International arbitration in times of Covid-19
Introduction

Covid-19 has ravaged the world in break-neck speed and caused large swaths of the global economy to slow down or grind to a halt. No sector or industry has been immune. At this point in the global progression of the disease and the response to it, there are obviously more questions than answers about the future. We identify below and briefly discuss some of the key questions that users and potential users of international arbitration are likely to be asking in these uncertain times.

Impact of Covid-19 on the availability and conduct of arbitration

Can an international arbitration be initiated in this period of large-scale shut downs?

Most major arbitral institutions including the International Chamber of Commerce (“ICC”) and the London Court of International Arbitration (“LCIA”) are remaining fully operational from remote work-stations and have requested that all new filings be made using their respective online systems, or by email. The International Centre for Settlement of Investment Disputes (“ICSID”) has likewise directed that new requests for arbitration be filed electronically.

A party may also initiate an ad hoc arbitration during this time, though the logistics may be more challenging, and delays may be experienced in constituting an arbitral tribunal if an appointing authority has to be involved, especially if it is a court rather than one of the major arbitral institutions.

Are national courts available in support of arbitration?

Many national courts are presently closed to all but the most essential and urgent matters, and each national court system, or even court, is likely to set its own standards for what is “essential” or “emergency.” A party’s application to a court for interim or conservatory measures may possibly meet such standards, depending on the particular circumstances. Parties whose contracts are subject to arbitration under certain institutional rules, such as those of the ICC, may have an even clearer path to interim relief in this period via recourse to an emergency arbitrator. Most national courts will likely classify a problem in constituting an arbitral tribunal as not sufficiently urgent to be heard in this period. Post-award challenges to awards or enforcement actions are also likely to be subject to greater delays, with many legal systems extending deadlines for legal filings.

What are the main implications for arbitral proceedings already underway?

International arbitration has long been a pathbreaker in the use of electronic means for transmission and filing of submissions and documents. Parties and arbitrators are commonly situated in different countries, so most interactions between parties’ counsel and arbitrators already take place by e-mail or telephone conference. Unlike most court litigation, the continuation of an arbitration proceeding does not depend upon court facilities being open. Most existing arbitrations are thus moving ahead in this period. The party-driven nature of arbitration and the flexibility afforded to arbitrators and parties to make necessary adjustments to timetables and procedures will be essential in allowing parties time and space to navigate the difficulties arising from the Covid-19 pandemic. We discuss below certain aspects of arbitral procedure that nevertheless may be affected.

Evidence and witnesses

With offices closed, individual quarantines, government-enforced lockdowns, domestic and international travel curtailed, parties’ access to documents and physical evidence may presently be limited or impaired. Disease and the Covid-19 measures will likely prevent in-person dealings with party representatives, witnesses and experts for some time. To the extent that electronic records and documents are available and that counsel, parties, their witnesses and experts can be connected by telephone or even videoconference, these impediments can be largely overcome. However, where that is not possible, or where gaps remain, parties and arbitral tribunals will very possibly need to adjust certain deadlines (eg, document production) and/or might even more liberally allow parties to introduce documentary and witness evidence in supplemental submissions.

Procedural and merits hearings

Many international arbitrators and practitioners prefer in-person case management conferences (“CMCs”), but the trend already has been to conduct a number of these remotely. The current crisis makes such “virtual” CMCs necessary for now and may well convert this into the usual practice.

A major way in which Covid-19 will affect arbitral proceedings is by impacting merits hearings. Counsel traditionally prefer to cross-examine/re-examine witnesses and experts in person, such hearings allow arbitrators to form a clear view of witness/ expert credibility, and participants like to be able to “read the room.” However, in-person hearings are not possible in most places now and may be infeasible for some time to come. Unless the parties and/or tribunal agree to what may be a long postponement, the hearing may thus need to be conducted via video and/or teleconference.

The arbitration rules of some major arbitral institutions such as the ICC, LCIA, SIAC, HKIAC, and the UNCITRAL rules, already expressly contemplate the possibility of virtual hearings, and some arbitral hearings have been conducted this way, in whole or part. (Current circumstances have even led a few national courts to now experiment exceptionally with virtual hearings/trials, and Linklaters recently acted in a fully “virtual trial” before the
The changes brought by the current Covid-19 crisis are likely to make virtual merits hearings a more regular feature of international arbitration even once this crisis has been overcome.

Conducting an arbitral hearing virtually requires considerable planning and logistical coordination amongst the parties and arbitrators concerning, notably: establishing strong and secure internet connections to facilitate seamless proceedings; determining the requisite software and hardware to be used; securing good quality video for any witness examinations and ensuring witnesses have the right materials; creating separate means of communication for legal teams and arbitrators (virtual “break out” rooms); and, of course, accommodating participants in different time zones. The ICC and other institutions have issued guidance on the subject in the past, and the 2020 Seoul Protocol on Video Conferencing in International Arbitration also provides welcome guidance, including as to control on who is present with a witness and other “ground rules” to preserve procedural fairness.

Which legal or contractual remedies are likely to be debated in disputes resulting from the Covid-19 crisis?

Contracting parties sometimes include clauses in their agreement defining situation in which, due to circumstances external to the parties, contractual performance is prevented or delayed (“force majeure”) or has become excessively onerous (“hardship”), and regulating the nature and scope of possible relief from strict contractual performance. Some transactional agreements (though rather rarely in Europe) include “material adverse change/event” clauses (“MAC clauses”), defining circumstances under which a party can decline to close a transaction (though these often exclude changes affecting the economy generally). Even in the absence of such contract clauses, under many legal systems, particularly civil law systems, suspension or termination relief under the doctrine of force majeure may be available to a party prevented from performing its contractual obligations when the event preventing performance is beyond the party’s control, was unforeseeable and is incapable of being overcome.

A number of legal systems recognise the concept of *hardship*, affording possible relief of renegotiation, revision or termination, where the equilibrium of the contract is altered in such a way by external circumstances that it becomes excessively onerous for one party to perform.

Some legal systems, particularly under common law, may apply a doctrine of “frustration” to afford certain relief when the purpose of the contract is defeated by external events.

Where the above-mentioned contract clauses or legal doctrines are invoked, disputes may arise about, notably, how the standards for qualifying for such relief should be interpreted, whether the particular factual circumstances meet them, or about consequences, and various jurisdictions may interpret these criteria differently, requiring careful analysis under the applicable governing law.

A renewed reason to opt for arbitration? Sectors and types of contracts where international arbitration may be preferred for disputes arising from the Covid-19 crisis

Arbitration has long been a preferred means of dispute resolution for important and complex cross-border contracts, ventures and projects, including those of long duration. We briefly describe below main areas for such potential disputes.

After several months of many national courts dealing only with emergency or essential matters, commercial disputes (even high-value ones) brought to the courts once the crisis has abated are likely to face very substantial court backlogs and delays, and national court judges with excessive caseloads may have difficulty giving such complex matters the attention they deserve. Parties who have not included an arbitration clause in their contract are nevertheless free to agree to submit a defined dispute to arbitration once it has arisen, if the parties consider it a more efficient choice.

*Energy and natural resources*

Reduced demand for oil due to drastic reductions in movements (notably by airplane and automobile) and business and manufacturing, combined with a historic collapse in the price of oil, will weigh heavily on the energy industry, creating tensions between parties who may seek to protect their conflicting economic interests. Disputes may be anticipated for instance under production sharing agreements or due to cuts in exploration spending and cancellation of drilling plans.

*Construction*

Many construction sites have been put on hold; disputes may arise if the decision to suspend works was not mutually decided or over the timing or circumstances of resumption of work. Remobilization delays may occur, and supply chain disruptions and delays may affect procurement of necessary construction materials and equipment even after the emergency measures are lifted. Disputes about the possible applicability of certain Covid-19 crisis national laws purporting to offer relief to non-performing parties in respect of liquidated damages or other penalty clauses may also arise.
Manufacturing, transportation and logistics

Already very affected by the Covid-19 crisis when it hit China, many European and American manufacturers have now had to close or drastically reduce operations at their factories. Manufacturers are often involved in chains of contracts with their suppliers on the one hand and their customers on the other, and these various contracts may well be subject to differing governing laws and dispute resolution clauses. While not explicitly targeted by the lockdown measures, transportation of goods and logistics firms are obviously affected by labour shortages and travel restrictions, as well as by the massive disruptions to international supply chains, and they risk having their own disputes or being caught up in disputes between and among actors in those supply chains.

Post-M&A and joint ventures

The unprecedented nature, scope and effects of the Covid-19 health crisis, including on economies and financial markets, make it almost inevitable that post-M&A disputes will erupt in respect of a number of relatively recent transactions, on matters such as post-acquisition valuations or closing accounts, acquisition price adjustments, claims under contractual guarantees, MAC clauses, change in control issues. Disputes between international joint venture partners are also likely, as the earth may have shifted under the business of the joint venture itself and/or of the partners thereto.

Availability of investor-state arbitration for redress

How could state measures taken to contain the Covid-19 pandemic breach international treaties or international law standards?

To stifle the pandemic, a number of countries have implemented nation-wide (or at least regional) lockdowns severely restricting the movement of the workforce and requiring many businesses to cease their activities. Some businesses considered to be essential are however exempt. Discriminatory treatment in determining such exemptions might breach such treaty standards.

Some governments are nationalising certain industries and requisitioning medical equipment, supplies and manufacturing plants to serve public health. Some export bans have been implemented to prevent essential supplies from leaving a country. If these measures affect the assets of foreign investors and are unjustified or not properly compensated for, they might constitute improper expropriations or unfair and inequitable treatment.

In addition, most nations have enacted economic support packages to mitigate the losses caused by the pandemic. The eligibility criteria to benefit from these measures could be discriminatory, especially if some form of national preference is applied.

Are remedies available to foreign investors for the adverse effects of state measures taken to contain the Covid-19 pandemic?

Many countries are parties to international treaties in which they undertake to respect minimum standards of treatment when interacting with foreign investors or investments. These international investment agreements (“IIAs”) usually prohibit illegal expropriation, require host states to treat foreign investors fairly and provide them protection and security, and prohibit arbitrary and discriminatory treatment, eg, treating their own nationals more favourably. Many such treaties allow foreign investors they protect a direct right to initiate arbitration against the host state for breaches of substantive standards of treatment, for example under the ICSID Rules or UNCITRAL Rules.

To what extent will an arbitral tribunal defer to the host state as to such measures?

States have the right to regulate, provided that their measures comply with the protective standards of IIAs. IIAs may include exemptions, however, for state measures taken to protect essential security interests and perhaps public health, which exemptions are likely to be invoked by states in respect of Covid-19 measures and may prevail depending on specific IIA wording and the facts of the case.

A state may also argue that, under customary international law, it is not responsible for breaches of IIA standards if it acted in a situation of necessity, distress, or force majeure. The defence of necessity, for instance, requires the state to show, notably, that it had no other alternative than to adopt the particular measures to safeguard public interest and that such measures did not contribute to aggravating the situation. It may be noted that investment arbitration caselaw arising from the Argentinian economic crisis of the 2000s established that even if a state is permitted to adopt exceptional measures in the midst of a crisis, it may face some liability to a foreign investor if a breach of an IIA standard persists once the crisis has abated.

Key contacts

For any questions, please reach out to the authors listed below or your regular Linklaters contacts.

Roland Ziadé  
Partner, Paris  
Tel: +33 1 56 43 28 34  
roland.ziade@linklaters.com

Andrew Plump  
Counsel, Paris  
Tel: +33 1 56 43 59 11  
andrew.plump@linklaters.com

linklaters.com