



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA PROJECTS

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

PORTUGAL

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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.

In the context of arbitration, Portugal's primary source of statutory law is Law No. 63/2011, of December 14, which approved the Portuguese Voluntary Arbitration Law ("PVAL"). The PVAL does not expressly provide for the right to a physical hearing in arbitration.

The PVAL integrated the 2006 UNCITRAL Model Law ("Model Law") with few adaptations to harmonize it with Portugal's legal tradition. It preserves the Model Law's core principles and is considered a monist law, with only a handful of provisions governing international arbitration.¹ In this regard, Article 51 of the PVAL explicitly provides domestic arbitration rules to apply *mutatis mutandis* in international arbitration. The definition of which arbitrations are considered international is subject to those that implicate international trade interests, in line with the standard defined by Article 1504 of the French Code of Civil Procedure.² The Former Portuguese Voluntary Arbitration Law, Law No. 31/1986, of August 29 ("FPVAL") regulated arbitration proceedings until the PVAL entered into force in 2012. The FPVAL was thoroughly amended in 2003 by Decree-Law No. 38/2003, of March 8, and neither its original version nor its amendments expressly provided for the right to a physical hearing.

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)?*

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¹ See PVAL, Articles 32 to 35.

² See António SAMPAIO CAMELO, "A Condução do Processo Arbitral – Comentário aos arts. 30.º a 38.º da Lei da Arbitragem Voluntária", *Revista da Ordem dos Advogados* (2013) p. 669.

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Short answer: Likely excluded by way of interpretation of Portugal's *lex arbitri*.

It is not surprising that the PVAL did not expressly include a right to physical hearings, considering how the Portuguese Parliament adopted it. In 2009, the Government requested the Portuguese Arbitration Association (“APA”) to draft an arbitration law to integrate the Model Law into the Portuguese legal system. As a result, the drafting of the PVAL was a significant opportunity for the Portuguese arbitration community to modernize arbitration proceedings to state of the art in jurisdictions with an “arbitration-friendly” tradition.³ Both the Portuguese Government and the Arbitration community joined efforts in a common purpose for Portugal to become a jurisdiction favorable to arbitration. Therefore, the consensus on a monist approach that would allow for as much flexibility as possible.

The last push to the approval of the PVAL came in 2011 amidst Portugal's financial crisis and its signature of a Memorandum of Understanding (“MoU”) with the European Commission, the International Monetary Fund, and the Central European Bank. The MoU included a set of Portugal's economic recovery measures. Among others, Portugal committed to issuing an arbitration law by the end of September 2011 “to make the arbitration for executive actions fully operational by the end of February 2012 and facilitate the recovery of backlogged cases and out-of-court settlement”.⁴

It is noteworthy that, among others, the PVAL incorporated Articles 19 (“Determination of rules of procedure”), 20 (“Place of arbitration”), and 24 (“Hearings and written proceedings”) of the Model Law⁵ as detailed below.

Determination of rules of procedure. Article 30(2) of the PVAL establishes that the parties may agree on the arbitration rules until the acceptance of the first arbitrator. In doing so, the parties must follow the fundamental principles defined in Article 30(1) of the PVAL. And in the absence of such agreement by the parties, or the absence of provisions applicable in the PVAL, the arbitral tribunal may conduct the arbitration as it deems appropriate, including determining the procedural rules.⁶

According to the fundamental principles in Article 30(1) of the PVAL, every arbitral proceeding must assure that (i) the respondent is served to defend itself; (ii) the parties are treated equally and given a reasonable opportunity to assert their rights, in writing or orally before the rendering of a final decision; and (iii) there must be a guarantee of compliance with the adversarial principle at all stages of the proceedings – subject to the exceptions provided for in the PVAL.

³ See Filipe VAZ PINTO, “Chapter 2: The Portuguese Voluntary Arbitration Law: History and Overview” in André PEREIRA DA FONSECA, Dário MOURA VICENTE, *et al.*, eds., *International Arbitration in Portugal* (Kluwer Law International 2020) p. 17.

⁴ Memorandum of Understanding on Specific Economic Policy Conditionality, para 7.6.

⁵ See PVAL, Article 30.

⁶ *Ibid.*

The inclusion of the mandatory observance of the PVAL's fundamental principles is particularly relevant in the Portuguese context since *ad hoc* arbitrations are relatively common. We also highlight that a fundamental principle in every arbitral process is the parties' right to assert their claims orally. However, nothing in the PVAL allows concluding that such a fundamental principle must be done through a physical hearing.

Place of arbitration. According to Article 31(2) of the PVAL, unless parties agree otherwise, the arbitral tribunal may meet at any place it deems appropriate to conduct hearings, evidentiary proceedings, and more generally, to make any decisions. The default rule is that arbitral tribunals are free to determine *where* to meet. Nothing in the PVAL leads to conclude for such *a place* to be *physical*. Most importantly, the very same provision applies to the arbitral tribunal's meetings to make *any decision*. It is unlikely that Portuguese Courts would conclude that a different standard applies to the arbitral tribunals' decision-making meetings, *vis-à-vis* hearings, in interpreting this sole provision in the PVAL.

Hearings and written proceedings. Article 34 of the PVAL⁷ establishes that unless otherwise agreed by the parties, the arbitral tribunal may decide whether it will hold hearings for evidence production or conduct the process solely based on documents and other evidence.⁸ Similarly to Article 24 of the Model Law, the arbitral tribunal shall hold one or more hearings for evidence production whenever one of the parties requests so, and unless the requesting party waives such right. Once again, the default rule is that the arbitral tribunal has full discretion to hold oral hearings or conduct the proceedings solely based on documents. Arbitral tribunals should consider the costs that a hearing with parties from different nationalities may have. In such cases, the Portuguese doctrine understands that "electronic means may be an appropriate remedy to keep costs under control while still serving the purposes of assisting the arbitral tribunals and the parties".⁹

⁷ The drafting of Article 34 of the PVAL was inspired by Article 24 of the Model Law (and the German and Spanish laws based thereon), with minor differences.

⁸ Regarding this topic, see Alan REDFERN and Martin HUNTER, "Redfern and Hunter on International Arbitration", 5th edn. (Oxford University Press 2009) p. 413: "[I]t has been said many times that the only thing wrong with 'documents only' arbitrations is that there are not enough of them. Such arbitrations are commonplace in certain categories of domestic arbitrations, notably in relation to small claims cases involving, for example, complaints by holidaymakers against tour operators and claims under insurance policies. In the international context, the main examples of 'documents only' arbitrations are those conducted under the rules of the London Maritime Arbitrators Association in connection with disputes arising out of charter parties and related documents. However, in the mainstream of international arbitration, it is unusual for the arbitral proceedings to be concluded without at least a brief hearing at which the representatives of the parties have an opportunity to make oral statements to the arbitral tribunal, and the arbitral tribunal itself is able to ask for clarification of matters contained in the written submissions and in the written evidence of witnesses".

⁹ Ana SERRA E MOURA, "Chapter 7: The Conduct of Arbitral Proceedings" in A. PEREIRA DA FONSECA, D. MOURA VICENTE, *et al.*, eds., fn. 3 above, p. 97 at p. 112.

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On another angle, while Article 24 of the Model Law references “oral hearings for the presentation of evidence or for oral argument”, Article 34(1) of the PVAL restricted the provision to “evidence hearings” only. The drafters of the PVAL considered the expected difficulty in conciliating the participants’ agendas to a hearing, primarily when arbitrators, the parties’ representatives, and the witnesses or experts reside in places far apart. Thus, there was a preference to allow parties to request a hearing for evidence production, leaving aside the possibility for them to request that a hearing took place for oral arguments.

A party’s right to a hearing is said to be a fundamental principle in international arbitration.¹⁰ However, the question remains as to whether this necessarily means a *physical* hearing. A hearing consists of an oral and synchronous exchange of arguments or evidence, as opposed to the written and asynchronous exchange of arguments or evidence in the parties’ briefs.¹¹ By reading Articles 19, 20, and 24 from the Model Law as incorporated in the PVAL altogether, it is highly unlikely for Portuguese Courts to conclude that parties have a right to a physical hearing, if any, as a default rule in the *lex arbitri*.

To sum up, with the incorporation of the Model Law, the default rule in the PVAL is that arbitral tribunals enjoy a wide range of discretion in determining whether to conduct hearings or decide solely on documents. Similarly, the PVAL grants the arbitral tribunal to choose *the place* where it will meet (including to conduct hearings). The aforesaid with the caveats of always respecting party autonomy, who may agree otherwise, and unilaterally request the arbitral tribunal to conduct hearings.¹² By way of interpretation of the PVAL, and the fact that hearings *per se* are not a fundamental principle in the arbitration process, it is improbable that Portuguese Courts will conclude that parties have a right to a physical hearing. Portuguese Courts will likely not focus on the *form* in which a hearing takes place (whether remotely or physically) but rather on whether the guarantees of due process have been properly met.

Like the PVAL, the arbitration rules of the leading arbitral institutions in Portugal do not expressly provide for a right to a physical hearing nor exclude the possibility of

¹⁰ See, e.g., Gary BORN, *International Commercial Arbitration*, 2nd edn. (Kluwer Law International 2014) p. 3512.

¹¹ See Maxi SCHERER, “Remote Hearings in International Arbitration: An Analytical Framework”, 37 J. Int’l Arb. (2020) p. 407 at p. 416.

¹² There is a general consensus among Portuguese authors of the possibility to conduct hearings remotely. However, Professor António Menezes Cordeiro expressed a contrary view in 2015, referring that: “The question is whether a court cannot function electronically, without people ever meeting physically and without the need for a physical space where the elements are legally stored; this is not possible: it would leave open the various legal points to which the determination of the seat is relevant and this even when all practical problems are overcome” (free translation by the Authors). António MENEZES CORDEIRO, “Commentary to Article 31 of the PVAL” in *Tratado da Arbitragem – Comentário à Lei 63/2011, de 14 de Dezembro* (Almedina 2015) p. 311.

remote hearings. And it is also notable that the 2020 revised Rules of Arbitration of the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry (“PCAC”) expressly allow holding remote hearings by conference-call, videoconference, or other means of remote communication.¹³

Steps towards the use of remote means in contentious proceedings in Portugal had been occurring long before the COVID pandemic restricted physical gatherings and imposed mandatory lockdowns and international border controls. For example, Portugal’s Online Dispute Resolution (“ODR”) is currently a form of alternative dispute resolution between consumers and suppliers of goods or services, entirely through online platforms and remote hearings. It is also worth mentioning that since 2009 Portugal has migrated all filings in court litigation to an online platform called “CITIUS” with the electronic signature of submissions.

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: Likely not.

The Portuguese general rules of civil procedure do not expressly provide a right to a physical hearing. Albeit there is a *status quo* assumption regarding the physical distinctiveness of trial hearings. The rationale behind this is that the principles of *orality* and *immediacy* – core principles of the civil procedure¹⁴ – are only fulfilled to their fullest extent in physical hearings.

(i) *Immediacy principle*. This principle provides that the judge must have as direct contact as possible with the means of evidence. However, it has some notable exceptions. For example: letters of request; the possibility of producing evidence in advance of the hearing (albeit subject to stringent requirements); and in the case of expert evidence –when its nature requires its production before the hearing.¹⁵

(ii) *Orality principle*. This principle is instrumental to the immediacy principle and entails that personal evidence production takes place orally before the judge. This

¹³ See Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry, Rules of Arbitration, Articles 14(2) and (3) and 29(2), available at <https://www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Projetos_Regulamentos_2020/Regulamentos%20de%20Arbitragem%20Reviso%20Novembro%202020.pdf> (last accessed 25 November 2020).

¹⁴ Based on constitutional principles, in particular that of due process.

¹⁵ Fernando PEREIRA RODRIGUES, *O Novo Processo Civil. Os Princípios Estruturantes* (Almedina 2013) pp. 147-152.

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principle is also subject to exceptions, namely, in situations where certain entities enjoy the prerogative of being questioned in writing.¹⁶

In addition to said principles, Portuguese procedural law also provides that the trial hearing shall be public, i.e., accessible to the public in general to ensure the transparency and openness of the justice system.¹⁷ However, efficiency and cost-saving purposes have commonly justified a significant increase in remote hearings.¹⁸ The principle of due process is not presumably violated by holding remote hearings, as long as the hearing is held orally, and the court still has direct contact with the evidence produced – even if presumably to a lesser extent when compared to physical hearings.

It is also worth noting that the legislation recently enacted in response to the COVID pandemic demonstrates that remote hearings are perceived as equally suitable to satisfy the requirements of the principle of *due process*. According to this emergency legislation, remote hearings are clearly defined as *the rule*, not *the exception*. Which further illustrates the widespread acceptance thereof.

Although the principles of orality and immediacy are certainly of paramount importance in the Portuguese general rules of civil procedure, it is less clear whether they mandate the physical conduction of hearings. There is no recorded case law on this issue. Still, it is reasonable to conclude that parties and courts did not commonly opt for remote trial hearings for a matter of convenience rather than a legal prohibition of doing so.

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.

According to paragraph 3 of Article 30 of the PVAL, if the parties have not agreed as to the procedural rules applicable to the arbitration proceedings, the tribunal has the autonomy to determine which rules they consider appropriate to the arbitration. This way, the arbitral tribunal may resort to the Portuguese Code of Civil Procedure (i.e., the “CPC”) whenever it deems suitable and convenient for the proceedings.

Considering the above, it is reasonable to conclude that the Portuguese Code of Civil Procedure provisions regarding proceedings held before the State courts are not directly applicable to arbitration. Such provisions will only be applicable given the parties' agreement. And in the absence of the parties' agreement as to the arbitration's procedural

¹⁶ *Ibid.* See also José LEBRE DE FREITAS and Isabel ALEXANDRE, *Código de Processo Civil Anotado*, II, 4th edn. (Almedina 2019) pp. 677-688.

¹⁷ António ABRANTES GERALDES, *et. al.*, *Código de Processo Civil Anotado*, I (Almedina 2018) p. 715.

¹⁸ José LEBRE DE FREITAS, *A Ação Declarativa Comum*, 4th edn. (Gestlegal 2017) pp. 351-360.

rules, if the arbitral tribunal considers the provisions of the CPC appropriate to the proceedings.

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.

Party autonomy is of utmost importance in arbitration,¹⁹ and equally important is the parties' right to agree on the applicable rules to conduct the proceedings.²⁰ Under Article 30(2) of the PVAL, parties are free to determine the rules in the arbitration proceeding. However, such a right has two limitations. First, the parties' autonomy must respect the fundamental principles of arbitration procedures and other mandatory rules contained in the PVAL. Second, the parties may only exercise such freedom until the acceptance of the first arbitrator. From that moment on, the power to determine the rules of procedure is transferred to the arbitrators.²¹ Hence, the parties may exercise their autonomy to decide the rules in the arbitration procedure in their arbitration agreement,²² or

¹⁹ Mariana FRANÇA GOUVEIA, *Curso de Resolução Alternativa de Litígios*, 3rd edn. (Almedina 2018) pp. 119-126; António P. PINTO MONTEIRO, *et al.*, *Manual de Arbitragem* (Almedina 2019) pp. 132-135; Manuel PEREIRA BARROCAS, *Manual de Arbitragem*, 2nd edn. (Almedina 2013) pp. 143-148.

²⁰ Armindo RIBEIRO MENDES, "Comentário ao Artigo 30.º da LAV" in Dário MOURA VICENTE, *et al.*, *Lei da Arbitragem Voluntária Anotada*, 3rd edn. (Almedina 2017) pp. 100-103; A. MENEZES CORDEIRO, "Commentary to Article 31 of the PVAL" in *Tratado da Arbitragem*, fn. 12 above, pp. 280-284; A. SAMPAIO CAMELO, "A Condução do Processo Arbitral", fn. 2 above, pp. 669-742.

²¹ This last limitation was introduced to protect arbitrators, since the parties' agreement will also bind them. Therefore, it is expected for arbitrators to know such an agreement before accepting their mandate.

²² For example, by referring to the rules of an arbitral institution.

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alternatively once the arbitration commences, and as long as they do so before the first arbitrator accepts her appointment.

Article 30(3) of the PVAL establishes that if the parties do not reach an agreement to the procedural rules applicable to the arbitration, the arbitral tribunal may conduct the arbitral proceedings in the way it deems appropriate. The power granted to the arbitral tribunal is limited by the guiding principles of the arbitration proceedings and the mandatory rules contained in the PVAL. Also by the parties' stipulations in the arbitration agreement (or in a written agreement concluded before the acceptance of the first arbitrator). And although the parties have a time limit to agree on the procedural rules that will govern the arbitration proceeding, this does not result in the arbitral tribunal's power to dismiss later parties' agreements on the matter, e.g., to conduct a physical hearing, with no objective justification.

Therefore, the answer to this question depends on *when* the parties agreed to a physical hearing. If the parties agreed to a physical hearing before the first arbitrator accepts its mandate and the arbitral tribunal subsequently decides to hold a remote hearing, this would entail a breach of the parties' agreement on the arbitration's procedural rules. Consequently, this could result in setting aside the award and annulment of the arbitration proceeding. Additionally, arbitrators could also be liable for any damages suffered by the parties from the said breach. Yet, the consequences can only be assessed on a case-by-case analysis. On another hypothetical scenario, if the parties only agreed to hold a physical hearing after the acceptance of the first arbitrator, then the arbitral tribunal is not bound by said agreement. Therefore, the arbitral tribunal has the discretion to order remote hearings, despite the parties' agreement to the contrary. Nevertheless, the common understanding is that the arbitral tribunal should follow the parties' determinations unless there is an objective reason to proceed otherwise.

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 detailed in paragraph a above, the PVAL does not provide for the right to a physical hearing in arbitral proceedings, neither expressly nor by inference. Assuming, however, that such right was recognized and breached, the affected party must raise this objection immediately and before continuing the arbitral process, according to Article 46(4) of the PVAL. By not doing so, the party is deemed to have waived the right to challenge the award on such grounds. Article 18(6) of the PVAL also states that a party

to the arbitration should also object to the arbitral tribunal exceeding its competence immediately.

According to the PVAL, a party will lose their right to challenge the arbitral award if the following requirements are met: (i) the infringed rule or principles must not be mandatory; (ii) there is a demonstration that the interested party knew about the breach; (iii) the lack of immediate reaction should be understood as failure to react “without undue delay”, as provided for in Article 4 of the Model Law.²³ If these requirements are confirmed, the party is deemed to have waived the right to challenge the award. The purpose of this provision is to deter and sanction frivolous claims for the annulment of awards that could have been addressed during the arbitral process. It also presumes that the parties’ conduct during the arbitration proceeding is coherent with their desire of not having the award annulled at a later stage.

Also noteworthy, Article 46(5) of the PVAL sets out that the parties may not waive the right to apply for the setting aside of the arbitral award beforehand.²⁴ Legal scholars and case law differ as to the interpretation of this provision. On the one hand, the majority of the Portuguese scholars argue that the prohibition of the waiver in advance of the right to challenge the award refers to a moment before the alleged breach occurs.²⁵ On the other, a minority of scholars argue that such prohibition refers to the moment before the arbitration proceedings begin, and notably, to the moment when the arbitration agreement was negotiated.²⁶ Therefore, implicitly arguing that the parties can waive such right even before the occurrence of an alleged breach that could lead to the annulment of the award.

Consequently, if a party wants to argue its right to a physical hearing as grounds of annulment, it should raise the breach before the arbitral tribunal immediately as it becomes aware of it, under penalty of loss or preclusion of the right to challenge the award.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

²³ António SAMPAIO CAMELO, *O Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras* (Almedina 2016), pp. 165-173.

²⁴ See António SAMPAIO CAMELO, “Chapter 14: Challenge of Arbitral Awards” in A. PEREIRA DA FONSECA, D. MOURA VICENTE, *et al.*, eds., fn. 3 above, pp. 239-273.

²⁵ See A. MENEZES CORDEIRO, “Commentary to Article 46 of the PVAL” in *Tratado da Arbitragem*, fn. 12 above, pp. 455-456; Mário ESTEVES DE OLIVEIRA, *et al.*, *Lei da Arbitragem Voluntária Comentada* (Almedina 2014) p. 573; António SAMPAIO CAMELO, *A Impugnação da Sentença Arbitral*, 3rd edn. (Almedina 2020) p. 26.

²⁶ See José ROBIN DE ANDRADE, “Comentário ao Artigo 46” in Dário MOURA VICENTE, *et al.*, *Lei da Arbitragem Voluntária Anotada*, 4th edn. (Almedina 2019), p. 174.

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Short answer: N/A

Not applicable.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: Likely not.

In line with the Model Law, the PVAL provides that arbitral awards have the same binding effect as final and binding court decisions. Accordingly, in principle, arbitral awards are not subject to judicial review by way of an appeal to a higher State court.²⁷ The default rule in Portugal is that awards can only be challenged through an annulment proceeding, unless the parties agree otherwise.

The grounds for annulment of an arbitral award are defined in Article 46(3), according to which the requiring party must prove that: (i) a party to the arbitration agreement did not have legal standing; or that such arbitration agreement is not valid under the law to which the parties subjected it to, or in the absence of any indication in this regard, under the PVAL; (ii) there was a violation of some of the fundamental principles referred to in Article 30(1) in the case, and with a decisive influence on the resolution of the dispute; (iii) the award has been made in respect of a dispute not covered by the arbitration agreement or contains decisions that go beyond the scope of the arbitration agreement; or (iv) the composition of the arbitral tribunal or the arbitration proceedings have not conformed with the agreement of the parties, or in the absence of such an agreement, have not been conformed with the PVAL and, in either case, if such non-conformity has had a decisive influence on the resolution of the dispute.

Furthermore, Article 46(2) of the PVAL provides that a decision to set aside an arbitral award can also be taken *ex officio* by a Portuguese Court provided that: (i) the award was rendered in violation of the requirements set out in Article 42(1) and 42(3) of the PVAL – related to the mandatory formalities of the award; (ii) the award has been served to the parties after the expiry of the deadline for the arbitral tribunal to render a decision; (iii) the court finds that the object of the dispute is not capable of being decided by arbitration under Portuguese law; or (iv) the content of the award breached the principles of international public order of the Portuguese State.

²⁷ In Article 53 of the PVAL, the default rule is that awards rendered in international arbitrations are not subject to appeal on factual or legal grounds. However, Article 53 also allows parties to agree on an appeal stage before another arbitral tribunal – given their express consent to the terms of such proceeding.

It is unlikely that a failure to conduct a physical hearing by the arbitral tribunal would constitute *per se* a basis for setting aside the award. There is no recorded case law in which the Portuguese Courts dealt with the issue of physical hearings in arbitration and civil litigation as a condition *per se* sufficient to annul the ruling/award. However, there is case law pertaining to criminal cases in which Portuguese Courts dealt with the issue of whether the failure to conduct a physical hearing to read a ruling constituted a ground to annul the criminal proceeding on the basis of the principle of publicity of criminal trials for the general public.

In a decision of the Court of Appeals of Évora in April 2018,²⁸ the Court dealt with the request for annulment of a trial in a criminal proceeding that was conducted by videoconference. The issue before the Court was whether conducting a hearing by videoconference breached the general public's right of attendance to criminal trials. The Court held that the Portuguese criminal procedural legislation does not expressly provide for the discussion and judgment hearing (which includes the act of reading the sentence) to be held by videoconference, with the Judge in another courtroom. The Court decided however, that the trial was not null because no evidence was produced during the hearing that had been held by videoconference. Therefore, the Court solely annulled the reading of the ruling through videoconference. The Porto Court of Appeal dealt with a similar issue in a recent decision in July 2020.²⁹ The Court concluded that the Judge's reading of the ruling through videoconference would translate into an irregularity. But not sufficient for annulling the ruling if the Judge guaranteed access to the hearing by the general public.

Taking into consideration the reasoning by Portuguese Courts in recent case law pertaining to criminal proceedings where the right to physical hearings is expressly provided for, it is reasonably predictable that the failure to conduct a physical hearing by the arbitral tribunal would not constitute *per se* a basis for setting aside an award.

A party's challenge to an award on the basis of a right to a physical hearing would probably be argued in connection with the breach of the fundamental principles of the arbitral process under Article 30(1) of the PVAL. According to Article 30(1) every arbitral proceeding must guarantee that: (i) the respondent is served to defend itself; (ii) the parties are treated equally and given a reasonable opportunity to assert their rights, in writing or orally, before a final award is rendered; and (iii) at all stages of the proceedings, compliance with the adversarial principle is guaranteed, without prejudice to the exceptions provided in the PVAL. The standard for annulment under Article 46(3) of the PVAL is that the alleged violation of the fundamental principles referred to in Article 30(1) must have had a decisive influence on the resolution of the dispute.

²⁸ Tribunal da Relação de Évora [Court of Appeal of Évora] of 04 December 2018 in Proceedings No. 236/17.5T9STC-A.E1, available at <<http://www.dgsi.pt>> (last accessed 18 February 2021).

²⁹ Tribunal da Relação do Porto [Court of Appeal of Porto] of 01 July 2020 in Proceedings No. 181/15.9PAVFR.P1, available at <<http://www.dgsi.pt>> (last accessed 18 February 2021).

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Portuguese Courts have consistently held that in annulling an award, the focus should be on the result of the alleged breach. In a landmark decision rendered in June 2017,³⁰ the Supreme Administrative Court, concluded that in determining a potential breach in due process for annulling an award, a *principle of essentiality* should be followed. That is, in considering a potential violation of fundamental principles, such offense should have interfered in a decisive or determining way to justify the annulment of the arbitral award.

To sum up, if a party would be keen to challenge an award based on a hearing not being conducted physically, it should provide a causal relationship or correlation with the violation of the fundamental principles in Article 30(1) of the PVAL – for the claim to have merit. Besides, as explained in sub-paragraph d.7 above, the challenging party must immediately raise the breach before the arbitral tribunal, as it becomes aware of it, and carries the burden to prove that such breach was decisive in the resolution of the dispute.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Likely not.

The Portuguese Courts have traditionally focused on the effects of the alleged breaches when deciding whether to reject the recognition and enforcement of foreign awards. This *effects standard* makes it unlikely for the Portuguese Courts to decide solely based on a breach of a right to a physical hearing unless the facts of the case allow them to interpret such breach as *gross deviance* to Portugal's international public policy. As a result, if the Portuguese Courts found that a right to a physical hearing exists according to the law of arbitration seat, it would not likely deny the enforcement and recognition of the foreign award without undertaking an analysis of whether such breach has caused actual prejudice.

More generally, the rules for the recognition and enforcement of arbitral awards in Portugal are found in the New York Convention and the PVAL. Portugal ratified the

³⁰ Supremo Tribunal Administrativo [Supreme Administrative Court] of 20 June 2017 in Proceedings no. 01249/16, available at <<http://www.dgsi.pt>> (last accessed 18 February 2021).

New York Convention in 1994 with the reciprocity reservation of Article I(3). As a result, Portugal is bound to apply the New York Convention to recognize and enforce awards if seated in a jurisdiction signatory to the New York Convention.³¹

Before 2012 when the PVAL entered into force, the FPVAL did not include any mentions to the enforcement and recognition of arbitral awards for non-signatory parties to the New York Convention. Therefore, enforcement and recognition of foreign awards rendered in non-signatory parties to the New York Convention had to follow civil procedure rules applicable to foreign court decisions. As a breakthrough novelty, the PVAL introduced Articles 55 and 56, which incorporated practically identical wording as the New York Convention.

Portuguese Courts' interpretation of Article V(1)(b) of the New York Convention. Similarly to Article V(1)(b) of the New York Convention, Article 56(a)(ii) of the PVAL, establishes as grounds for rejection of the enforcement and recognition of a foreign award: if the respondent party was not duly informed of an arbitrator's appointment or the arbitration proceedings or was not allowed to assert her rights, otherwise.

There is limited case law on applying Article V(1)(b) of the New York Convention in Portugal. Nonetheless, a ruling by the Portuguese Supreme Court of Justice in February 2006,³² leads to reasonably predict that Portuguese Courts are likely to review the seat's law solely in terms of due process. In the said case, the party challenging the award's recognition and enforcement argued that the tribunal did not allow it to assert her rights during the arbitral proceeding seated in London, as no proper service had taken place. The Court held it should only consider the due process rules at the arbitration seat, according to which the respondent was properly served, even if it would not have been the case according to the Portuguese rules of service.

Portuguese Courts' interpretation of Article V(1)(d) of the New York Convention. Similarly to Article V(1)(d) of the New York Convention, Article 56(a)(iv) of the PVAL establishes as grounds for rejection of the enforcement and recognition of a foreign award: when the arbitral tribunal constitution or the arbitral proceedings did not follow the parties' agreement or, absent such an agreement, it was not in accordance with the law of the seat of the arbitration.

There is no reported case law on this provision in Portugal.

Portuguese Courts' interpretation of Article V(2)(b) of the New York Convention. Similarly to Article V(2)(b) of the New York Convention, Article 56(1)(b)(ii) of the PVAL establishes as grounds of rejection of the enforcement and recognition of a foreign award: when doing so would lead to a result manifestly incompatible with the Portuguese State's international public policy.

³¹ Guilherme SANTOS SILVA, "Chapter 15: Recognition and Enforcement of Foreign Arbitral Awards" in A. PEREIRA DA FONSECA, D. MOURA VICENTE, *et al.*, eds., fn. 3 above, pp. 275-295. See also A. SAMPAIO CAMELO, *O Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras*, fn. 23 above.

³² Supremo Tribunal de Justiça [Supreme Court of Justice] of 18 May 2005 in Proceedings no. 05B3766, available at <<http://www.dgsi.pt>> (last accessed 18 February 2021).

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A landmark ruling by the Portuguese Supreme Court of Justice in March 2017³³ stated that the international public policy is characterized by (i) its imprecision; (ii) the national nature of its requirements (that vary from State to State); (iii) its exceptionality (as it is a limit to the recognition of an arbitration decision based on the principle of private autonomy); (iv) its oscillation and contemporaneity (as it is interpreted per the prevailing paradigms in the country where the matter is raised); and (v) its relativity (as it is applied under the circumstances of the case and, particularly, the intensity of the ties between the legal issue and the recognizing State). The Portuguese Supreme Court held that in determining the Portuguese State's international public policy, the reasoning should focus only on the legal effects derived from the decision.

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: Yes.

Since the outbreak of the COVID pandemic, the Portuguese Government has approved several extraordinary rules. These are: Law No.1-A/2020 of March 19 ("Law 1-A/2020"), amended by Law No. 4-A/2020 of April 6 and by Law No. 4-B/2020 of April 6 (which republished Law 1-A/2020 with the wording of the subsequent amendments published).

According to Article 7 of Law 1-A/2020, procedures should be conducted remotely whenever technically feasible and as long as all the parties have given their prior consent.³⁴ Within the scope of this Article, only urgent matters involving fundamental rights,³⁵ should be conducted physically, provided that the number of persons attending the hearing follow the recommendations of the Portuguese Health Authorities.³⁶

In its subsequent amendments, Law 1-A/2020 maintained the preference to conduct any procedures or hearings remotely. Article 7 only remained in force until May 29, 2020, when Law No. 16/2020 of May 29 ("Law 16/2020") revoked it. In turn, Law 16/2020³⁷ gave a preference to conducting hearings and procedures involving the

³³ Supremo Tribunal de Justiça [Supreme Court of Justice] of 14 March 2017 in Proceedings no. 103/13.1YRLSB.S1, available at <<http://www.dgsi.pt>> (last accessed 18 February 2021).

³⁴ See Law No. 1-A/2020, Article 7(7).

³⁵ Namely, proceedings concerning minors, matters involving the right to education, and hearings of arrested defendants.

³⁶ In this regard, see Law No. 1-A/2020, Article 7(8).

³⁷ Law 16/2020 entered into force on 3 June 2020.

examination of witnesses physically, provided that Portuguese Health Authorities' guidelines were observed. However, remote communication remained as an alternative whenever there were no conditions to do so in person.

Starting 2021, Portugal entered into a new state of emergency and faced a recent lockdown due to the pandemic's aggravation.³⁸ As a result, the Portuguese Government approved Law No. 4-B/2021 (the 9th amendment of Law 1-A/2020) and determined, *inter alia*, the suspension of specific judicial deadlines.³⁹ Particularly, Article 6-B(5)(c) of Law 4-B/2021 reinstated remote communication as the default rule for proceedings and hearings.⁴⁰ Physical hearings are only to occur if a remote hearing is not technically feasible, or a party objects.⁴¹

Regarding arbitration matters, Article 7 of Law 1-A/2020 initially stayed domestic arbitrations and was later amended to clarify that the suspension was subject to the parties' availability.⁴² Thus, the parties to the arbitration could (i) maintain the original calendar for the arbitration proceedings, (ii) agree to extend the deadlines initially decided without the need for suspension, or (iii) stay the proceedings.⁴³ Also, following the approval of Law 4-B/2021, the Commercial Arbitration Center from the Portuguese Chamber of Commerce and Industry ("CAC") released a communication addressing the course of action of the Center in light of the recent legislative developments. In broad terms, CAC determined that (i) its Secretariat shall carry out the acts and proceedings of its competence;⁴⁴ (ii) the parties are autonomous to suspend or continue with the ongoing deadlines whenever the arbitral tribunal has not yet been constituted; and (iii) in the event that the arbitral tribunal has already been constituted, it has the autonomy to determine if the arbitration proceedings shall be stayed or not.⁴⁵

Considering the unforeseeable course of the pandemic, an absolute return to face-to-face hearings remains uncertain. In this sense, depending on the stage of the arbitration, technology can considerably lessen the impact of the existing emergency measures.

³⁸ The lockdown commenced on 15 January 2021 and remains in force in the present date.

³⁹ For example, certain eviction proceedings.

⁴⁰ This principle may also apply to any proceedings or hearings related to urgent matters.

⁴¹ A party can object to a remote hearing arguing, for example, their lack of technical means. See Law 4-B/2021, Article 6-B(7)(a) and (b).

⁴² See Law No. 1-A/2020, Article 7(5)(a), as amended by Law No. 4-A/2020.

⁴³ See Law No. 1-A/2020, Article 7(5)(a), as amended by Law No. 4-A/2020, which states that: "The provision on paragraph 1 shall not preclude: the conduct of proceedings and the practice of both face-to-face and non-face acts that are not urgent when all the parties consider that they are in a position to ensure their practice through electronic platforms that make it possible to carry them out electronically or through appropriate means of remote communication, such as teleconferencing, video calling or other equivalent" (free translation by the Authors).

⁴⁴ The CAC relied on Article 6-B(5)(b) of Law 4-B/2021, in deciding not to suspend any of the acts and procedures of its competence.

⁴⁵ Further information in this regard can be found at <www.centrodearbitragem.pt> (last accessed 13 March 2021).

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Electronic submissions, remote hearings, and generally, communication by virtual means (such as e-mail and even WhatsApp) are contingent alternatives that preserve the arbitration proceedings' efficiency.