

# COVID-19 AND INVESTOR-STATE DISPUTE SETTLEMENT

The current COVID-19 pandemic and the resultant global economic and financial crisis have led to major disruptions for governments in the performance and fulfilment of their various contractual obligations. The pandemic has also negatively affected negotiations between Governments and foreign investors, and in some cases, caused the termination of contracts. These COVID-19 impacts are likely to result in an increase in the number of disputes being referred to arbitration post pandemic and require dialogue between public and private sector parties to find amicable solutions to potential disputes<sup>1</sup>.

Due to the current environment and government imposed measures to curb the effects of the pandemic, various stakeholders have voiced concerns about possible disputes brought by foreign investors regarding the implementation of projects related to infrastructure development, power generation, mining and oil & gas.

The pandemic has also affected the normal conduct of arbitration proceedings as a result of travel restrictions imposed by various governments. The methods suggested by arbitral institutions to respond to such measures vary from broad to very specific. The Kigali International Arbitration Centre, for example, proffered a broad range of approaches, such as encouraging parties to agree to the tribunal issuing awards based on documents rather than having physical hearings<sup>2</sup>. Additionally, a joint statement released by a group of arbitral institutions provide broad measures, such as requesting that arbitral tribunals and parties mitigate the effects of any potential impediments to the conduct of arbitration proceedings in order to ensure the fairness and efficiency of arbitral proceedings<sup>3</sup>.

On the other hand, the Cairo Regional Centre for International Commercial Arbitration has issued more specific guidelines, amongst which are the use of email to file notices of arbitration, written submissions and exhibits; virtually conducting meetings amongst the members of the tribunal and/or the parties, procedural hearings or deliberations; limiting the number of hearing attendees to five people; and the use of masks and social distancing on its premises<sup>4</sup>.

Below are answers to frequently asked questions posed in light of the COVID-19 pandemic and the likely consequential increase of investor-state dispute settlement (ISDS) cases on the continent.

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1-International Institute for Sustainable Development.

<https://www.iisd.org/library/investor-state-claims-amidst-covid-19>

2-Kigali International Arbitration Centre communique on coronavirus. <https://kiac.org.rw/new/spip.php?article207>

3-“Joint statement on arbitration and coronavirus [COVID-19] issued by group of arbitral institutions”.

[https://www.lexisnexis.co.uk/blog/covid-19/joint-statement-on-arbitration-and-coronavirus-\[covid-19\]-issued-by-group-of-arbitral-institutions](https://www.lexisnexis.co.uk/blog/covid-19/joint-statement-on-arbitration-and-coronavirus-[covid-19]-issued-by-group-of-arbitral-institutions)

4-Cairo Regional Centre for International Commercial Arbitration. <https://crica.org/NewsDetails.aspx?ID=1123>

# What is the main impact of COVID-19 on investor-state dispute settlement mechanisms?

With the increase of COVID-19 cases, various governments have imposed travel advisories and restrictions and health and safety measures. This has had an impact on physical meetings and hearings. While the current pandemic has led to an increase in case and communication backlog, tribunals are coming to a consensus to better integrate the use of technology in dispute settlement. This is more so as increasingly more cases are being referred for arbitration due to changes in the performance of contracts.

To avoid piling up cases and postponement of arbitral hearings, a number of arbitral centres have begun conducting “virtual hearings” for some cases. Fortuitously, some international arbitration centres were already conducting preliminary proceedings remotely, e.g., telephonically, given that investor-state disputes often involve parties that are domiciled in different parts of the world. Governments may therefore consider participating in virtual hearings depending on the complexity of the dispute, the number of parties involved in the dispute and their location, the efficiency and security of the technology to be employed, the costs involved, and the consequences of delay.

For virtual hearings to be effective, the technology available should be adequate in terms of connectivity and availability of reliable power. The cost and time advantages potentially available through virtual hearings could make investments in technology beneficial to African governments in the long run.

## What IT solutions and good practices exist for conducting virtual hearings during the COVID-19 crisis?

With mounting cases globally and growing uncertainty about when the pandemic will be brought under control, many international arbitral institutions have adopted flexible and pragmatic approaches to maintaining on-going proceedings. Throughout the COVID-19 crisis, arbitral institutions that are continuing to accept requests for arbitration, have put in place procedures outlined in guidance notes. These are aimed at providing guidance on virtual hearings and other procedures to be adopted to mitigate the effects of COVID-19 on arbitral proceedings<sup>5</sup>.

Guidance documents issued by arbitral institutions to facilitate virtual arbitration proceedings include the following:

1. a report on the handling and production of electronic documents;
2. a report on the use of information technology in international arbitration; and
3. a guide on possible measures to mitigate the effects of COVID-19.

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<sup>5</sup>-<https://www.reedsmith.com/en/perspectives/2020/06/french-court-qualifies-covid19-crisis-as-force-majeure-event>

Based on the aforementioned documents and feedback from practitioners, parties involved in a virtual arbitration should note that:

1. notifications will be in electronic format;
2. parties must agree in advance on technological requirements and procedures to be used to ensure efficiency in the presentation of evidence, examination of witnesses and experts;
3. virtual hearing procedures shall be determined on a case by case basis since access to justice should not be dependent on access to high-quality technology but rather should rely on the principles of fairness and equality;
4. tribunals must ensure the confidentiality of the proceedings and protect data exchanged or recorded electronically [only few platforms can reach that level of security];
5. the presentation of electronic evidence should not compromise the efficiency and effectiveness of the arbitration;
6. the security and privacy of information provided in the arbitration must be guaranteed; and
7. arbitration awards will be physical in principle, unless otherwise agreed by the parties.

## **What considerations should a government take into account and reflect in executing new agreements in the context of COVID-19?**

The COVID-19 pandemic has far reaching effects on foreign investments and investor-state agreements. Where governments are conducting negotiations with counterparties in respect of large investment projects, it is important that risks are appropriately considered in light of the current environment. For instance, governments should take into consideration the impact that COVID-19 may have on risks such as currency and curtailment.

Ongoing negotiations should take into account the changing landscape of dispute resolution given the impact of COVID-19 on global and national economies. Definitions of key terms such as force majeure, change in law and derivative clauses such as the termination clauses should sufficiently take account of the current and future impact of the pandemic. It is also important to always ensure that clear and practical dispute resolution procedures are provided to guarantee effective and efficient resolution of disputes, including in times of a pandemic or other global crises of similar effect.

Agreements should also consider provisions for the parties to review amicably their contractual obligations in exceptional circumstances and provide a process for such review. Indeed, the pandemic has highlighted the importance for parties to adopt a more collaborative approach in order to address potential difficulties. In particular, governments and their private sector partners should consider alternative solutions, including mediation and the establishment of dispute boards, as part of the dispute resolution process.

The current COVID-19 pandemic has affected the method and pace of communication between arbitral tribunals and parties, and this will have an effect on the number of arbitration cases heard and resolved. Therefore, going forward, governments should pay close attention to the drafting of dispute resolution clauses in contracts, particularly the selection of the *lex arbitri*. The applicable substantive laws may vary significantly with regards to:

1. the timing and method of arbitration commencement/initiation;
2. provisions dealing with the selection of emergency arbitrators;
3. interim measures;
4. procedural rules regarding postponement of hearings; and
5. provisions regarding the resolution of conflict of laws.

The careful negotiation of the dispute resolution clause in any contract will help to avoid issues that may be further exacerbated by the effects of a global crisis such as COVID-19.

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