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DISPUTE RESOLUTION AND ARBITRATION

Coronavirus: The impact on international arbitration

In the context of the international public health emergency caused by the new Coronavirus (COVID-19) pandemic, many countries have declared a state of emergency. They have also introduced measures to contain the disease and these measures have impacted the movement of people and goods. They have also led to closures of public and private services. These measures have naturally affected arbitral proceedings that are pending or just starting.

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In the context of the international public health emergency caused by the new Coronavirus (COVID-19) pandemic, many countries have declared a state of emergency. They have also introduced measures to contain the disease and these measures have impacted the movement of people and goods. They have also led to closures of public and private services. These measures have naturally affected arbitral proceedings that are pending or just starting

International arbitrations with connections to more than one country are facing problems that must be mitigated. To this end, the countries, arbitration institutions, arbitral tribunals, and lawyers have created a range of mechanisms.

One possible measure is the suspension of procedural time limits during the state of emergency and procedural acts have been postponed (Chapter A).

Another measure is the use of electronic means to do procedural acts and, in this respect, various arbitration institutions have played an important role in supporting the parties and the arbitral tribunals (Chapter B).

Suspension of procedural time limits

Procedural time limits can be suspended by legislation or by agreement between the parties. With respect to suspension by legislation, the applicable law will, in most cases, be that of the country of the seat of the arbitration.

Legislative suspension of procedural time limits

Faced with the various containment measures, many countries have suspended the time limits applicable to judicial procedures. This is the case of Portugal,¹ Spain,² Mexico,³ Chile,⁴ Ireland,⁵ Italy,⁶ the United Kingdom,⁷ Canada,⁸ and Luxembourg,⁹ among others.

In Switzerland, the Federal Council has brought forward the court holidays, making them longer. This measure also suspends certain procedural time limits (applicable to civil and administrative cases).¹⁰

1 Article 7(1) of Law 1-A/2020 of 19 March 2020, as amended by Law 4-A/2020 of 6 April.

2 Royal Decree 463/2020 of 14 March 2020, second additional provision.

3 https://www.cjf.gob.mx/resources/AcuerdoGeneral_4-2020-V2.pdf

4 <https://www.leychile.cl/Navegar?idNorma=1144003>

5 Article 5 of Resolution 313 of 19 March 2020 of the National Council of Justice

6 Decree-Law 18, 17 March 2020, article 83(20).

7 Practice Direction 51Z- Possession Proceedings Stay - Coronavirus - applicable to possession claims and enforcement; Practice Direction 51ZA - Extension of Time Limits and Clarification of Practice Direction 51Y - Coronavirus - provides that the parties can agree to extend time limits and provides guidance to the courts.

8 In the province of Ontario: Ontario Regulation made under the Emergency Management and Civil Protection Act - Order Under Subsection 7.1(2) of the Act. It covers the Ontario Arbitration Act and suspends time limits in arbitration proceedings in the province - <https://www.osler.com/en/blogs/risk/march-2020/adapting-litigation-rules-to-covid-19-suspension-of-limitation-periods-and-deadlines-and-other-temp>.

9 Grand-Ducal Regulation of 25 March 2020.

10 <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-78502.html>.

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In contrast, China, a country that was initially more affected by this virus, has not introduced specific legislation. This is because, under article 150 of the Chinese Code of Civil Procedure¹¹, the parties can invoke *force majeure* or other circumstances to apply for the suspension of procedural time limits (except when the acts can already be done online).

However, it is important to emphasise that the suspensions of procedural time limits in state courts do not, in themselves, affect the procedural time limits in arbitration proceedings. Therefore, certain jurisdictions have created specific legislation to the effect, as is the case of Portugal.

Arbitrations with their seat in Portugal are now suspended under article 7 of Law 1-A/2020 of 19 March, as amended by Law 4-A/2020 of 6 April. This article establishes that "*without prejudice to the provisions of the following paragraphs, all time limits to do procedural acts that must be done in cases pending before judicial, administrative and tax courts, the Constitutional Court, the Court of Auditors and other jurisdictional bodies, arbitral tribunals, the Public Prosecution Service, justices of the peace, alternative dispute resolution bodies and enforcement bodies, are suspended until the end of the exceptional situation to prevent, contain, mitigate and treat the epidemiological infection by SARS-CoV-2 and the disease COVID-19, to be decreed in accordance with the following number.*"

However, this suspension is at the discretion of the parties. Therefore, those involved in the arbitration proceedings can (i) maintain the original procedural calendars, (ii) agree to extend time limits without the need for suspension, or (iii) suspend the proceedings. As established in article 7(5)(a): "*The provisions of number 1 do not preclude: Continuing with proceedings and doing acts either in person or remotely when all parties believe they are in a position to deal with these things using the IT platforms that make it possible to do them electronically, or by distance communication, including teleconferencing, video calls or equivalent*".

Suspension of procedural time limits by agreement

If the law does not suspend the time limits, the parties can always agree to suspend the arbitration proceedings, but if the arbitral tribunal has already been constituted, any such agreement will require its consent.

Some tribunals and arbitral institutions, such as the Corte Española de Arbitraje¹² and the Camera Arbitrale di Milano¹³, have already taken the initiative to suspend procedural time limits. They are still doing the minimum procedural acts, but always electronically and never in person.

Use of electronic means to do procedural acts

In situations where the procedural time limits have not been suspended, it will be necessary to find alternatives. As a result, most arbitral institutions have created mechanisms to ensure that arbitral proceedings continue as normally as possible:

¹¹ Translation proposed by the CICC - "An action shall be suspended in any of the following circumstances: (...) 4. one of the parties is unable to participate in the action due to an event of force majeure; 6. other circumstances require the suspension of proceedings" - <http://cicc.court.gov.cn/html/1/219/199/200/644.html>

¹² <http://www.cearbitraje.com/index.html>

¹³ <https://www.camera-arbitrale.it/it/index.php>

- The ICC International Court of Arbitration (“ICC”): has created a team to respond to the outbreak of COVID-19 and revise its operations in accordance with the advice of the various authorities. It has published a communiqué in which encourages parties and tribunals to assess the development of the pandemic and consider its impact on pending cases. On 9 April, it issued a comprehensive guide with possible measures to mitigate the effects of COVID-19 on ICC arbitrations;¹⁴
- The London Court of International Arbitration (“LCIA”): this body recommends the adoption of a set of measures for opening of new cases and dealing with pending cases, in particular, the use its virtual platform or email to file applications;¹⁵
- The Hong Kong International Arbitration Centre (“HKIAC”): its case administration team remains fully operational and most of its members are working remotely. The HKIAC is now accepting the submission of documents by email and other electronic means, in accordance with the applicable rules. As regards the hearings, the HKIAC has started to recommend and offer its users a wide range of services for virtual hearings. The centre’s facilities remain operational to host meetings and hearings, with the restrictions on access by visitors and with strict sanitary measures;¹⁶
- The American Arbitration Association (“AAA”) and its international arm, the International Center for Dispute Resolution (“ICDR”): is active and operational. However, no hearings will be held at its premises until at least until 1 June 2020.

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- The parties and arbitrators will be contacted to discuss alternative for holding hearings, including video and teleconferencing, or even rescheduling of hearings. The institution suggests that the parties use electronic means to submit their documents to observe social distancing and the guidelines of municipal authorities, state and federal authorities¹⁷;
- Corte de Arbitraje de Madrid (“CAM”): Despite in-person hearings being suspended until 12 April 2020, it has made virtual hearings and meetings available to the parties if they so wish;¹⁸

¹⁴ <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>

¹⁵ <https://www.lcia.org/lcia-services-update-covid-19.aspx>

¹⁶ <https://www.hkiac.org/news/hkiac-service-continuity-during-covid-19>

¹⁷ https://go.adr.org/covid19.html?_ga=2.142493047.496888848.1586414726-289836912.1586148343

¹⁸ http://arbitramadrid.com/detalle_noticia/-/asset_publisher/3HQZrygJgpw3/content/medidas-relacionadas-con-el-covid-19

- Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (“CAM/CCBC”): Email has to be used for all purposes and at any point in the case, including for communications, notifications or summonses, The face-to-face protocol for physical petitions is suspended at the CAM-CCBC headquarters, both at the São Paulo and Rio de Janeiro offices. To replace the hearings and in-person meetings now suspended, the secretariat is making arrangements for remote hearings, via electronic platforms, and it will record all such hearings. The counting of procedural time limits will begin on the first working day after the secretariat sends the email;¹⁹
- Câmara de Conciliação, Mediação e Arbitragem CIESP/FIESP (“FIESP”): the filing of any petition or document, and the sending by the arbitral tribunal of arbitral awards, decisions and procedural orders, must be sent to the secretariat electronically. Acts, communications and notifications sent by the Chamber will also preferably sent electronically. This does not apply to the notification of the beginning of new cases, the content of arbitral awards and decisions, witness summonses, and other acts for which physical communication is necessary. In these cases, physical copies will be also sent by post with acknowledgement of receipt. When it comes to hearings, at the request of the arbitral tribunal, the secretariat of the Chamber will arrange for meetings to be held and procedural acts to be dealt with remotely. The procedural time limits that have been suspended from 17 to 27 March will begin to run again and, to confirm them, the secretariat will acknowledge both the receipt of electronic messages, petitions and documents, and the sending electronic messages. In doing so, it will indicate the files received or sent.

The period will run from the first business day following the sending of the notification by the secretariat.²⁰

- Câmara de Mediação e Arbitragem Empresarial – Brasil (CAMARB): the services of the secretariat continue to operate remotely and, exclusively electronically, it will receive the protocols and applications to begin new arbitration proceedings. When proceedings have already started, but the arbitral tribunal has not yet been constituted, they will be suspended if they cannot be conducted electronically by the secretariat. In the case of ongoing proceedings, the parties, arbitrators and mediators will have to decide on the possible suspension of the proceedings, hearings, meetings, changes to the calendar, or any other changes they see fit.²¹

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In the case of investment arbitration cases under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”), the centre has stated that it is fully operational and working remotely, and that procedural acts must be submitted electronically. It also encourages the parties and the tribunals submit written arguments by electronic means only.²²

19 <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/>

20 http://www.camaradearbitragem.org.br/pt/res/docs/2020_26_03_Resolucao2-Covid-19-Bicolunada.pdf

21 <http://camarb.com.br/>

22 <https://icsid.worldbank.org/en/Pages/News.aspx?CID=361>.

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In 2017, the ICC published a report on the use of technological resources in international arbitrations, with a specific chapter on holding hearings using digital platforms.²³

On 18 March 2020, Asian professionals published the Seoul Protocol on videoconferencing in international arbitration. This Protocol incorporates feedback from the Seoul International Dispute Resolution Center and compiles and summarises the best practices for planning, testing, and using videoconferencing in international arbitrations.²⁴

For its part, on 8 April 2020, the Chartered Institute of Arbitrators ("CI Arb") published a remote procedures guideline. Even though it was drafted due to the current pandemic, is a general guide that will be very useful in the future.²⁵

The containment measures have naturally had effects on arbitral proceedings. One way to mitigate these effects is to suspend the procedural time limits until the end of the containment measures. However, this solution delays the final award and this could lead to even more damaging consequences for companies that use arbitration to resolve their disputes.

As arbitration is a means of alternative dispute resolution known for its speed and flexibility, the use of information technologies in arbitral proceedings is perfectly possible. This would make it possible to resolve conflicts in good time, even with the restrictions of confinement imposed in many countries around the globe. ■

23 https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0055.htm?l1=Commission+Reports

24 http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024.

25 <https://www.ciarb.org/news/ciarb-releases-new-remote-procedures-guideline-for-dispute-resolution-during-covid-19-restrictions/>