

## Arbitration Proceedings during and after COVID-19: Questions and Answers

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In the course of just a couple of months, the COVID-19 outbreak has evolved into a global crisis having significant impact on every aspects of our lives, both socially, economically, and legally. The legal proceedings, including arbitration, are definitely amongst those legal areas that require adaptation to this "new normal". There is no doubt that COVID-19 will cause significant amount of new disputes in the near future and the arbitration practice should be prepared for the procedural and substantive challenges associated with it.

It seems that, so far, the arbitration-related discussions in the wake of COVID-19 have focused more on the features of virtual hearings, such as which medium to use, how to maintain uninterrupted online hearing or even which background to choose. However, before diving into these discussions, parties must first ensure that their arbitration agreement and the rules of the seat of arbitration allow for virtual hearings, or more generally, online arbitration. Technical glitches may shatter the impact of a counsel's delivery, but a heedlessly conducted arbitration may get the award annulled. In this practical note, we touch upon – in Q&A format – key points that parties should take into account, from a Turkish-law perspective, in arbitrating during and after COVID-19.

### Is your arbitration agreement online-friendly?

In order to replace a previously-agreed procedural phase with an online equivalent in an arbitration proceeding, there must be a clear consensus between the parties on this issue and the arbitral tribunal must ensure that the arbitration agreement and the *lex arbitri* does not prohibit such a procedural method. In Turkey, the International Arbitration Act numbered 4886 (IAA) and the Code of Civil Procedure numbered 6100 (CCP) are silent on online arbitration. Therefore, parties and arbitral tribunals are encouraged to draw up a specific procedural order for online arbitration. Explicit agreement on online arbitration should also eliminate the risk for rejection of enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**), which allows refusal of recognition and enforcement of the arbitral award, in the event that the arbitral procedure is not in accordance with the agreement of the parties.

### Should we consider postponing hearings?

Given current uncertainties associated with COVID-19, postponement of hearings may not be the ideal solution for parties, unless the parties and/or the arbitral tribunal decide that a physical hearing is indispensable. In order to postpone hearings in proceedings subject to the IAA, parties must ensure that the relevant proceeding is in line with Article 10 of the IAA, which provides that: "*the arbitral award on the merits of the dispute shall be rendered within one year in the case of a sole arbitrator, from the date of her/his appointment or, in the case where there is an arbitral tribunal, from the date when the minutes of the arbitral tribunal's first meeting are recorded*". Incompliance with this provision may constitute a ground for annulment of the arbitral award. However, this 1-year-long time period may be extended by the agreement of the parties, or failing such an agreement, by the court upon the request of one of the parties. Therefore, in order to eliminate the risk of a set-aside action initiated due to the lapse of one year, parties should explicitly (and preferably in writing) consent to the extension of the proceedings before postponing their hearings for a long period of time.

### **Does suspension of legal proceedings affect arbitral proceedings in Turkey?**

As a measure against COVID-19, the Law No. 7226 suspended all statutory time limits in relation to all legal proceedings, including those before civil, criminal and administrative courts and enforcement offices, until 30 April 2020. Although the Law No. 7226 does not explicitly name arbitration proceedings under the IAA or the CCP, it provides that time limits stipulated under the laws containing procedural provisions are also within the scope of the Law No.7266. Therefore time limits set out under the IAA and/or the CCP should also be under the scope of the Law No.7226, as applicable. However, in institutional arbitration, the time limits are generally determined by an agreement (i.e. institutional rules) and therefore the Law No. 7226 should not have impact on procedural aspects of institutional arbitration. Thus, in such a case, the arbitral tribunals are free to conduct the proceedings as usual. However, please note that the Law No. 7226 has had an impact on all arbitration proceedings requiring assistance by courts. During the suspension period (until 30 April 2020) parties will not be able to recourse to the courts for, among others, appointment and removal of the arbitrators, collection of evidence, set-aside and enforcement actions.

### **Can parties request interim measures from the courts during the suspension period?**

Due to the not final and binding nature of the interim measures ordered by the arbitral tribunals, without doubt, the request for an interim measure is the most common assistance sought from the national courts in arbitration proceedings. Fortunately, requesting and objecting interim measures are excluded from the scope of the Law No. 7726. As a result, the processes regarding the interim measures will be carried out as usual.

### **Can the arbitral awards be signed electronically?**

Even if the parties were able to conduct a successful online proceeding, the problem with the signing of the arbitral award still remains unsolved due to the travel restrictions and even curfews around the world. Article 14 of the IAA requires an arbitral award to be signed by the arbitral tribunal but is silent on the form of the signature. Similarly Article IV of the New York Convention provides that the party seeking recognition or enforcement of the award produces the “duly authenticated original award”. In practice, arbitrators can sign the award via electronic signature with a certification authority guaranteeing that the signature belongs to the respective arbitrator. The object of both Article 14 of IAA and Article IV of the New York Convention is to confirm the integrity of the award and the identity of the arbitrators. Such object is thus respected by way of a secure electronic signature. Considering that the secure e-signature has the same effect as a handwritten signature under the Turkish Law (subject to certain exceptions), we believe that it would be paradoxical not to accept the arbitral award signed with a secure electronic signature. However, as the validity of electronically signed arbitral awards has not been tested by the Turkish courts before, the tribunals should approach the subject with great caution.

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