

International Arbitration Focus Team

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COVID-19: the world is on hold, but what about arbitration?

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The whole world is facing unprecedented challenges due to the COVID-19 pandemic. International arbitration is no exception. This Q&A briefly addresses some of the queries that practitioners and clients may have in respect of ongoing arbitration proceedings and/or commencing new arbitrations.

1. I wish to start a new arbitration – are there any limitations or practical issues?

a. What measures have been taken by arbitral institutions to facilitate the filing of requests for arbitration?

Arbitral institutions are operational, and in many cases with their staff working remotely. Most of them have issued guidance on how to cope with the current situation, and they strongly recommend exchanging communications with them by email only. Several institutions have directed that new requests for arbitration shall not be filed in hard copy but exclusively by electronic means such as email (*e.g.*, the ICC and the LCIA), certified email (*e.g.*, the Milan Chamber of Arbitration) or through specific online filing systems (*e.g.*, the LCIA).

b. What practical issues may be faced when filing a request for arbitration in an arbitration administered by an institution?

Some arbitral rules allow the request for arbitration to be transmitted to the respondent by electronic means, where possible (*e.g.*, the Milan Chamber of Arbitration Rules, the LCIA). However, most arbitral rules require that the request be delivered to the respondent in hard copy, either by the institution or directly by the claimant (*e.g.*, the ICC Rules). In those cases, some difficulties may arise due to logistical issues, such as disruptions in the postal services of certain countries or lockdown measures forcing the respondent's personnel to work remotely, leaving the respondent unable to receive documents sent by mail or courier.

c. What if the arbitration is ad hoc?

If the parties have agreed upon a procedure, or a set of rules, providing that the notice of arbitration be filed electronically, the commencement of the arbitration will likely not suffer significant delays.

If the procedure or the set of rules provide that the notice of arbitration be delivered in hard copy, the claimant might face some logistical issues.

If nothing is provided, regard should be given to the law of the seat of the arbitration and the applicable rules on the service of documents, bearing in mind that some countries may have temporarily modified the applicable provisions in light of the health emergency.

2. I have an ongoing arbitration – what phase of the proceedings can the COVID-19 emergency and the governmental directives affect?

a. Given that the parties involved are from different states/nationalities, are there any implications of different governmental directives/policies when it comes to COVID-19?

Most of the popular arbitral jurisdictions have implemented travel bans, self-isolation and social distancing measures. This renders any kind of in-person hearing and meeting extremely difficult, if not impossible.

b. Which phases of the arbitration proceedings could be affected?

Besides the commencement of the arbitration, other phases of the proceedings might experience delay and need adapting in light of the current pandemic. The COVID-19 emergency will most likely affect hearings, normally held in-person. Hearings on the merits will be under more risk of being rescheduled than case management conferences or hearings on procedural or legal issues, as the first generally require counsel, experts, witnesses and clients to travel from all around the world and meet in person, while the second are more easily managed by telephone or video-conference. Site visits might suffer the same fate. Document production activities might also be affected: while production is generally done electronically, the physical collection of documents, with the client's offices closed and employees smart-working, might prove to be more time-consuming.

3. A hearing is scheduled – should it be postponed?

a. Could a dispute be decided “on paper” and when would this be appropriate?

Several arbitral institutions provide that, subject to the parties' agreement, the proceedings may be conducted on a documents-only basis, without an

oral hearing taking place.¹ In practice, however, this procedure might not always be viable. First, the parties need to assess whether the law of the seat requires a mandatory oral hearing. Second, documents-only arbitration might prove inadequate for complex and high-value cases, which usually involve the taking of detailed, technical evidence. Conducting proceedings “on paper” might be best suitable for resolving smaller, straightforward contractual interpretation disputes.

b. Could hearings be held in video or teleconference and which hearings are more suitable for being conducted remotely?

While video and teleconferences are commonly used for discussing procedural issues, some counsel and arbitrators are still skeptical when it comes to a full video-hearing on the merits. Resorting to a videoconference might be challenging in case of complex and high-value disputes, such as complex construction cases, requiring a hearing that lasts several days and involves multiple participants from all around the world. In those cases, postponing the hearing might be a better option. Conversely, online hearings might be viable - and even advisable - for small claims involving few witnesses, as they avoid undetermined postponements and are cost-effective.

In any event, successful video hearings require the cooperation of all participants. There is a potential risk of abuse by parties interested in delaying the proceedings; they might object to the video hearing and request a suspension of the arbitration, failing which they might raise obstacles to the smooth conduct of the video hearing. However, it is generally acknowledged that the arbitrators have certain inherent powers and discretion as to the appropriate measures for conducting the arbitration, provided that each party is given a reasonable opportunity to present its case.²

c. Can an arbitral institution help the client to better organize the proceedings?

Some institutions are recommending the arbitrators and parties to postpone or cancel in-person hearings to be held in the near future, while encouraging recourse to video hearing technologies. To facilitate this approach, many of them suggest or offer the use of well-known videoconferencing software and e-hearing technology (*e.g.*, Webex, Microsoft Teams, Skype, *etc.*), whereas others offer their own videoconferencing and document management facilities (*e.g.*, ICSID). In

¹ See for example R-32(d) of the 2013 AAA Arbitration Rules; Article 25(6) of the 2017 ICC Rules; Article 19(1) of the 2014 LCIA Rules, Article 24(1) of the UNCITRAL Model Law. The only exception not requiring the parties’ agreement is Article 22(4) of the 2018 HKIAC Rules.

² See for instance, Article 17(1) of the 2017 UNCITRAL Rules; Article 22(2) of the 2017 ICC Rules; Articles 14(1) and (5) and 19(2) of the 2014 LCIA Rules; Article 19.1 of the 2016 SIAC Rules. The 2013 AAA Arbitration Rules go even further, expressly attributing to the arbitrators the power to allow the presentation of evidence by videoconference (R-32(c)).

any event, institutions are available to discuss with the parties and the tribunal the various options for conducting a remote hearing and to assist them in its preparation.

4. When a videoconference hearing is decided upon, what should I be aware of?

a. What must be borne in mind when organizing a virtual hearing?

To ensure due process, every aspect of the video hearing should be planned well ahead, and it is advisable that the agreement reached on the conduct of the hearing be memorialized in a procedural order.

In practice, parties and tribunals should consider several aspects, including the following:

- each participant should have a proper internet connection and be equipped with all the necessary IT tools;
- the videoconferencing platforms used should be capable of hosting multiple servers, allow the parties to share documents in different formats, and provide separate chats or rooms where counsel can liaise privately with their clients;
- given that certain platforms have experienced serious security issues, attention must be paid in selecting reliable technology that ensures the privacy and security of the connection;
- all devices and electronic equipment should be tested in advance several times;
- it is advisable to have technical assistance available throughout the whole duration of the hearing;
- the different time zones of the participants should be taken into account, since there could be disadvantages for the parties participating in the e-hearing outside normal business hours; and
- reserve time should be provided, as the hearings could last longer than expected due to disruptions and connections strains.

Useful guidance for planning the videoconference is also provided by the Seoul Protocol on Video Conferencing in International Arbitration, issued on 18 March 2020 by the Korean Commercial Arbitration Board.

b. How can a fact or expert witness participate successfully?

The lack of face-to-face interaction and the possible disruptions during an online hearing may impair the effectiveness of the cross-examination and make it more difficult for the tribunal to assess the demeanour (*i.e.*, body language, facial expressions) and credibility of the witness being cross-examined. To limit this risk, the parties and the tribunal should consider implementing further logistical precautions, including the following:

- a reasonable portion of the room in which the witness/expert is

located should be displayed, to ensure that the witness is alone;

- an opposing party's representative may be present in the room with the witness/expert, to avoid any risk of illicit influence or suggestions;
- the display of documents to which counsel and/or tribunal may refer to during the hearing should be ensured;
- difficulties may arise in ensuring a witness' effective sequestration, or when an interpreter is needed.

c. Can the hearing be recorded? Are there any confidentiality issues?

A video recording and transcripts of the hearing could prove extremely useful, especially when it comes to drafting post-hearing briefs. However, the prior agreement of the parties and the approval from the tribunal are required. Failing such an agreement, recording an e-hearing could lead to serious breaches of confidentiality and of the participants' right to privacy.

5. I am waiting for an award – what can I expect?

a. Will awards be delayed?

The quarantine imposes arbitrators to work remotely and separately, therefore lengthening the decision-making process and the drafting of awards. Even though arbitrators will strive to minimize disruptions by resorting to digital means to deliberate on their findings, final awards may suffer delays. For the same reasons, the delivery of the original award by the arbitral institution may be delayed too. For instance, the LCIA recently clarified that, in all but exceptional cases, it will transmit awards to parties electronically, with originals and certified copies to follow, once the LCIA office has re-opened.

b. Can arbitrators e-sign the award?

Electronic signatures may pose problems of award recognition and enforcement both under the law of the seat of the arbitration and the law of the place where enforcement is sought. Certain national laws recognize the validity of e-signed awards (*e.g.*, the US, the UAE, and the Netherlands), whereas others require the parties' agreement in that respect (*e.g.*, the UK and Switzerland). However, some countries still do not recognize the validity of e-signed awards; hence it is fundamental to carefully verify, on a case-by-case basis, which formal requirements need to be fulfilled to ensure the validity of the award.



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The Focus Team is a constellation of skills in different practice areas with a focus on International Arbitration.

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