



ARBITRATION UPDATES

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THE IMPACT OF COVID-19 ON ARBITRATION





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COVID- 19; THE BACKGROUND

As cases of COVID-19¹ is being reported in rising numbers in countries around the world, the likelihood of a worsening global impact looms. On the 11th day of March, 2020 the World Health Organization² officially declared the outbreak a global pandemic.

In the course of just a couple weeks, the virus has evolved from a challenge largely affecting Central China to a crisis that has the world's full attention. In the past few weeks, the number of affected countries has escalated from approximately 25 to over 114, with the number of confirmed cases rising rapidly. As at 1st April, 2020 COVID-19 has infected over 187,000 people globally and 174 people in the Nigerian state, resulting in a high fatality rate.

The virus has already destabilized global commerce, hit company earnings within and without Nigeria and prompted significant drops in global stock markets. Cities, regions and, now, countries are being locked down. Daily work and travel plans are being altered for virtually the entire citizenry of the Nation with the exemption of Medicare providers, gentlemen of the press and providers of essential commodities such as foods.

It is natural to panic but doing so may not be warranted. There is good cause for hope that public health strategies will be successful. At this point, the goal is to slow the spread of the virus so that healthcare systems can be properly prepared and not overwhelmed.

IMPACT ON THE GLOBE

It is certain that the virus is already affecting the way business is done. International supply chains have been severely affected. Many law firms are advising their clients regarding suspending contractual performance and force majeure provisions. Contract drafters are rethinking contractual terms including provisions as to arbitral clauses, (arbitral seats, choice of law, institutions) and procedures.

Across the globe generally, the virus has caused disruption to international arbitration practice. Apart from quarantines, isolations, - travels from one part of the Nigerian state to another has been banned by the Federal and state governments. On the 30th day of March, 2020 the federal government through the President imposed major restrictions in some parts of the country as he gave an order for a temporal lockdown across Lagos State, Ogun state and the Federal Capital Territory.

The virus is increasingly affecting arbitration in regions that had limited exposure to the contagion before. In a period of three weeks, a small outbreak in Lagos state with just one case of the malady has escalated to a growing concern throughout the federation.

Arbitration hearings have been delayed or relocated and most practitioners are giving thought to whether it is safe to conduct hearings in certain locales. A growing number of companies and law firms are requiring employees to work from home or are imposing their own travel bans.

Even without travel bans, many arbitration practitioners are cautious of travel and hosting delegations from affected areas. There is also the risk of travel ban as healthy travelers are currently being confronted with an unexpected travel ban within and outside Nigeria. As a result, arbitration in Nigeria will be curtailed not only where the virus is present but where it may be spread as this malady is being spread exponentially, everywhere.

The virus is likely to lead not just to the delay or relocation of hearings but to the cancellation of meetings and conferences in various parts of the country and the world at large. Arbitration and other conferences in Nigeria, Hong Kong, Singapore, elsewhere in Africa, Asia, and more recently, in Europe and in the United States of America, have already been cancelled. Planners and potential attendees of major upcoming international arbitration conferences in largely unaffected locales are therefore watching the developing situation closely.

In view of this, upcoming arbitration conferences in Nigeria scheduled for the year are being threatened. This is inclusive of the Nigerian Institute of Chartered Arbitrators (NICArb's) annual conference slated for later in the year (November 25-26, 2020) with the theme "Making Arbitration Work for Africa".

TEMPORARY CHANGES TO ARBITRATION PRACTICE IN NIGERIA

As the stock markets moves unsteadily, the market for video conferencing technology is booming. Across the globe there have undoubtedly been, more evidentiary hearings being conducted online or at least with some of the participants participating remotely. This sea change in the way international arbitrations are conducted may be the turning point in finally bringing Online Dispute Resolution (ODR) to the world of international arbitration.

With this we admonish the adoption of Online Dispute Resolution in the practice of Alternative Dispute Resolution in Nigeria in this sensitive period of the pandemic.

The virus will also affect the way evidence is created, gathered and transmitted. Reliance on paper contracts and documents sent through the mail or by courier is likely to be curtailed as the world relies more heavily on digital signatures and document transmissions to avoid spreading contagions. In turn, parties are more likely to conduct document searches, reviews and production digitally.

1. The pathogen associated with the Coronavirus outbreak

2. World Health Organization available at <https://www.who.int> accessed 31st March 2020

3. Kluwer Arbitration Blog: Derric Yeoh (Schellenberg Wittmer). 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' available at <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/> accessed 31st March 2020

Tribunals will prefer digital memorials and document submissions. The hard-copy evidentiary bundle is likely to go by the wayside as arbitrators who insist on paper submissions give way to those willing and able to operate digitally. Adoption of digital solutions may lead to increased implementation of Artificial Intelligence⁴ and other new technologies.

Sadly, we must expect there will be illness, if not deaths, among those participating in arbitrations. A serious pandemic could be devastating for many. The threat requires all of us to proceed in a cautious, thoughtful and civil manner. For now the best guidance is to follow the health and travel advisories of public health authorities including the World Health Organization, national health protection agencies, such as the Nigeria Centre for Disease Control and local public health officials.

Without mitigation efforts, even localized outbreaks of the virus may have lasting impacts, causing loss of lives and weakening economies. Major, rapid outbreaks may mark the end of certain arbitral seats or the rise of others as states struggle to recover from economic, political or even military turmoil.

POTENTIAL BEYOND THE VIRUS

As long as some measure of National and global commerce continues, we can expect there will be a demand for arbitration in the Nigerian state and international arbitration in the world as a whole. We may therefore experience more digital arbitral proceedings as parties seek to avoid public forums.

Optimistically speaking, when we move beyond the virus, we may see much more arbitral matters within Nigeria and throughout the globe. Undoubtedly the virus will shake supply and pricing expectations in nearly every global market inclusive of Nigeria, from commodities to industrial products; as can be seen, many major National projects across various sectors have come to a halt.

Many new claims will be initiated involving commercial delays or cancellations due to for instance- disruptions in supply chain, construction, manufacturing of goods and provision of services. Likewise, there will be claims relating to international transit, from shipping to rail to air and sea, including claims involving delays or cancellation of shipment of components for a wide array of consumer and industrial products. There will be claims relating to biotech, pharmaceutical and healthcare efforts to fight the outbreaks. Data privacy claims will be on the rise. Undoubtedly, we will see a significance increase in insurance claims in all sectors. Leading to a robust atmosphere and inclination towards domestic and International Commercial Arbitration for the resolution of disputes.

CONCLUSION

The coronavirus is a threat that can only be contained through the leadership of the health sector and support from each of us as global citizens. We all have the obligation to be proactive about public safety. That requires taking recommended precautions with respect to healthcare and travel. As to arbitration, that includes organizing arbitral proceedings as efficiently as possible and exploring the option of videoconferencing and other technologies to limit transmission risks.

With proper precautions, and a bit of luck, the coronavirus will be a short-lived challenge.

A lot of disputes will arise which will need expeditious resolutions. As a result Arbitration and Alternative Dispute Resolution will blossom in Nigeria and in the entire universe.



NIGERIAN INSTITUTE OF CHARTERED ARBITRATORS

International Centre for Arbitration and ADR, 1a Remi Olowude Street, Lekki Phase 1, Lekki-Epe Expressway, Lekki, Lagos.

+234 (817) 101 5925

follow us on  nicarborg

4. Kluwer Arbitration Blog: Claire Morel de Westgaver, Olivia Turner (Bryan Cave Leighton Paisner LLP). 'Artificial intelligence, A Driver for Efficiency in International Arbitration- How Predictive Coding can Change Document Production' available at <http://arbitrationblog.kluwerarbitration.com/2020/02/23/artificial-intelligence-a-driver-for-efficiency-in-international-arbitration-how-predictive-coding-can-change-document-production/> accessed 31st March 2020