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# COVID-19 Legal Insights



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## Conduct of arbitration proceedings. Questions and answers

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This Arbitration Alert aims at providing brief and practical answers to certain key queries that might arise in relation to organization of arbitration proceedings in the context of recent COVID-19 outbreak.

1. **Are arbitration proceedings stayed during the COVID-19 crisis?**

As to the arbitration proceedings conducted or seated in Romania, the answer is: in principle, no.

Presidential Decree No. 195/2020 which instituted the state of emergency on the territory of Romania (“**Decree 195/2020**”) only includes measures for the suspension of civil cases that are registered on the dockets of State courts, except for certain urgent matters. This was due to the judiciary proceedings in Romania being essentially public, with in-person hearings scheduled frequently and for each step of the proceedings.

As opposed to litigating in public courts, arbitration is an alternative means of dispute resolution essentially private in character (with some exceptions imposed by public order and imperative norms, the rules governing the conduct of arbitration are chosen or established by the parties and the arbitral tribunal). The written phase of the arbitration proceedings is normally conducted remotely, with documents being filed electronically and participants communicating via email or conference calls. In-person meetings usually take place only during the oral phase of the procedure when hearings with all relevant participants are scheduled.

While arbitral tribunals are empowered to extend deadlines or otherwise amend the procedural timetable when justified reasons require so, those arbitration proceedings that are in their written phase should normally not be affected by the state of emergency established by Decree 195/2020.

The situation is however different in case of arbitrations proceedings entering their oral phase. Due to concerns related to in-person meetings, some arbitral institutions, including the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (CCIR), recommended that in-person hearings scheduled in this period be postponed. Nevertheless, even in these cases, alternative means, such as remote hearings or other measures, are available and can be considered by the parties and arbitral tribunals as discussed further on.

As to the arbitration proceedings conducted or seated outside Romania, the answer would be similar: in principle, these are not stayed either, but always depending on the procedural rules and public measures in place at the seat of arbitration or applicable at the level of the relevant arbitral institution administering the case.

## **2. Can arbitration proceedings be initiated during this time of crisis?**

Yes. Given that the activity of the Romanian State courts is currently stayed, except for urgent matters, it would even be recommendable for the parties to choose arbitration, if mutual consent is possible. Arbitration also looks like the better alternative since it is to be expected that State courts be overly crowded once the state of emergency ceases, which could translate into protracted litigations.

Many arbitral institutions contain special expedited procedure rules for the rapid settlement of cases with small amounts at dispute, with the award being issued within just a few months. By agreement of the parties expedited procedure rules can also be applied regardless of the amount in dispute.

Going to arbitration is an option even in those cases where disputes are already pending before State courts. Parties could conclude an arbitration agreement allowing them to settle their dispute in arbitration, thus terminating the procedure before State courts. As already explained, this might be an attractive option as it could allow for a more rapid dispute settlement. This might however not be feasible for those disputes that are in an advanced stage and for which important expenses were already made.

## **3. Can in-person hearings be conducted during the COVID-19 crisis?**

For those hearings scheduled to take place in Romania the answer is: in principle, no. Severe movement restrictions are in place during the state of emergency, with foreign citizens not being as a rule allowed to enter Romania and flights being seriously curtailed.

Considering that, apart from certain urgent matters, civil proceedings pending before State courts are stayed during the state of emergency, a similar rationale would apply to hearings in arbitration even though Decree 195/2020 does not govern arbitration matters as such. Holding in person hearings in pending arbitrations might therefore not justify the urgency requirement.

As for in-person hearings seated outside Romania the answer would depend on the local rules in place at the hearing venue. However, as noted, some arbitral institutions have recommended postponement of in-person meetings at this time.

#### **4. Are remote or video hearings a suitable substitution to in person hearings?**

In principle, yes, albeit with certain caveats as this option might not be suitable in all cases.

For example, it might be difficult to organize remote hearings where many participants are to attend (e.g. where several witness and experts are to be examined). Certain confidentiality issues may also arise, while the policing of certain rules may prove challenging (such as ensuring that certain persons do not attend the hearing unless supposed to). It may also be difficult to ensure effective use of time during sitting hours (e.g. where parties are in different time zones) or prevent participants from losing their focus (e.g. where hearings are scheduled to take place several days in a row). Disruptions caused by technology failures need also be considered.

Any such difficulties are not however insurmountable and will most likely be overcome in the period to follow, also in view of the clear advantages in organizing remote hearings (such as mitigation of costs as related to travel, accommodation and venue). Even in pending arbitrations, parties and arbitral tribunals can readily discuss and decide upon certain measures to allow the proceeding to continue, as discussed below.

#### **5. What measures can be taken to ensure the smooth continuation of pending arbitration proceedings?**

While arbitral tribunals have a final say in these matters, it is recommended that case management conferences be held with all participants to discuss the impact of this crisis on the current procedural timetable.

Parties and arbitral tribunal could discuss and decide upon one or more of the following measures to allow the proceedings to unfold in an orderly fashion during the state of emergency:

- a) Decide that all submissions are to be filed electronically only, with no hard copies being dispatched;
- b) Decide that settlement of the case be done exclusively based on documentary evidence, with no hearings at all being scheduled;
- c) If hearings are nevertheless required, decide whether these or parts thereof can be carried out remotely;
- d) Decide how to properly manage and shorten any hearing to be carried out exclusively by remote means such as by: identifying whether examination is indeed required for all witnesses and experts; identifying issues that may be agreed upon by the parties and preparing a joint-agreed list of undisputed facts that do not need to be further addressed; preparing a list of contentious issues so as to limit the

scope of examinations; deciding that no closing arguments are to be made orally, but by means of post hearing briefs only.

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## Editors

**COVID-19 Legal Insights** is our response to the COVID-19 outbreak. We shall keep you informed on the various legal challenges posed by the coronavirus, thanks to a dedicated practice group comprising lawyers with different backgrounds, such as compliance/regulatory, corporate and commercial, insurance, labour and employment, litigation and arbitration, insolvency, public procurement, data privacy, tax and customs. In addition, our taskforce offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, etc. To keep abreast of developments, please feel free to regularly check our dedicated online resource: <http://www.tuca.ro/covid-19/>



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