

# Arbitral proceedings – efficient and effective during times of COVID-19?

## LATEST RECOMMENADTIONS BY THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) AND THE CHARTERED INSTITUTE OF ARBITRATORS (CIARB) FOR ADJUSTED PROCEEDINGS

### Executive Summary

- According to the International Chamber of Commerce (hereinafter: ICC), arbitral proceedings shall become more efficient through thorough preparation.
- Remote proceedings via video conference will become „best practice“ with contact and travel bans put in place. The digital approach may also prove helpful in cases of urgent arbitral proceedings which cannot take place physically even under adjusted conditions.
- Software and other tech tools supporting remote arbitral proceedings will be announced in due time. This enables participants of arbitral proceedings to make the necessary arrangements and to carry out trial runs.

### 1. Introduction

The global COVID-19 pandemic does not only affect ongoing arbitral proceedings. It also gives rise to new disputes of which the handling is currently very limited. On April 9, 2020, the ICC published its guidance notes<sup>1</sup> aiming to mitigate the consequences of the crisis and to enable proceedings under the currently aggravated circumstances.

<sup>1</sup> <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

### 2. Recommendations for action

Despite the fact that the pandemic does not overthrow general principles of arbitral proceedings, the ICC recommends to adapt proceedings to the current situation. Next to postponements, the arbitral tribunal may act via video and audio conferences immediately in order to mitigate greater consequences of the pandemic on the arbitral proceedings.

#### 2.1. Preparation of proceedings

The consequences of the pandemic require a closer look at the modalities of the arbitral proceedings. In times of crises, it is important to ensure – and if possible – to improve the efficiency of arbitral proceedings. This can be achieved by the ICC's recommendations compiled in a list of extensive measures which does not make any claim to completeness.



Below, the main points are discussed in brief:

- The arbitral tribunal shall carry out preparatory measures for the conduct of proceedings promptly in order to reduce potential delays.
- Relevant deadlines and time limits shall be communicated and discussed in a timely manner.
- It may also be possible to alter the mode of proceedings scheduled as in-person-proceedings to written proceedings. The same applies for summoned witnesses whose hearings may be canceled or rescheduled otherwise. If possible, hearings may take place via video conference.

On a general note, the arbitral tribunal should assess the importance of each part of a respective proceeding and try to keep proceedings as lean as possible.

## 2.2. Video conferences

Domestic restrictions as well as travel bans may cause disruptions or the suspension of physical arbitral proceedings. As a relief, the ICC emphasises the option of video-conferencing. According to the “Guidance Notes” by the CI Arb<sup>2</sup>, video conferences should be favored over audio conferences. Furthermore, remote-only proceedings can be held via video conference or in-person proceedings may be complemented by individual parties “connected” to the proceedings via video conference. It is needless to say, that a secure and stable internet connection is a pre-requisite in this. Next to the availability of the required infrastructure, specific circumstances and regulations formulated by the respective states should be considered.

The ICC recommends to arbitral tribunals to consider the following aspects when planning video conferences in order to ensure all parties being treated equally:

- Different time zones, length and breaks of the hearings

<sup>2</sup> Cf. „Guidance Note on Remote Dispute Resolution Proceedings“, <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>.

- Preparation of minutes or other forms of transcription of the proceedings
- Interpreting
- Identification and taking note of the presence of every participant
- Agreement on and sharing of documents relevant for the proceedings on platforms accessible to all parties
- Use of so called „Electronic Bundles“ containing all relevant documents
- Preparation of a „Cyber-protocol“ for which a template (Annex II) is provided

According to the CI Arb, the use and selection of software, technology and other media should be communicated in due time. This ensures that all participants have the necessary software up and running in order to hold remote conferences and prevent delays. Parties should use the highest possible quality of audio and/or video connection available to them. Again, it is needless to say that the stability of each participant’s internet connection is vital. The CI Arb recommends storing important documentation as hard copies alongside the digital proceedings.

## 2.3. Postponement of proceedings

In a number of cases it will be inevitable to postpone already scheduled proceedings. Nonetheless, the concerned proceedings should take place as early as possible. New trial dates should therefore be scheduled reasonably – not in the distant future. The rescheduling should be declared top priority and be handled with care by everyone involved.

Postponements are not an option where the statute of limitation or certain preclusion clauses pose risks for the enforceability of claims. For those cases, it should be reviewed whether the proceedings may take place either in person and under additional conditions or according to the above recommendations. In this, the health of all participants is top priority. When holding physical proceedings, the ICC recommends creating sufficient space between individual participants and to provide facial masks as well as disinfectant.



### 3. Our assessment

In times of the COVID-19 pandemic, a meticulous and detailed preparation of arbitral proceedings is more important than ever. The communication among all participants of the proceedings is a key factor. Contact and travel bans should be handled by using technical aids. Especially the use of video conferencing allows a quick and pragmatic solution to hold or continue arbitral proceedings. A special responsibility lies with the arbitral tribunals. Arbitral tribunals need to professionally anticipate and handle difficulties arising from hearings being conducted via the internet by means of adequate coordination of the proceedings. It is important that the parties are treated equally at all times and that the personal circumstances of each individual are taken into account. For assistance in the conduct of proceedings via video conferencing, GSK refers to the checklists provided by the ICC.

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