

## INTERNATIONAL ARBITRATION PROCEEDINGS DURING THE COVID-19 PANDEMIC

Arbitration proceedings are as much affected by Corona as ordinary court proceedings. On 9 April 2020, the ICC International Court of Arbitration issued a guidance note how to mitigate the adverse effects of the COVID-19 pandemic and the mandatory restrictions to prevent the virus from spreading further.

The guidance note highlights the existing case management tools that have always been available through the ICC Arbitration Rules (the “Rules”) and explains the additional steps the ICC International Court of Arbitration (the “Court”) took at this occasion to streamline its internal processes further to the benefit of its users.

The guidance note inter alia. (I) recalls the procedural tools available to parties, counsel and tribunals to mitigate the delays generated by the pandemic through greater efficiency, and (II) provides guidance concerning the organisation of hearings in light of COVID-19 considerations, including conducting such hearings by audioconference, videoconference, or other similar means of communication (“virtual hearing”).

### (I) Guidance in respect of procedural tools

The pandemic does not change the fundamental principles by which the Court operates and by which arbitrations in general are conducted. Pursuant to Article 22(1) of the Rules, tribunals and parties have the duty "to conduct the arbitration in an expeditious and cost-effective manner." Pursuant to Article 25(1) of the Rules, tribunals have the additional duty to proceed “within as short a time as possible to establish the facts of the case by all appropriate means”.

Consistent with the Rules and aforesaid general principles, all parties involved in arbitration have to consider procedural measures that can mitigate the effect of delays to the arbitral process, including delays caused by the COVID-19 pandemic.

By means of example such procedural measures can include the following:

- Identifying whether the entirety of the dispute or discrete issues may be resolved on the basis of documents only, with no evidentiary hearing;



- Considering whether potentially dispositive issues, such as the application of a contractual limitation of liability or the inclusion of a non-signatory in the proceedings, can be decided without a phase for the production of documents, or with a highly limited production of documents that are deemed to be material only to the issue(s) to be decided;
- Identifying issues that may be resolved without witness and/or expert evidence or on the basis of written questions from the opposite party or the tribunal and written answers from the witness or expert;
- Considering whether site visits or inspections by experts can be replaced by video presentations or joint reports of experts;
- Considering whether direct recourse to a tribunal-appointed expert as opposed to party-appointed experts is appropriate;
- Using either audioconference or videoconference for conferences and hearings where possible and appropriate;

This non-exhaustive list of procedural options is illustrative for the many tools that have always been available to parties in arbitration to minimize procedural delays and to increase its cost-effectiveness. In this respect, the COVID-19 containment measures did not require the ICC Court to adopt any new rules, which confirms the solidity of the existing rules.

## **(II) Guidance in respect of virtual hearings**

Mandatory health and safety measures as well as travel restrictions can make it strenuous or even impossible to convene physically in a single location with all parties, counsel and arbitrators to hear the case. In this event, those involved should consider whether the hearing could be postponed, whether it can be held with special precautions, or whether to proceed with a virtual hearing.

The pandemic may make it impossible to organize a hearing at which everybody is present in a reasonable timeframe. Having to wait until this becomes possible again, could result in an unwarranted and prejudicial delay. An arbitral tribunal may then exercise its authority to adopt procedural measures suitable to the particular circumstances of the arbitration at hand in order to fulfil its overriding duty to conduct the arbitration in an expeditious and cost-effective manner.

Such procedural measure could consist of organising virtual hearings.

A virtual hearing will require a consultation between the tribunal and the parties to discuss the measures that will have to be put in place in order to



comply with any applicable data privacy regulations. Such measures will also have to deal with the privacy of the hearing and the protection of the confidentiality of electronic communications within the arbitration proceeding and any electronic document platform.

A virtual meeting can present certain challenges given the basic principles that all parties are to be treated with equality and that each party is to be given a full opportunity to present its case. To ensure observance of these principles, parties could request their arbitral tribunal to consider:

- The use of real-time transcript or another form of recording;
- Procedures for verifying the presence of and identifying all participants, including any technical administrator;
- Procedures for the taking of evidence from fact witnesses and experts to ensure that the integrity of any oral testimonial evidence is preserved;
- Use of demonstratives, including through shared screen views;
- Use of an electronic hearing bundle hosted on a shared document platform that ensures access by all participants.

The valuable guidance provided by the ICC can serve in the context of arbitrations pending for other arbitral institutions and ad hoc arbitrations as well.

To conclude, arbitration offers several tools allowing parties to mitigate the effect of the COVID-19 pandemic on the pending proceedings and the introduction of new proceedings, not to say such negative effects can be entirely avoided.

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