

Int'l Arbitration Continues Apace Despite Pandemic

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Governments worldwide have implemented a wide range of restrictive measures in response to the COVID-19 pandemic, many of which are affecting access to justice in one way or another. This brief survey examines how these COVID-19 measures are affecting the initiation and conduct of international arbitration under the major institutional rules and at leading seats of arbitration, including New York, London, Geneva, Hong Kong and Singapore.

As this article will show, arbitral institutions and practitioners across the globe are adapting to these challenging times and continuing to deliver high-caliber justice.

Impact of COVID-19 Measures on Initiating Arbitration

In response to the COVID-19 pandemic, many of the leading arbitral institutions have issued public statements, both individually and jointly,[1] emphasizing that they remain operational and that special arrangements have been put in place to enable staff members to work remotely. As a result, it remains possible to initiate international arbitration without complication or delay.

To adjust to current circumstances, most institutions now require or recommend that all communications with them be conducted by email and that all requests for arbitration and applications for emergency arbitrator proceedings be filed electronically.

For example, this is the case under guidance notes issued by the International Chamber of Commerce's International Court of Arbitration,[2] the American Arbitration Association's International Center for Dispute Resolution,[3] the London Court of International Arbitration,[4] the Swiss Chambers' Arbitration Institution,[5] the Hong Kong International Arbitration Center[6] and the Singapore International Arbitration Center.[7]

Impact of COVID-19 Measures on Pending Arbitrations

A number of different COVID-19 measures present significant challenges for the efficient conduct of pending international arbitrations, including restrictions on postal and courier services, prohibitions on international travel, and physical distancing requirements.



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To address these challenges, arbitral institutions and practitioners are turning to a variety of well-established case management techniques.[8] These techniques draw on the procedural flexibility that is one of the major selling points of international arbitration.

Communications, Filings and Notifications

International arbitration generally offers greater flexibility than court litigation with respect to the rules applicable to communications and the filing of written submissions. In fact, long before the current public health crisis, many arbitral tribunals had already moved exclusively to email communication and the electronic filing of all submissions (including exhibits, witness statements, etc.).

Even more arbitral tribunals are now following this trend in response to the disruptions in postal and courier services caused by the COVID-19 pandemic.

As for communications between arbitral tribunals and institutions, the London Court of International Arbitration, or LCIA, has requested that arbitrators communicate their awards by email to the LCIA, for electronic transmission to the parties, with originals and certified copies to follow once the LCIA office has reopened.[9]

For its part, the International Chamber of Commerce International Court of Arbitration, or ICC, has recommended that, subject to any requirements of mandatory law, the parties agree that arbitrators may sign awards in counterparts and that awards may be notified electronically.[10]

Procedural Time Limits

In international arbitration, the arbitral tribunal and the parties typically discuss and establish tailor-made procedural rules and a procedural timetable at the outset of each case. Under these procedural rules, parties usually may make reasoned requests for extensions of the time limits set out in the procedural timetable.

These procedural rules, as well as the rules of the major arbitral institutions,[11] afford arbitral tribunals the flexibility needed to address the difficulties that a party may face in preparing its written submissions on time due to the COVID-19 pandemic.

The rules of most major arbitral institutions similarly permit the institutions to extend the time limits for emergency arbitrator orders[12] and for arbitral awards in both expedited and ordinary proceedings,[13] pursuant to a reasoned request from the emergency arbitrator or the arbitral tribunal.

When applying these provisions, arbitral tribunals and institutions must make a case-by-case assessment of whether the COVID-19 disruptions at issue justify a delay in the progress of the arbitration. To date, most arbitral tribunals and institutions have been reluctant to grant significant extensions of time in the absence of very specific and substantiated explanations as to why a particular time limit cannot be met.

Evidentiary Hearings

COVID-19 measures, including travel restrictions and physical distancing requirements, pose significant difficulties for in-person evidentiary hearings. Arbitral tribunals and parties have responded to these challenges in two main ways.

A number of in-person evidentiary hearings, particularly those scheduled to take place in the short term, have been postponed for several months. Many other hearings, however, are moving to a virtual format — most often using videoconferencing technology — in order to proceed without delay.

Even before the COVID-19 pandemic, videoconferencing was used with some regularity in international arbitration, often where certain witnesses were unable to attend the hearing in person, but also occasionally for the entire evidentiary hearing. In fact, several arbitration rules, most notably the LCIA rules and Swiss rules, have long authorized arbitral tribunals to conduct evidentiary and other hearings by videoconference.[14]

Other arbitration rules, such as the ICC rules, encourage hearings by videoconference in appropriate cases to increase efficiency.[15]

Virtual hearings typically take place at the request and with the agreement of the parties. Whether an arbitral tribunal may order an evidentiary hearing to proceed by videoconference over the objection of a party will depend on the specific arbitration and procedural rules in place, as well as any applicable mandatory laws.

Generally, however, in most leading seats of arbitration, it would likely be difficult to set aside an arbitral award on this ground alone.

In the face of COVID-19, arbitral institutions and practitioners are placing increased emphasis on the need to embrace virtual hearings in order to avoid inordinate delay. For example, the ICC has issued specific guidance on the conduct of virtual hearings, and the implementation of cyber-protocols to ensure compliance with data privacy regulations, the privacy of the hearing, and the confidentiality of communications within the arbitration.[16]

Similarly, the COVID-19 guidance note from the American Arbitration Association's International Center for Dispute Resolution, or ICDR, offers assistance in arranging virtual hearings and provides parties and arbitrators with links to ICDR virtual hearing guides, as well as a template order and procedures for virtual hearings via videoconference.[17]

The Hong Kong International Arbitration Center is also partnering with technology vendors to provide virtual hearing services.[18] And, in Singapore, Maxwell Chambers also offers assistance with setting up virtual hearings.[19]

The experiences to date have confirmed that evidentiary hearings conducted by videoconference generally work well and provide the parties with a reasonable opportunity to present their cases, even in heated disputes involving multiple witnesses across many different countries and time zones.

The Impact of COVID-19 Measures on Arbitration-Related Court Proceedings

A number of jurisdictions have implemented COVID-19 measures that may delay or restrict the ability of parties to pursue arbitration-related court proceedings.

This includes, for example, applications for the appointment or replacement of arbitrators (in non-institutional arbitrations), applications for the taking of evidence and interim relief, as well as proceedings to set aside or enforce arbitral awards. The current state of affairs in several of the world's

leading seats of arbitration is surveyed below.

New York

While New York state courts have suspended the filing of any new nonessential proceedings,[20] New York federal courts remain open to hear new civil cases (albeit with limited in-person appearances), with emergency civil actions being handled in the regular course.[21]

For any court relief related to international arbitration, federal courts are therefore the best option. As individual federal judges have adopted their own rules with respect to case management, however, those rules should also be consulted by parties seeking to obtain arbitration-related court relief in New York.

London

The English courts are continuing to operate during this period, subject to certain new guidance and contingency plans.[22] Before the COVID-19 pandemic, the courts were already able to hold hearings by telephone, video or other remote means.[23] In response to the public health emergency, a new protocol on remote hearings has been issued[24] and the High Court of Justice has already held a number of hearings remotely without difficulty.

Some changes have been made to the U.K. civil procedure rules, which may have an effect on arbitration-related proceedings. For example, the length of time by which parties may extend a court deadline by agreement has been increased from 28 days to 56 days, provided that the extension does not put any hearing date at risk.[25]

Any further extensions require the permission of the court, which will nonetheless take into account the impact of the COVID-19 pandemic in deciding whether to grant such permission.

While the English courts therefore continue to be available where required to make orders in relation to international arbitration, parties could face some delays and may be required to comply with certain specific COVID-19 protocols.

Geneva

The Swiss federal government and the Swiss courts have put in place a range of different COVID-19 measures that may affect arbitration-related court proceedings.

The Swiss federal government suspended all time limits in administrative and civil court proceedings between March 21 March and April 19.[26] This means that the 30-day time limit for challenging arbitral awards rendered in Switzerland did not run between those dates, which affects all awards rendered between Feb. 20 and April 19.

In addition, the Swiss federal government has temporarily modified the civil procedure rules, as from April 20 to Sept. 30, to enable civil courts to hold hearings and witness examinations by videoconference and, if this is not possible and the matter is urgent, to proceed on the basis of written submissions only.[27]

In parallel with these governmental measures, the Swiss Federal Supreme Court restricted its activity

until April 19 to urgent procedures,[28] which is likely to lead to a backlog of cases. At the cantonal level, the Geneva civil courts are giving priority to certain urgent interim measures and urgent hearings, and prefer written proceedings where possible.[29] The Geneva courts have also extended certain time limits set by civil judges in ongoing proceedings, until May 25.[30]

Because these measures vary between courts and do not affect all proceedings in the same way, a case-by-case assessment is required to determine the impact on any specific arbitration-related court proceeding.

Hong Kong

With the COVID-19 outbreak, Hong Kong courts are closed and hearings are generally adjourned through May 3, following a recent extension.[31] During this period, hearings are being conducted only for urgent and essential matters, as directed by the presiding judge, and may be conducted remotely.[32]

Applications for emergency relief, such as ex parte applications in aid of arbitration to preserve assets and evidence, are likely to be considered urgent and essential matters, and continue to be resolved in a timely manner. Other types of arbitration-related matters, such as set aside proceedings or applications to recognize and enforce an arbitral award are unlikely to be considered urgent and essential barring exceptional circumstances.

Singapore

Following the Singapore government's lockdown of the city until early May 2020, the Singapore courts have adopted an approach similar to that implemented in Hong Kong.

The Singapore chief justice has directed that all matters scheduled to be heard during this period be adjourned, unless the matter is essential and urgent.[33] Such measures are enumerated in a nonexhaustive schedule, and generally include applications for urgent interim injunctions and relief. As far as possible, hearings which do proceed during this period will be conducted electronically (i.e., by video-link).

In sum, in most leading seats of arbitration, arbitration-related court proceedings may face some delays for nonurgent matters, although applications for interim relief will likely be treated expeditiously. As a practical matter, with the exception of interim relief, it is relatively rare that parties need to seek recourse from national courts at the outset or during the course of arbitral proceedings. Consequently, these potential delays in court proceedings will not affect the progress of most international arbitrations, at least until an award is rendered and challenged by party.

As the COVID-19 pandemic continues to present unparalleled public health challenges, this article shows that arbitral institutions and practitioners worldwide are responding with flexibility and professionalism to ensure that, while reasonable accommodations are made, international arbitration continues to deliver prompt and effective justice.

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[13] See for example, ICC Rules, Art. 31(2) and Appendix VI, Art. 4(1); Swiss Rules, Art. 2(3) and Art. 42(1)(d); HKIAC Rules, Arts 42.2(f) and 43.5; SIAC Rules, Rules 5.2(d), 29.4 and 32.3.

[14] LCIA Rules, Art. 19.2; Swiss Rules, Art. 25(4).

[15] ICC Rules, Appendix IV (Case Management Techniques), paragraph f.

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