

XVII. Court and arbitration proceedings

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Glossary

CAC

Arbitration Centre of the Portuguese Chamber of Commerce and Industry

ICC

ICC International Court of Arbitration

Decree-Law 10-A/2020

Decree-Law 10-A/2020 of 13 March, which establishes exceptional and temporary measures regarding the new Coronavirus – COVID-19 epidemic

Decree-Law 49/2014

Decree-Law 49/2014 of 27 March that regulates Law 62/2013 of 26 August (Judicial Organisation Law) and establishes the legal framework applicable to the organisation and operation of judicial courts (ROFTJ)

Law 44/86

Law 44/86 of 30 September, on the state of siege and the state of emergency

Law 1-A/2020

Law 1-A/2020 of 19 March, which approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19 epidemic, amended by Law 4-A/2020 of 6 April, by Law 4-B/2020 of 6 April and by Law 14/2020 of 9 May

Law 4-A/2020

Law 4-A/2020 of 6 April (the first amendment to Law 1-A/2020 of 19 March, which approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19 epidemic and the second amendment to Decree-Law 10-A/2020 of 13 March, which establishes exceptional and temporary measures regarding the new Coronavirus – COVID-19 epidemic).

Law 14-A/2020

Law 14/2020 of 9 May (third amendment of Law 1-A/2020 of 19 March, which approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19 epidemic)

XVII. COURT AND ARBITRATION PROCEEDINGS

XVII.A. Background

A range of measures has also been approved for the Justice sector, in order to implement the various constraints that affect the normal and regular operation of the courts and various other bodies and entities of the Justice system. In this chapter, we will restrict our analysis to measures with an impact on court and arbitration proceedings of a civil or commercial nature, thus leaving the analysis of the impact of the measures analysed here, and other measures, in other fields – including, for example, in administrative, tax, labour or criminal proceedings, proceedings concerning administrative offences, insolvency proceedings and recovery proceedings – to other chapters of this Guide.

The measures presented herein are essentially the result of the combination of two pieces of legislation: [Decree-Law 10-A/2020 of 13 March](#) and [Law 1-A/2020](#) whose initial version was published on 19-03-2020 and meanwhile amended by [Law 4-A/2020](#), by [Law 4-B/2020](#) (the latter having republished Law 1-A/2020, with the wording introduced by the amendments published until that date) and by Law 14/2020.

These measures will continue until “the exceptional situation of prevention, containment, mitigation and treatment of the epidemic SARS-CoV-2 and the disease COVID-19 ceases”, on a date to be defined in the future by decree-law.

It is possible that the impact of the measures currently in force will, in some way, be mitigated by a possible future readjustment, by the Portuguese lawmakers, of the periods of judicial

holidays applicable throughout the year of 2020, but may nevertheless cause delays in the normal course of some proceedings.

The provisions approved for this period of exception raise several interpretative doubts and require a careful case-by-case analysis that takes into account the particular circumstances of each case.

XVII.B. Non-urgent proceedings

The legal framework currently applicable to the deadlines for the performance of procedural acts and steps in proceedings qualified by the law as “non-urgent proceedings” is essentially characterized by the following:

- (i) Procedural deadlines are suspended **since 09-03-2020⁽¹⁾** and until a date to be defined by decree-law, in which the end of the exceptional situation will be declared (article 7(1) and (2) of the Law 1-A/2020)⁽²⁾;

⁽¹⁾ In the previous version of this text, we made note of an interpretative doubt regarding the date in which the suspension regime established in article 7 of Law 1-A/2020, in its first version of 19-03-2020, took effect. This doubt was attributed to the fact that article 10 of Law 1-A/2020 establishes as the law’s effective date the “effective date of Decree-Law 10-A/2020, of 13 March”, which, in its turn, establishes, in its article 37, three different effective dates, including 12-03-2020 (general effective date) and 09-03-2020 (effective date for articles 14 to 16). Law 4-A/2020 explicitly clarifies that Article 7 of Law 1-A/2020 took effect from 9 March 2020 (article 5 of Law 4-A/2020), with the exception of the rules applicable to urgent proceedings and the provisions of paragraph 12 (regarding the “non-suspension” of the deadlines related to the practice of acts performed exclusively by electronic means within the scope of competencies of the Portuguese Institute of Industrial Property (Instituto Nacional da Propriedade Industrial, I.P.), which only took effect from the date of entry into force of Law 4-A/2020, that is, from 07-04-2020.

⁽²⁾ In contrast to what occurred under the original version of article 7(1) of Law 1-A/2020, the suspension regime applicable to “urgent proceedings” – that is, to common proceedings (“*processos comuns*”), enforcement proceedings and other proceedings that do not qualify as urgent proceedings, under their own terms or under this law – no longer results from the application of the judicial holidays regime, but rather directly from the law, which now states that “all deadlines for the performance of procedural acts that should be performed (...) are suspended until the termination of the exceptional situation (...)”.

- (ii) All procedural deadlines are suspended, regardless of their duration⁽³⁾;
- (iii) Without prejudice to the aforementioned rule on the suspension of deadlines, it is possible, if all parties consider that they can do so, to proceed with proceedings and participate in acts that would normally require the physical presence of all participants, as well as acts that are generally performed by electronic means (*e.g.*, the submission of written pleadings), through the use of the computer platforms that allow the electronic performance of the acts in question (*e.g.*, *Citius*) or other appropriate distance communication means (*e.g.*, teleconference, video call or other similar means) (article 7(5)(a)) of the Law 1-A/2020);
- (iv) The suspension in question does also not prevent a final decision being handed down in proceedings in which the court and other relevant entities consider that no further acts or steps are necessary (article 7(5)(b) of the Law 1-A/2020);
- (v) With regard to the civil and commercial domains, the abovementioned rules also apply to procedures that are ongoing in notary and registry offices (article 7(9)(a) of the Law 1-A/2020).

XVII.C. Enforcement proceedings

Without prejudice to the rule of suspension of deadlines for the performance of acts in non-urgent proceedings, the new wording of Law 1-A/2020 also expressly provides for the suspension of any acts to be carried out within the context of enforcement proceedings – for example, acts relating to sales, ranking of creditors, judicial deliveries of property, attachments and their preparatory acts – **with the exception of those acts that cause**

serious harm to the claimant's subsistence or whose non-performance causes irreparable harm (article 7(6)(b)).

Whether harm exists or not depends on a court decision.

XVII.D. Urgent proceedings – specific rules

The current wording of article 7 of Law 1-A/2020, established by Law 4-A/2020, contains several changes to the legal framework applicable to urgent proceedings during this exceptional situation. The changes introduced by Law 4-A/2020 only take effect as of 07-04-2020 (article 6(2) of Law 4-A/2020). The legal framework established under the original version of Law 1-A/2020 was applicable between 09-03-2020 and 06-04-2020, which means that urgent proceedings were suspended during that period.

DEFINITION OF URGENT PROCEEDINGS

The typical example of proceedings qualified by Portuguese law as urgent proceedings are interim relief proceedings of an urgent nature (*“procedimentos cautelares”*).

In addition to the proceedings whose urgent nature is generally recognised by the law or recognised by the court in the context of specific proceedings, the present version of Law 1-A/2020 also qualifies the following proceedings as urgent, for the purpose of determining the submission of those proceedings to the specific rules applicable to urgent proceedings under that law (article 7(8)):

- (i) The proceedings and procedures concerning the defence of rights, freedoms and guarantees harmed or jeopardised by any unconstitutional or illegal measures referred to in Law 44/86 (which establishes, in general terms, the state of siege and the state of emergency);

⁽³⁾ The current wording of article 7(1) of Law 1-A/2020 abolished the reference to the judicial holidays regime, which, within the context of civil procedure, meant that the deadlines lasting six months or more were not suspended (article 138(1), *in fine*, of the Code of Civil Procedure).

- (ii) The urgent service established, among others, in the law on mental health, in the law for the protection of children and young people who are in danger and in the legal framework governing the entry, stay, exit and removal of foreigners from the national territory (article 53(1) of Decree-Law 49/2014);
- (iii) Proceedings, procedures, acts and steps that are necessary to avoid **irreparable harm**, for example, proceedings relating to minors at risk or urgent educational-guardianship proceedings.

PROCESSING OF URGENT PROCEEDINGS FROM 07-04-2020 ONWARDS

Under the current wording of Law 1-A/2020, the deadlines relating to urgent proceedings are no longer suspended during the exceptional situation, as it was the general rule (without prejudice to certain exceptions) under its initial version, applicable between 09-03-2020 and 06-04-2020.

From **07-04-2020**, urgent proceedings shall continue to be processed **without suspension or interruption** of the deadlines, acts or steps to be carried out within that context. This is the case, in particular, with regard to procedural steps that do not require the physical presence of their participants (for example, the parties or their representatives).

As to the performance of **procedural acts that require the physical presence of participants**, the law introduces some reservations (under the sub-paragraphs of article 7(7)):

- (i) Procedural steps that require the physical presence of the parties, their representatives or other participants (*e.g.*, preliminary hearings and final hearings, with the examination of witnesses) are to be held remotely, using the appropriate distance communication means (*e.g.*, teleconference, video call or other similar means);

- (ii) Where it is not possible to conduct procedural steps that require the physical presence of the parties, their representatives or other participants through the use of distance communication means and **the life, physical integrity, mental health, freedom or immediate subsistence of the parties** is at stake, the procedural step may be conducted with the physical presence of the participants, provided that it does not require the presence of more persons than stipulated in the health authorities' recommendations and that the guidelines laid down by the applicable high councils are taken into account⁽⁴⁾;

- (iii) If it is not possible to ensure that the procedural steps are carried out under the terms specified under sub-paragraphs (i) and (ii) above, these urgent proceedings shall be subject to the rule of suspension of deadlines applicable to non-urgent proceedings.

XVII.E. Procedures before the Portuguese Institute of Industrial Property, I. P.

The current wording of article 7 of Law 1-A/2020 also includes a novelty with regard to industrial property.

From 07-04-2020 onwards, all deadlines relating to **acts**, falling within the scope of competencies of the Portuguese Institute of Industrial Property, I.P., that are **to be performed exclusively by electronic means** are no longer suspended (articles 6(2) and 7(12) of Law 4-A/2020).

XVII.F. Limitation and expiration periods

Limitation and expiration periods are suspended for all types of proceedings and procedures, under the new wording of Law 1-A/2020.

⁽⁴⁾ No guidance on these matters has been issued by the appropriate high councils at this time.

XVII.G. Protection of the home and protection of tenants

PROTECTION OF THE HOME

The exceptional regime resulting from the update of Law 1-A/2020 maintains special safeguards for the protection of people's homes. In this sense, the following remain suspended, from 09-03-2020 (article 5 of Law 4-A/2020): eviction proceedings, special eviction proceedings and proceedings for the delivery of the leased property, **when the tenant**, due to a final court decision to be rendered, **may be put into fragile circumstances due to the lack of own housing** or, furthermore, **for any other compelling social reason** (article 7(11)).

This is not an automatic suspension; the judge in charge of the legal proceedings is responsible for deciding on the application of these rules on a case-by-case basis and in a reasoned manner.

The suspension of property **repossessions** is also maintained whenever it constitutes the debtor's own permanent home (article 8(d)).

EXTRAORDINARY AND TRANSITORY PROTECTION OF TENANTS

Law 1-A/2020 establishes extraordinary and transitional measures for the protection of tenants. According to its current wording, provided by Law 14/2020, the suspensions established therein **remain in effect until 30-09-2020** (article 8).

Currently, the following measures are in effect (article 8(a) to (c)):

- (i) Suspension of the effects of **notice of terminations** of residential and non-residential lease agreements **performed by the landlord**;
- (ii) Suspension of the **expiration periods** of residential and non-residential lease agreements, except in cases where the tenant opposes termination;

- (iii) Suspension of the **deadline after which the restitution of the building** rented under an urban or rural lease agreement can be demanded, pursuant to article 1053 of the Civil Code.

XVII.H. Justified impediment

Under the exceptional regime, if acts and other procedural steps do take place, either remotely, through distance communication means, or with the physical presence of the parties involved, it will always be possible to justify the non-attendance of the participant (lawyers, parties, witnesses, experts, among others) and the request to postpone the scheduled procedural act based on duly justified health reasons.

XVII.I. Voluntary arbitration and arbitration in matters relating to industrial property rights related to medicines

The abovementioned rules apply, with the necessary adaptations, to proceedings and procedures pending before arbitral tribunals, in the context of arbitrations taking place within the Portuguese territory⁽⁵⁾.

This means, with regard to non-urgent proceedings, that the procedural deadlines are suspended since 09-03-2020 and until a date to be defined by decree-law (article 7(1) and (2) of Law 1-A/2020), without prejudice to the exceptions provided for in the law, in particular: (i) regarding the possibility that all the parties consider that they can proceed with the proceedings and participate in the acts through the use of the computer platforms that allow them to perform such acts electronically or other appropriate distance communication means (*e.g.*, teleconference, video call or other similar means)

⁽⁵⁾ In relation to arbitrations based in other countries, even if involving Portuguese parties and/or representatives, the law of those other countries should be taken into account.

(article 7(5)(a)); and (ii) as to the circumstance that a final decision can be handed down in proceedings in which it is considered that no further acts or steps are necessary (article 7(5)(b)).

Regarding the first exception, it should be noted that, although there is usually no electronic platform like *Citius* in the context of *ad hoc* and institutional arbitrations, the exchange of correspondence between the arbitral tribunal and the parties, including the submission of pleadings by email or by equivalent electronic means (for example, through the provision, by email, of links to computer platforms where the parties can have access to certain documents), was already quite common and those means of communication are usually established in the applicable Rules. It is also common, especially in the context of international arbitration proceedings, where members of the arbitral tribunal and the parties and their counsel are based in different countries, and, often, in countries other than the seat of the arbitration, to hold meetings or conferences regarding procedural issues and pre-hearing conferences, between the arbitral tribunal and the parties, by conference call, videoconference or other similar means of communication. In particular, with regard to the final hearing, certain rules (*e.g.* the ICC Arbitration Rules and the LCIA Arbitration Rules) already expressly provided (and still provide) for the possibility of holding the final hearing by conference call or videoconference.

The initial wording of article 7(1) of Law 1-A/2020 made reference to the application of the “judicial holidays regime”, raising doubts as to its applicability to proceedings pending before arbitral tribunals, due to the fact that the law that regulates voluntary arbitration in Portugal and, also, the law that regulates arbitration in matters relating to industrial property rights related to medicines do not provide for the suspension of deadlines during the judicial holidays period or another similar regime. In its

current wording, article 7(1) of Law 1-A/2020 no longer refers to the “judicial holidays regime” and now directly determines that “all deadlines for the performance of procedural acts” are suspended, thereby clearing up any doubts that might exist regarding the “suspension” of proceedings and procedures pending before arbitral tribunals (even if with the exceptions already mentioned above, in particular, regarding the possibility of conducting arbitrations by electronic means or through the use of appropriate distance communication means).

XVII.J. Contingency plans adopted by arbitration institutions due to the pandemic

In the context of institutional arbitration, several arbitration institutions have issued guidelines to users, arbitrators and other parties involved, about the implications of the present situation on pending and future arbitrations.

For instance, since 19-03-2020, the CAC has been carrying out all administrative tasks related to arbitration proceedings under its responsibility via teleworking. At this moment, the physical attendance services are available three days a week, at reduced hours (see press releases published on 18-03-2020⁽⁶⁾ and on 05-05-2020⁽⁷⁾). According to the information most recently released by the CAC, on 05-05-2020, while the current situation lasts, no hearings, nor face-to-face meetings will take place at the CAC headquarters, provided certain exceptions. Possible hearings, meetings or other activities to be held at the CAC facilities, are subject to prior assessment by the CAC Secretary General.

According to a message released by the ICC on 17-03-2020⁽⁸⁾, all offices of the ICC Secretariat

⁽⁶⁾ “COVID-19 | SECRETARIAT SERVICES CONTINGENCY PLAN”, 18-03-2020.

⁽⁷⁾ “COVID-19 | SECRETARIAT SERVICES CONTINGENCY PLAN”, update – 5th of May 2020, available [here](#).

⁽⁸⁾ “COVID-19: Urgent COVID-19 to DRS community”, 17-03-2020, available [here](#).

are operational, and all staff members are working remotely via mobile posts. The ICC also strongly recommends that all communications with the ICC Secretariat be conducted by email. The ICC's communication further contains particular guidelines as to how to submit new requests for arbitration – by email at the addresses provided for in the notice – and as to how to send any correspondence, including awards, to the Secretariat – upon prior notice. According to this message, all hearings and other meetings scheduled to take place at the ICC Hearing Centre in Paris until 13-04-2020 have been postponed or cancelled and all meetings scheduled to take place at the ICC offices worldwide are being conducted virtually. In addition to the aspects related to the functioning of the respective Secretariat, the ICC also released, on 9-04-2020, a Guidance Note on *Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*⁽⁹⁾, which aims to recall some rules and measures already provided for in the ICC Arbitration Rules and other notes, reports and guides of this institution. The Guidance Note highlights factors relevant in assessing the possibility of holding virtual hearings and offers assistance to the parties, the counsel and the arbitrators regarding the necessary steps to be taken before an eventual virtual hearing, as to ensure its smooth conduct.

XVII.K. What future, after the termination of the abovementioned legal frameworks?

Pursuant to article 7(13) of Law 1-A/2020, “[a]fter the date of termination of the exceptional situation referred to in paragraph 1, the Portuguese Parliament shall proceed with the adaptation, under specific legislation, of the judicial holiday periods to take effect in 2020”.

This provision (which in the original version of Law 1-A/2020 was set out in article 7(11)) keeps

a series of relevant issues open, although article 7 no longer contains any reference to the judicial holidays regime, as was the case under the first version of Law 1-A/2020.

On the one hand, it is not possible to anticipate whether, and under what terms, the judicial holiday period will change when this Law ceases to apply. On the other hand, there is an understanding that the adaptation of judicial holiday periods should not jeopardise the personal holidays of the persons involved in the procedural steps, considering that for many judges and lawyers working remotely, from their homes, the current period does not correspond to personal holidays.

XVII.L. Continuation of situations of justified impediment

Upon termination of the exceptional regime established under the newly approved legislation and without prejudice to any future adjustments, the rules contained in the Code of Civil Procedure regarding cases of justified impediment (“*justo impedimento*”) will, in principle, be applicable, particularly that set forth in article 140, where “justified impediment” is defined as “an event that cannot be ascribed to the party nor to its representatives or lawyers and that prevent the timely performance of the act”.

According to the rule established in article 140(2) of the Code of Civil Procedure, the party that alleges having a justified impediment must immediately provide the respective evidence; the judge, after hearing the opposing party, can allow the requesting party to perform the act after the deadline if it considers that a situation of justified impediment occurred and acknowledges that the party submitted the application as soon as the impediment terminated.

Therefore, it is our belief that the current state of infection, including its prevention, when duly

⁽⁹⁾ “ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic”, available [here](#).

certified by the competent health authority, should continue to be considered as a cause of justified impediment in the future.

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