

Mitigating the Impacts of COVID-19 on your Arbitration

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By now it is clear that there are virtually no jurisdictions that are unaffected by COVID-19 or the international measures that have been put in place to try to contain and control it.

One of the areas of concern for our clients relates to their ongoing arbitrations. For arbitrations that were commenced before the current situation took hold, parties and tribunals find themselves in relatively new waters. How does one best run an arbitration that was started and planned before these new and extraordinary conditions took hold? Is it, and can it be, business as usual?

For most arbitrations, the short answer to this last question is “no”. The way in which virtually everyone does business has changed and this will necessarily impact arbitrations.

The good news, however, is that arbitration was, in a way, designed for this sort of a situation. It is, or should be, flexible and responsive to parties’ needs. Unlike, for example, court litigation, parties have easy access to their tribunals and are generally empowered to agree whatever procedures they consider appropriate to resolve their dispute.

But what does this mean in practice? Some of the key points you may want to consider in respect of your arbitrations that are already in progress include:

- **Immediate deadlines** - Do you, your opponent(s), or your tribunal, have any upcoming deadlines that may need to be reconsidered? We are seeing many tribunals contacting parties to ask if they anticipate any issues with immediate deadlines due to the current situation. This is sensible. It forces all parties to consider any immediate issues they may come across. But this is not the preserve of tribunals. If you have concerns about your own or others’ ability to meet any immediate deadlines, you may wish to consider raising them sooner rather than later.

- **The procedural timetable** – Regardless of immediate deadlines, think realistically about the overall timetable that is in place and how that may be impacted by the current situation. Issues to consider include ease of access to documents and ease of communications between and with the client, co-counsel, experts, and, witnesses. Even if you are able to communicate by telephone or video, if people are used to doing business in person, these alternative methods of communicating can be difficult and inefficient. Consider also the jurisdictions you are in or working with: calls or videos in and between certain jurisdictions can be significantly harder than in others. Acknowledge and plan for this. Pay particular attention to deadlines that invariably require a lot of contact with people or documents, such as document production or the preparation of witness evidence. It is important to aim to be efficient, but also be realistic.
- **The documents** – Most procedural orders will have made some provision for the use of hard copy documents. Go back to these requirements and consider if they are still workable. Even if they are, consider if they are necessary or essential in the current climate. Try and take steps early to reduce reliance on hard copy documents. If parties were not already doing so, ensuring documents are easy to access and review in their soft copy format is essential. No party wants its tribunal to be struggling to read the submissions or evidence it relies on.
- **Logistics** – Even if you are sticking to deadlines, consider the logistics surrounding filings. If you are submitting any hard copies, how will these be printed and how will they be shipped? Will everyone be able to receive courier deliveries and, in light of current issues, do they want to receive them? And what is the current guidance from any relevant arbitral institution? Many of the leading institutions have instituted a work-from-home policy for their staff and/or are asking parties not to send hard copies to their offices. All of these logistical practicalities need to be addressed early and with clear communication to all affected.
- **The claims or defences** – Consider whether the current situation impacts any of the claims or defences in your arbitration. It may well not have any impact: disputes often (though not always) relate to historical rather than current issues. However, it is not impossible that the current context will impact your or your opponent's claims or defences. Each case will depend on its own facts. One area which may be impacted is damages. If parties are claiming any losses for the current period, the nature and scope of those losses may be impacted by current events.
- **Hearings** – The current situation significantly impacts arbitral hearings. Most modern arbitration laws allow for hearings to be conducted other than in-person but it is essential to take advice on this. Also consider any relevant institutional rules. Nonetheless, it has not been common for important hearings to be carried out by telephone or video. Depending on how long the current situation lasts, parties and tribunals may need to move past this reticence. For now, though, we are seeing most substantive hearings being rescheduled for later in the year. In the interim, the international arbitration community is working together to try and develop best practices and guidance for “virtual” hearings so that they can be adopted with greater ease. But participants in arbitrations need to be practical. In many jurisdictions, video conferencing may, in practice, be far from useable. And adopting these technologies assumes equal access to the underlying technology itself. This is simply not the case. Parties and tribunals must be alive to the inequalities that one or more parties may face in the current climate simply by their not having access to the same options as others.
- **Settlement** – Now more than ever many businesses face significant problems. It is therefore sensible to consider whether the change in circumstances means either you or your opponents are more amenable to settlement on reasonable terms.

How the current situation impacts your arbitrations will very much depend on the specifics of your case. What is clear, though, is that it is likely that any arbitration that is currently in progress will be impacted in some way. It is for the parties and their tribunals to work together to sensibly try to identify and resolve those issues in an efficient and fair way that reflects the extraordinary situation in which we all now find ourselves.

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