

## The impact of the novel coronavirus in arbitration: barrier or opportunity?

07 May 2020 - by [Carolina Pitta e Cunha](#), [Isabel Rebello de Andrade](#)

The current pandemic, caused by SARS CoV-2 and COVID-19 (“**COVID-19 pandemic**” or “**pandemic**”), has had, and will likely continue to have, in the coming months, a very significant impact on several social and economic sectors, in particular, on the justice sector and on the activity of state courts and individuals that provide services in this sector, including lawyers, judges and arbitrators, as well as other entities, such as arbitral institutions.

As regards arbitration in particular, the containment measures approved in several States, including Portugal, and the confinement measures sometimes self-imposed by individuals and companies in order to avoid the contraction and spread of the coronavirus, have affected the conduct of arbitration proceedings in several cases, especially the conduct of hearings and other meetings scheduled to happen in the past two months and in the coming months. In addition, the current pandemic is likely to lead to both positive and negative variations on the number of new arbitrations, as well as to an increase in the number of cases regarding changes in the performance of contracts observed during this period or later, as a result of the pandemic<sup>[1]</sup>.

### 1. Legislative measures adopted in Portugal

In Portugal, the measures approved in the context of the current crisis and with an impact on arbitration proceedings are mainly contained in Law no. 1-A/2020, as published on March 19 and amended by Law no. 4-A/2020, of April 6, and by Law no. 4-B/2020, of the same date (the latter having republished Law no. 1-A/2020, with the wording introduced by the amendments published until that date) (“**Law 1-A/2020**”).

Law 1-A/2020 is only applicable to arbitrations taking place within the Portuguese territory. In relation to arbitrations seated in other countries, even if involving Portuguese parties and/or representatives (for example, arbitrations with seat in Paris, London or cities belonging to other jurisdictions), the law applicable in those countries should be taken into account.

Under Law 1-A/2020, all procedural deadlines regarding non-urgent proceedings pending before arbitral tribunals are suspended, since 9 March 2020. This does not, however, mean that proceedings cannot continue – and some proceedings have indeed continued –, considering the two possibilities expressly provided for in the law, namely:

- (i) the possibility that all parties consider that they can proceed with proceedings and participate in acts that would normally require the physical presence of all participants, as well as acts that are generally performed by electronic means through the use of computer platforms that allow for the electronic performance of the acts in question or by using other appropriate distance communication means, such as teleconference, video call or other similar means; and
- (ii) the possibility that a final decision is rendered in proceedings in which the arbitral tribunal and other relevant entities consider that no further acts or steps are necessary.

Law 1-A/2020 and the rules provided therein with respect to non-urgent and urgent proceedings apply, not only to proceedings and procedures pending before arbitral tribunals, but also to proceedings and procedures brought before judicial courts with respect to disputes submitted, or to be submitted, to arbitration, including, for example, interim proceedings initiated before or during the arbitration proceedings, proceedings for the appointment of arbitrators, proceedings for challenging an arbitrator, proceedings aimed at the reduction of the amount submitted by the tribunal on its fees and expenses, proceedings to set aside an award, appeals against awards, proceedings initiated to challenge an interlocutory decision made by the arbitral tribunal on its own jurisdiction, as well as proceedings for the recognition and enforcement of awards.

With the end of the state of emergency at 11:59 p.m. of May 2, 2020, it is likely that Law 1-A/2020 will be amended in the coming days, even if some restrictions may be maintained with respect to the performance of acts that would normally require the physical presence of all the parties involved.

## **2. Initiatives adopted by arbitral institutions in response to the pandemic**

Considering the spread of the COVID-19 disease, several institutions issued, in mid-March, communications addressed to their users, arbitrators and other neutrals on the implications of the present situation on the administrative tasks to be performed by those institutions, in the context of

pending and future arbitration proceedings. Some institutions have also issued – more or less detailed – guidelines on the specific procedural measures that can be adopted by arbitral tribunals and the parties (or their representatives) in order to mitigate the possible negative effects of the current pandemic and, in particular, on the possibility of holding hearings through distance communication means, including videoconferencing systems.

The **International Court of Arbitration of the International Chamber of Commerce** (ICC), with headquarters in Paris and offices in several other locations, first issued communication on March 17<sup>[2]</sup>, whereby it informed that all teams of the Secretariat of the Court are operational and staff members are working remotely, and advised that all communications with the Secretariat be conducted by email, thereby also providing the email addresses that should be used to file new requests for arbitration and to send other correspondence to the Secretariat, including awards. According to the ICC communication, as of 17 March, hearings and meetings scheduled to take place at the ICC Hearing Centre in Paris until 13 April have been postponed or cancelled and those meetings scheduled to take place at the ICC offices worldwide are being held on a virtual basis.

More recently, on April 9, the ICC further released a *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*<sup>[3]</sup>, which contains:

- (i) a reminder of the rules and measures already provided under the ICC Arbitration Rules and in other notes, reports and guides issued by this institution, including the *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Arbitration Rules*<sup>[4]</sup>, the Report approved by the ICC Arbitration Commission entitled “Controlling Time and Costs in Arbitration”<sup>[5]</sup> and the guide “Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives”<sup>[6]</sup>; and
- (ii) guidance on the matters to be taken into account when determining the possibility of holding hearings in a virtual manner, as well as on the steps to be taken by the arbitral tribunal and the parties prior to conducting a virtual hearing, in particular, to ensure the adequate conduct of the hearing and, where applicable, the privacy and confidentiality of the hearing itself and of any documents shared by electronic means.

The **London Court of International Arbitration** (LCIA) also released a message to the community<sup>[7]</sup>, on March 18, whereby it informed that its staff has been working remotely since March 19, provided

guidance on the filing of new cases – through the LCIA online filing system or by email – and the transmission of awards by the arbitrators to the institution – at the email address indicated in the communication –, and further informed that the LCIA will, in all but exceptional cases, correspond with parties and arbitrators by email only.

It should be noted, in particular, that the LCIA already provided its users with an online system that allows for the electronic performance of some acts to be carried out throughout the arbitration proceedings, including the filing of pleadings and the performance of other acts primarily addressed at the LCIA (for instance, the filing of the request for arbitration and the response), but not the exchange of correspondence and the filing of pleadings with the arbitral tribunal, which may, in any event, be carried out by email.

The **International Centre for Settlement of Investment Disputes** (ICSID), based in Washington, released two communications – on March 11 and 19<sup>[8]</sup> – in which it: clarifies that its Secretariat remains fully operational, working remotely and coordinating with tribunals and parties in order to minimize the implications of the present situation in pending cases; reminds users that new requests for arbitration or any requests concerning awards already notified to the parties (including requests for a supplementary award, for the rectification of the award or for its clarification, review or annulment) should be submitted electronically. In addition, ICSID also published, during this period, a guide on the conduct of virtual hearings (*A Brief Guide to Online Hearings at ICSID*) <sup>[9]</sup>, which provides an introduction on the ICSID's online services and technology, and starts by clarifying that about 60% of the 200 hearings and meetings organized by ICSID last year were held by video-conference.

In Portugal, the **Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry** (CAC) informed its users on March 18 that the Secretariat has, since that day, started to perform the tasks related to the administration of pending arbitration proceedings through teleworking. The CAC headquarters are closed to the public since March 19 and any contact with the CAC shall be made by email.

### **3. The use of new technologies in arbitration, particularly in the current context**

The use of the so-called “new information and communication technologies” is not new in arbitration.

Although there is usually no electronic platform like *Citius*[\[10\]](#) within the context of arbitration proceedings, the performance of acts that would normally not require the physical presence of the parties involved is very frequently carried out by email, as provided under most *ad hoc* and institutional rules. This is true both for acts performed by arbitral tribunals (e.g., the issuance of procedural orders, awards and other communications) and for acts performed by the parties (including the submission of pleadings), as well as for acts performed by the secretariats, in the case of institutional arbitrations[\[11\]](#).

It is also common for the arbitral tribunals and the parties to conduct procedural meetings or conferences by teleconference or videoconference, especially in international arbitrations where the members of the arbitral tribunal and the parties or their representatives are located in different countries, and often in countries other than that where the seat of arbitration is located.

That is, however, not the case with most hearings aimed at discussing the merits of the case and/or at the examination of witnesses, including the final (trial) hearings and hearings held in the middle of the proceedings (e.g., in cases where the arbitral tribunal decides to hold a “case review conference” or a “mid-stream conference”).

The biggest challenge brought by the COVID-19 pandemic, therefore, refers to the conduct of hearings that would normally be held with the physical presence, in the same place, of all the parties involved, including, in the case of arbitrations, the members of the arbitral tribunal, the parties or their representatives and the witnesses or experts to be examined, who can be in different parts of the world, in different time zones, and may require special equipment that allows for all the necessary evidence to be adequately produced.

Considering the advantages that technology – and its increasing development – may bring for the conduct of some arbitration proceedings, many arbitral institutions have provided in their arbitration rules for the possibility of using electronic mail as a means of communication between the parties and arbitral tribunals, and some institutional rules (e.g., the ICC Arbitration Rules[\[12\]](#) and the LCIA Arbitration Rules[\[13\]](#)) expressly provide for the possibility of holding (trial) hearings by teleconference or videoconference. In addition to the initiatives adopted within arbitral institutions (previously or in response to the pandemic), the *Seoul Protocol on Video Conferencing in International Arbitration*[\[14\]](#), whose first draft was presented in 2018, also provides very useful indications on how to plan, test and

conduct videoconferences within the context of international arbitration.

That said, the use of new technologies should not be approached in the same way in all arbitrations, and should consider the means available in each case and be guided by a cost-benefit analysis that primarily considers the potential impact of the use, or non-use, of the means in question on the efficiency of the arbitration proceedings, both in terms of time and costs.

In addition to the factors normally taken into account by arbitral tribunals and the parties when deciding whether or not to conduct certain procedural steps by technological means, the current pandemic poses special constraints, such as the possible inability to bring together, in the same room, all the participants of an hearing or meeting, and, especially in the case of international arbitrations, the fact that it is currently not possible to travel to and from certain countries. Considering the likely impact of these constraints on arbitration proceedings in which a hearing is scheduled to happen, with the physical presence of all the parties involved, within the coming months, arbitral tribunals and the parties may be forced to make a choice between (i) postponing the hearing, (ii) conducting the hearing, on the initial dates or on any alternative dates, by distance communication means, such as teleconferencing or videoconferencing, or (iii) a mixed model, whereby part of the hearing would be conducted by the appropriate distance means and the other part would be conducted with the physical presence of all the parties involved, if and when this becomes possible.

As always, the solution to be adopted by the arbitral tribunals and the parties in each case should take into account the principles that govern the arbitration proceedings and other applicable mandatory rules (including any legislative measures adopted in the context of the current pandemic, namely in the country where the arbitration takes place and where the award is to be enforced), as well as the specific circumstances of each case. The *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* issued by the ICC ("**ICC Note**") mentions some of the circumstances that should be taken into account in ICC arbitrations, in any case and, in particular, in cases where the parties, or any of the parties, do not agree on conducting a hearing by distance communication means. According to the ICC Note, when deciding whether or not to proceed with a virtual hearing, the arbitral tribunal should carefully consider all relevant circumstances, including the nature and duration of the hearing, the complexity of the case, the number of participants, whether or not postponing the hearing would cause excessive or unjustified delays, the need for the parties (or their representatives) to prepare for the

hearing<sup>[15]</sup> and the general rule, provided under Article 42 of the ICC Arbitration Rules, that the arbitral tribunal “*shall make every effort to make sure that the award is enforceable at law*”<sup>[16]</sup>.

Furthermore, the choice of the specific means to be used shall take into account the features and tools of the available platforms, namely as to ensure, depending on what each case requires, (i) the participation of all parties (including the members of the arbitral tribunal, the parties in dispute and/or their representatives, potential witnesses and/or experts), (ii) the possibility of sharing presentations (in different formats, including PowerPoint) and documents to be used in the examination of witnesses and experts, (iii) the use of real-time transcript, in a manner that is visible to all participants, (iv) the required quality of the sound and image, and (v) the recording of the hearing.

#### **4. Final remarks**

On the one hand, the use of technology to hold certain hearings or meetings by virtual means may present additional difficulties for the great majority of lawyers and members of arbitral tribunals, who are used to conduct those hearings or meetings in the physical presence of all parties and using hard copies of the required documents, namely during the examination of witnesses or experts.

On the other hand, and especially in cases where it is not justifiable nor indispensable to postpone the hearings or meetings, in order to conduct them in a single physical location, the present times may offer an opportunity to enhance and maximize the use and development of the technological resources available, within the arbitration context, as well as to prove some of the advantages often pointed out to this means of alternative dispute resolution, as compared with state courts, namely its greater speed and flexibility, and the possibility of tailor-making the procedure.

---

<sup>[1]</sup> For an analysis of the implications of the COVID-19 pandemic on the performance of commercial contracts under Portuguese law, see the chapter written by Catarina Monteiro Pires and Diogo Costa Seixas in Moraes Leitão’s Guide “A new time, a new mission: legal implications of the new coronavirus”, with a Portuguese version published on March 31, 2020 (and subject to constant updates), pp. 6-20, and with an English version available [here](#).

[2] ICC, “Urgent COVID-19 message to DRS community”, 17 March 2020, available at: <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>> (last accessed on 21 April 2020).

[3] Available [here](#).

[4] ICC International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Arbitration Rules of Arbitration*, 1 January 2019, available at <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> (last accessed on 21 April 2020).

[5] ICC Arbitration Commission, *ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration*, March 2018, available at <https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/> (last accessed on 21 April 2020).

[6] ADR and ICC Arbitration Committee, *Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives*, April 2018, available at <https://iccwbo.org/publication/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/>> (last accessed on 21 April 2020).

[7] LCIA, “LCIA Services Update: COVID-19”, 18 March 2020, available at <https://www.lcia.org/lcia-services-update-covid-19.aspx> (last accessed on 21 April 2020).

[8] ICSID, “Message Regarding COVID-19, 11 March 2020, available at <https://icsid.worldbank.org/sp/Pages/News.aspx?CID=358>> (last accessed on 21 April 2020), and “Message Regarding COVID-19 (Update)”, 19 March 2020, available at <https://icsid.worldbank.org/sp/Pages/News.aspx?CID=361>> (last accessed on 21 April 2020).

[9] ICSID, “A Brief Guide to Online Hearings at ICSID”, 24 March 2020, available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>> (last accessed on 21 April 2020).



[10] *Citius* allows for the submission of pleadings and documentary evidence within the context of proceedings pending before the Portuguese judicial courts.

[11] For an analysis of some safeguards to be taken into account on the electronic submission of pleadings and documents in the context of arbitration proceedings, see the following article by Rita Nunes dos Santos: “Electronic exchange of submissions and exhibits in arbitration: better be safe than sorry!”, published on this website on 1 February 2019 and available [here](#).

[12] *ICC Arbitration Rules, in force as from 1 March 2017*.

[13] *LCIA Arbitration Rules, effective 1 October 2014*.

[14] By Kevin Kim (Peter & Kim), Yu-Jin Tay (Mayer Brown), Ing Loong Yang (Latham & Watkins LLP) and Seung Min Lee (Shin & Kim), and available [here](#).

[15] See, in particular, § 18 of the ICC Note.

[16] See, in particular, § 22 of the ICC Note.

