



Impact of coronavirus (COVID-19) on commercial arbitration in Geneva

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Arbitration analysis: Catherine Anne Kunz, Simon Bianchi and Roxane Pedrazzini of LALIVE, Geneva, consider the impact the coronavirus (COVID-19) pandemic has had on arbitration in Geneva and whether it will result in any long-term changes to practice. This analysis is part of a series which considers the impact of coronavirus on commercial arbitration at key seats of international arbitration.

How has the pandemic impacted your individual practice?

LALIVE's management reacted swiftly and in line with applicable government policies to the pandemic threat. As of 23 March 2020, all LALIVE lawyers across all offices worked from home. Presence in the office was permitted on an ad hoc basis and only if absolutely required (eg hardcopy filing). A skeleton administrative staff kept all offices functioning. Thanks to the reliable IT system, LALIVE has remained fully operational, while at the same time ensuring the safety of everyone (clients, administrative staff and lawyers).

Except for the cancellation of certain hearings, the workload of the commercial and investment arbitration practice at LALIVE has remained steady and even grown. The number of meetings conducted by videoconference (whether internal or with clients) has drastically increased.

In summary, how have arbitral organisations/institutions in your jurisdiction responded to the crisis to date? What has been your experience in this regard?

In Switzerland, the Swiss Chambers' Arbitration Institution (SCAI) has decided to work remotely to the maximum extent possible and adopted a wide range of measures to continue offering fully operational services to its users, counsel and arbitrators.

Among the main measures, the SCAI has invited its users to file their submissions (eg applications for emergency relief, notices of arbitration and answers to such notices) by email, while, at the same time, informing them that SCAI's notifications might exceptionally be made by email as well. The SCAI has also actively encouraged arbitral tribunals in the award drafting phase to take advantage of this period to draft their awards as expeditiously as possible.

Finally, the SCAI is currently preparing short written notes relating to current topics to be published on various communication channels ([SCAI website](#) and [LinkedIn](#)), as well as several webinars.

Other arbitral institutions that are active in Switzerland, such as the International Chamber of Commerce (ICC), have implemented similar measures to remain operational (see in particular the [ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#)).

In respect of arbitration-related court applications, how have the courts/judiciary in your jurisdiction responded to the crisis and what impact have these changes had

on such proceedings? Any lessons learned or practical tips for those bringing and/or defending such proceedings in your jurisdiction?

In response to the pandemic, the Swiss Government has taken various measures that are likely to have consequences on arbitration-related court applications, including the following:

- the extraordinary stay of all debt collection proceedings from 19 March until 4 April 2020. As this period was immediately followed by the ordinary stay over Easter, debt collection proceedings were effectively stayed until 19 April 2020. Debt collection proceedings have now resumed but some delays cannot be completely excluded as a consequence of the extraordinary stay. However, attachment proceedings relating to the enforcement of arbitral awards were not suspended. LALIVE has several ongoing matters all of which were dealt with expeditiously by the debt collection authorities
- the extension of the ordinary Easter stay from 21 March 2020 in civil proceedings. As a result, legal and court-ordered deadlines were suspended from 21 March until 19 April 2020. However, time limits set by substantive law (eg statutory limitation period) were not suspended, and from 16 April to 30 September 2020, hearings relating to civil matters, including witness and expert witness hearings, can exceptionally be conducted by videoconference at the discretion of the competent court provided that: (i) the parties consent to an e-hearing, or (ii) it is justified by the circumstances (eg urgency or need to have a case decided in a timely manner). This is a major change since it constitutes a derogation to the principle of publicity of hearings enshrined in the Swiss Code of Civil Procedure. The extent to which e-hearings will be implemented in practice will, however, depend on the courts' ability to develop the necessary technologies to conduct e-hearings in the coming months

In addition to the government-imposed measures, local courts have taken further action likely to impact arbitration-related proceedings. In Geneva, the Court of First Instance, the competent court for interim relief applications and enforcement proceedings, suspended all hearings from 16 March to 19 April 2020. From 20 April 2020 onwards, only hearings that are deemed to be of an urgent nature will be held. Applications for interim relief on an ex parte basis ('mesures superprovisionnelles') and requests for attachment orders have continued and will continue to be treated by the Geneva Court of First Instance. The court has also withheld the notification of its decisions until 16 April 2020, except in emergency situations, and decided to extend all court-ordered procedural deadlines until 25 May 2020.

Finally, the 30-day time limit to challenge international arbitral awards before the Swiss Federal Supreme Court (in accordance with article 190 of the Swiss Private International Law Act) was suspended from 19 March until 19 April 2020. The pandemic should otherwise have a very limited impact on ongoing or future annulment proceedings before the Supreme Court as such proceedings are generally conducted by way of written submissions only. There have, however, been fewer decisions rendered by the Supreme Court since the outbreak of the pandemic as one can see from the list of daily cases.

Do you envisage any of the changes to the court system being implemented will result in long-term changes to practice and procedure?

While some of the above-mentioned changes (eg e-hearings) might have long-term consequences on the practice of Swiss courts and the applicable procedure, a reform of the current law would be required to continue implementing those changes after 30 September 2020. The pandemic might, however, accelerate the adoption and entry into force of the Swiss Government's proposal to amend the Swiss Code of Civil Procedure so as to allow hearings by videoconference beyond 30 September 2020. This proposal provides that Swiss courts will remain free to choose between e-hearings or in-person hearings. If Swiss courts are able to develop the required technologies to conduct e-hearings efficiently and safely (eg ensure data protection through fully encrypted transmissions), this might well result in an increase of e-hearings in the future, in particular for interim relief applications and enforcement proceedings (eg seizure of assets) where witness evidence is barely needed.

Furthermore, while Swiss procedural law currently takes a rather conservative stance towards electronic submissions (which are allowed only if they bear a 'qualified electronic signature'), the pandemic might ac-

celerate the current gigantic reform called 'Justice Reform 4.0' to digitalise Switzerland's entire judicial system by 2026. The reform will include the obligation (subject to certain exceptions) to communicate electronically via a highly secure central portal.

What are your views on the longer-term impact of the crisis on arbitration and arbitral practice more generally?

In the medium term, an increase of the number of commercial disputes can be expected in the following areas:

- the applicability of force majeure, hardship and impossibility doctrines across business sectors
- disputes relating to the sharp decline of oil prices
- disputes relating to delays in the supply of goods and commodities
- disputes relating to delays in construction projects
- disputes resulting from the insolvency of businesses,
- investment disputes arising out of measures adopted by States to address the pandemic

The pandemic is likely to cause companies to become more attentive in their future contracts to the incorporation and drafting of force majeure clauses, which will no longer be considered as boilerplate clauses.

Furthermore, as arbitration proceedings are currently experiencing less disruption than state court proceedings, there may be a shift in commercial disputes from court proceedings towards arbitration, as the latter is more flexible and can be managed on a decentralised basis.

Arbitration proceedings as such might also undergo various changes. As in-person hearings will remain impossible (or at least limited) for several months in most cases due to public health measures and travel restrictions, we will experience a surge in hearings by videoconference. This in turn may result in (i) arbitral institutions increasing investments in the necessary technologies to ensure the proper functioning of e-hearings and offer this service to their users, and (ii) users and arbitrators becoming more familiar with e-hearings. Positive experiences of users and tribunals with hearings by videoconference, might lead to a long-lasting shift towards e-hearings in commercial arbitration, at least for smaller cases and hearings on procedural issues. We also expect to see a greater number of smaller cases being decided (at least partially) on the basis of written submissions only, in particular for specific issues for which no witness evidence is required.

Interviewed by Gloria Palazzi.

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