



# COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal



**Constança Borges Sacoto**

International Arbitration and Litigation



**Jorge Azagra Malo**

International Arbitration and Litigation

**I**

n order to fight the COVID-19 pandemic, Spain and Portugal declared states of emergency in their countries. These exceptional circumstances have had, and still have, an impact on arbitral proceedings seated in Spain and Portugal.

**Home**

**Editorial**

COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees

Non-Precluded Measures Clauses in Times of COVID-19

COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal

Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal

COVID-19 and Online Hearings

COVID-19 Pandemic and Standards of Investment Protection – A Cooperative Approach

COVID-19 and Investment Claims: What Role for War and Emergency Clauses?

COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure

COVID-19, *Rebus Sic Stantibus* and the Law of Treaties

**Investment Arbitration:  
Contact Lawyers**

## Impact of Arbitrations Seated in Spain

In Spain, Royal Decree 463/2020, declared a 15-day state of emergency to address the COVID-19 health crisis,<sup>1</sup> and it was subsequently amended by Royal Decree 465/2020<sup>2</sup> ('State of Emergency RD'). The 15-day state of emergency period has already been extended six times<sup>3</sup> and may be extended again

<sup>1</sup> Royal Decree 463/2020, declaring a state of emergency to address the COVID-19 public health crisis (entered into force 14 March 2020). Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/03/14/463>> accessed 16 April 2020. Royal Decree 463/2020 was enacted by virtue of article 116(2) of the Spanish Constitution, available online in Spanish at <<https://www.boe.es/eli/es/c/1978/12/27/116/con>> accessed 16 June 2020. See unofficial English translation of the Spanish Constitution issued by the Official State Gazette Agency, available online at <[http://www.congreso.es/constitucion/ficheros/c78/cons\\_ingl.pdf](http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf)> accessed 16 June 2020. Article 116(2) of the Spanish Constitution reads as follows: 'a state of emergency (estado de alarma) shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period may not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply.'

<sup>2</sup> Royal Decree 465/2020, modifying Royal Decree 463/2020, of 14 March, which declared a state of emergency to address the COVID-19 public health crisis (entered into force 17 March 2020). Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/03/17/465>> accessed 16 April 2020.

<sup>3</sup> Royal Decree 476/2020, extending the state of emergency until 12 April 2020. Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/03/27/476>> accessed 16 April 2020. Royal Decree 487/2020, extending for the second time the state of emergency until 26 April. Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/04/10/487>> accessed 16 April 2020. Royal Decree 492/2020, extending for the third time the state of emergency until 10 May 2020. Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/04/24/492>> accessed 26 April 2020. Royal Decree 514/2020, extending the state of emergency for a fourth time until 24 May 2020. Available online in Spanish at <<https://www.boe.es/eli/es/>

depending on how the situation evolves. In addition, several royal decree-laws<sup>4</sup> have been enacted since in connection with the state of emergency.

However, neither the State of Emergency RD nor the royal decree-laws contain provisions in relation to the effects of the COVID-19 outbreak on arbitration proceedings in Spain. In contrast, the second additional provision of the State of Emergency RD expressly declared the general suspension of time limits and court proceedings.<sup>5</sup> The stay—which ended on 3 June 2020—also extended to hearings and trials, as stated by the General Council of the Judiciary in the instruction issued on 14 March 2020.<sup>6</sup>

<sup>4</sup> [rd/2020/05/08/514](https://www.boe.es/eli/es/rd/2020/05/08/514) accessed 16 June 2020. Royal Decree 537/2020, extending the state of emergency for a fifth time until 7 June 2020. Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/05/22/537>> accessed 16 June 2020. Royal Decree 555/2020, further extending for a sixth time the state of emergency until 21 June 2020. Available online in Spanish at <<https://www.boe.es/eli/es/rd/2020/06/05/555>> accessed 16 June 2020.

<sup>5</sup> The enactment of royal decree-laws is an exceptional legislative tool for the Government envisaged in article 86 of the Spanish Constitution. Pursuant to article 86(1) of the Spanish Constitution, 'in cases of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-laws and which may not affect the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General Electoral Law'. The royal decree laws should be subsequently ratified by the Spanish Congress pursuant to the terms and conditions included in article 86(2) of the Spanish Constitution.

<sup>6</sup> Under the heading 'stay of proceedings', para 1 of the second additional provision of the State of Emergency RD provides that 'the terms are stayed and the time limits provided in procedural law are stayed and interrupted for all jurisdictions. The calculation of the terms resumes at such time as this royal decree or any extensions ceases to be in effect.'

<sup>7</sup> Available online in Spanish at <<http://www.poderjudicial.es/cgpi/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/En-Portada/El-CGPI-acuerda-la-suspension-de->

## Neither the State of Emergency Royal Decree nor the royal decree-laws contain provisions in relation to the effects of the COVID-19 outbreak on arbitration proceedings in Spain

The general suspension rule contained specific exceptions<sup>7</sup> and also provided, as a catch-all exception, that the judicial court 'may decide to carry out any judicial actions necessary to prevent irreparable harm to the legitimate rights and interests of the parties to the proceedings.'<sup>8</sup> Whether this latter exception could have been used within the general suspension of time limits and court proceedings by a Spanish court to adopt interim or conservatory measures to secure the result of arbitration proceedings—either ongoing or to be started—was not tested, but it should have been perfectly possible.

In any case, in the absence of bespoke provisions for arbitration proceedings, and taking into consideration the current situation as well as the measures adopted to restrict citizens' freedom of movement, official recommendations

[las-actuaciones-judiciales-y-de-los-plazos-procesales-en-todo-el-territorio-nacional--garantizando-los-servicios-esenciales->](https://www.boe.es/eli/es/rd/2020/05/08/514) accessed 16 April 2020.

<sup>7</sup> Paras 2 and 3 of the second additional provision of the State of Emergency RD contain some logical exceptions to the general suspension rule such as, among others, criminal *habeas corpus* proceedings, the proceedings of police courts or with a person who has been arrested or proceedings for the protection of fundamental rights.

<sup>8</sup> Para 4 of the second additional provision of the State of Emergency RD.

and directives regarding the COVID-19 outbreak were published immediately after the declaration of the state of emergency in Spain. To cite some, the Court of Arbitration of the International Chamber of Commerce<sup>9</sup> (ICC), the Spanish Court of Arbitration<sup>10</sup> (CEA for its Spanish acronym), the Civil and Commercial Court of Arbitration<sup>11</sup> (CIMA for its Spanish acronym) and the Court of Arbitration of Madrid<sup>12</sup> (CAM for its Spanish acronym) issued statements and decisions to stay proceedings and postpone evidentiary hearings.

In our experience, the impact of the COVID-19 outbreak on ongoing

<sup>9</sup> ICC Secretariat, 'Urgent Communication to Users, Arbitrators and Other Neutrals' (17 March 2020) <<https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/>> accessed 16 April 2020.

<sup>10</sup> CEA, 'Suspensión general de plazos en todos los arbitrajes administrados por la Corte Española de Arbitraje' (16 March 2020) <<https://www.camara.es/suspension-plazos-arbitrajes-corte-espanola-arbitraje/>> accessed 16 April 2020.

<sup>11</sup> CIMA, 'Medidas adoptadas por CIMA por el estado de alarma' (16 March 2020) <<http://arbitrajecima.com/wp-content/uploads/2020/03/MEDIDAS-ADOPTADAS-POR-CIMA-ESTADO-DE-ALARMA.pdf>> accessed 16 April 2020.

<sup>12</sup> CAM, 'Medidas relacionadas con el COVID-19' (16 March 2020) <[http://arbitramadrid.com/detalle-noticia/-/asset\\_publisher/3HQZrygJgpw3/content/medidas-relacionadas-con-el-covid-19](http://arbitramadrid.com/detalle-noticia/-/asset_publisher/3HQZrygJgpw3/content/medidas-relacionadas-con-el-covid-19)> accessed 16 April 2020.

Home

Editorial

COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees

Non-Precluded Measures Clauses in Times of COVID-19

COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal

Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal

COVID-19 and Online Hearings

COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach

COVID-19 and Investment Claims: What Role for War and Emergency Clauses?

COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure

COVID-19, *Rebus Sic Stantibus* and the Law of Treaties

Investment Arbitration: Contact Lawyers



Home

Editorial

COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees

Non-Precluded Measures Clauses in Times of COVID-19

COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal

Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal

COVID-19 and Online Hearings

COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach

COVID-19 and Investment Claims: What Role for War and Emergency Clauses?

COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure

COVID-19, *Rebus Sic Stantibus* and the Law of Treaties

Investment Arbitration: Contact Lawyers

arbitrations in Spain can be divided into three phases:

(i) An initial phase within the first few days after the declaration in Spain of the state of emergency in which, unless the parties agreed otherwise, deadlines were generally stayed (especially, in proceedings without an appointed arbitrator) and evidentiary hearings postponed following the recommendations and directives published by the arbitration courts; and

(ii) a second phase in which, once it was acknowledged that the exceptional situation may be extended, arbitration courts<sup>13</sup>, arbitrators and

parties discussed either how to resume stayed proceedings or how to adapt the proceedings in light of the exceptional circumstances (e.g. adjusting procedural timetables and enabling virtual hearings).

(ii) a third —current— phase in which the measures implemented to adapt arbitration proceedings to the COVID-19 crisis are being put into practice, with the first virtual hearings taking place as we speak.

As a final comment, since the so-called second phase, practitioners and arbitration courts<sup>14</sup> have also been

[www.lcia.org/News/message-from-the-institutions-arbitration-and-covid-19.aspx](https://www.lcia.org/News/message-from-the-institutions-arbitration-and-covid-19.aspx) accessed 16 April 2020.

<sup>14</sup> Court of Arbitration of Barcelona (TAB for its Spanish acronym), 'Fast Track a consecuencia de Covid-19' (8 April 2020) <<https://tab.es/ca/fast-track-consecuencia-covid-19/h>> accessed 16 April 2020. The TAB announced its fast-track procedure as 'an agile and fully reliable procedure to be used by those who as a result of the (COVID-19) situation require a definitive solution to their dispute, avoiding significant delays

encouraging the use of arbitration — along with other ADR mechanisms such as mediation—<sup>15</sup> as efficient tools to deal with disputes linked to the COVID-19 health crisis.

### Impact of Arbitrations Seated in Portugal

Portugal declared a 15-day state of emergency on 19 March 2020, which was extended (twice) until 2 May 2020. Currently the country is in state of calamity, which is less serious and imposes less restrictions than the state of emergency.

Following the declaration of the state of emergency, several laws have been passed to regulate specific aspects of life in society during this period (e.g. which

of judicial proceedings, especially under the current circumstances.'

<sup>15</sup> Álvaro López de Argumedo, 'Nuevos conflictos y coronavirus: la mediación como alternativa' (*Expansión*, 2 April 2020).

rights and freedoms are restricted during this period) and also to help people and companies cope with the restrictions and lockdown measures and to mitigate the impact of the general lockdown around the country.

One of the measures taken relates to the justice system. The Parliament initially approved Law 1-A/2020 of 19 March ('Law 1-A') which, among other measures, declared that the court holiday rules<sup>16</sup> are in place as of 9 March 2020 in all non-urgent proceedings pending before courts in Portugal, including arbitral proceedings, while the state of emergency to address the COVID-19 outbreak is in place.. Law 1-A also establishes that limitation periods (*prescrição* and *caducidade*) for all proceedings (expressly referring to arbitration) are suspended during this exceptional period.

<sup>16</sup> During the court holidays the judicial proceedings are stayed and no procedural acts are performed.

<sup>13</sup> ICC Secretariat, 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' (9 April 2020) <<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>> accessed 16 April 2020. London Court of International Arbitration (LCIA), 'Message from the Institutions: Arbitration and COVID-19' (16 April 2020) <<https://>

**Home****Editorial**

COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees

Non-Precluded Measures Clauses in Times of COVID-19

COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal

Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal

COVID-19 and Online Hearings

COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach

COVID-19 and Investment Claims: What Role for War and Emergency Clauses?

COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure

COVID-19, *Rebus Sic Stantibus* and the Law of Treaties

**Investment Arbitration: Contact Lawyers**



The court holiday rules that Law 1-A refers to are those established in the Portuguese Civil Procedure Code, which stipulates that during court holidays<sup>17</sup> all procedural deadlines are suspended (unless they are of six months or longer) and no hearings are held, except for urgent proceedings (e.g. insolvency proceedings, interim measures and certain criminal proceedings, etc.).

However, this apparently straightforward and clear measure has created some confusion because the Portuguese Voluntary Arbitration Law (Law 63/2011 of 14 December) does not establish any court holiday rules or stipulate that the Civil Procedure Code rules

apply, which could be interpreted as meaning that no court holiday periods apply to arbitrations seated in Portugal. Therefore, the question is whether Law 1-A effectively suspended arbitration proceedings seated in Portugal.

It is not uncommon in Portugal for practitioners to establish some form of holiday period to apply to arbitrations, either by reference to the court holiday rules set out in the Civil Procedure Code or a modified version of them. Whenever this is the case, it seems that if the parties agree, the arbitral proceedings should be suspended in accordance with and under the terms of those rules as a result of Law 1-A. However, the parties have to confirm this interpretation with the arbitral tribunal.

If the parties have not established any holiday period rules, either specifically

or by reference to those established in the Civil Procedure Code, and in case of institutional arbitration where no such holiday periods and suspension of proceedings are established<sup>18</sup> the question is whether those cases can be suspended as a result of Law 1-A. How can one apply a regime of court holidays to an arbitration that has not established the applicability of such a regime?

On 6 April, Law 1-A was amended by Law 4-A/2020,<sup>19</sup> and it seems to have cast some light on this matter by removing the reference to the court holiday rules and instead establishing that all non-urgent proceedings pending before the courts, including arbitrations,

<sup>18</sup> The Arbitration Rules of the Chamber of Commerce of Lisbon, for instance, such as those of the ICC, have no provisions on holidays and suspension of proceedings.

<sup>19</sup> This law is available at <<https://dre.pt/legislacao-covid-19>>, accessed 24 April 2020.

are suspended. Additionally, it also establishes that in those cases, the parties and the court can agree to keep proceedings active and moving ahead through electronic means.

This amendment of Law 1-A seems to establish that all arbitrations seated in Portugal are suspended unless, of course, the parties and the tribunal agree otherwise and decide to continue with the case by electronic means.

However, even though the Portuguese Voluntary Arbitration Law makes one reference to the suspension of proceedings (in instances when the parties do not pay arbitrators' fees or arbitral fees), it does not specify under what terms. Therefore, the suspension of the arbitral proceedings should once again be interpreted and applied in accordance with the parties'

<sup>17</sup> The law sets out the following standard court holiday periods: Christmas: 22 December to 3 January both inclusive; Easter: from the Sunday before Easter Sunday until Easter Monday both inclusive; and for Summer: 16 July until 31 August both inclusive.



needs, given all the restrictions that the COVID-19 health crisis might cause globally and also in view of the procedural rules applicable to the case at hand.<sup>20</sup> In any event, it is always advisable to consult the court on this matter.

The reality was that in spite of the rule established by Law 1-A, the suspension of proceedings was not automatically applied to arbitration proceedings in Portugal. Instead, it was left to arbitral tribunals to decide on the matter. According to our experience, some proceedings had been suspended, with the agreement of the parties and the arbitral tribunal, but many others had not —especially in the light of the amendment of Law 1-A (which allowed the proceedings to continue by electronic means, if the court and the parties agree). In the latter cases, some parties requested deadline extensions on the grounds of the restrictions imposed by the measures to address the pandemic, which in general were granted by arbitral tribunals.

Meanwhile, it was already approved the law which lifted the suspension of proceedings and impose a transitional regime with health measures that will have to be implemented any time a merits hearing takes place (all other

<sup>20</sup>For instance, as mentioned, the ICC has issued a guide outlining a range of measures to help mitigate the effects of the COVID-19 pandemic on arbitral proceedings, which focus on ensuring continued efficiency, even if this means resorting to virtual hearings: See ICC (n 13). On virtual hearings see Santiago Rodríguez Senior, 'COVID-19 and Online Hearings', on this Special Issue of the Investment Arbitration Outlook.

hearings should be held virtually, whenever possible). However, this law requires hearings to be held virtually whenever someone who should be present is considered to be in a risk group for COVID-19, though this will only apply to the intervention of that person. This law was published in the Official Journal on 29 May 2020 and enters into force five days after its publication, which means that the suspension was lifted on 3 June 2020.

### Conclusions

As with most issues raised in arbitration proceedings, the consequences of these exceptional circumstances, whether in Spain or in Portugal, have to be assessed on a case-by-case basis, as there is no straightforward answer applicable to all cases. Therefore, to avoid unwelcome surprises it is always advisable to consult the arbitral tribunal with regard to a possible suspension of the proceedings. In fact, as arbitration is expected to be flexible and based on the parties' will, the approach in each case should be tailor-made — whether this means holding virtual hearings, moving forward only with the written submissions or suspending the proceedings.

Finally, given the uncertainty caused by many of the measures imposed by Spain and Portugal to fight the pandemic, arbitration (and other alternative dispute resolution methods, such as mediation) will probably play a key role in solving potential disputes in connection with these exceptional circumstances.

#### Home

#### Editorial

[COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees](#)

[Non-Precluded Measures Clauses in Times of COVID-19](#)

[COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal](#)

[Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal](#)

[COVID-19 and Online Hearings](#)

[COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach](#)

[COVID-19 and Investment Claims: What Role for War and Emergency Clauses?](#)

[COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure](#)

[COVID-19, \*Rebus Sic Stantibus\* and the Law of Treaties](#)

**Investment Arbitration:  
Contact Lawyers**