UNITED STATES OF AMERICA

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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.

Neither the Federal Arbitration Act (FAA) nor state laws on international arbitration provides for the right to a physical hearing.

International arbitration in the U.S. is primarily governed by the FAA. While the FAA does not explicitly provide for a right to an arbitration hearing at all, the drafters certainly contemplated that hearings are an integral part of the arbitral process.[1] The FAA is however silent as to how hearings should be conducted, including as to whether any hearing must be physical. This is hardly surprising given that Chapter One of the FAA remains largely as enacted in 1925, when the drafters were unconcerned with the possibility of holding hearings other than in-person.

At the state level, a few States have adopted some form of the UNCITRAL Model Law on International Commercial Arbitration as their international arbitration statutes. That is the case for California, Texas, and Florida, who thus have provisions similar to Articles 18 (equal treatment of parties), 19 (determination of rules of procedure), 20

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[1] FAA § 4 (providing that after an order compelling arbitration, "[t]he hearing and proceedings … shall be within the district in which the petition for an order directing such arbitration was filed); FAA § 10(a)(3) (allowing courts to vacate an award "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown[.]"

(place of arbitration), and 24 (hearings and written proceedings) of the Model Law.[2] The latter, in particular, provides that failing the parties' agreement to the contrary, the tribunal shall have discretion to determine whether an oral hearing shall take place or if the case will be decided solely on the basis of written submissions and documentary evidence. One important qualification on this discretion, present in all three states mentioned above, is that "unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party". This provision, however, does not require the hearing to take place physically. Coupled with the provisions granting the tribunal discretion to determine where to take testimony and hear oral argument (based on Article 20 of the Model Law), it means it is unlikely that courts applying those statutes would find that parties are entitled to a physical hearing.

Twenty-two States have adopted the Revised Uniform Arbitration Act (RUAA), drafted by the Uniform Law Commission to promote uniform treatment across different jurisdictions. Inspired by the FAA and the UNCITRAL Model Law, the RUAA provides that arbitrators may conduct arbitration proceedings as they consider appropriate for a fair and expeditious disposition of the proceeding, limited to parties' agreement, and that failure to postpone a hearing when good cause is shown or to hear material evidence can lead to vacatur.[3] It also provides that "*if* an arbitrator orders a hearing, the arbitrator

[2] See CA Civ. Pro §1297.181, 1297.191-193, 1297.201-203, 1297.241-242; Tex. Civ. Prac. & Rem. §172.101, 172.103-104, 172.106, 172.111*;* FL ST §684.0029, 684.003, 684.0031, 684.0035. As there are limited circumstances in which state law would apply, these statutes are rarely invoked and there is little caselaw. See generally Alexandra DOSMAN and Clara FLEBUS, "The Federal Arbitration Act and State Arbitration Acts: Impact of Federalism on International Arbitration in the U.S" in Laurence SHORE, Tai-Heng CHENG , et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017), at pp. 31-54 (2017); David LINDSEY, James HOSKING and Jennifer GORSKIE, "United States" in *World Arbitration Reporter*, at p. USA-7-8 (explaining the interplay between the FAA and state law and citing cases); AMIRFAR, REID and POPOVA, "National Report United States" in ICCA *International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 5 (explaining the relationship between federal and state arbitration law and stating that "an arbitration concerning a commercial transaction will rarely, if ever, fall outside the scope of the FAA."); Ina C. POPOVA and Duncan PICKARD, "Country Report: The United States of America" in Franco FERRARI , Friedrich Jakob ROSENFELD, et al., eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020), p. 429 at p. 430-31 (stating that "[u]nless parties explicitly choose to have a state international arbitration statute govern their dispute, these statutes will rarely impact an international arbitration given the supremacy of federal law, which largely governs that area" and citing cases).

[3] RUAA, Section 15(a) and Section 23(3); RUAA, Section 15, Uniform Law Commission's Comment 1.

shall set a time and place",[4] a literal reading of which would suggest the tribunal is not obligated to hold a physical hearing. However, the RUAA's application to international arbitration will be very limited.[5]

New York's arbitration statute, on which the FAA was originally modelled[6] and which is codified in Article 75 of the New York Civil Practice Law and Rules (CPLR), deals with arbitration broadly and does not expressly grant a right to a physical hearing. The few provisions dealing with the issue simply establish that "[t]he arbitrator shall appoint a time and place for the hearing and notify the parties", that the tribunal "may adjourn or postpone the hearing", and that "[t]he parties are entitled to be heard, to present evidence and to cross-examine witnesses".[7] Nothing in the language of the statute implies that this conduct of the proceeding must happen in person.

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

Short answer: Likely not.

There is no such reported case in the U.S. More specifically, it is unlikely that U.S. courts would read the requirements of granting the parties an oral hearing—to the extent that such provision exists either in the arbitration agreement or in the relevant state's law—as requiring a physical hearing. The main issue is not whether the hearing is physical or remote, but whether it is conducted in such a way as to grant the parties a fundamentally fair proceeding, which includes a full opportunity to present material evidence.[8] U.S. courts have generally held that, absent party agreement to the contrary

[4] RUAA, Section 15(c).

[5] "The subject of international arbitration is not specifically addressed in the RUAA", and the statute will only apply where the parties chose a RUAA state law as the applicable law, the State has no international arbitration statute in place and the dispute commences in state courts and is not removed to federal courts. RUAA, Preparatory Note to the 2000 Revision.

[6] D LINDSEY, J. HOSKING and J. GORSKIE, "United States", fn. 7 above, at p. USA-1.

[7] NY C.P.L.R. §7506(b) and (c).

[8] See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (finding that procedural issues are for the arbitrators, not the judges, to decide). See also *ST Shipping & Transp. PTE, Ltd. v. Agathonissos Special Mar. Enter.*, 2016 WL 5475987, at *4 (S.D.N.Y. 6 June 2016) ("there is no brightline rule requiring arbitrators to conduct oral hearings. … 'The key issue is whether the arbitral panel 'allow[ed] each party an adequate opportunity to present its evidence and argument.'"). See also AMIRFAR, REID and POPOVA, "National Report United States of America" in *Handbook*, p. 43 ("the Federal Arbitration Act (the FAA) […]

(either expressly or by reference to arbitration rules), the arbitrators have broad discretion to decide whether or not to hold evidentiary hearings, as well as the format the hearing should take.[9] As such, an arbitrator's discretion should include the power to order remote hearings so long as the parties' due process rights are protected.

In the only arbitration-specific decision to date arising out of challenges presented by the COVID-19 pandemic, a district court in Illinois relied on long-standing FAA case law to deny a preliminary injunction that sought to bar an arbitration hearing from proceeding remotely. The petitioner argued, *inter alia*, that the applicable arbitration rules—those of the Financial Industry Regulatory Authority (FINRA)—required a physical hearing as they contained provisions entitling the parties to "attend all hearings", "in the event a hearing is necessary", at the "time and place" designated by the director of the institution.[10] The court reasoned that "[u]nder the Federal Arbitration Act, 'procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator to decide.' […] Whether FINRA

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imposes minimal procedural standards on arbitrations subject to the statute. Courts applying those grounds recognize, however, that arbitrators have virtually unlimited discretion to handle procedural issues as they deem fit, subject only to the provisions of any applicable rules, the agreement of the parties, and each party's fundamental right to be heard"; Paula F. HENIN and Rocío Ines DIGÓN, "Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA" in Laurence SHORE , Tai-Heng CHENG , et al., eds., *International Arbitration in the United States*, (Kluwer Law International 2017) p. 553 at p. 581 (stating that "U.S. courts afford significant deference to the decisions of arbitral tribunals pertaining to the management of the proceedings, including evidentiary rulings and restrictions on the conduct of oral hearings" and citing cases).
See also the discussion in answer to sub-paragraph d.9 below.

[9] See *Graham v. Scissor-Tail, Inc*., 28 Cal. 3d 807, 822 (1981) (finding there was no right to an oral hearing when the by-laws on which the arbitration was based contained a waiver on taking oral testimony and presenting oral arguments); Gary B. BORN, *International Commercial Arbitration, 2d ed.* (Kluwer Law International 2014) at pp. 2134-35 ("In the United States, the FAA's statutory text is silent regarding procedural matters, but U.S. judicial decisions and other authority uniformly confirm the parties' freedom to agree upon the arbitral procedures, subject only to very limited requirements of procedural fairness.") and p. 2148 (stating that in the U.S. "arbitrators possess broad powers to determine arbitral procedures, absent agreement on such matters by the parties" and citing cases) See, adopting seemingly an opposite opinion, Restatement (Third) U.S. Law Int'l Comm. Arb., §4.19, Reporters' Notes, Comment c, Proposed Final Draft (2019).

[10] *Legaspy v. Financial Industry Regulatory Authority, Inc.*, 2020 WL 4696818, at *2-3 (N.D. Ill 13 August 2020), motion for preliminary injunction pending resolution of appeal denied (7th Cir. 14 August 2020). As the subject arbitral hearing had already taken place, a subsequent appeal became moot and was dismissed without prejudice by request of the parties. While this is a domestic arbitration case, the courts' deference to arbitrators on issues of procedure is similar whether the arbitration is international or domestic.

can or should conduct a hearing remotely is a question of procedure that FINRA, not the court, must decide."[11] The court also found that, even if the requirements for the injunction had been met, the balance of equities would dictate against granting the order. That is because the injunction would force either a physical hearing—which FINRA was currently not holding due to the pandemic—or an indefinite postponement, immeasurably hurting the opposing party's interest. Thus, the balance of equities lead to the conclusion that holding a remote hearing was the least harmful way forward. Lastly, the court found there was no proof that holding a remote hearing would harm petitioner's right to present its case. On the contrary, the court drew from its own positive experiences with remote proceedings to say that "[r]emote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses."[12]

UNCITRAL Model Law jurisdictions—such as California, Texas and Florida—expressly require the conduct of oral hearings if requested by a party but there is no statutory provision or case law requiring that the parties, the witnesses and the tribunal be physically present in the same room.[13] The FAA and the New York CPLR, on the other hand, do not have a specific provision expressly requiring oral arbitration hearings. However, the CPLR does provide that "parties are entitled to … cross-examine witnesses".[14] And an arbitrator's refusal to hear material evidence or postponing a hearing "when sufficient cause [is] shown" is one of the grounds for vacatur under §10(a)(3) of the FAA.[15] These are exceptional cases, however, and courts have been clear that a tribunal's procedural decisions will be respected unless they lead to a *fundamentally unfair* proceeding.[16]

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.

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[11] Ibid.
[12] Ibid.at *4.
[13] See statutory provisions listed in fn. 7 above.
[14] NY C.P.L.R. §7506(c). This right can be waived. NY C.P.L.R. §7506(f).
[15] 9 USC §10(a)(3).
[16] See discussion on fundamental fairness in subparagraph d.9.

Pursuant to Section 203 of the FAA, disputes arising out of international arbitrations are deemed to "arise under the laws and treaties of the United States" and, as such, are subject to the original jurisdiction of the federal courts.[17] This analysis will therefore focus on the Federal Rules of Civil Procedure (FRCP), which will be applied by federal courts in actions related to the enforcement of an agreement to arbitrate or an arbitration award to the extent that those procedures are not covered by the FAA.[18]

The FRCP requires that "witness testimony must be taken in open court".[19] However, "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location".[20] This permission has often been used even before the COVID-19 pandemic to allow witnesses to testify by video or telephone when travel to the place of trial would be unfeasible or lead to unnecessary costs, when the complexity of the case justified testimony by contemporaneous transmission, as well as when the evidence was cumulative.[21]

Although a few decisions have found "trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder,"[22] technological advances have made U.S. courts more supportive of using such

[17] 9 USC §203.

[18] Fed. R. Civ. P. 81(a)(6)(B) ("These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: … (B) 9 U.S.C., relating to arbitration"). See also *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) ("the Federal Rules fill in only those procedural gaps left open by the FAA.") There are also rules of civil procedure promulgated in each State; however they are broadly analogous to the FRCP.

[19] Fed. R. Civ. P. 43(a).

[20] Ibid. Also, Fed. R. Civ. P. Rule 78(b) allows the court to proceed without oral hearings.

[21] See, e.g., *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471 (D. Md. 2010) (allowing testimony by videoconference when witness resided outside the U.S. and travel costs would be a needless expense); *In re Vioxx Prod. Liab. Litig.*, 439 F. Supp. 2d 640, 643 (E.D. La. 2006) (allowing testimony by videoconference, *inter alia*, given the complex nature of a multi-district litigation and when defendant exerted control over the witness but refused to voluntarily produce it for purely tactical reasons); *Thomas v. Anderson*, 912 F.3d 971 (7th Cir. 2018) (refusing testimony except by video when evidence was cumulative).

[22] *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020).

technology.[23] This trend has been dramatically accelerated by the impact of the COVID pandemic, in which entire trials have been conducted by videoconference.[24]

It has been said that "the drafting history (of Rule 43(a)) shows that the purpose of requiring testimony to be taken in open court was a matter of functionality rather than physicality."[25] The notes of the Advisory Committee overseeing drafting the FRCP make clear that this rule was meant to abolish the practice from patent and trademark actions of using affidavits rather than live testimony,[26] as well as the use of edited depositions, which, in addition to being inaccurate and incapable of being tested by cross-examination, did not allow the factfinder to observe a witness's demeanor and assess their credibility.[27] Thus, courts have said "[t]he primary purposes of Rule 43(a) are to ensure that the accuracy of witness statements may be tested by cross-examination and to allow the trier of fact to observe the appearance and demeanor of the witnesses."[28]

The possibility of "contemporaneous transmission" was added to Rule 43 in a 1996 amendment. The Advisory Committee stressed the importance of live testimony in the U.S. legal tradition, which gives factfinders "[t]he opportunity to judge the demeanor of a witness face-to-face", as well as reasoning that "[s]afeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured."[29] These are the factors that federal courts have considered when assessing whether "appropriate

[23] *In re Vioxx Prod. Liab. Litig.*, 439 F. Supp. 2d 640, 642 (E.D. La. 2006) ("there has been an increasing trend by federal courts allowing and by legal commentators advocating for the use of contemporaneous transmission of trial testimony.") (listing cases). See Charles Alan WRIGHT and Arthur R. MILLER, *Federal Practice and Procedure* (Thomson Reuters 2020) §2414 ("federal courts have shown consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices")

[24] See, e.g., *Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, 2020 WL 3104033 (E.D.N.Y. 11 June 2020).

[25] *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 2020 WL 3717792, at *2 (E.D. Mich. 30 June 2020). See C. WRIGHT and A. MILLER, *Federal Practice and Procedure*, fn. 23 above, at §2414 ("The subdivision [43(a)] reflects a preference for oral testimony in open court that is in large part a reaction to the abuses of taking testimony by deposition in the historic equity practice.")

[26] Fed. R. Civ. P. 43(a), Advisory Committee's Note (1937).

[27] *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 2020 WL 3717792, at *2 (E.D. Mich. 30 June 2020) (citing treatises).

[28] *In re Adair*, 965 F.2d 777, 780 (9th Cir. 1992) (citing *Carter–Wallace, Inc. v. Otte*, 474 F.2d 529, 536 (2d Cir.1972)).

[29] Fed. R. Civ. P. 43(a) Advisory Committee's Note (1996).

safeguards" are in place to make remote testimony possible.[30] Lastly, while older decisions have stressed that "remote transmission is to be the exception and not the rule [under Rule 43(a)]",[31] more recent decisions have found that "advances in technology minimize these concerns" as they "permit[] the jury [or, in a bench trial, the Court] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration."[32]The same general approach appears in state court decisions,[33] although the policy concerns underlying the preference for live testimony have explicitly been found to be properly addressed in evidence given via Skype—even before the COVID-19 pandemic.[34]

Therefore, although it is certain that courts have the right to hear live testimony from witnesses, it is less clear that this needs to be done in a physical hearing. The reference to requiring testimony in "open court" may be read as calling for a public proceeding rather than a physical one.[35] It is thus unclear whether a right to a physical hearing currently exists in the general rules of civil procedure. To the extent that it does, it contains a significant exception allowing for remote hearings in special circumstances. Further, the case law specifically endorses the use of technology such as that deployed in remote arbitral hearings.

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.

U.S. courts have repeatedly confirmed that arbitrators are not bound to follow judicial rules of procedure.[36] In any event, as noted in answer to sub-paragraph b.3, it is unclear

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[30] See, e.g., *Flores v. Town of Islip*, 2020 WL 5211052, at *2 (E.D.N.Y. 1 September 2020) (stressing the improvement of testimony given via Zoom and similar video platforms over telephone testimonies in relation to credibility assessment).

[31] *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479 (D. Md. 2010).

[32] *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020) (quoting *In re Vioxx Prods. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

[33] *Bonamarte v. Bonamarte*, 263 Mont. 170, 174 (1994) (listing the reasons for requiring a witness's personal appearance in court).

[34] See *City of Missoula v. Duane*, 380 Mont. 290 (2015).

[35] See *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 2020 WL 3717792, at *3 (E.D. Mich. 30 June 2020) (reviewing the meaning of "open court" in the criminal context and its application to civil cases).

[36] *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957) ("For matters of procedure relating to the hearings before the arbitrators we refer not to the Rules of Civil Procedure but to the Commercial Arbitration Rules of the American Arbitration Association which the parties agreed should control."); *EBR Holding Ltd. v. Hollywood Woodwork, Inc*., 2005 WL 8155311, at *6 (S.D. Fla. 17 October 2005)

whether a right to a physical hearing currently exists in the general rules of civil procedure. To the extent that such a right does exist, it is limited by the showing of good cause and adoption of appropriate safeguards, all of which are properly addressed by procedures that are already common practice in international arbitration. These include hearing live testimony through video platforms (allowing arbitrators to identify the witness, observe demeanor and assess credibility), having a party representative present at the location where the witness is giving her testimony or using a 360º camera (ensuring the witness is not being coached during testimony), and making cross-examination bundles available to the witness, either in hard copies, electronically or by simply sharing the screen (ensuring the right to cross-examination is not hindered).

Thus, to the limited extent that a right to a physical hearing may apply to litigations conducted under the FRCP, such a right does not extend to arbitration, neither as a legal nor as a practical matter.

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.

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

Short answer: It depends.

The U.S. Supreme Court has consistently ruled that "arbitration is a matter of contract"[37] and arbitration agreements must be enforced according to their terms.[38] That

("arbitrators have discretion over discovery matters and are bound neither by the Federal Rules of Civil Procedure that govern discovery nor by courts' interpretations of discovery rules.").

[37] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

[38] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

is so even if the contractual terms lead to inefficient proceedings.[39] This is true whether the agreement at issue involves substantive or procedural matters.[40] Therefore, if the arbitration agreement requires a physical hearing, either expressly or by reference to arbitration rules,[41] an arbitral tribunal could not order a remote hearing contradicting the parties' agreement. An order under such circumstances could well lead to vacatur for excess of authority.[42]

That is so, however, only if the arbitration agreement makes clear the parties' intent to have a physical hearing in any circumstances. U.S. courts apply vacatur provisions narrowly and will not review the arbitrator's construction of the contract except in exceptional circumstances.[43] If the arbitration agreement is silent or ambiguous on whether a hearing will be physically held, the arbitral tribunal has discretion to determine to hold one remotely.[44] The tribunal's decision on whether to hold a hearing or not and

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[39] See *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 840–41 (9th Cir. 2010) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217–21 (1985) (enforcing an agreement that would have the claims and counterclaims heard in different forums)).

[40] *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005) (internal citations omitted) ("While we acknowledge that there is a strong public policy in favor of international arbitration, we have never held that courts must overlook agreed-upon arbitral procedures in deference to that policy.") See also G. BORN, *International Commercial Arbitration*, fn. 3 above, pp. 2134-35 (stating that U.S. courts uniformly confirm the parties' freedom to agree on procedural matters, subject only to "very limited requirements of procedural fairness, and citing cases) and p. 2182 (highlighting the limited scope of judicial review of arbitral procedures in the U.S. and citing cases).

[41] *Chem-Met Co. v. Metaland Int'l, Inc.*, 1998 WL 35272368, at *2 (D.D.C. 25 March 1998) (vacating an award where the arbitrator granted "summary judgment" without an evidentiary hearing on the basis that the arbitration rules "impl[y] that, unless the parties enter a Section 37 waiver, the arbitrators must hold an oral evidentiary hearing in every case.") (The arbitration was conducted under a prior version of the AAA Commercial Arbitration Rules no longer in force.)

[42] 9 U.S.C. §10(a)(4).

[43] See *Stolt–Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 671 (2010) ("to obtain that relief [set aside under section 10(a)(4) of the FAA], they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error."). See also Andreas A. FRISCHKNECHT, Yasmine LAHLOU, Gretta WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) at p. 191 (stating that New York courts give "the narrowest of readings to the [FAA's] authorization to vacate awards" and citing cases); Marike R. P. PAULSSON, *The 1958 New York Convention in Action*, (Kluwer Law International 2016), pp. 173-74 (citing U.S. caselaw confirming the narrow interpretation of the Article V grounds).

[44] See *In re Arbitration between Griffin Indus., Inc. & Petrojam, Ltd.*, 58 F. Supp. 2d 212, 215 (S.D.N.Y. 1999) (upholding an arbitral award when the tribunal found an oral hearing was not required under the applicable procedure).

its conduct during the hearing will generally be respected, unless it was fundamentally unfair.[45]

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 mentioned above, neither the FAA nor the reviewed state laws on international arbitration provide for the right to a physical hearing. Assuming, however, that such a right was recognized in a specific case, a party would have to object during the arbitration to preserve the issue for a subsequent petition to vacate the award. U.S. courts typically refuse petitions to set aside or to challenge enforcement if the resisting party did not raise the impugned arbitral conduct during the arbitration.[46]

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 above, neither the FAA nor the reviewed state laws on international arbitration provide for the right to a physical hearing. Assuming, however, that such a right was recognized in a specific case, parties seeking to vacate an award generally must

[45] See answer to sub-paragraph d.9.

[46] See, e.g., *Teamsters Local Union No. 764 v. J.H. Merritt and Co.*, 770 F.2d 40, 42–43 (3d Cir. 1985); *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993). See Andreas A. FRISCHKNECHT , Yasmine LAHLOU and Gretta WALTERS, *Enforcement of Foreign Arbitral Awards and Judgments in New York*, (Kluwer Law International 2018), pp. 121, 167-68; AMIRFAR, REID and POPOVA, "National Report United States of America" in *Handbook*, p. 83 (citing cases for the proposition that "procedural objections not made to the tribunal will be deemed to have been waived").

not only establish the violation of a right *per se*, but that such violation actually prejudiced its case as to deprive it of a fundamentally fair hearing.[47]

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-dependent but, of itself, likely not.

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

The list of grounds for vacatur is set out in §10 of the FAA. [48] As mentioned in answer to sub-paragraph a.2 above, §10(a)(3) provides that an award can be set aside when the

[47] *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399 (5th Cir. 2006). A. FRISCHKNECHT, Y. LAHLOU, G. WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York*, fn. 43 above, at p. 127; see also Paula F. HENIN and Rocío Ines DIGÓN, "Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA" in Laurence SHORE, Tai-Heng CHENG, et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017) at p. 582 ("some—but not all—courts have also required a showing that the resisting party was actually prejudiced by the alleged procedural unfairness."). This is the case for the 2d Circuit (*Phoenix Aktiengesellschaft v. Ecoplas*, Inc., 391 F.3d 433, 434 (2d Cir. 2004)), and the 5th Circuit (*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004)), as well as the district courts in the District of Columbia (*Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, 1992 WL 122712 (D.D.C. 29 May 1992)), Florida (*Jankula v. Carnival Corp.*, 2019 WL 8060595 (S.D. Fla. 8 July 2019)), Pennsylvania (*Calbex Mineral Ltd. v. ACC Res. Co., L.P.*, 90 F. Supp. 3d 442 (W.D. Pa. 2015)) and Washington (*Purus Plastics GmbH v. Eco-Terr Distrib., Inc.*, 2018 WL 3064817, (W.D. Wash. 21 June 2018)).

[48] For years courts in the U.S. have diverged on whether the grounds for vacatur listed in §10 of the FAA are exhaustive. In *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court ruled that "the answer is yes, that the text compels a reading of the §§10 and 11 categories as exclusive" (at 586). However, even after the *Hall Street* decision, a circuit split remains on whether "manifest disregard of the law", which does not appear in the text of the FAA, could still be used to set an award aside. More recently, the Restatement (Third) U.S. Law of Commercial Arbitration (2019) has also taken the position that the grounds in FAA §10 are exclusive, and that any attempt to expand those grounds, either by agreement or by choice of state law, is invalid (See comment §4-21(a) and (b)). See also A. FRISCHKNECHT, Y. LAHLOU, G. WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York*, fn. 43 above, p. 193-96 (2018); Jennifer L. PERMESLY and Yasmine LAHLOU, "Recognition and Vacatur of Foreign Arbitral Awards

tribunal is guilty of misconduct, including in refusing to hear material evidence and/or postpone the hearing when good cause is shown. U.S. courts give great deference to an arbitral tribunal's decision on procedural issues,[49] recognizing that "to vacate on the ground of arbitrator misconduct, pursuant to § 10(a)(3), a mere difference of opinion between the arbitrator and the moving party about the correct resolution of a procedural problem is insufficient".[50] The FAA sets a high threshold, and an arbitrator will only be found to have committed misconduct if she acted in bad faith or committed an error so gross "as to amount to affirmative misconduct".[51]

In actions under §10(a)(3) of the FAA, U.S. courts will often look at potential procedural irregularities through the prism of "fundamental fairness".[52] A fundamentally fair hearing is one that "meets the minimal requirements of fairness", namely adequate notice, an impartial decision-maker and a hearing on the evidence.[53] Even then, courts have upheld awards decided on documents only, without an evidentiary hearing.[54] Instead, fundamental fairness requires that a party be given a "full and fair opportunity to present evidence."[55] Thus, U.S. courts are unlikely to second guess a tribunal's decision to hold a remote hearing so long as the parties were given a fair opportunity to

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in the United States" in Laurence SHORE , Tai-Heng CHENG, et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017) p. 471, at pp. 495-98. This issue goes beyond the scope of this report. However, where an award is challenged on the basis of failure to hold physical hearings, the relevant grounds for vacatur would be limited to §§10(a)(3) and 10(a)(4) of the FAA.

[49] See *Lumbermens Mut. Cas. Co. v. Broadspire Management Servs., Inc.*, 623 F.3d 476, 480 (7th Cir. 2010) (quoting *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84–85 (2002)). See also D. LINDSEY, J. HOSKING, J. GORSKIE, "United States", fn. 7 above, p. 35 (stating that, under the FAA, the arbitral tribunal is generally free to determine the style and characteristics of an oral hearing, subject to due process requirements).

[50] *Dorward v. Macy's Inc.,* 588 Fed.Appx. 951, 953 (11th Cir. 2014). See also I. POPOVA and D. PICKARD, "Country Report: The United States of America", fn. 7 above, p. 437 (citing cases in which U.S> courts have found that failure to postpone a hearing qualified as misconduct).

[51] *United Paperworks Int'l. Union, AFL-CIO v. Misco, Inc*., 484 U.S. 29, 40 (1987).

[52] See, e.g., *Kolel Beth Yechiel Mechil of Tartikov, Inc. V. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) ("We have held that misconduct occurs under this provision only where there is a denial of "fundamental fairness").

[53] *Generica Ltd. v. Pharmaceutical Basics, Inc*., 125 F.3d 1123, 1130 (7th Cir. 1997).

[54] See, e.g., *In re Arbitration between Griffin Indus., Inc. & Petrojam, Ltd*., 58 F. Supp. 2d 212, 219–20 (S.D.N.Y. 1999).

[55] *Fowler v. Ritz-Carlton Hotel Co., LLC,* 579 F. App'x 693, 698 (11th Cir. 2014). See also A. FRISCHKNECHT, Y. LAHLOU and G. WALTERS, *Enforcement of Foreign Arbitral Awards and Judgments in New York*, fn. 46 above, pp. 126-27 (citing U.S. cases on procedural fairness).

present material evidence.[56] Likewise, vacatur will not be granted when a party or a witness cannot testify in person at a physical hearing but was able to give testimony via telephone or video.[57]

Also potentially relevant is vacatur for excess of the arbitrator's authority under §10(a)(4) of the FAA. This is said to be the most common ground invoked to vacate an award.[58] Although it is more typically used when the arbitrator is alleged to have misapplied the material provisions of the contract, it could also be invoked in relation to the interpretation of the arbitration agreement itself.[59] However, U.S. courts construe this section very narrowly so that vacatur based on this ground would at a minimum require evidence of the parties' clear agreement to hold a physical hearing[60] and the tribunal's subsequent disregard thereof.

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

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[56] See, e.g., *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992) overruled on other grounds; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).

[57] *Bisnoff v. King*, 154 F. Supp. 2d 630 (S.D.N.Y. 2001) (rejecting motion to vacate when one of the respondents was given the opportunity to appear via telephone or have his deposition videotaped in advance); *Trademark Remodeling, Inc. v. Rhines*, 2012 WL 3239916, at *5 (D. Md. 6 August 2012) (finding that allowing a witness to testify by telephone did not establish misconduct); *Al-Haddad Commodities Corp. v. Toepfer Int'l Asia Pte., Ltd.*, 485 F. Supp. 2d 677, 686 (E.D. Va. 2007) (finding that cross-examination of a witness conducted by telephone did not render the proceeding fundamentally unfair).

[58] *Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 64 (1st Cir. 2015) ("Perhaps the most common basis—and the rationale invoked by the district court in this case—is "where the arbitrators exceeded their powers.")

[59] See, e.g., the discussion on the interpretation of arbitration agreements in relation to class arbitration. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010).

[60] See *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 475 (1989) ("in construing an arbitration agreement within the coverage of the FAA, "as with any other contract, the parties' intentions control[.]"); *Stolt–Nielsen S.A. v. Animalfeeds International Corp*., 559 U.S. 662, 671 (2010) ("'It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable.' *Citation omitted.* In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract[.]")

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 the breach of a right to a physical hearing, if such right is deemed to exist under the particular circumstances of the case, would lead a U.S. court to exercise its discretion to refuse enforcement.

When presented with an Article V defense to recognition and enforcement, U.S. courts will conduct a *de novo* review[61] of the issues raised by the party. However, in reviewing awards, courts largely adopt a "pro-enforcement bias", conducting an extremely narrow reading of the provisions.[62]

It is broadly accepted that Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process".[63] This does not mean that the parties should have been given the full set of procedural rights afforded to litigants in U.S. courts, but rather that they have been afforded a "fundamentally fair" proceeding.[64] Most relevant,

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[61] *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010) ("We review *de novo* whether a party established a defense to enforcement of an arbitration award under the New York Convention.") See also Restatement (Third) U.S. Law Int'l Comm. Arb.§ 4.7, comment b (2019).

[62] *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974); *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010) ("Polimaster's burden [of showing the existence of a New York Convention defense] is substantial because the public policy in favor of international arbitration is strong, cit. omitted., and the New York Convention defenses are interpreted narrowly.") See also A. FRISCHKNECHT, Y. LAHLOU, G. WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York* fn. 46 above,pp. 111-13; P. HENIN and R. DIGÓN, "Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA", fn. 2 above, p. 575; M. PAULSSON, *The 1958 New York Convention in Action*, fn. 43 above, pp. 13-15.(citing U.S. caselaw on the development of the convention's "pro-enforcement bias", an expression coined by US courts).

[63] *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974). See also *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129–30 (7th Cir. 1997)*;* G. BORN, *International Commercial Arbitration*, fn. 3 above, at p. 2176 (stressing that U.S. courts considering the fairness of international arbitral proceedings apply the constitutional requirements of due process, which "guarantees 'an opportunity to be heard at a meaningful time and in a meaningful manner'") and at.p. 3501-02 (citing cases).

[64] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 299 (5th Cir. 2004). See also Jennifer L. PERMESLY and Yasmine LAHLOU, "Recognition and Vacatur of Foreign Arbitral Awards in the United States" in Laurence

courts will look at whether the party was given "the opportunity to be heard 'at a meaningful time and in a meaningful manner'".[65] Thus, in one of the seminal U.S. cases applying the New York Convention, the court enforced an arbitral award over the objection that the tribunal's refusal to postpone the hearing to accommodate a witness' schedule deprived the petitioner of its right to present its case.[66] The court reasoned that by choosing arbitration, the parties "relinquish [their] courtroom rights … in favor of arbitration with all of its well known advantages and drawbacks", that postponing a hearing to accommodate the witness would be too disruptive, and that the logistical problems involved in scheduling a cross-border arbitration weighed against adjournment.[67] Subsequent case law, including embracing the advent of video technology unthinkable when this decision was issued almost 50 years ago, has confirmed the court's general approach to such defenses to enforcement.[68]

Generally speaking, U.S. courts will not focus on whether a right to a physical hearing existed at the seat, but will apply U.S. notions of due process[69] and assess

SHORE , Tai-Heng CHENG, et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017) p. 471, at pp. 482-83 (explaining U.S. courts' interpretation of "fundamental fairness" and citing cases); D. LINDSEY, J. HOSKING and J. GORSKIE, "United States", fn. 7 above, pp. USA-83-84 (citing cases on U.S. courts' understanding of fundamental fairness, and stressing that is does not include the full set of procedural rights guaranteed by the FRCP)

[65] *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992)). See also I. POPOVA and D. PICKARD, "Country Report: The United States of America", fn. 7 above, pp. 439-40 (stating that U.S. courts "generally defer to arbitrators' case management techniques 'unless such ruling create serious procedural inequalities'", as well as that the party resisting enforcement need not only prove an improper denial of a procedural opportunity, but that such denial resulted in significant prejudice to its rights and citing cases).

[66] *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

[67] Ibid.at 975.

[68] See *China Nat. Bldg. Material Inv. Co., Ltd. v. BNK Intern. LLC*, 2009 WL4730578, at *7 (W.D. Tex. 4 December 2009) (party's hurdle to attend a hearing in Hong Kong due to alleged health issues was not sufficient ground for refusal of enforcement as the party was given the option of attending and giving testimony by video-conference); *Eaton Partners, LLC v. Azimuth Capital Mgmt. IV, Ltd.*, 2019 WL 5294934 (S.D.N.Y. 18 October 2019) (enforcing an award despite the party's objection that the tribunal refused to postpone the hearing when a witness became unavailable but was given the option of appearing by video, among other factors).

[69] See *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) ("an arbitral award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard *as our due process jurisprudence defines it.*" Emphasis added.).

whether the challenging party was given "an adequate opportunity to present its evidence and arguments".[70]

With respect to a defense premised on Article V(1)(d), two main considerations arise in the present context. First, in considering the "law of the country where the arbitration took place," U.S. courts will look at the *arbitration* law rather than the *civil procedure* law of the seat,[71] which for awards issued in the United States is the FAA.[72] That means that any right to a physical hearing stemming from the seat's general rules of procedure may not lead to a successful V(1)(d) defense. Second, mere lack of compliance with the procedural rules is not sufficient, of itself, to justify non-enforcement. Rather, U.S. courts require the party resisting enforcement to show that non-compliance caused it substantial prejudice.[73] U.S. courts give great deference to the tribunal's interpretation of the parties' agreement and of the law of the seat, and will generally enforce the award unless this high threshold of substantial prejudice resulting from the arbitrator's procedural decision is shown.[74] Thus, a party seeking to resist enforcement in the U.S. under Article V(1)(d) because the tribunal failed to hold a physical hearing has the substantial burden of proving, first, that such a right existed in the *arbitration* law of the

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[70] *Slaney v. The Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592-93 (7th Cir. 2001); *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co.*, 1992 WL 400733, at *3 (S.D.N.Y. 23 December 1992) (enforcing an award rendered without a hearing despite the party's request for one when the lack of live testimony did not prejudice its opportunity to present its case). Note, however, the potentially contradictory conclusion sanctioned by the Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4.13 (2019) (advocating that if a tribunal has complied with the requirements of the arbitration agreement, but in so doing violated a mandatory rule of the seat's arbitration law, a U.S. court should deny recognition or enforcement if the conditions for such relief are otherwise met).

[71] A. FRISCHKNECHT, Y, LAHLOU and G, WALTERS, *Enfocrcement of Foreign Arbitral Awards and Judgments in New York*, fn. 43 above, p. 141.

[72] *In re Arbitration between InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993) (challenge to an award issued in New York was reviewed under the FAA).

[73] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 296 (5th Cir. 2004) (enforcing an award as the consolidation of separate contracts with different procedures to appoint arbitrators did not prejudice the party); *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co.*, 1992 WL 400733, at *3 (S.D.N.Y. 23 December, 1992) (enforcing an award despite the tribunal's failure to follow the AAA rules procedure regarding notice since the party was not prejudiced by such action). See also AMIRFAR, REID and POPOVA., "National Report United States of America" in *Handbook*, p. 83 (stating that "generally, however, US courts will not vacate an award on the basis of procedural technicalities unless they substantially prejudice the rights of the complaining party" and citing cases).

[74] See, e.g., *Caja Nacional de Ahorro Y Seguros in Liquidation v. Deutsche Rueckversicherung AG, 2007* WL 2219421, at *5 (S.D.N.Y. 1 August 2007).

seat or was clear from the parties' agreement, and second, that the tribunal's failure to order a physical hearing caused it substantial prejudice.

The public policy defense in Article V(2)(b) is also construed narrowly, and enforcement is only denied when it would violate "the forum state's most basic notions of morality and justice".[75] Courts in the U.S. have found that "'public policy' and 'national policy' are not synonymous",[76] and to justify non-enforcement the public policy "must be 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'".[77] The mere fact that a policy is embodied in some clearly expressed rule of statutory or common law is not itself sufficient to demonstrate an expression of the forum's most basic notions of morality and justice., since "[a]ll laws, be they procedural or substantive, are founded on strong policy considerations."[78] Thus, even if the U.S. had a national policy requiring physical hearings, it is unlikely that it would rise to the level required by Article V(2)(b) to justify refusal of enforcement.[79]

By way of illustration, a foreign arbitral award has been enforced in the U.S. over a party's argument that the tribunal's refusal to hold an oral hearing violated U.S. public policy.[80] Petitioner argued that the applicable UNCITRAL Arbitration Rules entitled it to an oral hearing, and that the award, issued solely on documents despite petitioner's express request to hold an oral hearing, was contrary to the U.S.'s notion of fundamental fairness and justice. The tribunal had issued a procedural order ordering parties to submit all documentary evidence and witness statements for persons who wished to testify by a given deadline. Petitioner did not submit any witness statement at that time, and simply stated "[w]e remain at the Arbitrators' disposal for any oral hearing they might wish to call in this case." Petitioner requested an oral hearing two weeks later, which the tribunal ultimately refused, finding that petitioner had waived such right by not making a request by the deadline expressed in the procedural order. The U.S. court found that, irrespective of waiver, "under the rules and procedures established by the Tribunal, [petitioner]

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[75] *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)

[76] *Belship Navigation, Inc. v. Sealift, Inc*., 1995 WL 447656 at *6 (S.D.N.Y 28 July 1995).

[77] *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 299 (S.D.N.Y. 2013) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987))

[78] *A. Halcoussis Shipping Ltd. v. Golden Eagle Liber. Ltd*., 1989 WL 115941 at *2 (S.D.N.Y. 27 September 1989).

[79] Illustrating how high this threshold is, a U.S. court rejected an Article V(2)(b) defense based on an alleged "side-switching" prohibition, barring experts to testify against parties that had previously retained them, when the party did not prove the existence of this public policy through laws or precedent. See *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998).

[80] *Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp.*, 2006 WL 1228930, at *3 (W.D. Pa. 5 May 2006).

would have had no evidence to present at the hearing"[81] as it did not present witness statements. Under those circumstances, "[petitioner] ha[d] failed to meet its burden to prove that the arbitral process violated [the U.S.'s] basic notions of fundamental fairness and justice."[82]

Similarly, an award has been enforced despite being based on witness statements from witnesses who were unavailable for cross-examination, allegedly in contravention of the parties' agreed-upon procedures, when petitioners failed to request an adjournment to hear the witnesses at a later hearing.[83]

Thus, it is unlikely that a right to a physical hearing, to the extent that it might exist in any relevant jurisdiction, would qualify as one of the U.S.'s most basic notions of morality and justice so as to justify refusal of enforcement under Article V(2)(b).

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: N/A

For many years federal court filings have been made electronically, which practice has continued throughout the pandemic. Further, U.S. courts have been using videoconferencing and similar forms of technology for over 20 years, although the number of remote proceedings has significantly increased in the wake of the COVID pandemic.[84] Given the autonomy retained by each court, proceedings vary from one

[81] Ibid.at *3.
[82] Ibid.
[83] *AO Techsnabexport v. Globe Nuclear Servs. & Supply, Ltd*., 656 F. Supp. 2d 550, 560 (D. Md. 2009), aff'd sub nom. AO Techsnabexport v. Globe Nuclear Servs. & Supply GNSS, Ltd., 404 F. App'x 793 (4th Cir. 2010).
[84] See fn. 24, 25, 30 and 32 above. See also *Ciccone v. One W. 64th St., Inc.*, 2020 WL 5362065, at *5 (N.Y. Sup. Ct. 4 September 2020) ("[F]ederal trial courts across the country [...] have consistently determined that given the pandemic, it is necessary, appropriate, and fair to hold bench trials entirely by videoconference."), order amended and superseded, (N.Y. Sup. Ct. 2020) (also noting that the technology for video-conferencing is "straightforward and easy to use", thus rejecting objections based on counsel's technical capability to participate virtually) ; *Xcoal Energy & Resources v. Bluestone Energy Sales Corp*., 2020 WL 4794533 (D. Del. 18 August 2020); *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 2020 WL 3411385 (E.D. Va. 23 April, 2020); and *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, 2020 WL 3605623 (D. Del. 2 July 2020) (establishing rules for the

court to the other. The 7th Circuit, for example, is hearing cases scheduled through 31 December 2020 by telephone or video communication, with audio live-streamed to YouTube.[85] And many states have issued orders suspending or extending deadlines and tolling statutes of limitations.[86] Also, several courts have installed, or are in the process of installing, video platforms and providing training to judges and court personnel, as well as issuing guidelines and instructions for attorneys.[87] Overall, the U.S. court system has been supportive of adopting remote proceedings, and the technological advances and necessity of the current circumstances have only strengthened such perception.[88]

Likewise, U.S.-based arbitral institutions and arbitration centers have issued directives and protocols promoting adoption of procedures for remote hearings and seeking to assist parties with the practical aspects of advancing arbitration cases during the pandemic.[89]

trial that require all witness to testify by video and limit the number of representatives for each party that can be present in the courtroom).

[85] United States Court of Appeals for the Seventh Circuit. "Order Regarding COVID-19" (3 August 2020).

[86] See, e.g., State of New York. "Executive Order No. 202.48 Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency" (6 July 2020).

[87] See, e.g., Southern District of New York. "Skype for Business Instruction Guide for Attorneys" (30 April 2020).

[88] See Andreas FRISCHKNECHT, "United States", in *IBA Impact of COVID-19 on Court Operations & Litigation Practice*, at pp. 110-13.

[89] See AAA-ICDR, "Virtual Hearing Guide for Arbitrators and Parties" and "Model Order and Procedures for a Virtual Hearing via Videoconference"; CPR, "Annotated Model Procedural Order for Remote Video Arbitration Proceedings"; ABA-ILS "COVID-19 Quick Reference Guide"; and SVAMC "Coronavirus Advisory". See James HOSKING and Marcel Engholm CARDOSO, "Practical Considerations for Holding a Remote Arbitration Hearing", N.Y.S.B.A., 13(2) N.Y. Disp. Res. Lawyer (2020) at p. 17 (collecting protocols and related resources).