

COVID-19 AND THE IMPACT ON INTERNATIONAL ARBITRATION

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International Arbitration has also had to face the COVID-19 crisis, both from a procedural and from a logistical perspective. The latter, which in a legal context is rarely critical, gained particular importance in the “transnational” scenario of the controversies brought to arbitration, which is generally characterized by travelling and meetings of people coming from all parts of the world. Meetings between clients and representatives, arbitrators discussing awards, parties and tribunal meeting for hearings, or even just the gathering of individuals for seminars and congresses aimed at diffusing the culture of arbitration. The gathering was everywhere.

The International Arbitration community is certainly characterized by professionals of great mobility and the COVID-19 crisis created a huge hurdle to such “activeness”. Restrictions to mobility and the need for social distancing imposed by government authorities forced professionals of the sector to reorganize their own activities and manage the complications arising in pending proceedings.

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COVID-19's impact on International Arbitration

After an initial moment in which COVID-19 seemed to have spread only in few geographical areas (China, South Korea and Italy), it soon became apparent that the true extension and spread of the COVID-19 pandemic would hit worldwide.

That means consequences taking place in the broadest spectrum of International Arbitration. First, there came the need for arbitral tribunals to evaluate if the health emergency could affect aspects such as the necessity to postpone arbitral hearings, procedural deadlines of the parties or the same issuance of the award.

In such evaluation, multiple factors gained relevance. For instance, the *lex arbitri* regulating the arbitral procedure, which might include mandatory provisions issued by States regarding the crisis in the country where the arbitration is seated, is of importance.

It is true that the impact of provisions issued by the country of the seat on arbitral proceedings will vary from place to place. Nonetheless, provisions have been adopted by arbitral institutions in order to react to the COVID-19 crisis and those, irrespective of the seat of arbitration, have an impact on the arbitration proceedings governed by such rules.

Vice versa, in *ad hoc* arbitrations the solution to the above-mentioned issues will have to be found in the relevant *lex arbitri* and in possible agreements of the parties.

1. Institutional approach regarding pending proceedings

Many have been the institutions and arbitral chambers to adopt measures and recommendations addressing the needs arising out of the current situation in order to help preventing the spread of the pandemic while trying to give continuance to current proceedings.

In general, all main institutional players remain operational and keep providing parties and tribunals with solutions that allow for the continuance of the proceedings currently pending. Below, we provide a glimpse on the reactions and solutions adopted by some of the main arbitral institutions as a reaction to the COVID-19 crisis:

- On 16 April 2020, thirteen of the major arbitral institutions in the world released a joint statement guided by the common ambition to “... *support international arbitration’s ability to contribute to stability and foreseeability...*”¹. Therein, parties and tribunals are invited to use to the full extent permissible the respective institutional rules and any case management techniques which may permit arbitrations to substantially progress without undue delay despite the present impediments.
- The International Chamber of Commerce (“**ICC**”), which initially limited itself to sharing in its website the French Government guidelines, has gone as far as to publish the “*ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*”². A 13-page publication issued on 9 April 2020 which includes, *inter alia*, suggestions for increasing the efficiency of proceedings, guidance on the organization of virtual hearings and recommendations regarding cyber security and technical issues.
- The Singapore International Arbitration Centre (“**SIAC**”) published on 28 April 2020 the open letter “*Arbitration at SIAC during COVID-19*” authored by SIAC Court President, Gary Born, clarifying issues about arbitration at SIAC during the COVID-19 pandemic³. On the same date, SIAC also published a list of answers to COVID-19 related frequently asked questions⁴.
- The London Court of International Arbitration (“**LCIA**”) has also dedicated part of its website to inform stakeholders of the measures adopted to prevent the spread of the COVID-19 virus, but clarified that the chamber’s operations remain active⁵. Few differences in the way in which proceedings are managed include, for instance, communication exclusively done via email (but for exceptional cases) and the issuance of awards only electronically (paper copies will be sent once the LCIA reopens).

¹ Available at <<https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>>.

² Available at <<https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>>.

³ Available at [https://www.siac.org.sg/images/stories/press_release/2020/\[Open%20Letter%20from%20SIAC%20Court%20President\]%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf](https://www.siac.org.sg/images/stories/press_release/2020/[Open%20Letter%20from%20SIAC%20Court%20President]%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf).

⁴ Available at <https://www.siac.org.sg/faqs/siac-covid-19-faqs>.

⁵ Available at <<https://www.lcia.org/lcia-services-update-covid-19.aspx>>.

- The Stockholm Chamber of Commerce (“**SCC**”) has an entire page of its website dedicated to information from the SCC relating to COVID-19⁶. The page includes the chamber’s guidance for SCC arbitrations, updates on the SCC operations, a checklist on holding hearings in times of COVID-19 and a full spectrum of possibilities for online events and seminars which practitioners may join during these times of social distancing. Latest news includes a joint video message related to COVID-19 released together with the Camera Arbitrale di Milano (“**CAM**”), the German Arbitration Institute (“**DIS**”) and the Vienna International Arbitral Centre (“**VIAC**”) ⁷.
- Likewise, the Hong Kong International Arbitration Centre (“**HKIAC**”) ⁸ and the Centre of Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (“**CAM-CCBC**”) ⁹ have published in their respective websites measures aimed at preventing the spread of the pandemic, together with information regarding the continuity of the services provided in these times of crisis.

2. Changes in the agenda of events related to International Arbitration

Other than the activities of arbitral institutions, the agenda of events related to International Arbitration has also been significantly impacted by the COVID-19 crisis. Many activities and gatherings originally scheduled for the months of March, April and May 2020 have been postponed or adapted. In such regard, the following is worth highlighting:

- The LCIA has postponed seminars and events initially scheduled for the first half of 2020 to a date yet to be defined¹⁰. A virtual roundtable to discuss the long-term effects of the COVID-19 crisis on arbitration is currently scheduled to take place on 12 May 2020.
- The International Bar Association has published in its website a list of no less than 27 conferences and events that have been postponed as a result of the current situation¹¹.
- “*Skills Training Workshops*” events organized by the Young ICCA aimed at diffusing the culture of arbitration among younger generations and that were supposed to take place in the months of March, April and May 2020 (Chicago, Munich, San Francisco, Tashkent, Vienna and Washington DC), have been postponed to a date yet to be defined¹². Same was the destiny of the events organized by SIAC, which refilled its agenda with a series of webinars¹³.

Particular relevance is to be given to the Willem C. Vis International Commercial Arbitration Moot (“**Vis Moot**”), the most important academic competition of international arbitration which gathers every year hundreds of universities worldwide. The competition, which consists in having each team defending and pleading as counsel for parties in a fictitious case in front of arbitral tribunals constituted by some of the most renowned professionals in the field, was on the verge of being cancelled this year. Fortunately, the organizers decided to take their chance and run the competition online. The required coordination and organization of such an endeavour should certainly be considered pioneering in light of the enormous number of people involved. With more than 250 universities taking part in the online Vis Moot and over 500

⁶ Available at < <https://sccinstitute.com/about-the-scc/information-from-the-scc-relating-to-covid-19/>>.

⁷ Available at < <https://drive.google.com/file/d/1W3ZJJ-KQkdbw6fENaB1usZGSwFWnUKjY/view>>.

⁸ Available at < <https://www.hkiac.org/our-services/Facilities>>.

⁹ Available at < <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/ar-39-2020/>>.

¹⁰ Available at < https://www.lcia.org/lcia-events/events_schedule.aspx>.

¹¹ Available at < <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7a69bf51-3862-4964-9a49-9f394ccbbff0>>.

¹² Available at < <https://www.arbitration-icca.org/YoungICCA/news/2020/464/young-icca-skills-training-workshops-notice-about-the-coronavirus.html>>.

¹³ Available at < <https://www.siac.org.sg/events/event-Calendar>>.

hearings taking place in the frame of less than a week, the competition has been a success and has allowed for students who had been preparing for months to live the moot experience, even if only remotely.

3. Other initiatives aimed at deepening the dialogue on the matter

On top of the above-mentioned good news regarding the postponement of activities related to International Arbitration (in lieu of mere cancellation), attempts to keep the dialogue open and running inside the International Arbitration community are also appreciated. In fact, the COVID-19 crisis and its impact on International Arbitration has been among the “hot topics”, despite the restrictions nowadays in force in most countries. In that sense, the following initiatives are worth mentioning:

- The SCC has made available an “*Online Seminar menu*” encouraging the continuity of the dialogue among the users and the many stakeholders of the chamber in these critical times where meetings in person are not feasible¹⁴.
- One of the main online platforms for discussion of hot topics and diffusion of news related to International Arbitration and dispute resolution (the “*Young OGEMID*”¹⁵) has organized its 11th virtual symposium entitled “*Alternatives to In-Person Arbitration: Pandemics and Beyond*”. The discussion took place exclusively online via exchange of emails among the participants.
- The Russian Arbitration Association (RAA) has been promoting its ArbitRAAtion Kitchen, which is a series of episodes in which leading practitioners of the Arbitral Community talk about arbitration while cooking¹⁶. Episodes already released include Jacomijn van Haersolte-van Hof cooking Dutch asparagus, Alexis Mourre making Stuffed Tomatoes Sicilian style, Kevin Nash cooking barbecue short ribs and Stefano Azzali making Tiramisu.

Another appreciated contribution is the one of the Korea Commercial Arbitration Board, which on 18 March 2020 published the “*Seoul Protocol on Video Conferencing in International Arbitration*”¹⁷. Such protocol contains a series of detailed provisions regarding the conduction of hearings and witness examination online, enlisting the possibilities and the risks that adhering to such type of approach can bring to the proceedings. It is undoubtedly an innovative contribution that ends up being of particular relevance in these delicate times.

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Possible legacy that the COVID-19 might leave to International Arbitration

At the end of the day, it is inevitable to consider if and which legacy, strengths, lessons and scars, the COVID-19 crisis might leave in the world of International Arbitration.

¹⁴ Available at < <https://sccinstitute.com/our-services/online-seminar-menu/>>.

¹⁵ Available at < <https://www.transnational-dispute-management.com/subscriptions.asp>>.

¹⁶ Available at < <https://www.youtube.com/channel/UCiPNzIPFci7q97YsgGBFtRq>>.

¹⁷ Available at

<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>.

1. Increase in the number of arbitrations

There is a concrete possibility that the COVID-19 crisis might result in the increase of international arbitrations. The crisis has with no doubt reverberated through several “transnational” contractual relationships. For instance, suffice it to imagine the following scenarios (among infinite possibilities):

- Contracts of supply of goods or services in which the performance of the provider cannot be fulfilled, or is fulfilled with a certain delay, as a result of the restrictions in movement and transportation imposed by public authorities in light of the COVID-19 crisis.
- Procurement contracts in which the performance of the subcontractor has been delayed due, for example, to the delay in the shipment of goods – also arising out of the restrictions imposed in the context of the COVID-19 crisis.
- Insurance contracts which do not clearly establish whether the insurer has assumed or not the risk of the effects of the COVID-19 outburst.

It is reasonable to assume that analogous cases as the ones above, whenever the underlying contract includes an arbitration agreement, will lead to an increase in the number of international arbitrations.

2. Positive impacts on International Arbitration Practice

Some illustrious scholars have then sustained that the emergency may ultimately have a positive impact on the International Arbitration Practice, by accelerating some virtuous conducts in the managing of the arbitral proceedings.

2.1 Use of video-conference systems

In this regard, it is possible to notice that the COVID-19 emergency can certainly motivate the use of video-conference systems for hearings that cannot occur in person.

That could lead to the overcome of the resistance of arbitration users to conduct proceedings remotely. While the arbitration rules of the majority of arbitral institutions already provide for the possibility of conducting arbitral proceedings and hearings remotely, practice shows that – up to the present days – tribunals and parties have long resisted adopting such approaches.

The COVID-19 crisis might result in possible changes of perspective. In particular:

- Tribunals and Parties could feel compelled in the future to conduct hearings in person only when strictly necessary (adhering to video-conference systems whenever the meeting is not “crucial”).
- Also, hearings that take place in person could be limited as to the number of people attending them, favouring practices such as the examination of fact and expert witnesses by means of video-conference systems (which would result in a significant decrease of expenses related to the proceedings).
- Arbitral tribunals could make use of video-conference systems also during the phase of deliberation of an award.

Obviously, the above-mentioned suggestions should be accompanied by a parallel availability and readiness of hearing centres as to the existing video-conference systems

and possibilities to connect people fast and efficiently, allowing for an “immediate” exchange of information of those attending (virtually or in person) the meeting.

2.2 Paperless Arbitration

It is known that the submissions in International Arbitration can reach remarkable volume and comprise thousands of pages (submissions and annexes considered).

As of today, practice has shown a certain reluctance of arbitral tribunals to waive paper copies of the submissions. Indeed, when setting the rules of the game, procedural orders often require parties to deliver to the arbitral tribunal and the opposing party a paper copy of the submission and respective annexes on top of any electronic file sent.

It would be welcome if the current crisis, which has undoubtedly had an impact on courier services, could lead to a reconsideration of the need for such paper copies. One should hope for it to develop a better consciousness on the matter leading to a desirable transition towards a paperless arbitration.

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Il presente articolo ha esclusivamente finalità informative e non costituisce parere legale.

This article is exclusively for information purposes, and should not be considered as legal advice.




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