ICC Issues Guidance on Arbitration During COVID-19

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On 9 April 2020, in light of the COVID-19 pandemic the International Chamber of Commerce ("ICC") assured that the International Court of Arbitration (the "Court") remains operational and continues to progress pending arbitrations and accept new cases, and issued a guidance note on possible measures aimed at mitigating the effects of the COVID-19 pandemic.

The guidance note addresses various issues including mitigating COVID-19 related delays, modification of the procedural timetable or adoption of appropriate procedural measures, guidance on virtual hearings, cyber-protocol, and sample clauses.

Here we outline some of the highlights of the ICC's guidance note.

Mitigating COVID-19 related delays

The guidance note ensures consistency and compliance with Article 22(1) of the ICC Arbitration Rules (the "Rules") which require tribunals to conduct any arbitration in an expeditious and cost-effective manner and Article 25(1) of the Rules which requires tribunals to proceed with as short a time as possible to establish the facts of the case by all appropriate means.

The ICC advocated that the pandemic should not create an unnecessary delay to tribunals' deliberations or draft awards as such can be conducted remotely, with the time-limits for submission of draft awards to the Court as well its policy to reduce arbitrator fees in cases of unjustified delays remain in effect.

Notwithstanding, the ICC will take into consideration specific cases where delays are genuinely attributable to specific COVID-19 caused situations, such as the illness of an arbitrator.

The ICC has also noted that it will be accountable for any hardship faced due to COVID-19 in assessing advances for fees.

Modification of the procedural timetable or adoption of appropriate procedural measures

The guidance note provides a non-exhaustive list of procedural options that parties, counsel, and tribunals may adopt in line with Article 24(3) of the Rules to mitigate potential delays caused by COVID-19 such as:

- 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 site visits or inspections by experts can be replaced by video presentations or joint reports of experts.
- Using either audioconference or videoconference for conferences and hearings where possible and appropriate.
- Considering whether and how the number and size of submissions can be limited.
- Considering whether the parties would agree to opt-in to the ICC Expedited Rules Provisions.

As of 17 March 2020, new requests for arbitration must be filed in electronic format, and the ICC encourages tribunals and parties to conduct the arbitration digitally as is reasonably possible, including the electronic signing of terms of reference, counterparts to an award signed separately and assembled in a single electronic file, and submitting all exhibits in electronic format.

Guidance on virtual hearings

The guidance note clarifies that the language of Article 25(2) of the Rules which requires that a tribunal "shall hear the parties together in person if any of them so requests" should not be misconstrued to permit virtual means of the appearance, but should be read in that it refers to parties having an opportunity for a live, adversarial exchange in person.

However, Section 15 of the guidance note also states that:

"While tribunals have often erred on the side of caution and decided to hold at least one face-to-face hearing on the merits if a party so requires, the COVID-19 pandemic may mean that it is not possible to hold a face-to-face hearing in a reasonable time and that waiting until it becomes possible would produce unwarranted and even prejudicial delay. Accordingly, a tribunal may, in appropriate circumstances, adopt different approaches as it exercises its authority to establish procedures suitable to the particular circumstances of each arbitration and fulfills its overriding duty to conduct the arbitration in an expeditious and cost-effective manner."

The guidance note encourages parties and tribunals to be appreciative of restrictions on travel, and health and safety concerns, but where the tribunal determines that convening in a single physical location is vital but not currently possible, efforts should be made to reschedule the hearing or convene in a way that mitigates delay.

If it is an absolute necessity to convene in a single physical location, the guidance note advises that specific rules and guidance on the location and appropriate sanitary measures should be put in place to ensure the safety of the participants.

Cyber-protocol and sample clauses

The guidance note emphasizes that virtual hearings require the creation of a cyber-protocol (implementing measures) subject

to consultation between the tribunal and the parties. Sample clauses provided for by the guidance note include:

- How parties, counsel, the tribunal, witnesses, expert, transcribers, other participants, and support staff and technicians take part in the virtual hearing including detailing their log-in locations and points of connection.
- Minimum system specifications and technical requirements, and hardware, equipment, and any location-specific requirements, and test runs to ensure connectivity.
- Confidentiality, privacy, and security including no recording of any part of the hearing and inclusion of support or technical staff or consultants as participants.
- Online etiquette and due process considerations such as muting microphones when not speaking, avoiding the use of equipment that interferes with connectivity, and mechanisms for objections.
- Presentation of evidence and examination of witnesses and experts in a clear and visible manner on screen, coordination towards the connection time and duration for each witness or expert, virtual sequestration of witnesses and experts, permissibility or prohibition of synchronous or asynchronous communications, whether witnesses or experts will be giving testimony whilst alone or with the assistance of anyone on location, and other matters.

The guidance note also emphasizes adherence to data privacy controls and regulations in the application of a cyber-protocol and virtual hearings.

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