ Section 13-1, first paragraph, of the Disputes Act 2005 (free translation by the Authors).

²⁰ Section 13-1, third paragraph, of the Disputes Act 2005 (free translation by the Authors)

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hearing is the default option unless there exist special provisions or an agreement between the parties to the contrary.²¹

After the initial shutdown in Norway on 12 March 2020, a large number of court cases were postponed. On 27 March 2020, the Government passed a provisional administrative regulation giving the courts an additional opportunity to hold hearings remotely.²² This administrative regulation was replaced by a provisional law on 26 May 2020,²³ regulating the use of remote hearings in Section 3, which reads as follows: “The court can decide that a hearing should in whole or in part be held remotely, and that testimonies may be held remotely, if it is deemed necessary and unproblematic”.²⁴

Whether or not these temporary changes to the ordinary civil proceedings will have any lasting impact remains to be seen. Some of the positive effects associated with remote hearings, such as increased flexibility, have already been underlined,²⁵ and it is hard to imagine that the courts will return completely to the practice of the pre-COVID world. This development will be discussed further below.²⁶

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: It does not.

The question of what impact the rules of civil procedure have on arbitration is particularly interesting in a Norwegian context.²⁷ As stated above, the rules of civil procedure have historically had a tremendous impact on arbitration in Norway. While it

²¹ See also Jens E.A. SKOGHØY, *Tvisteløsning*, 3rd edn. (Universitetsforlaget 2017) p. 682-683.

²² Midlertidig forskrift om forenklinger og tiltak innenfor justissektoren for å avhjelpe konsekvenser av utbrudd av Covid-19 2020.

²³ Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv 2020.

²⁴ Section 3, first paragraph, Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv 2020 (free translation by the Authors).

²⁵ The President of the Oslo District Court observed the following when asked if there were any positive effects of the new COVID regulations: “Yes, undoubtedly. For us, as for many other professions, it has been a steep learning curve. We will examine ways of continuing to use these measures, also after Corona. There might be gains to be had, both in terms of resources and in other ways” (free translation by the Authors). Tore LETVIK, “Slik har Norges største domstol løst koronakrisen”, *Juristen* (17 April 2020) at <<https://juristen.no/nyheter/2020/04/slik-har-norges-st%C3%B8rste-domstol-l%C3%B8st-koronakrisen>> (last accessed 30 April 2021).

²⁶ See sub-paragraph f.11 below.

²⁷ Generally, on the relationship between domestic courts and arbitration in Norway, see O.Ø. NISJA, “Arbitration and Domestic Courts in Norway”, fn. 7 above.

has been argued that this arrangement worked satisfactorily, also for international arbitration,²⁸ it could not continue to the same extent if Norway was to become a Model Law jurisdiction. In the Arbitration Act 2004's *travaux préparatoires* it is also made plain that the Act cannot be supplemented with the rules of civil procedure.²⁹

Although the general rules of civil procedure cannot be applied by way of analogy to fill the lacunae of the Arbitration Act 2004, they can provide some guidance.³⁰

Thus, as pointed to above,³¹ the right to a physical hearing enshrined in the Disputes Act 2005 is likely to be given some weight when interpreting the Arbitration Act 2004.

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, unless the agreement concerns consumer relations.

If one were to conclude that there does exist a right to a physical hearing according to the Norwegian Arbitration Act, the basis for this right would be Section 26, first paragraph, which provides a right to an oral hearing. As discussed above, this may arguably be inferred to be a right to a physical hearing.³² However, the rights enshrined in this provision is, as a general rule, waivable. Pursuant to Section 26, fourth paragraph, of the Norwegian Arbitration Act, the parties may “contract out of the provisions of this section, except in consumer relations”.³³

The wording “contract out of” will undoubtedly cover waivers in advance of any dispute as well as after a dispute has arisen.

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?*

²⁸ A.B. TØRUM, “‘Best practice’ i norsk og nordisk voldgift og NOMAs Guidelines”, fn. 6 above, p. 288.

²⁹ NOU 2001: 33 at p. 68: “The general rules of civil procedure that apply for the national courts shall not function as a framework for the arbitration proceedings in the event that the parties have failed to agree” (free translation by the Authors). See O.Ø. NISJA, “Arbitration and Domestic Courts in Norway”, fn. 7 above.

³⁰ O.Ø. NISJA, “Arbitration and Domestic Courts in Norway”, fn. 7 above.

³¹ See paragraphs a and b above.

³² *Ibid.*

³³ Section 26, fourth paragraph, of the Arbitration Act 2004 (free translation by the Authors).

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Short answer: The arbitral tribunal cannot decide to do so. The legal consequence could be that the award is set aside.

Section 21 of the Arbitration Act 2004 stipulates that the tribunal shall “conduct the arbitration in such manner as it considers appropriate within the limits prescribed in the arbitration agreement and this Act”.³⁴ The wording of the provision makes it clear that the tribunal’s view of what is appropriate is subordinate to the arbitration agreement. This understanding is confirmed by Section 43 of the Arbitration Act 2004, which sets out the grounds for invalidity. According to Section 43, first paragraph, letter e, an award may be set aside by the courts if “the arbitral procedure was contrary to law or the agreement of the parties”.³⁵ In other words, as long as the arbitration agreement does not violate any of the mandatory provisions of the Arbitration Act 2004, it is binding upon the tribunal. An agreement to hold physical hearings would not run contrary to any mandatory provision. Consequently, the arbitral tribunal cannot decide to hold remote hearings contrary to the parties’ agreement, irrespective of whether the tribunal considers it more expedient to do so.

If the arbitral tribunal decided to hold a remote hearing contrary to the arbitration agreement, and if it is demonstrated that this had an impact on the ultimate decision of the tribunal, the award can be set aside by the courts pursuant to Section 43 of the Arbitration Act 2004.³⁶ We will return to this question below.³⁷

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, unless the agreement concerns consumer relations.

As noted above, any right to a physical hearing might be asserted on different bases. It could either be through a mutual agreement between the parties to hold a physical hearing or, if the Arbitration Act 2004 is considered to enshrine such a right, one of the parties may unilaterally invoke its right to a physical hearing according to Section 26, first paragraph, of the Norwegian Arbitration Act.

On the premise that the parties have mutually agreed to conduct arbitral proceedings physically, the failure of the arbitral tribunal to conduct one would be regarded as a

³⁴ Section 21 of the Arbitration Act 2004 (free translation by the Authors).

³⁵ Section 43, first paragraph, letter e, of the Arbitration Act 2004 (free translation by the Authors).

³⁶ *Ibid.* The same conclusion is reached by G. WOXHOLTH, *Voldgift*, fn. 5 above, p. 543.

³⁷ See sub-paragraph d.8 below.

violation of Section 21 of the Arbitration Act 2004,³⁸ the ultimate consequence of which can be the setting aside of the award. This is, however, contingent on the parties' raising an objection within a set time frame.

Section 4 of the Arbitration Act 2004 states that where a party is aware that the arbitral proceedings do not comply with any non-mandatory provision of the Act or any provision of the arbitration agreement it "must raise an objection to such non-compliance within the prescribed time-limit or, if no such time-limit has been prescribed, without undue delay. If he fails to do so, he shall be deemed to have waived his right to object" (free translation by the Authors). The provision is applicable since the right to a physical hearing flows from the arbitration agreement. Consequently, a party who fails to raise a breach of the right during the course of the arbitral proceeding will be considered to have waived its right.

On the premise that one of the parties unilaterally invokes a right to a physical hearing and such a right is found to exist, a failure to conduct one would be a violation of Section 26, first paragraph, of the Arbitration Act 2004. Since this is a "non-mandatory" provision, Section 4 would be equally applicable as in the Section 21 cases. However, by reason of Section 26 being mandatory in consumer relations, a consumer who fails to raise an objection would retain his objection and may use it as a ground for challenging the subsequent award.

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: A breach does not constitute *per se* a ground for setting aside the award.

Section 43 of the Arbitration Act 2004 consists of an exhaustive list of grounds for setting aside an award,³⁹ only the most severe of which would automatically lead to the award being set aside irrespective of whether there is a material effect on the outcome of the proceeding. Examples of severe breaches are lack of capacity in Section 43, first paragraph, letter a, or a lack of opportunity for one of the parties to present their views according to Section 43, first paragraph, letter b. Other breaches will have to be decided on the basis of Section 43, first paragraph, letter e, which states that an award may be

³⁸ Section 21, first paragraph, first sentence, of the Arbitration Act 2004: "The arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate within the limits prescribed in the arbitration agreement and this Act" (free translation by the Authors).

³⁹ Section 43 of the Arbitration Act 2004.

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set aside if “the arbitral procedure was contrary to law or the agreement of the parties, and it is likely that this has had an impact on the decision”.⁴⁰

A breach of a right to a physical hearing would, depending on the particular circumstances of the case, be assessed on the basis of either Section 43, first paragraph, letter b, or Section 43, first paragraph, letter e.

As to the former, Section 43, first paragraph, letter b, is intended to ensure an adversarial proceeding,⁴¹ which is an imperative component of the right to a fair hearing and due process.⁴² In Norwegian legal theory, the principle is typically held to consist of four components: (i) the right to present statements and evidence, (ii) the right to get to know the counterparty's statements and evidence, (iii) the right to be given sufficient notice of steps during the proceedings and (iv) the chance to comment on the counterparty's argumentation and evidence.⁴³ The Supreme Court has emphasized the importance of this principle in arbitration, since the arbitrators may have non-judicial backgrounds, and therefore may be more inclined to give weight to facts or information that were not expressly argued during the course of the arbitral proceeding, contrary to the adversarial principle.⁴⁴ Another important point is that many of the general rules of civil procedure have safeguarding of the adversarial principle as their aim.⁴⁵ Although they do not directly apply to arbitration, the Supreme Court has held that the adversarial principle shall be equally observed in an arbitral proceeding as in a regular court proceeding.⁴⁶

However, the mere existence of a failure to hold physical hearings would not be sufficient to set an award aside pursuant to Section 43, first paragraph, letter b. Said failure must have resulted in or accentuated a failure to let both parties sufficiently present their cases through, for example, a remote hearing conducted electronically. Provided that the tribunal puts adequate measures in place, such as a video conference where all sides get sufficient time to present their case, it is unlikely that a court would find this arrangement in breach of Section 43, first paragraph, letter b.

⁴⁰ Section 43, first paragraph, letter e, of the Arbitration Act 2004 (free translation by the Authors).

⁴¹ G. WOXHOLTH, *Voldgift*, fn. 5 above, p. 871.

⁴² As observed by, for example, the European Court of Human Rights in *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 40, 3 March 2000: “However, the concept of a fair hearing also implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision”.

⁴³ Anne ROBBERSTAD, *Sivilprosess*, 3rd edn. (Fagbokforlaget 2015) p. 8.

⁴⁴ One may question the validity of this concern, but it was at the forefront in the landmark decision Rt-2005-1590.

⁴⁵ Examples include Sections 1-1, third subparagraph, 9-6, first paragraph and 11-1, third paragraph, of the Disputes Act 2005.

⁴⁶ Rt-2005-1590 at 29.

Section 43, first paragraph, letter e, consists of two elements. Firstly, the procedure must run “contrary to law or the agreement of the parties” and secondly it must be “likely that this has had an impact on the decision”.⁴⁷ The provision is general in nature and is intended to cover procedural errors that are not encompassed by the other alternatives in Section 43.⁴⁸ The first prerequisite would be satisfied if the parties agreed to hold a physical hearing and the tribunal failed to do so as this would be a procedure contrary to the parties’ agreement. The second condition would be more challenging to fulfil. It is certainly possible to imagine that a failure to hold physical meetings could have an impact on the decision, but such an outcome would be easily avoided by a diligent tribunal. If, as mentioned above, the tribunal was careful to implement measures to remedy the negative effects of not meeting in person, it appears unlikely that a court would set aside the award.

Consequently, a breach of the right to a physical hearing does not alone constitute a ground for setting aside an award. It must either evolve into a situation where other grounds are satisfied, such as a lack of due process, or it must be assessed on its own against the standard in Section 43, first paragraph, letter e, according to which it must have had an impact on the decision.

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: No, that would be very unlikely.

We refer to the presentation of Section 43, first paragraph, letter b, in sub-paragraph d.8 above. Setting aside an award on this basis appears very unlikely.

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: It cannot be ruled out completely, but it appears highly unlikely.

⁴⁷ Section 43, first paragraph, letter e, of the Arbitration Act 2004 (free translation by the Authors).

⁴⁸ G. WOXHOLTH, *Voldgift*, fn. 5 above, p. 880 and Borgar HØGTVEIT BERG, ed., *Voldgiftsloven med kommentarer* (Gyldendal akademisk 2006) p. 323.

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The New York Convention, Article V(1)(b) is incorporated into Norwegian law almost verbatim through Section 46, first section, letter b, of the Arbitration Act 2004. Norwegian courts would not consider a breach of the right to a physical hearing *ipso facto* a breach of the right provided by Section 46, first paragraph, letter b, for a party to present its case. Norwegian courts apply a broader assessment of the situation when Section 46, first paragraph, letter b, is invoked, in which the party's opportunity to make its case, at every step of the process, is taken into account.⁴⁹ The courts would take the same approach irrespective of whether or not there exists a right to a physical hearing at the seat.

The New York Convention, Article V(1)(d) has been transposed into Section 46, first paragraph, letters d and e, of the Arbitration Act 2004, where the former concerns the composition of the tribunal and the latter pertains to the arbitral proceedings. However, in order to set aside an award due to procedural irregularities, the irregularity tainting the process must have had an impact on the decision. Proving this would be an up-hill battle for a party resisting recognition and enforcement.

Firstly, it is an established Norwegian procedural principle that the party attacking the award must prove that there exist irregularities according to foreign law.⁵⁰ Secondly, even if proven, the resisting party must establish a causal link between the procedural irregularity and the impact. Thirdly, Section 46, first paragraph, letter e, only gives the court a right to refuse recognizing the award, not a duty to do so. In accordance with the principles of the New York Convention, Norwegian courts apply a strict interpretation of the different grounds and seldom refuse to recognize awards.⁵¹ Nevertheless, even though it appears unlikely, one cannot exclude the possibility that a claimant would be able to convince the courts that these prerequisites had been met as the result of a breach of the right to a physical hearing.

New York Convention, Article V(2)(b) is incorporated into Section 46, second paragraph, letter b, of the Arbitration Act 2004. The provision is intended to have a narrow scope. It is not sufficient that a rule of law has been violated.⁵² This narrow scope is further underscored by the *travaux préparatoires*, in which disregard for fundamental legal principles is mentioned as an example of when the provision is applicable. A failure to hold physical hearings, considered in isolation, will not be sufficient to satisfy the prerequisites of this provision. In order for the provision to be applicable, the failure must have resulted in breaches of fundamental legal principles. The most apparent risk

⁴⁹ LB-2010-14069 is a good example. The claimants held that the arbitral award had been handed down without adhering to the principle of contradiction. The court rejected the claim as the party had been delivered a letter through FedEx, and therefore should have been aware that an arbitration proceeding had been initiated against them.

⁵⁰ B. HØGTVEIT BERG, ed., *Voldgiftsloven med kommentarer*, fn. 48 above, p. 342.

⁵¹ See G. WOXHOLTH, *Voldgift*, fn. 5 above, p. 917.

⁵² Per M. RISTVEDT and Ola Ø. NISJA, *Alternativ Tvisteløsning* (Cappelen Akademisk Forlag 2008) p. 586.

would be that the lack of physical hearings led to breaches of principles of due process. As with Section 43, first paragraph, letter b, discussed above,⁵³ the failure to hold a physical hearing constituting such a breach, while possible, is not particularly likely.

f. COVID-Specific Initiatives

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

Short answer: The current pandemic has had a major impact on the use of remote hearings, in whole or in part, both in the ordinary court system and arbitration.

As mentioned above,⁵⁴ the provisional law, Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv 2020, was enacted earlier this year. One of its aims was to lower the threshold for holding court hearings remotely. Scholars and practitioners have for years addressed the lack of digitalization as a problem for the Norwegian court system.⁵⁵ By way of example, Norway is currently, perhaps surprisingly, the only country in Europe that does not record main proceedings.⁵⁶ While these are still early days, it appears very likely that the COVID pandemic will stand as a turning point in the history of the court's digitalization.

The impact on arbitration is a different matter altogether. There has not been a corresponding societal debate about the digitalization of arbitral proceedings, nor does there exist any equivalent law or regulation for arbitration as the provisional law mentioned above. However, the pandemic has brought about discussions about digitalization within the arbitral community. The Oslo Chamber of Commerce has, for instance, advocated for increased use of remote hearings employing digital technology as an alternative to physical meetings.⁵⁷

⁵³ See sub-paragraph d.9 above.

⁵⁴ See paragraph b above.

⁵⁵ Halvard H. FREDRIKSEN and Magne STRANDBERG, "Is E-justice Reform of Norwegian Civil Procedure Finally Happening?", Oslo Law Review (2016) p. 72.

⁵⁶ Arne KROKAN, "Domstolene må styrkes digital", Midtnorsk debatt (8 October 2020) at <<https://www.midtnorskdebatt.no/meninger/ordetfritt/2020/10/08/Domstolene-m%C3%A5-styrkes-digitalt-22792145.ece>> (last accessed 30 April 2021).

⁵⁷ Oslo Chamber of Commerce, "Covid-19 og effektivisering av voldgiftsprosesser", available at <<https://www.chamber.no/covid-19-og-effektivisering-av-voldgiftsprosesser/>> (last accessed 30 April 2021).