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# Law and technology: Virtual general meetings in Brazilian companies

## *Introduction: What has changed?*

On March 13, 2020, the world was brutally affected by the emergence of the COVID-19 pandemic, declared by the World Health Organization – WHO, causing a halt to all economic activities, which has deeply affected (and will affect) business relations: “it is as if they have ‘pulled the plug on the economy’ – and no one knows when and how it is going to be turned on again”.<sup>1</sup>

In Brazil, the first measures of social isolation were enacted by public authorities at the end of March, 2020, in the middle of peak season for the holding of companies’ annual shareholder meetings that deliberate on matters of relevance and in the interest of the company and its shareholders, provided for in article 132 of Law no. 6.404/76, with a maximum term of realization in the four months following the end of the fiscal year and therefore, in most cases, as the fiscal year coincides with the civil calendar, this term would expire on 30 April 2020.<sup>2</sup>

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<sup>1</sup> J.P. Scalzilli, L.F. Spinelli, R. Tellechea, *Pandemic, economic crisis and Bankruptcy Law*, Porto Alegre, RS: Buqui, 2020, p. 29.

<sup>2</sup> “Art. 132: Annually, in the first 4 (four) months following the end of the fiscal year, there must be 1 (one) shareholder meeting to: I – take the management’s accounts, examine, discuss and vote the financial statements; II – resolve on the allocation of net income for the year and the distribution of dividends; III – elect the management and members of the audit committee, when applicable. IV – approve the correction of the monetary expression of the stockholders’ capital (article 167).” BRAZIL. Law no. 6404, of December 15, 1976 (Corporations Law), [http://conteudo.cvm.gov.br/export/sites/cvm/subportal\\_ingles/menu/investors/anexos/Law-6.404-ing.pdf](http://conteudo.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.404-ing.pdf) [accessed: 20.06.2022].

Provisional Presidential Decree 931 was issued on March 31, now voted into Law no. 14.030, of July 28, 2020, in the set of measures incorporated by the Federal Government that aimed to minimize the negative effects of social isolation due to the COVID-19 pandemic in the economic activities.

This law addresses several initiatives to “mitigate the negative consequences of the COVID-19 pandemic for Brazilian entrepreneurs”, but the main one refers to the possibility of holding a virtual shareholder meeting (exclusively by videoconference or hybrid – part of the participants in person and part by videoconference, as will be discussed below), to avoid the travelling of shareholders, management and other participants to the meeting place and their permanence for deliberation, because “both these travels and the concentration of people are contrary to the measures that have been adopted to contain the spread of the Coronavirus (COVID-19)”<sup>3</sup>

Therefore, this was the big change in relation to the public companies’ meetings; before MP 931, now converted into Law no. 14.030, shareholder meetings were exclusively face-to-face, with the possibility of distance voting by prior sending of the distance voting ballot. Now, the regulation allows companies to hold virtual meetings (all participants by videoconference) or hybrid (part of the participants face-to-face and part by videoconference), with the possibility of effective participation of the shareholder remotely, as will be verified in the item that will address regulation.

Finally, any occasional criticisms or restrictions to the virtual or hybrid formats for holding the shareholder meeting that will be presented do not represent an understanding contrary to the use of technology, which is so necessary nowadays and has already been incorporated in the companies’ daily lives. To paraphrase Minister Barroso of the Supreme Court in the trial of ADPF no. 49 (restrictions on the UBER application), “the attempt to contain the change process is obviously not the way, since I believe it would be like trying to stop the wind with your hands”<sup>4</sup>

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<sup>3</sup> According to Recitals no. 0096/2020 of MP 931, of March 27, 2020, which also regulates other topics not covered in this text.

<sup>4</sup> BRAZIL. STF. ADF no. 49. Full. Judge-rapporteur Justice Luiz Fux. Unanimous. Tried on May 8, 2019. In his opinion, Justice Barroso presented an account of the social impact of innovations on the life of a country: “This is not the only dispute that is taking place between new technologies and traditional markets: (i) WhatsApp and telephone companies have their own litigation; (ii) Netflix and cable television companies; (iii) Airbnb and hotel chains; and, as depicted in this appeal to the Federal Supreme Court, (iv) between the individual transport service by application and taxis.

## Regulation

### 1. Face-to-face shareholder meeting

The Shareholder Meeting is the company's supreme authority. It is formed by the meeting of the company's shareholders previously called to deliberate on any matter of interest to the company.<sup>5</sup> It consists of all of the company's shareholders, whether or not they have the right to vote.

It is the company's highest court, as it concentrates political power by bringing together all shareholders to express themselves on issues relevant to its operation. In the governance's chain of command, the meeting is positioned above the board of directors and this, in turn, exerts power over the executive board.<sup>6</sup>

The shareholder meeting is an indispensable body in all companies and cannot be replaced in its jurisdiction or function by any other body. The shareholder meeting is the company's supreme body. However, the meeting is not above nor outside the law, and the deliberations taken within it must be in harmony not only with the specific law that governs the subject – Business Corporation Act, as with the company's Bylaws, and also with the Federal Constitution, mainly if such resolutions cause losses to shareholders.<sup>7</sup>

It is a typical and necessary body for the operation of the company.<sup>8</sup> Traditionally, "shareholders, as they arrive at the site and display the necessary documents, must sign the attendance book indicating the name, nationality, residence and the shares they own, mentioning quantity, type and class"<sup>9</sup>

It is customary to say that the shareholder meeting is the company's sovereign body, through which the social will is manifested. But it cannot do everything.<sup>10</sup> It is this warning that this article will address, that is, if and when the way of holding a shareholder meeting, be it virtual (all participants exclusively by videoconference) or hybrid (part face-to-face participants and part by videoconference) could violate or restrict the shareholders right to participate and vote at shareholder meetings.

<sup>5</sup> Art. 121: The shareholder meeting, called and convened in accordance with the law and the bylaws, has the power to decide all business related to the company's purpose and to take the resolutions it deems convenient to its defense and development. BRAZIL. Law no. 6404..., *op. cit.*

<sup>6</sup> C. Pereira, "What is a general meeting of shareholders and how does it work", *Capital Alberto*, <https://capitalalberto.com.br/secoes/explicando/assembleia-geral-de-acionistas/> [accessed: 12 January 2019].

<sup>7</sup> BRAZIL. TJSP. 8th Chamber. Civil Appeal no. 264.383.4/8-00, Judge-rapporteur Justice Zelia Maria Antunes Alves, trialed on August 13, 2003.

<sup>8</sup> A. de Assis Gonçalves Neto, *Companies Instructions, or Corporations*, São Paulo: Editora Revista dos Tribunais, 2013, p. 164.

<sup>9</sup> F.U. Coelho, *Corporate law course*, vol. 2, São Paulo: Saraiva, 2012, p. 275.

<sup>10</sup> A. de Assis Gonçalves Neto, *op. cit.*, p. 164.

## 2. Virtual and hybrid shareholder meeting.

Even before the existence of this recent legal provision for the participation and remote voting of shareholders, the CVM (Brazilian Securities and Exchange Commission), in a consultation formulated in 2008, was urged to convey on the possibility of remote participation of shareholders in meetings, specifically regarding the possibility of providing forum and/or blog so that shareholders could express their comments on meeting agendas, whether they could remain open during the meeting and whether the conclave could be broadcast live to shareholders or any interested parties.

The Securities and Exchange Commission conveyed in favor of the terms of the consultation regarding the absence of impediments to the maintenance of blogs or forums in which the shareholders could express their opinions, including during the meeting, but provided that their access was restricted to the shareholders, previously identified by name and Individual Taxpayer Identification Number (CPF), avoiding fictitious names or nicknames. In the event that the company manifests itself in these forums or blogs, the agency suggested that the symmetry between the information then provided in these forums or blogs and that already disclosed in its traditional means of communication with the market should be maintained. It also recommended that the company should clarify that the participation of shareholders in the forum or blog is not to be confused with their vote at the meeting.<sup>11</sup>

Subsequently, Law no. 12.431, of June 24, 2011, added sole paragraphs to articles 121 and 127 of Law no. 6404/76, which address the holding of the shareholder meeting, to allow remote participation and voting in the shareholder meeting of publicly held companies, pursuant to the regulations of the Securities and Exchange Commission.<sup>12</sup>

In view of the modification above, the Brazilian Securities and Exchange Commission – CVM issued normative ruling no. 561, of April 7, 2015 to adapt the text of normative ruling no. 481, of 2009 (which regulates matters related to shareholder meetings) to this new possibility of remote participation and voting by shareholders at shareholder meetings, adding some

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<sup>11</sup> CVM (Brazilian Securities and Exchange Commission). Administrative Proceeding no. RJ 2008-1794, Reporting Director Sergio Weguelin, trialed on 06/24/2008.

<sup>12</sup> “Art. 121: [...] Sole paragraph. In publicly held companies the shareholder may participate and vote remotely at a shareholder meeting, pursuant to the regulations of the Securities and Exchange Commission. Art. 127. [...] Sole paragraph. For all purposes of this Law, a shareholder who registers his/her presence remotely is considered to be present at the shareholder meeting, as provided for in the regulations of the Securities and Exchange Commission.” BRAZIL. Law no. 6404..., *op. cit.* Text in accordance with Law no. 12.431, of June 24, 2011.

provisions, but applicable exclusively to publicly held companies registered in A class.<sup>13</sup>

In 2018, in an administrative proceeding at the Securities and Exchange Commission involving issues related to remote voting at a Shareholder Meeting (AGM/EGM), the rapporteur, in his opinion, after emphasizing the importance of the dynamics of the events of the meeting and the possibility of immediate reaction by the participating shareholders, already signaled about the possibility of holding a meeting in which “there was an effective possibility of monitoring the work remotely and voting at a distance according to the dynamics of events”:

We already have plenty of technology for that. Currently, it seems totally feasible for the shareholder to “login” to an online system that may be made available by the company, where the shareholders would be properly identified through digital *tokens*. Thus, duly “logged in” and identified, they would participate in the work in a manner almost comparable to face-to-face, so much so that they could follow the dynamics of the events of the meeting and vote at a distance on all matters that were to be resolved, considering the reality of the moment.”<sup>14</sup>

Finally, in the same administrative proceeding the opinion also suggested that CVM’s Market Development Superintendence (SDM) carry out studies to “stimulate the use of remote voting systems that use the technology and legal framework currently available, with the purpose of enabling the realization of meetings that allow effective monitoring and remote (online) voting of the works”.<sup>15</sup>

Therefore, the hybrid shareholder meeting format already had a statutory provision due to the combination of article 124, paragraph 2, of law 6404/76 (which still maintained the need to hold the shareholder meeting at the company’s headquarters or elsewhere, provided that in the same Municipality as the headquarters) with article 121, in the wording given by law 12.431, of June 24, 2011, which added the sole paragraph to allow the remote participation and voting of shareholders in the shareholder meetings of public companies, duly regulated by the normative instruction no. 561 of the Securities and Exchange Commission, exclusively for publicly-held companies registered in A class, as previously mentioned.

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<sup>13</sup> The classes of issuer of securities are regulated in normative ruling no. 480, of December 7, 2009, which provides for the registration of issuers of securities admitted to trading on regulated securities markets.

<sup>14</sup> CVM (Brazilian Securities and Exchange Commission). Administrative proceeding no. 19957.003630/2018-01, Reporting Director Gustavo Tavares Borba, trialed on 09/11/2018.

<sup>15</sup> *Ibidem*.

Now, the novelty of the new law (law 14.030, of 2020) in relation to publicly held companies was the possibility of holding fully virtual shareholder meetings, due to the express statutory provision § 2-A of article 124 of law 6404/76.

Here, there is a divergence of the new law in addressing the same subject – virtual shareholder meeting – in two ways: in providing this possibility for publicly and privately held corporations, the text of article 124, § 2-A, of law 6404/76 was simply authoritative: “publicly and privately-held companies may hold a virtual meeting, under the terms of the regulations of the Securities and Exchange Commission and the competent body of the federal Executive Branch, respectively”. However, when addressing this same issue in relation to limited liability companies, the caput of art. 1.080-A was also authoritative: “the member may participate and vote remotely in a meeting or assembly, under the terms of the regulation of the competent body of the federal Executive Branch”, but the sole paragraph was added to emphasize that this virtual format must respect “the legally foreseen rights of participation and expression of members and other regulatory requirements.”

As a result of this novelty, the Securities and Exchange Commission issued normative instruction no. 622, of 4/17/2020, after receiving numerous suggestions as a result of the public hearing held under the terms of SDM no. 3/20, with the purpose of improving the provisions of the instruction no. 481, of 2009 – previously mentioned – related to the remote participation and voting by shareholders in virtual shareholder meetings which will be specified below.

With the new regulation, the formats for holding shareholder meetings are as follows:

- (a) Face-to-face meeting: held exclusively with the presence, participation and voting of shareholders, at the company’s headquarters or, for reasons of force majeure, elsewhere, provided that it is in the same Municipality as the headquarters and clearly indicated in the announcements.
- (b) Virtual Meeting: held exclusively with the remote participation and voting of shareholders, via an electronic system, without the presence, participation and voting of shareholders at the company’s headquarters, and
- (c) Hybrid meeting: held with the presence, participation and voting of shareholders at the company’s headquarters (or outside of the company’s headquarters, on an exceptional basis and upon justification presented in the notice of meeting, including in another municipality) and simultaneously with remote shareholder participation and voting via an electronic system.<sup>16</sup>

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<sup>16</sup> For the Securities and Exchange Commission, in any of the formats of shareholder meeting of publicly held companies – face-to-face, virtual or hybrid – there is also the possibility of remote

### 3. Recommendations for holding the virtual Ordinary Shareholder Meeting

Contrary to Securities and Exchange Commission Instruction no. 561, of April 7, 2015, which restricted these formats exclusively to publicly held companies registered in A class, the recent CVM Instruction no. 622, of April 17, 2020 allowed them to be carried out for all publicly held companies.

CVM Instruction no. 622, of April 17, 2020, adopted a neutral position regarding the electronic system to be utilized by companies for the remote participation and voting by the shareholder, and only established the conditions for its operation.

The notice of meeting for the shareholder meeting shall contain the rules and procedures on how shareholders can participate and vote remotely at the meeting, including necessary and sufficient information for shareholders to access and utilize the system.

This information may be disclosed in the notice of meeting in a summarized form with an indication of the addresses on the world wide web, where the complete information must be available to all shareholders.

The company may require the delivery of the identification documents and proof of shareholder quality from the shareholder who intends to participate through the electronic system up to 2 days before the date of the meeting.

The company must ensure that the electronic voting and participation system ensures:

- I. the attendance register of the shareholders;
- II. vote registration;
- III. the possibility of manifestation and simultaneous access to documents presented during the meeting that have not been previously made available;
- IV. the full recording of the meeting; and
- V. the possibility of communication between shareholders.

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voting by sending the distance voting ballot (DVB). The DVB represents a static, standardized, and early voting mechanism for the shareholder. On the subject, see the opinion rendered in the Securities and Exchange Commission in administrative proceeding no. 19957.003630/2018-01, Reporting Director Gustavo Tavares Borba, trialed on 09/11/2018. Here there is yet another divergence in regulation. While the Securities and Exchange Commission considers the DVB only a voting method and its sending does not characterize the holding of virtual or hybrid meetings, which necessarily must use electronic systems to allow the remote participation of shareholders, to the National Department of Business Registration and Integration (DREI), which regulated the meetings of privately-held companies, the DVB can be one of the formats of a hybrid or virtual meeting, according to Normative Instruction no. 81, of June 10, 2020, Annex V – Publicly-held Company Registration Manual, Chapter II – Registration procedures, Section VIII – Semi-distance or virtual meetings or assemblies, item 4 – Remote participation, sub-item 4.2 – Distance voting ballot. The DREI regulation utilizes the term semi-distance to indicate the hybrid shareholder meeting.

If an electronic system is made available for remote participation in the meeting, the company must give the shareholder the right to simply attend the meeting or to participate and vote in the meeting.

Management, third parties authorized to participate and persons whose attendance is mandatory at meetings may also participate remotely at meetings held partially or exclusively in virtual format.

### *Challenges and opportunities*

The first experiences of publicly held companies with these new types of shareholder meetings are commented on by Gustavo Gonzalez, Director of Brazilian Securities and Exchange Commission (CVM).<sup>17</sup> From May 1, 2020, the text informs that 78% of the companies that are members of the Ibovespa<sup>18</sup> have held virtual meetings and that the most utilized systems were: *zoom*, *teams* and *webex*. The author mentions that the eventual “consolidation of the new dynamics cannot depend only on a possible change in behavior in the return to normality; it will also depend on the position that may be adopted by investors, especially institutional ones, and by other relevant agents”.

<sup>17</sup> G. Gonzales, “Virtual shareholder meetings: initial impressions on the Annual Shareholder Meetings (AGOS) 2020 season”, *Capital Alberto*, <https://capitalaberto.com.br/secoes/artigos/assembleias-digitais-impressoes-iniciais-sobre-a-temporada-de-agos-de-2020/> [accessed: 17 July 2020].

<sup>18</sup> “The Bovespa Index, popularly known as Ibovespa, is one of the most important instruments of the Stock Exchange and the stock market in Brazil. Certainly, you must have heard two classic phrases when following the news, which usually talks about it on a daily basis, such as: ‘Ibovespa went up...’ or ‘Ibovespa went down...’ But what does it mean? **What is Ibovespa?** The Ibovespa is the index that basically measures the performance of the shares of companies with a large volume of trading on B3, the official Stock Exchange of Brazil, an environment where transactions in the national stock market take place. In summary, the index is calculated by averaging the performance of the most traded shares in recent months by the Stock Exchange. And when it is said that the ‘Ibovespa rose’, it means that the index’s companies, on average, appreciated and that investors in general are more optimistic. The opposite is also true. When the Ibovespa goes down, it means that the market is more cautious, usually due to some news event. **What shares form the Ibovespa?** Although there are more than 300 companies registered at B3, 75 of them are responsible for 80% of the transactions traded on the Stock Exchange. To be part of the index list, the following criteria must be respected: (a) being present in at least 95% of the trading sessions in the last year; (b) having at least 0.1% of the total value traded on the exchange in the period; (c) not being a *penny stock*, that is, not having an average price lower than R\$ 1.00; (d) being free from court-supervised and out-of-court reorganization procedures, special temporary administration regime or interventions. Every 4 months B3 renews and updates its portfolio, adding and removing some companies from the list”; [https://conteudos.xpi.com.br/aprenda-a-investir/relatorios/indice-bovespa/?campaignid=2071412286&adgroupid=80742396641&adid=377608412760&gclid=CjwKCAjw4MP5BRBtEiwASfwALxmlTPSruqM9fHTs4yv6pEqWPPVvqppiFEiV5XXbCIFNWWHwAlhBoCfsAQAvD\\_BwE](https://conteudos.xpi.com.br/aprenda-a-investir/relatorios/indice-bovespa/?campaignid=2071412286&adgroupid=80742396641&adid=377608412760&gclid=CjwKCAjw4MP5BRBtEiwASfwALxmlTPSruqM9fHTs4yv6pEqWPPVvqppiFEiV5XXbCIFNWWHwAlhBoCfsAQAvD_BwE) [accessed: 17 July 2020].

The chart below seeks to demonstrate whether the shareholder meeting held by Petrobras S/A on July 9, 2020 (in virtual format), when compared to previous ones, had (or did not have) an increase in the remote participation of minority shareholders.<sup>19</sup>

	<b>EGM 1</b> 07/09/2020	<b>EGM 2</b> 09/30/2019	<b>EGM 3</b> 12/15/2017
Total votes	6,490,149,440	6,746,923,372	6,499,288,221
Control (Gov + BNDESPar)	3,758,171,743	3,758,171,743	3,758,171,743
DVB (distance voting ballot)	865,243,334	551,029,946	446,424,824
Face-to-face	0	2,437,721,683	2,294,691,654
Remote participation and voting	1,866,734,772		

Comparing EGM 1 (2020) with EGM 3 (2017) – both have the same subject of deliberation (adaptation of the company's bylaws to the provisions of Law 13.303/2016, Legal Statute of State-owned Companies), it appears that in-person minority votes in 2017 were above the votes of minority shareholders who participated and voted remotely in 2020 in this new virtual format. In EGM 3 (2017) there were 2,294,691,654 in-person votes and in EGM 1 (2020) there were 1,866,734,772 remote votes.

Also, in the comparison between EGM 1 (2020) and EGM 3 (2017), an increase in remote voting through the distance voting ballot is observed, which was already available and made possible before this recent CVM regulation. At EGM 1 (2020) there were 865,243,334 distance votes, through the DVB and at EGM 3 (2017), 446,424,824 in-person votes.

Comparing EGM 1 (2020) with EGM 2 (2019), the latter being the face-to-face format carried out by the company before the COVID-19 pandemic, it appears that the face-to-face votes cast by minority shareholders in 2019 were also above the number of votes cast by minority shareholders who participated and voted remotely in 2020 in this new virtual format. In EGM 2 (2019) there were 2,437,721,683 in-person votes and in EGM 1 (2020) there were 1,866,734,772 distance votes.

Still in the comparison between EGM 1 (2020) and EGM 2 (2019) an increase is again verified in remote voting through the distance voting ballot, which was already available and made possible before the recent CVM

<sup>19</sup> Petrobras S/A discloses the entirety of its final voting maps, allowing a quick verification of the voting formats in its meetings, which is why it was considered in this study; <https://www.investidorpetrobras.com.br/governanca-corporativa/assembleias-e-reunioes/> [accessed: 15 July 2020].

regulation. In EGM 1 (2020) there were 865,243,334 distance votes, through the DVB and in EGM 2 (2019), 551,029,946 in-person votes.

From the information above it appears that whether in the comparison between shareholder meetings with the same subject (EGM 1 and EGM 3) – or in the comparison between the last face-to-face and the first virtual one (EGM 1 and EGM 2) – at least in this first moment, it is not possible to affirm that the new virtual format – which allows remote participation and voting – has created incentives to increase the participation of minority shareholders in the shareholder meeting of 07/09/2020, the first virtual meeting held by the company during the period of the COVID-19 pandemic.

Also, the growth of remote voting through the early submission of the DVB cannot be considered an indication of this growth because this type of voting has no relation to the technological incentives of the recent regulation, because the DVB was already possible.

#### 1. Whose decision is it to hold the virtual shareholder meeting?

In general, the notice for the shareholder meeting is carried out by the company's management (board of directors, if any, or executive board), although it is certain however that other notice options are also provided for in article 123 of Law 6404/76.<sup>20</sup>

As it is usual to call the shareholder meeting by the so-called management bodies and considering that the majority of Brazilian publicly held corporations have defined control, in practice, the decision on how to hold the meeting will ultimately be of the controlling group, because the management body, when using its jurisdiction to convene the meeting, will also define its format (in person, virtual or hybrid).

In other words, this right to choose the format in which the shareholder meeting will be held may be directed, at the discretion of the controlling group, to decide on holding the meeting in the format it deems more appropriate, and in certain cases it may difficult the representation of minorities and preferred shares.

<sup>20</sup> Art. 123. It is the board of directors' responsibility, if there is one, or the officers', subject to the provisions of the bylaws, to call the shareholder meeting. Sole paragraph. The shareholder meeting may also be called: a) by the audit committee, in the cases provided for in item V of article 163; b) by any shareholder, when the management delays the notice of meeting in the cases provided for by law or in the bylaws for more than 60 (sixty) days; c) by shareholders who represent at least five percent of the stockholders' capital, when the management does not respond within eight days to a duly justified notice of meeting that they present, with an indication of the subjects to be addressed; d) by shareholders who represent at least five percent of the voting capital, or at least five percent of the shareholders without voting rights, when the management does not meet, within eight days, a request to call a meeting for the installation of the audit committee. BRAZIL. Law no. 6404, of December 15..., *op. cit.*

If this right to choose the format of holding the meeting was granted to the controlling group and to the company's management when the virtual or hybrid format was decided, the company should ensure and guarantee the participation of the shareholder, as in the face-to-face format. Thus, when the National Department for Corporate Register and Pay-up (DREI) addressed the formalities prior to the conclave for privately held companies, it should not have exempted the company from any liability "for problems arising from the shareholders' computer equipment or connection to the worldwide computer network, as well as by any other situations that are not under its control", considering that the choice for the virtual meeting format was a decision of the company.

In addition, the corporate law still maintains the preference for holding the shareholder meeting at the company's headquarters.<sup>21</sup> Any other format could not limit the shareholders' rights.

## 2. Technological neutrality of the regulatory body.

Another point to be considered was the so-called technological neutrality of the regulator, in this case the Brazilian Securities and Exchange Commission (CVM). In compliance with the aforementioned recommendations for holding the virtual shareholder meeting, the regulation allowed full freedom for the companies to choose the technological means considering the reality of each company, such as the number of its shareholders, the costs involved etc.

However, other activities carried out remotely due to the COVID-19 pandemic were subject to regulation with a minimum of recommendation and guidance as to the procedures to be adopted. Two quite illustrative examples are cited.

The Disciplinary Board of the Courts of São Paulo, through Announcement CG no. 284/2020,<sup>22</sup> defined guidelines and procedures for conducting videoconference hearings. In addition to the training manual detailing the procedures to be adopted by the parties and their lawyers, the announcement stated that in the event of a data transmission failure the judge must evaluate the conditions for the continuity of the act through the same link, or its re-assignment.

The Center for Arbitration of the Brazil-Canada Chamber of Commerce – CAM-CCBC published Administrative Resolution no. 40/2020, of

<sup>21</sup> Art. 124. § 2 The shareholder meeting should preferably be held in the building where the company is headquartered or, for reasons of force majeure, elsewhere, provided that it in the same Municipality as the headquarters and clearly indicated in the announcements. *Ibidem*.

<sup>22</sup> Available at [https://www.tjsp.jus.br/Download/Portal/Coronavirus/Comunicados/Comunicado\\_CG\\_N284-2020.pdf](https://www.tjsp.jus.br/Download/Portal/Coronavirus/Comunicados/Comunicado_CG_N284-2020.pdf) [accessed: 14 May 2020].

April 2, 2020,<sup>23</sup> with broad and detailed guidelines for holding meetings and hearings remotely with the indication of technical specifications (a) internet speed: 1Mbps/2 Mbps – High-definition group video calls (540px videos on 1080px screen); (b) recommendation to perform a connection test to verify that the *download* and *upload* speed will meet the requests for the videoconference; (c) preference for the wired network; (d) technical support during the videoconference. It is noteworthy that in these guidelines CAM-CCBC also defined the participation of a *case manager* who will be responsible for monitoring the audience with remote participation, from start to finish, ensuring the smooth progress of the works.

Similar initiatives could have been embraced by the regulatory body, in this case the Brazilian Securities and Exchange Commission (CVM), to offer and guarantee minimum conditions for the remote participation of shareholders in virtual and hybrid meetings because, as regulated, each one does what they can and how they can, that is, “all in the same sea, but in different boats”.<sup>24</sup>

### 3. Paper meeting vs. real meeting

Perhaps the main function of the virtual meeting format allowing remote participation of shareholders is to bring minority shareholders and investors closer to the company’s corporate life. It is known that, in practice, some shareholder meetings are held only for the purpose of complying with legal requirements. They could even be considered corporate events during which the corporate law liturgy follows, without any opposition or disagreement from the shareholders present. Those who practice law in the area have already had the opportunity to participate in this type of corporate event, known in jargon as a “paper meeting”.

Fabio Ulhoa Coelho says that, according to the greater concentration of control of the company,

[...] the shareholder meeting clearly takes on the character of a formal instrument of manifesting that person’s will. There are no debates, confrontations or dissenting votes, reducing the meeting to the simple collection of the controller’s signature in the appropriate instruments. Occasionally, a shareholder with a small equity interest with or without voting rights may attend, interested in clarifying the agenda, which requires the execution of the law proceeding, without other relevant implications.<sup>25</sup>

<sup>23</sup> Ref.: Administrative Resolution 40/2020, of April 2, 2020. Guidelines for holding meetings and hearings remotely, according to item 4 of RA 40/2020. CAM-CCBC, <https://ccbc.org.br/wp-content/uploads/2020/04/Reunioes-remotas-RA-40-2020.pdf> [accessed: 2 April 2020].

<sup>24</sup> M. Bergamo, “We are in the same sea, but the boats are different”, 2020, *Folha de S. Paulo*, <https://www1.folha.uol.com.br/colunas/monicabergamo/2020/08/estamos-no-mesmo-marmas-os-barcos-sao-diferentes-diz-erika-januza.shtml> [accessed: 10 August 2020].

<sup>25</sup> F.U. Coelho, *Commercial Law Course*, vol. 2: *Company law*, São Paulo: Saraiva, 2012, p. 254.

Thus, the virtual and hybrid meetings' formats came at a good time, since they will contribute to bringing minorities and investors closer to the companies' daily routine, contributing to the change in posture of investors not used to attending company meetings, leaving the decisions in the hands of the controlling shareholder, "or, what is worse, the idle speculators".<sup>26</sup>

In the case of publicly held companies with minority and preferred shareholders with relevant interests that can assure them the performance of certain rights (such as the adoption of multiple votes, separate election, among others, or even when the resolution involves matters of relevance to the company), in these cases, the meetings are real and the presence, participation and discussion of matters are of great importance. "There may even be tension during the works, in the clashes between controller and minority". In this case, the meeting is the place of the dispute for the company's own control; in it, the blocks of shareholders organize, measure strength and fight for supremacy in the conduct of social business. The celebration of the law proceeding is, therefore, indispensable to guarantee the shareholders' rights.<sup>27</sup>

In these hypotheses of the so-called "real meetings" with effective discussion and deliberation of the issues, the virtual and hybrid formats of holding the meeting may represent difficulties for minorities and preferred shareholders, because the live discussions and deliberations with immediate and face-to-face interaction between the participants will be totally harmed and replaced by the "presence" on the screens of computers and cell phones, with no possibility of interaction, compromising the true meaning of the popular saying "unity is strength".

#### 4. Possibility of opposition to the virtual format

As already mentioned, the decision to hold the meeting in virtual or hybrid formats is, as a rule, up to the administration, the body that decides on the summons and, when deciding on the summons, automatically also decides on the format of its holding.

One aspect that could have been subject to regulation is the possibility of opposition to the holding of the virtual shareholder meeting by minority or preferred shareholders. In this perspective that it would not be up to the Brazilian Securities and Exchange Commission (CVM) to protect the interests of shareholders to decide if and when it would be possible to hold a meeting in virtual format, the regulation could at least have established the possibility

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<sup>26</sup> A. Lamy Filho, "Considerations on the elaboration of the corporation law and its necessary updating", *Revista de Direito Bancário e do Mercado de Capitais*, 2011, vol. 51, p. 243.

<sup>27</sup> F.U. Coelho, *Commercial Law Course...*, *op. cit.*

of opposition, in a mechanism that would be simple and could work in the following manner.

If the shareholder meeting is called to be held virtually, if minority or preferred shareholders understood that this method would in no way prejudice its realization – be it in relation to the performance of certain rights, or in relation to the relevance of the topic to be resolved – the meeting would be held, since the main stakeholders (minority and preferred shareholders) would agree.

Now, when the meeting was convened to be held virtually, minority or preferred shareholders could express their opposition or transformation to the hybrid format, allowing face-to-face interaction in debates and deliberations. But after all what would this opposition be like? Who and how? Only as a suggestion, the percentages set out in the recent CVM Instruction no. 627, dated 06/22/2020, which established a scale of the minimum shareholding necessary to perform certain rights provided for in said instruction depending on the share capital, could be used.<sup>28</sup>

If shareholders holding a specific shareholding can call a shareholder meeting, they could object to the format of meeting chosen by the company's management. Just as the management of the company is not sovereign to call the meeting whenever it sees fit, neither would it be sovereign to decide on the format of its realization in the case of opposition from shareholders.

These percentages vary from 5% of shareholding for companies with capital up to BRL 100 thousand and from 1% for companies with capital above BRL 10 million.

Likewise, shareholders holding the shares provided for in the recent aforementioned CVM Instruction no. 627, dated 06/22/2020, could also request the participation of the *case manager*, that is, maintaining the virtual format chosen by the management, an independent professional would be responsible for verifying compliance with the preliminary measures and monitoring the meeting with remote participation, from start to finish, ensuring the smooth running of the works.<sup>29</sup>

<sup>28</sup> According to art. 1: This Instruction sets a scale reducing the minimum percentage of shareholding, depending on the share capital, necessary to: I – fully display the company's books provided for in art. 105 of Law no. 6.404, of December 15, 1976; II – call a shareholder meeting in the event described in item "c" of the sole paragraph of art. 123 of Law no. 6.404, of 1976; III – request information from the administrator referred to in § 1 of art. 157 of Law no. 6.404, of 1976; IV – file the derivative action against the administrators provided for in § 4 of art. 159 of Law no. 6.404, of 1976; V – request information from the audit committee on matters within its jurisdiction, pursuant to paragraph 6 of art. 163 of Law no. 6.404, of 1976; and VI – initiate a liability action against the controlling company without the provision of collateral, pursuant to item "a" of § 1 of art. 246 of Law no. 6.404, of 1976.

<sup>29</sup> It is not new to propose the appointment by the company of a trustee to represent the communion of investors, because this situation is provided for in Law 6404/76, when requiring, in the

Criteria and solutions exist in the CVM's own regulations. The suggestion remains.

### 5. Why do videoconferences exhaust us psychologically?

European experts (Gianpiero Petriglieri, professor at Insead, and Marissa Shuffler, professor at Clemson University) say that communication keys are lost in a videoconference, “[...] such as tone of voice, a part of facial expressions and physical gestures. By not being so evident in a videoconference, the participant is forced to pay more attention and, in the end, especially if there are many participants, the meeting can be exhausting”.<sup>30</sup>

“When one of the communication components is absent or limited – as in videoconferences – sender and receiver are obliged to pay more attention and make a greater effort to express themselves and to understand each other correctly”, explains Ignacia Arruabarrena, associate professor of the Department of Social Psychology at the University of the Basque Country. This wear is intensified “if there are more people involved in the videoconference”, according to Arruabarrena.<sup>31</sup>

Another aspect that negatively influences the participant of a videoconference is its remote interaction with the other participants: “If we want to appear natural, we have to act a little; if we want our voice to be heard better, we have to raise or lower the pitch in an artificial way.” All of this “requires an effort that causes tension in those who are not used to it – in short, we become exhausted sooner” explains Yago de la Cierva, professor of People Management in Organizations at IESE Business School, from the University of Navarra.<sup>32</sup>

The “Work Trends Index” report, drafted by researchers at the Microsoft Human Factors Laboratory based on interviews, daily studies, focus groups and studies of the human brain, showed the experience of remote workers. The study showed that remote collaboration is mentally more challenging than when done in person and that, after 30/40 minutes of remote participation in a meeting, a process of fatigue of the participant begins.<sup>33</sup>

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issuance of debentures of publicly held companies, the existence of the trustee to represent the communion of debenture holders before the issuing company.

<sup>30</sup> J.M. Zuriarrain, “Why do videoconferences exhaust us psychologically?”, 6 May 2020, *El País*, <https://brasil.elpais.com/brasil/2020-05-06/por-que-as-videoconferencias-nos-esgotam-psicologicamente.html> [accessed: 6 May 2020].

<sup>31</sup> *Ibidem*.

<sup>32</sup> *Ibidem*.

<sup>33</sup> J. Spataro, “The future of work – the good, the bad and the unknown”, 8 Julho 2020, *Microsoft*, <https://news.microsoft.com/pt-br/o-futuro-do-trabalho-o-bom-o-ruim-e-o-desconhecido> [accessed: 8 July 2020].

## Case Study

But how are these challenges and opportunities being addressed in practice? Below are details of a complaint filed by investors to the SEC – *Securities and Exchange Commission* and the procedures adopted by Petrobras.

1. Investors complain to the SEC about problems with virtual meetings  
Managers representing hundreds of institutional investors with at least US\$ 45 trillion in assets submitted a letter to the SEC – *Securities and Exchange Commission* on July 6th of this year reporting difficulties that inhibited the participation of shareholders in shareholder meetings held virtually, due to the restrictions of the COVID-19 pandemic.<sup>34</sup>

These managers report the following occurrences, at least in this initial season of virtual meetings: (a) obstacles to entering the meetings; (b) difficulties in asking questions and participating “in a meaningful way”; (c) shareholders were unable to ask questions live; (d) failure to share the issues with other participants and, in some cases, (e) misrepresentation that no other questions had been asked.

At the end of the exhibition, the managers pondered that companies should ensure the reasonable participation of the shareholders in the questions submitted and, without this happening, this event could not be classified as a *shareholder meeting*.<sup>35</sup>

<sup>34</sup> The Managers referred to are: Council of Institutional Investors. Interfaith Center on Corporate Responsibility. US SIF: The Forum for Sustainable and Responsible Investment. Shareholder Rights Group. Investor Network on Climate Risk.

<sup>35</sup> In the original: “In our experience, and from what we heard from a range of institutional and individual shareholders, many faced obstacles in getting into meetings, and in particular in asking questions and participating in a meaningful way. [...] Exacerbated by the virtual meeting format, we saw numerous instances this season in which shareholders were unable to ask questions on a live basis, submitted questions that were not shared with other attendees at the meeting, and sometimes saw company misrepresentations that no other questions had been asked. [...] It has been reported that a number of companies stated during the meeting that no additional questions were received, when in fact it is documented that the company had received additional questions. A misleading statement of ‘no further questions’ by the CEO or other company representative could be materially misleading, especially if the statement masks material concerns raised by share owners and go unanswered. [...] In some extreme instances, the lack of bona fide shareholder participation opportunities in a meeting could raise questions as to whether a particular event even constituted a legal ‘shareholder meeting.’ [...] The corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceeding”; B. Quesada, “Investors complain to the SEC about problems in virtual meetings 17 July 2020, *Capital Alberto*, <https://capitalalberto.com.br/secoes/reportagens/investidores-se-queixam-a-sec-de-problemas-em-assembleias-digitais> [accessed: 17 July 2020].

## 2. Petrobras Annual General Meeting (AGM) of 07/22/2020

Petrobras convened an annual general meeting (AGM) for July 22nd, with an extensive agenda of 11 items and, considering the effects of the COVID-19 pandemic in Brazil and the measures taken by the health and government authorities to face the pandemic, especially regarding the restriction of circulation and meeting of people, the administration decided to hold the meeting exclusively virtually.<sup>36</sup>

The participation manual released by the company containing information and instructions for the participation of shareholders in the conclave recommends to the shareholder that, after having requested its participation in the shareholder meeting, if it did not receive the individual invitation for virtual access within 24 hours of the conclusion of the conclave, it should contact the company to resend instructions.

As previously seen, the decision to hold the virtual meeting is made by the company, but the difficulties for its realization, in this case of Petrobras, are transferred to the shareholder, that is, if the individual invitation for access was not received, the shareholder must mobilize and contact the company on the eve of the meeting.

The company's *free float* is 8.250.571.304 shares. In retail there are 1.624.400.063 shares. No effort is required to verify that, even if the percentage of failures in receiving the invitation to access is minimal, whose responsibility to send is the company's, because it was the company that decided to hold the meeting virtually, the shareholders may be prevented from attending the meeting because of congestion of requests due to failures that may occur – again – resulting from the way of holding the meeting chosen by the company.

Another point of doubtful legality is the control of the shareholder voice rights that will be exercised by the company during the virtual meeting, in the following terms: “after the presentation on each matter included in the Meeting's Agenda, the present shareholder may speak through of the ‘Webex’, so that, in the order in which the requests are received by the board, the authorized shareholder is given the floor, through the opening of the audio. In order to keep the Meeting going smoothly, a maximum time can be established for the manifestation of each shareholder present”.

Only those authorized by the president of the conclave and during the time set may speak, after that the audio will be turned off. This would be equivalent, in the face-to-face meeting, to keeping security guards in the meeting room to

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<sup>36</sup> *Virtual General Meeting*, Petrobras: 2020, [https://mz-prod-cvm.s3.amazonaws.com/9512/IPE/2020/ed898736-65e8-41e0-8756-2a95706bfc72/20200608235220202485\\_9512\\_767335.pdf](https://mz-prod-cvm.s3.amazonaws.com/9512/IPE/2020/ed898736-65e8-41e0-8756-2a95706bfc72/20200608235220202485_9512_767335.pdf) [accessed: 17 July 2020].

forcibly remove from the room the shareholder who exceeds its time of manifestation. Does the law provide for and authorize control of the shareholder's voice rights? Of course, abuses occur and should be restrained, insofar as they occur and when proven to be detrimental to the smooth running of the works, but this can only be checked and verified at the time of the meeting and not previously, as stated in the participation manual.

This participation manual is also of a deliberative nature, because it expressly contained an authorization from the shareholders present at the meeting (which has not yet taken place and, therefore, the shareholder is authorizing something that does not know what and how it is) so that the company "uses any information contained in the recording of the meeting for the defense of the Company, its management and contracted third parties, in any judicial, arbitration, regulatory or administrative sphere", for example. The shareholder's right to participate in the meeting could not be conditioned to this prior authorization.

### *Conclusions*

The technological means employed in the virtual shareholder meetings must take into account the reality of each company, considering the number of its shareholders, costs involved, etc., but the use of the exclusively virtual format for holding the meeting can create embarrassments for the admission of shareholders, for their exercise of voting rights, interaction with other shareholders. Also, as a way to mitigate any occasional abusive performance of the right to call and hold exclusively virtual meetings by the company's management and its controller, the right of opposition could be guaranteed to the other shareholders, as previously seen.

Although healthy, the risks and problems inherent to remote participation (loss of Wi-Fi or energy, technological difficulties, lack of resourcefulness of older generations in this area, diverse participation dynamics etc.) cannot be disregarded, which imposes thoughtfulness and caution in adopting completely virtual mechanisms, without exaggerated excitement with the current phase of massive use of new media. As the saying goes: "not everything is black and white".<sup>37</sup>

So, the intermediary solution could be the hybrid or semi-presential shareholder meeting, as a format that – at the same time – meets the interests of shareholders in general, especially minority shareholders and individual

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<sup>37</sup> G.T. Borba, Virtual and hybrid shareholder meetings, 2020, *Migalhas*, <https://www.migalhas.com.br/depeso/325751/assembleias-virtuais-e-hibridas> [accessed: 19 April 2020].

investors,<sup>38</sup> allowing them, at a lower cost, to participate in the debates and perform their right to participate and vote at the meeting, without excluding the right of shareholders who want to exercise in person their sacred right to participate and vote in the conclave.

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<sup>38</sup> Stock Exchange reaches the mark of 2.6 million individual investors in June. It was in July 2019 that B3 reached the first million investors. That number, which took years and years to reach, only needed a few months to double and reach two million Individual Taxpayer Identification Numbers (CPFs), in April this year. Now, another big jump, 2.648.975 investors. <https://www.cnnbrasil.com.br/business/2020/07/02/bolsa-atinge-a-marca-de-2-6-milhoes-de-investidores-pessoas-fisicas-em-junho> [accessed: 2 July 2020].

*País*, <https://brasil.elpais.com/brasil/2020-05-06/por-que-as-videoconferencias-nos-esgotam-psicologicamente.html> [accessed: 6 May 2020].

## Abstract

### Law and technology: Virtual general meetings in Brazilian companies

The text examines the challenges and opportunities presented by new formats of general meetings held by public limited companies. These were brought about by a recent amendment to Law 6404/76, regulated by the Brazilian Securities and Exchange Commission – CVM, which allows the holding of a digital meeting (everyone participates exclusively by videoconference) or a hybrid format (some participate in person and some by videoconference). These new formats create an opportunity to bring shareholders closer to the corporate life of companies, as it enables online participation in debates and voting on matters of relevance and interest to the company. The text makes comments on the procedures laid out in CVM the regulations to be adopted by companies before, during and after the creation of these new formats and addresses some of the main challenges, such as the possibility of opposition to the digital format by minority shareholders, as a way to mitigate any possible abusive use of these new meeting formats and any loss of the minority shareholders' right to participate and vote.

**Key words:** law and technology, general shareholders' meeting, digital assembly, public companies, voting rights, minority shareholders