



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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

BRAZIL

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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.

First of all, the answers in this questionnaire are applicable, in principle, to both domestic and international arbitrations governed by Brazilian law (as *lex arbitri*). Under the Brazilian Arbitration Act (“BAA”),¹ there is no distinction between domestic and international arbitration. Brazil has a monist system:² in principle, all arbitrations are subject to the same set of rules when Brazilian law is applicable.³ In addition, Brazilian authors generally agree that the BAA was inspired by international standards, applicable to both domestic and international arbitrations governed by Brazilian law.⁴ However, an important distinction exists with respect to arbitral awards. Adopting a geographical criterion (*jus solis*), the BAA differentiates domestic awards (rendered within the Brazilian territory) from foreign awards (rendered outside the Brazilian territory).⁵

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¹ Federal Law No. 9307 enacted on 23 September 1996 and amended on 26 May 2015, available at <http://www.planalto.gov.br/ccivil_03/leis/19307.htm> (last accessed 14 November 2020).

² Rafael F. ALVES, “Country Report: Brazil” in Franco FERRARI, Friedrich ROSENFELD and Dietmar CZERNICH, eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020) p. 55; Rafael F. ALVES, “*Jura Novit Arbiter* under Brazilian Law” in Franco FERRARI and Giuditta CORDERO-MOSS, *Iura Novit Curia in International Arbitration* (JurisNet 2018) p. 47 at pp. 47-52. See also Adriana BRAGHETTA, *A import ncia da sede da arbitragem* (Forense 2010) p. 338.

³ STJ REsp 1231554, Reporting Justice Nancy Andrighi, June 1, 2011. See also N dia ARA JO, “Direito Internacional Privado: Teoria e Pr tica Brasileira”, *Revista dos Tribunais* (2019) p. 392.

⁴ See, e.g., A. BRAGHETTA, *A import ncia da sede da arbitragem*, fn. 2 above, p. 338.

⁵ BAA, Art. 34: “A foreign arbitral award is considered to be an award made outside the national territory”. Free translation contained in Andr  ABBUD, Daniel LEVY and Rafael F. ALVES, *The Brazilian Arbitration Act: A Case Law Guide* (Kluwer Law International 2020) p. 167.

Foreign arbitral awards are subject to a recognition process before the Superior Court of Justice (“STJ”) in order to produce effects in Brazil,⁶ and the New York Convention applies (since its adoption by Brazil in 2002).

With respect to the right to a physical hearing in arbitration, in principle, there is no specific provision in the BAA that creates such a right.⁷ The BAA only determines that the deposition of parties and examination of witnesses shall occur in a given “location” previously determined, with the depositions and testimony being recorded in writing.⁸ Since this legal provision is generic, it is arguable whether it actually requires a *physical* location or whether a *remote* location would also be acceptable. The current understanding among Brazilian authors and practitioners is that the BAA *does not prohibit remote hearings*,⁹ as will be detailed in this report. In practical terms, since the COVID-19 pandemic hit Brazil in late February and early March 2020, most Brazilian institutions have *adapted* their services by enacting new Rules, Guidelines or Recommendations regarding remote hearings (see sub-paragraph f.11 below) and many remote hearings have been held, with *general acceptance* within the arbitral community.¹⁰ As a matter of fact, Brazilian scholars had already accepted the possibility of holding *remote hearings* in arbitration *even before* the COVID-19 pandemic.¹¹ In the context of COVID-19, more authors have *reaffirmed* this position,¹² particularly with

⁶ BAA, Art. 35: “In order to be recognised and enforced in Brazil, a foreign arbitral award is only subject to homologation by the Superior Court of Justice”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 173.

⁷ Reaching the same conclusion, Flávia F. MANGE and Daniela M. GABBAY, “Audiências arbitrais por videoconferência”, *Revista do Advogado* (2020) p. 108 at pp. 113-114.

⁸ BAA, Art. 22, paragraph 1: “Depositions by parties and witnesses shall be taken at places, dates and hours previously communicated in writing to the parties, with the deposition being transcribed and signed by the deponent, or on his behalf, and by the arbitrators”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 113.

⁹ F.F. MANGE and D.M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above.

¹⁰ João M.R. SILVA, “Os impactos da Covid-19 na administração de procedimentos arbitrais”, 17 *Revista Brasileira de Arbitragem* (2020) p. 191; F.F. MANGE and D.M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above.

¹¹ Carlos A. CARMONA, *Arbitragem e Processo*, 3rd edn. (Atlas 2009) p. 316; Eduardo A. PARENTE, *Processo Arbitral e Sistema* (Atlas 2012) p. 245; J.M.R. SILVA, “Os impactos da Covid-19 na administração de procedimentos arbitrais”, fn. 10 above, p. 192; F.F. MANGE and D.M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above, p. 112.

¹² Debora VISCONTE, “Notas de medidas de mitigação dos efeitos do COVID-19 da corte da CCI e recomendações sobre procedimentos remotos de resolução de conflitos da CI Arb”, 17 *Revista Brasileira de Arbitragem* (2020) p. 198.

respect to evidentiary hearings.¹³ Flávia Mange and Daniela Gabbay, two of the most talented Brazilian practitioners in the arbitration field, have gathered relevant information and data from Brazilian institutions on arbitral hearings during the pandemic and published them in December 2020.¹⁴ The authors' research indicates that most of the arbitral hearings in Brazil were maintained during the pandemic, turning into remote hearings.¹⁵

To corroborate the understanding that the BAA does not prohibit remote hearings, it may be useful to interpret the words "place" (*"lugar"*) and "location" (*"local"*) often used by the BAA. The use of such terms does not necessarily indicate a *physical venue* under the BAA. For example, when establishing the mandatory requirements for "*compromisso*" (i.e., an arbitration agreement entered into by the parties after the dispute has arisen), Article 10 determines that it should include the "place" where the arbitral award will be rendered, and Brazilian authors agree that this provision does not require that the arbitrators be *physically* present in such specific "place" to execute the arbitral award.¹⁶ In other words, under the BAA, the "place where the award is rendered" could be Miami, and the award could still be executed by the arbitrators in São Paulo (or elsewhere). So, under the BAA, the "place where the award is rendered" does not require *physical* presence.

One additional clarification in such regard: the BAA does not expressly use the concept of "seat" of arbitration. Accordingly, Brazilian authors take different views on the definition of "seat" under the Brazilian law: (i) some authors understand that the seat is "the place where the award is rendered",¹⁷ (ii) other authors understand that the seat is "the place where the arbitration takes place", that is, where the proceedings occur,¹⁸ and (iii) a third view understands that the concept of "seat" is alien to the BAA.¹⁹ However, under any of those understandings, Brazilian authors agree that (i) the arbitrators do not need to be *physically* present at any "seat" or "place" to execute the award, and that (ii) arbitral awards rendered *outside* the Brazilian territory (because the "seat" is abroad or because "the place where the award is rendered" is abroad, depending on the definition adopted) are *foreign awards* and, thus, currently subject to (a) the New York Convention and (b) an *exequatur* process before the STJ in order to produce effects in Brazil, as explained above.

¹³ F.F. MANGE and D.M. GABBAY, "Audiências arbitrais por videoconferência", fn. 7 above, pp. 112-113.

¹⁴ *Ibid.*, pp. 112-118.

¹⁵ *Ibid.*, pp. 115-116.

¹⁶ C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, p. 372; Peter C. SESTER, *Comentários à Lei de Arbitragem e à Legislação Extravagante* (Quartier Latin 2020) pp. 325-326; Rafael F. ALVES, "Sentença Arbitral" in Daniel LEVY and Guilherme S.J. PEREIRA, eds., *Curso de Arbitragem* (Revista dos Tribunais 2019) p. 253.

¹⁷ A. BRAGHETTA, *A importância da sede da arbitragem*, fn. 2 above, p. 16; R.F. ALVES, "Sentença Arbitral", fn. 16 above, p. 253.

¹⁸ P.C. SESTER, *Comentários à Lei de Arbitragem*, fn. 16 above, p. 197.

¹⁹ C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, p. 204.

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For the purpose of this report, the relevant conclusion is that when the BAA uses the words “place” (“*lugar*”) and “location” (“*local*”), it does not necessarily imply the need for *physical presence* in such venue.

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: Yes, it can be inferred by interpretation of other procedural rules of the BAA that a right to a physical hearing in arbitration *does not exist*.

The BAA contains only one *specific* provision regarding the production of evidence and hearings (Article 22).²⁰ Such provision grants the arbitrators broad powers to order the production of evidence in arbitral proceedings. It determines that the arbitrators *may* order the deposition of parties, the examination of witnesses, the production of technical or expert evidence, or of other evidence deemed *necessary*. By using “may” and “necessary” in such provision, the BAA is implying that the arbitrators may *also* decide the case solely on the documents submitted by the parties if they understand that a hearing *would not be necessary*. This conclusion is also supported by Brazilian commentators.²¹ Therefore, it is possible to infer that a “right to a physical hearing” is *excluded* by reference to other procedural rules of the BAA.

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: No.

²⁰ BAA, Art. 22: “The arbitrator or the arbitral tribunal may take the parties’ deposition, hear witnesses and order the production of expert evidence and other evidence deemed necessary, either ex officio or at the parties’ request”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 113.

²¹ André F. MONTORO, *Flexibilidade do Procedimento Arbitral* (Universidade de São Paulo 2010) pp. 293-296.

Although the BAA *does offer an answer* that a right to a physical hearing in arbitration is *excluded* (see sub-paragraphs a.1 and a.2 above), it is worth mentioning that the same conclusion is supported by reference to general rules and principles of Brazilian civil procedure.

First, when discussing Brazilian procedural rules for the purpose of this report, we will focus on *civil matters*, as opposed to criminal matters, because the procedural rules for the latter may lead to different conclusions. In any event, under Brazilian law, it does not seem that criminal procedural rules would have any influence on, or applicability to, commercial arbitration.

In Brazil, it is widely accepted that specific civil procedure *rules*, particularly from the Brazilian Civil Procedure Code (“CPC”), are not *automatically* applicable to arbitration.²² However, some *general principles* underlying the CPC *may* be used as a *guide* to arbitral proceedings under Brazilian law, as well as to interpret *procedural public policy* in Brazil. As also described in sub-paragraphs b.4 and f.11 below, Brazilian state courts have been holding remote hearings *even before* the COVID-19 pandemic.

Brazilian civil procedure rules *do not provide* the right to a *physical* hearing. As a matter of fact, some specific CPC rules expressly indicate the possibility of using *video conferencing*, such as when one of the parties resides in a city other than the city where the court is located (see, e.g., Article 385, paragraph 3,²³ Article 453, paragraph 1,²⁴ and Article 937, paragraph 4,²⁵ of the CPC). Accordingly, Brazilian procedural law establishes *the right to a hearing* (whether physical or remote) when it is necessary to produce oral evidence, including (i) examination of expert witnesses, (ii) examination of factual witnesses, and/or (iii) the live testimony of the parties. Attorneys may also present oral arguments remotely by video conference during a trial before the lower courts or on appeal before the Court of Appeals.

²² Guilherme S.J. PEREIRA, “Procedimento I” in D. LEVY and G.S.J. PEREIRA, eds., *Curso de Arbitragem*, fn. 16 above, p. 163 at p. 174; E.A. PARENTE, *Processo Arbitral e Sistema*, fn. 11 above, pp. 105, 108, 118; A.F. MONTORO, *Flexibilidade do Procedimento Arbitral*, fn. 21 above, pp. 115-121; Carlos A. CARMONA, “Flexibilização do Procedimento Arbitral”, 6 *Revista Brasileira de Arbitragem* (2009) p.7 at pp. 13-21.

²³ CPC, Art. 385, paragraph 3: “The personal testimony of the party who resides in a different judicial district, judicial section or subsection to the one before which the action is pending may be taken by videoconference, or other technological means of real time transmission of sound and video, which may even occur during the trial” (free translation by the Author).

²⁴ CPC, Art. 453, paragraph 1: “The hearing of witnesses who reside in a judicial district, judicial section or subsection different to the one before which the case is pending may be carried out by means of a videoconference or other technological resource for the transmission and reception of audio and video in real time, which may even occur during the trial” (free translation by the Author).

²⁵ CPC, Art. 937, paragraph 4: “A lawyer whose place of business is located in a different city to the seat of the court is allowed to deliver the oral arguments by videoconference or other technological sound and video real time broadcasting resource, provided he or she requests it until the day prior to the trial” (free translation by the Author).

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Furthermore, due to the COVID-19 pandemic, the Brazilian National Council of Justice (“CNJ”), the body responsible for issuing general administrative rules applicable to the Brazilian Judiciary, *confirmed* the possibility of holding *remote hearings* (Resolutions 313/2020 and 314/2020), and also issued new resolutions allowing judges, clerks of court and public servants to work *remotely*. In addition, the STJ has *suspended all physical hearings* and *extended the hearings via videoconference* until December 2020.²⁶ Finally, pursuant to the CNJ’s Guidelines and in accordance with the CPC, several Courts of Appeals²⁷ also issued administrative rules during the COVID-19 pandemic to confirm the possibility of holding *remote hearings* and to regulate their implementation.

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: N/A

As mentioned above, on the one hand, it is widely accepted in Brazil that civil procedure rules, particularly the ones stemming from the CPC, *are not automatically applicable* to arbitral proceedings. On the other hand, general principles of Brazilian civil procedure *may* be used to *guide* arbitral proceedings under Brazilian law. For the purposes of this questionnaire, such principles *confirm* the acceptability of remote hearings under Brazilian law (both in judicial and arbitral proceedings) and, accordingly, the use of such technology, in and of itself, does not violate any procedural right of the parties.²⁸

²⁶ STJ, Resolução STJ/GP n. 19 de 27 de agosto de 2020, available at <https://bdjur.stj.jus.br/jspui/bitstream/2011/146418/Res_19_2020_GP.pdf> (last accessed 15 November 2020).

²⁷ TJPR, Judicial Decree No. 227/2020-DM; TJSP, Statement CG No. 284/2020 and Statement CG No. 317/2020; TRT 2nd Region, Act GP No. 08/2020; TJRJ, Normative Act TJ No. 14/2020, Art. 6; Provision CGJ No. 36/2020, Art. 5, II; TJRS, Act No. 003/2020-1^a VP, Art. 1; TJSC, Regimental Act TJ No. 1/2020, Art. 1; TJMT, Ordinance No. 003/2020/NUPEMEC-PRES, Art. 1; TJMG, Ordinance No. 6.414/CGJ/2020, Art. 1; TJMS, Provision 477/2020, Art. 1; TJES, Ordinance 001/2020/NUPEMEC, Art. 1; TJBA, Judicial Decree No. 276, Art. 1 / Judicial Decree 244/2020 / Judicial Decree 245/2020; TJAC, Joint Ordinance No. 24, Art. 1; TJAL, Normative Act No. 11/2020, Art. 1; TJCE, Ordinance No. 1/2020/NUPEMEC, Art. 1; TJGO, Provision No. 3/2020, Art. 1; TJMA, Ordinance No. 22/2020, Art. 1; TJPE, Joint Normative Instruction No. 6/2020, Art. 1; TJRN, Ordinance 224/2020.

²⁸ D. VISCONTE, “Notas de medidas de mitigação dos efeitos do COVID-19 da corte da CCI”, fn. 12 above.

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

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

Short answer: N/A

As mentioned in sub-paragraph a.1 above, under the BAA, there is *no express right* to a physical hearing. Therefore, the parties are free to agree on remote hearings and also to choose (*ex ante* or *ex post*) an arbitral institution that expressly provides for the possibility to hold remote hearings.

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

Short answer: In principle, no, but it depends on the circumstances of the case, as detailed below.

First of all, if the parties had *not* agreed to a remote hearing, i.e., if the arbitration agreement is silent on whether a hearing could be held physically or remotely, the arbitral tribunal has *full discretion* to decide to hold the hearing *remotely*. Under the BAA, arbitrators have broad discretion to establish the procedural rules applicable to the arbitration,²⁹ absent an agreement of the parties,³⁰ which includes remote hearings.³¹ Under the BAA, the arbitrators' decision shall only observe and respect the parties' right

²⁹ BAA, Art. 21, paragraph 1: "Depositions by parties and witnesses shall be taken at places, dates and hours previously communicated in writing to the parties, with the deposition being transcribed and signed by the deponent, or on his behalf, and by the arbitrators". Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 107.

³⁰ E.A. PARENTE, *Processo Arbitral e Sistema*, fn. 11 above, pp. 229-235; A.F. MONTORO, *Flexibilidade do Procedimento Arbitral*, fn. 21 above, pp. 86-88; R.F. ALVES, "Country Report: Brazil", fn. 2 above; G.S.J. PEREIRA, "Procedimento I", fn. 22 above, pp. 167-173; C.A. CARMONA, "Flexibilização do Procedimento Arbitral", fn. 22 above, pp. 13-21.

³¹ C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, p. 316.; E.A. PARENTE, *Processo Arbitral e Sistema*, fn. 11 above, p. 245.

to equal treatment, impartiality, and the right to be heard, i.e., the parties' due process rights.³²

However, assuming that the premises of the question are (i) the right to a physical hearing does not exist and (ii) parties have agreed to a physical hearing, there are two possible scenarios that lead to different outcomes, depending on whether the agreement to hold a physical hearing is reached before or after the arbitration has commenced:

*Scenario 1 – the arbitration agreement provides for physical hearings.*³³ If the arbitration agreement provides for a *physical hearing*, either expressly or by reference to institutional rules which establish a *physical hearing* as mandatory, in principle, arbitrators are bound by this provision and are required to apply it.³⁴ The parties could amend the arbitration agreement in the terms of reference³⁵ in order to *exclude or waive* such limitation (provided that the arbitral institution also accepts it, as the case may be). Under the BAA, the terms of reference are considered part of the arbitration agreement.³⁶ However, if the limitation remains in force, absent a different agreement by the parties throughout the proceedings, the hearing would necessarily have to be *physical*. Otherwise, the award could be *annulled* under the BAA, due to the violation of the “limits of the arbitration agreement”, which is an *express* ground for setting aside.³⁷

³² BAA, Art. 2, paragraph 2: “The parties may also agree that the arbitration shall be conducted under the general principles of law, customs, usages and international rules of trade”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 13; F.F. MANGE and D. M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above, p. 114.

³³ Scenario 1 is applicable to any arbitration agreement as defined by the BAA (*convenção de arbitragem*). In other words, such scenario and its consequences are valid either (i) to the arbitration agreement entered into by the parties before any dispute has arisen (for instance, an arbitral clause in the contract) or (ii) to “*compromisso*”, the arbitration agreement entered into by the parties after the dispute has arisen but before the arbitration has commenced.

³⁴ BAA, Art. 21: “The arbitral procedure shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialized entity, it being possible for the parties to empower the sole arbitrator or the arbitral tribunal to regulate the procedure”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 107.

³⁵ BAA, Art. 19, paragraph 1: “Once the arbitration has been commenced and if the arbitrator or the arbitral tribunal finds that there is a need to clarify a matter set forth in the arbitration agreement, an addendum shall be drafted together with the parties, and be executed by all, this document becoming part of the arbitration agreement”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 97.

³⁶ *Ibid.*

³⁷ BAA, Art. 32, No. IV: “An arbitral award is null and void if: IV – it was rendered beyond the limits of the arbitration agreement”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 155.

Scenario 2 – the arbitration agreement does not provide for physical hearings, but the parties have agreed on it during the arbitration. If the arbitration agreement does not provide for a physical hearing, but the parties have agreed to hold a physical hearing *during the arbitration*³⁸ (for instance, by a joint submission to the arbitrators or by separate submissions but with the same position),³⁹ opinions differ on whether or not arbitrators would be bound by the parties’ decision. Some Brazilian scholars understand the arbitrators have *broad discretion and autonomy* to decide on how the evidence will be produced *even contrary to the parties’ will*.⁴⁰ Other scholars reason that party autonomy is the cornerstone of arbitration under Brazilian law and, therefore, the arbitrators are bound by the parties’ agreements, even agreements reached during the proceedings and *not included* in the arbitration agreement. Adopting a cautious approach to preserve the validity and integrity of the arbitral award under Brazilian law, it would be more prudent for the arbitrators to follow the parties’ agreement on how the hearing should be conducted, particularly if the parties specifically request a *physical hearing*, unless there are any specific concerns regarding, for instance, (i) public health issues and compliance with the law and the public authorities’ regulations (e.g., during the COVID-19 pandemic), and (ii) the quality and integrity of the evidence to be produced in such a hearing (for instance, concrete due process concerns, detrimental to any of the parties’ right to be heard and defend itself). In conclusion, it is difficult to avoid a case-by-case analysis: within the cautious approach adopted herein, the arbitrators should render a reasoned decision *balancing* the different interests, rules and principles at stake in the specific case.⁴¹

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: N/A

³⁸ According to Article 19 of the BAA, an arbitration commences when the arbitral tribunal is constituted, which occurs when the sole arbitrator accepts his/her nomination/appointment or, if an arbitral tribunal, when the last arbitrator accepts his/her nomination/appointment.

³⁹ According to Flávia Mange and Daniela Gabbay’s empirical research on the subject, the majority of the remote hearings held during the pandemic had the parties’ consent. There were only two cases in which, even with the opposition by one of the parties, the remote hearing was held, and two other cases where both parties opposed to holding the hearing remotely, but such remote hearing occurred nevertheless, despite the parties’ opposition (see F.F. MANGE and D. M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above, p. 117).

⁴⁰ E.A. PARENTE, *Processo Arbitral e Sistema*, fn. 11 above, pp. 229-235.

⁴¹ Reaching a similar conclusion, F.F. MANGE and D.M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above, p. 114.

In any event, with respect to the *annulment* of an arbitral award under the BAA, as detailed in scholarly works,⁴² an arbitral award is *not subject to appeal* under Brazilian law and *may not be reviewed on the merits* by the courts. The grounds for setting an arbitral award aside in Brazil are *very limited*, as provided by Article 32 of the BAA.⁴³ Furthermore, state courts usually interpret such grounds *narrowly*, which means that *only in very exceptional circumstances* an arbitral award will be annulled under Brazilian law.⁴⁴ In addition, as also detailed in scholarly works,⁴⁵ the STJ gives great deference to the arbitrators' decision on how to conduct the proceedings. Attempts to set aside arbitral awards due to mere dissatisfaction with the outcome disguised as "due process violations" (under Article 32, No. VIII, and Article 21, second paragraph, of the BAA)⁴⁶ tend to be short-lived in Brazilian courts.⁴⁷ The STJ has been deferential to arbitrators and has generally rejected due process allegations, particularly related to production of evidence. For instance, in a 2016 judgement, the STJ ruled that the arbitral tribunal's rejection of a party's request to produce expert evidence does not, in and of itself, violate the adversarial principle.⁴⁸ The same conclusion was reached by the STJ in another case decided in 2019.⁴⁹ Accordingly, it is unlikely that a party will be successful in Brazil on an allegation that the arbitrators violated due process because they decided to hold a remote hearing.

⁴² Rafael F. ALVES, *Árbitro e Direito: o julgamento do mérito na arbitragem* (Almedina 2018), pp. 256-273; see also R.F. ALVES, "Jura Novit Arbiter under Brazilian law", fn. 2 above, pp. 47-52.

⁴³ See C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, pp. 411-412; José E.N. PINTO, "Anulação de Sentença Arbitral infra petita, extra petita ou ultra petita", in Eduardo JOBIM and Rafael B. MACHADO, eds., *Arbitragem no Brasil: Aspectos Jurídicos Relevantes* (Quartier Latin 2008) pp. 250-251; Marcus V.T.C. FERNANDES, *Anulação da sentença arbitral* (Atlas 2007) pp. 55-56.

⁴⁴ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 256-273; R.F. ALVES, "Jura Novit Arbiter under Brazilian law", fn. 2 above, pp. 47-52.

⁴⁵ *Ibid.*; R.F. ALVES, "Country Report: Brazil", fn. 2 above, p. 57.

⁴⁶ BAA, Art. 32, No. VIII: "An arbitral award is null and void if: VIII – it violated the principles set forth by Article 21, Paragraph 2 of this Law". Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 155; BAA, Art. 21, paragraph 2: "The principles of adversarial proceedings, equal treatment of the parties, impartiality of the arbitrator and the arbitrator's free reasoning shall always be respected in the arbitral proceedings". Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 107.

⁴⁷ R.F. ALVES, "Country Report: Brazil", fn. 2 above.

⁴⁸ STJ RESP 1500667 Reporting Justice João Otávio de Noronha, August 19, 2016.

⁴⁹ STJ AgInt AgInt AREsp 1143608 Reporting Justice Moura Ribeiro, March 18, 2019.

Finally, with respect to *ex post* waivers related to due process allegations, *in principle*, a party intending to challenge the award in the future should allege *any* due process violations *at the first opportunity during the arbitral proceeding*, otherwise it *could* be interpreted as an *ex post tacit waiver*, under Article 20 of the BAA.⁵⁰ However, it should be clarified that this issue of an *ex post tacit waiver* regarding due process violations is *controversial* among Brazilian scholars, as some authors understand that *no waiver could occur* given the nature of *procedural public policy* that would be at issue in considering a due process violation.⁵¹ On the other hand, as further detailed in scholarly works,⁵² in the context of recognition of a foreign arbitral award (SEC 3709)⁵³ the STJ found that a party *tacitly waived* its right to object to the tribunal's jurisdiction and its decision on party representation (also related to due process allegations) because the party failed to raise an objection during the arbitration, as required by the applicable institutional rules (in such case, the American Arbitration Association rules).

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, a right to a physical hearing in arbitration does not exist under Brazilian law. In any event, as explained in sub-paragraph d.7 above, and as further detailed in scholarly works,⁵⁴ the STJ grants arbitrators broad discretion to conduct the arbitral proceedings. Attempts to set aside arbitral awards on the basis of “due process violations” under Article 32, No. VIII, and Article 21, paragraph 2, of the BAA tend to

⁵⁰ BAA, Art. 20: “A party wishing to raise issues as to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first possible opportunity after the commencement of the arbitral proceedings”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 103.

⁵¹ C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, p. 284; P.C. SESTER, *Comentários à Lei de Arbitragem*, fn. 16 above, p. 197.

⁵² R.F. ALVES, “Country Report: Brazil”, fn. 2 above, p. 72. Felipe V. SPERANDIO, “Homologação de Sentença Arbitral Estrangeira. Convenção de Nova Iorque. Conflito de Jurisdição. Superior Tribunal de Justiça. SEC nº 3.709 – US. Comverse Inc. v. American Telecommunication do Brasil Ltda. J. 14.06.2012. Relator: Teori Albino Zavascki”, 9 *Revista Brasileira de Arbitragem* (2012) p. 63.

⁵³ STJ SEC 3709, Reporting Justice Teori Albino Zavascki, June 29, 2012.

⁵⁴ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 256-273; R.F. ALVES, “Country Report: Brazil”, fn. 2 above, p. 57.

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be unsuccessful in Brazilian courts, particularly if the party fails to produce robust evidence of material violations and actual prejudice to the outcome of the case.⁵⁵

In addition, in principle, Article 32 contains all the grounds to set aside an arbitral award in Brazil, and the violation of public policy is not among them. However, most Brazilian authors agree that *public policy* could also be a ground for setting aside an arbitral award under Article 32 of the BAA in *very limited, exceptional circumstances*,⁵⁶ even though there is a debate as to what should be the applicable *standard*, i.e., domestic public policy, international public policy or transnational public policy.⁵⁷

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: It depends, but most likely not.

As detailed in sub-paragraphs d.7 and d.8 above, a party seeking to annul an award on the basis of due process violations faces an incredibly high bar. Usually, Brazilian courts require robust evidence of material violations and actual prejudice to the outcome of the case.⁵⁸

In such context, we understand that the failure to conduct a physical hearing by the arbitral tribunal *could* constitute a basis for setting aside the arbitral award in the following scenarios: (i) under Article 32, No. IV, of the BAA (decision exceeding the

⁵⁵ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 256-273.

⁵⁶ *Ibid.*; Luiz O. BAPTISTA, *Arbitragem comercial internacional* (Lex Magister 2011) p. 178; C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, pp. 415-416; Ricardo C. APRIGLIANO, *Ordem pública e processo: o tratamento das questões de ordem pública no direito processual civil* (Atlas 2011) p. 240; Pedro B. MARTINS, *Apointamentos sobre a lei de arbitragem* (Forense 2008) p. 319; Clávio V. FILHO, *Poder judiciário e sentença arbitral: de acordo com a nova jurisprudência constitucional* (Juruá 2003) p. 163; João B. LEE, *Arbitragem comercial internacional nos países do MERCOSUL* (Juruá 2011) pp. 206-207; Fabiane VERÇOSA, *A aplicação errônea do direito pelo árbitro: uma análise à luz do direito brasileiro e estrangeiro* (CRV 2015) pp. 181-182; Ricardo R. ALMEIDA, *Arbitragem comercial internacional e ordem pública* (Renovar 2005) p. 268; Fernando F. GAJARDONI, “Aspectos fundamentais de processo arbitral e pontos de contato com a jurisdição estatal”, *Revista de Processo* (2002) p. 189.

⁵⁷ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 256-273. See also André ABBUD, *Homologação de sentenças arbitrais estrangeiras* (Atlas 2008) p. 208.

⁵⁸ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 256-273.

scope of the arbitration agreement),⁵⁹ if a physical hearing was expressly provided for in the arbitration agreement and/or if the parties did not agree to holding the hearing remotely (see sub-paragraph c.6 above) or (ii) under Article 32, No. VIII, and Article 21, paragraph 2, of the BAA (due process),⁶⁰ if a party successfully proves material violations and actual prejudice to the outcome of the case.

In this last scenario, it should be emphasized that the problem *would not be* that the hearing was remote *per se*, but *how* such hearing has been *actually conducted* by the arbitrators. Also, as detailed in sub-paragraph d.7 above, *in principle*, the party should allege the due process violation at the first opportunity during the arbitral proceeding, otherwise it could be interpreted as an *ex post tacit waiver*, under Article 20 of the BAA.⁶¹ However, as explained above, the issue of an *ex post tacit waiver* regarding due process violations is *controversial* among Brazilian scholars, as some authors understand that *no waiver could occur* given the nature of *procedural public policy* that would be at issue in the event of a due process violation.⁶²

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: In principle, no.

⁵⁹ BAA, Art. 32, No. IV: “An arbitral award is null and void if: IV – it was rendered beyond the limits of the arbitration agreement”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 155.

⁶⁰ BAA, Art. 32, No. VIII: “An arbitral award is null and void if: VIII – it violated the principles set forth by Article 21, Paragraph 2 of this Law”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 155; BAA, Art. 21, paragraph 2: “The principles of adversarial proceedings, equal treatment of the parties, impartiality of the arbitrator and the arbitrator’s free reasoning shall always be respected in the arbitral proceedings”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 107.

⁶¹ BAA, Art. 20: “A party wishing to raise issues as to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first possible opportunity after the commencement of the arbitral proceedings”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 103.

⁶² C.A. CARMONA, *Arbitragem e Processo*, fn. 11 above, p. 284; P.C. SESTER, *Comentários à Lei de Arbitragem*, fn. 16 above, p. 197.

In Brazil, as of the date of this report, no case law has been developed in the STJ on the *specific* subject of the questionnaire. We found no decisions at the STJ regarding the recognition and enforcement of a foreign arbitral award discussing a purported right to a physical hearing. Therefore, the answer to the current question will consider only the general Brazilian case law regarding the applicability of the New York Convention for the recognition and enforcement of a foreign arbitral award.

As mentioned above, the STJ is the competent court in Brazil to decide on the *exequatur* of foreign arbitral and judicial awards.⁶³ With respect to the recognition of foreign arbitral awards, the STJ *usually grants the exequatur*, in accordance with the *pro-enforcement* bias of the BAA and of the New York Convention, as detailed in scholarly works.⁶⁴

The STJ construes *narrowly* the *exhaustive grounds* for the refusal of recognition of foreign awards listed in Article V of the New York Convention and Articles 38 and 39 of the BAA.⁶⁵ Only in *very few exceptional cases* has the STJ *refused* the recognition of a foreign award and then only upon the production of robust evidence by the party resisting enforcement establishing these limited grounds for refusal.⁶⁶ As explained in scholarly works,⁶⁷ despite being widely known that the STJ *should first* apply the provisions of the New York Convention, since the BAA serves only as a gap-filler (Articles 34 and 36), the STJ *rarely* applies the New York Convention when deciding on the recognition and enforcement of foreign arbitral awards. So far, the STJ has based its decisions expressly on Article V of the New York Convention in only two cases, regarding Article V(1)(a) and Article V(1)(e),⁶⁸ which fall outside the scope of this question. Scholars have criticized the STJ for this lack of application of the Convention.⁶⁹ In any event, other authors highlight that the Superior Court has been

⁶³ There are basically two types of proceedings related to the *exequatur* of foreign awards before the STJ: (1) either there is no opposition from any of the parties to the award or (2) one of such parties opposes the *exequatur*. If the latter occurs, then the Special Court of the STJ, comprising the fifteen most senior Justices of the STJ (among thirty-three Justices) will hear the case. Such proceedings are identified with the abbreviation “SEC”, which means “contested foreign judgment”. Today, the abbreviation SEC has been replaced by “HDE”.

⁶⁴ R.F. ALVES, “*Jura Novit Arbiter* under Brazilian law”, fn. 2 above, pp. 47-53; A. ABBUD, *Homologação de sentenças arbitrais estrangeiras*, fn. 57 above, pp. 127-130.

⁶⁵ A. ABBUD, *Homologação de sentenças arbitrais estrangeiras*, fn. 57 above, pp. 127-130.

⁶⁶ For more details, see R.F. ALVES, “*Jura Novit Arbiter* under Brazilian law”, fn. 2 above, pp. 47-52.

⁶⁷ *Ibid.*, pp. 47-53.

⁶⁸ As detailed in R.F. ALVES, “Country Report: Brazil”, fn. 2 above, pp. 57-72.

⁶⁹ Eduardo D. GONÇALVES, “Artigo V (inciso 2)”, in Arnaldo WALD and Selma F. LEMES, eds., *Arbitragem comercial internacional: a Convenção de Nova Iorque e o direito*

applying the same standards,⁷⁰ which is not surprising, since the provisions of the BAA in this regard are generally *similar* to those of the New York Convention.⁷¹ However, with respect to due process exceptions, Article V(1)(b) of the New York Convention, for instance, was not completely mirrored by Article 38, No. III, of the BAA. The expression “unable to present his case” in the first one was modified in BAA to “or if there has been a violation of adversarial principle to the detriment of the full defense”. The provision in the BAA could be deemed as a more restrictive concept than the one in the New York Convention.⁷²

With respect to due process exceptions, the table below – recently published in a scholarly work⁷³ – indicates the most relevant cases discussing due process allegations related to the *conduct of the arbitral proceedings* (and not, for instance, proper notice of the commencement of arbitration) in the context of recognition and enforcement of a foreign arbitral award by the STJ:

<i>Case Law Reference</i>	<i>Reporting Justice</i>	<i>Published</i>	<i>Due Process Violation(s) Alleged</i>	<i>Judgment</i>
SEC 507	Gilson Dipp	November 13, 2006	The arbitral proceedings were expensive, and the respondent was unable to nominate an arbitrator	Allegation of due process violation <i>rejected</i> and exequatur granted
SEC 611	João Otávio de Noronha	December 11, 2006	Inappropriate rejection of evidence by the arbitral tribunal	Allegation of due process violation <i>rejected</i> and exequatur granted
SEC 831	Arnaldo Esteves Lima	November 19, 2007	Inappropriate rejection of evidence by the arbitral tribunal	Allegation of due process violation <i>rejected</i> and exequatur granted
SEC 3709	Teori Albino Zavascki	June 29, 2012	Lack of adequate party representation	Allegation of due process violation

brasileiro (Saraiva 2011) p. 277; Albert J. VAN DEN BERG, “The New York Convention and Its Application by Brazilian Courts”, *Revista de Arbitragem e Mediação* (2013) p. 15; George BERMANN, “Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts”, *Revista de Arbitragem e Mediação* (2014) p. 327.

⁷⁰ José E.N. PINTO, “Artigo V (inciso 1 ‘C’ e ‘D’)” in A. WALD and S.F. LEMES, eds., fn. 69 above, p. 234.

⁷¹ A. ABBUD, *Homologação de sentenças arbitrais estrangeiras*, fn. 57 above, pp. 129-130.

⁷² As discussed in R.F. ALVES, “Country Report: Brazil”, fn. 2 above.

⁷³ R.F. ALVES, “Country Report: Brazil”, fn. 2 above.

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				<i>rejected</i> and exequatur granted
SEC 5692	Ari Pargendler	September 1, 2014	Lack of adequate reasoning of the arbitral award and violation of the full defense principle	Allegation of due process violation <i>rejected</i> and exequatur granted
SEC 10643	Humberto Martins	December 11, 2014	Lack of adequate party representation	Allegation of due process violation <i>rejected</i> and exequatur granted
SEC 12115	Luis Felipe Salomão	May 3, 2016	Inappropriate rejection of evidence by the arbitral tribunal	Allegation of due process violation <i>rejected</i> and exequatur granted

As can be seen, attempts to challenge foreign arbitral awards under the grounds of “due process violations” related to the conduct of the arbitral proceedings tend to be unsuccessful. Under Brazilian law, the STJ preserves the arbitrators’ broad discretion to conduct the arbitral proceedings, which is in line with the BAA’s purpose to foster arbitration in Brazil. The STJ has been very deferential to arbitrators, rejecting unsubstantiated allegations of due process violations.⁷⁴ For instance, as detailed in the chart above and in sub-paragraph d.7, in the context of *exequatur* proceedings, the STJ rejected allegations that the arbitrator (or the arbitral tribunal) violated due process solely due to the fact that it had rejected a request to produce additional evidence – see SEC 611, SEC 831 and SEC 12115 in the chart above.⁷⁵ The STJ has held that, except for *very few exceptional circumstances related to public policy exceptions*, arbitrators are free to decide on the production of evidence.⁷⁶

With respect to Article V(2)(b) of the New York Convention, the BAA has a similar provision in Article 39, No. II.⁷⁷ In Brazil, parties often allege public policy violation when resisting recognition or enforcement of a foreign arbitral award (usually combined with allegations of due process violations). However, the STJ tends to reject such

⁷⁴ As referred to *ibid.*, pp. 80-81.

⁷⁵ As also detailed *ibid.*, fn. 126.

⁷⁶ As referred to *ibid.*, pp. 80-81.

⁷⁷ BAA, Art. 39, No. II: “Recognition or enforcement of a foreign arbitral award will also be refused if the Superior Court of Justice finds that: II – the decision violates national public policy”. Free translation contained in A. ABBUD, D. LEVY and R.F. ALVES, *The Brazilian Arbitration Act*, fn. 5 above, p. 197.

allegations, granting the *exequatur*.⁷⁸ In such context, Brazilian authors generally agree that when Article 39, No. II, BAA refers to “*national* public policy”, it does not mean “*domestic* public policy”, and it should actually be interpreted as the “Brazilian public policy as applied in foreign relations”.⁷⁹ However, so far, the STJ has not provided a clear definition of “public policy” in the context of the *exequatur* of arbitral awards. For instance, the STJ does not differentiate “domestic public policy” from the “Brazilian public policy as applied in foreign relations” when deciding on the recognition and enforcement of foreign arbitral awards.⁸⁰

With respect to the role of the seat of arbitration when the STJ decides on allegations of due process violations in *exequatur* proceedings, the case law is also unclear. However, in recent years, the STJ has been more deferential to an *autonomous* standard applied to international arbitration (instead of a purely domestic one), protecting party autonomy and preserving the parties’ choice of the applicable rules (even foreign laws) – see SEC 3709, SEC 5692 and SEC 12115, detailed in the chart above.⁸¹

In conclusion, in general, the mere holding of a remote hearing *would hardly constitute* a basis to challenge a foreign arbitral award in Brazil. However, as explained above in sub-paragraph d.9, the failure to conduct a physical hearing by the arbitral tribunal *could* constitute a basis for challenging a foreign arbitral award in Brazil in the following scenarios: (i) if expressly provided for in the arbitration agreement and/or if all parties do not agree on holding the hearing remotely (see sub-paragraph c.6 above) or (ii) if a party successfully proves material due process violations and actual prejudice to the outcome of the case. As mentioned, in this last scenario, the issue would *not* be holding the hearing remotely in and of itself, but *how such hearing has been conducted* by the arbitrators. Also, as detailed in sub-paragraph 7, in principle, the party should allege the due process violation at the first opportunity during the arbitral proceeding, otherwise it could be interpreted as an *ex post tacit waiver*. As also detailed above and in scholarly works,⁸² in SEC 3709,⁸³ the STJ found that there had been a *tacit waiver* of the right to object to the tribunal’s jurisdiction and its decision on party representation (also related to due process allegations) because the party had not raised an objection at

⁷⁸ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 310-330.

⁷⁹ *Ibid.*; R.C. APRIGLIANO, fn. 56 above, p. 53; A. ABBUD, *Homologação de sentenças arbitrais estrangeiras*, fn. 57 above, p. 208.

⁸⁰ R.F. ALVES, *Árbitro e Direito*, fn. 42 above, pp. 310-330. See also the Report “Homologação de sentença arbitral estrangeira” by the Working Group of a research project organized by the Brazilian Arbitration Committee (CBAr) and Fundação Getulio Vargas in 2008-2009, available at <http://cbar.org.br/PDF/Homologacao_de_Sentenca_Arbitral_Estrangeira.pdf> (last accessed 22 January 2021).

⁸¹ As also detailed in R.F. ALVES, “Country Report: Brazil”, fn. 2 above.

⁸² *Ibid.*, p. 72; F.V. SPERANDIO, “Homologação de Sentença Arbitral Estrangeira”, fn. 52 above, pp. 63-92.

⁸³ STJ SEC 3709, Reporting Justice Teori Albino Zavascki, June 29, 2012.

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the first opportunity it had during the arbitration, as required by the applicable institutional rules (in such case, the American Arbitration Association rules).

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: Most hearings in Brazil have been taking place on *virtual* platforms, both in arbitration and courts, since the COVID-19 pandemic hit.

With respect to courts, as mentioned above, the CPC already provided for the possibility of remote hearings, which have been further regulated by the CNJ Resolutions and Courts of Appeals' Resolutions.

With respect to arbitration, most proceedings in Brazil were “physical” before the COVID-19 pandemic. However, considering the new scenario the pandemic has imposed, many arbitration institutions in Brazil have issued Resolutions with directives and recommendations to arbitrators and parties to shift the proceedings to digital platforms, including guidelines for remote hearings.⁸⁴ Some Brazilian scholars believe that digital transformation and the use of technology in arbitral proceedings may increase from now on,⁸⁵ especially considering that, in the aftermath of the pandemic, the Brazilian community will have experienced remote hearings and virtual proceedings satisfactorily.

Moreover, Brazilian courts have already developed digital platforms allowing parties to fully access all dockets, and at least one Brazilian arbitral institution (Câmara do Mercado – B3) have already created a digital platform allowing all procedural acts to be

⁸⁴ See, e.g., Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (“CAM-CCBC”), Notes on CAM-CCBC Remote Meetings and Hearings, available at <<https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/remote-hearings/>> (last accessed 14 November 2020); Chamber of Conciliation, Mediation and Arbitration (“CIESP/FIESP”), Resolution No. 2/2020 (25 March 2020) at <http://www.camaradearbitragem.org.br/pt/res/docs/2020_26_03_Resolucao2-Covid-19-Bicolumnada.pdf> (last accessed 15 November 2020); Orientações da Câmara CIESP/FIESP para a Realização de Audiências Virtuais (2 July 2020) at <<http://www.camaradearbitragem.org.br/pt/res/docs/camara-ciesp-fiesp-orientacoes-para-realizacao-de-audiencias-virtuais-1.pdf>> (last accessed 15 November 2020).

⁸⁵ F.F. MANGE and D.M. GABBAY, “Audiências arbitrais por videoconferência”, fn. 7 above, p. 122; J.M.R. SILVA, “Os impactos da Covid-19 na administração de procedimentos arbitrais”, fn. 10 above, pp. 193-194.

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performed virtually, without filing documents physically,⁸⁶ while other arbitral institutions are developing similar initiatives in Brazil.

⁸⁶ See <<https://www.camaradomercado.com.br/en-US/camdigital.html>> (last accessed 22 January 2021).