

Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices

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A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CI Arb-K) Webinar ADR Talk Series 8 held on 28th May 2020

Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for best practices

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Abstract

The paper critically discusses the concept of virtual arbitration amidst the Covid-19 pandemic. The challenges caused by the pandemic have impacted all sectors of life including the field of arbitration. Measures such as travel restrictions and social distancing have affected the traditional in-person arbitration hearings. Due to its flexible nature, arbitration has often adopted innovative measures when need arises. Virtual arbitration is now increasingly being utilised more so in the context of the COVID-19 pandemic. The paper discusses the efficacy of virtual arbitration. It addresses some of the concerns arising from virtual arbitration and proposes best practices aimed at enhancing the efficacy of the process.

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1. Introduction

The Coronavirus Disease (COVID-19) has resulted in unprecedented global economic and social concerns.¹ It has created a new normal highlighted by social distancing amongst other safety measures. The consequence of this has been downscaling of normal activities including work to reduce physical interaction among people through measures such as working from home arrangements.²

The justice system has not been spared from the COVID-19 pandemic. On the 15th March 2020, the Chief Justice of the Republic of Kenya announced a scale down of court activities throughout the country due to the concerns created by the outbreak of the pandemic.³ Courts were seen possible hotspots for the spread of the pandemic owing to the large crowds of persons including advocates, court staff and litigants who are normally part of the day to day court operations. The ensuing period has seen digital upscaling of court operations through measures such as e-filing, video conferencing and electronic delivery of rulings and judgments.⁴

The uncertainties created by the COVID-19 pandemic demonstrate the need for the increased adoption of technology in arbitration. The social distancing requirements and travel restrictions mean that the traditional arbitration hearings that would normally comprise of the physical meeting of the tribunal, parties and their representatives and witnesses are no longer tenable. It is against this backdrop that the paper critically analyses the concept of virtual arbitration amidst the COVID–19 pandemic. It

¹ Nocola.M., et al, 'The Socio-Economic Implications of the COVID-19 Pandemic' *International Journal of Surgery*, 2020, April 17

² Ibid

³ Judiciary, 'Press Statement: Administrative and Contingency Management Plan to Mitigate COVID-19 in Kenya's Justice Sector' available at <https://www.judiciary.go.ke/press-statement-administrative-and-contingency-management-plan-to-mitigate-covid-19-in-kenyas-justice-sector/> (accessed on 24/05/2020)

⁴ National Council on the Administration of Justice (NCAJ), Judiciary to Upscale Justice Delivery through Increased Use of Technology: available at <https://lsk.or.ke/Downloads/doc01399220200416132802.pdf> (accessed on 19/05/2020)

discusses the efficacy of virtual arbitration proceedings and analyses some of its concerns. Finally, the paper proffers some suggestions on best practices aimed at enhancing the efficacy and integrity of virtual arbitration proceedings in the wake of the COVID-19 pandemic.

2. Virtual Arbitration Proceedings

Virtual arbitration is not an alien concept. Technological developments especially in the 21st century have changed the way in which people communicate and interact with each other.⁵ This has inevitably impacted the ways in which disputes are managed and resolved.⁶ Arbitration is a flexible and innovative process and has often adopted the use of technology where it has been impossible to conduct in-person hearing.⁷ This is in line with the principle of procedural autonomy that allows parties to agree on the conduct of the arbitral proceedings.⁸ Consequently, various technological platforms such as email, video/audio conferencing, online platforms, electronic signatures and e-filing have been incorporated in the field of arbitration. In virtual arbitration, parties communicate with the arbitrator and submit their documents, evidence, and documents electronically via emails and teleconferences.⁹ This form of arbitration can be more expeditious and cost effective since it eliminates the need of having to travel to a physical location for the arbitral hearings and filing of voluminous documents.¹⁰

⁵ Blake S., Heather JB, & Stuart S., *A Practical Approach to Alternative Dispute Resolution*. 2nd Edn Oxford University Press, 2016, pp. 67

⁶ Ibid

⁷ Walker.J., *Virtual Hearings: An Arbitrator's Perspective*, available at <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf> (accessed on 19/05/2020)

⁸ Roodt. C., 'Autonomy and Due Process in Arbitration: Recalibrating the Balance' *The Comparative and International Law Journal of Southern Africa*, Vol. 44 No. 3 (November 2011), p 311-339

⁹ Kallel. S., *Online Arbitration*, *Journal of International Arbitration*, 25 (3): 345-353, 2008.

¹⁰ Ibid

Virtual trials are being embraced in various jurisdictions in light of the COVID-19 pandemic. Recently, the English Commercial Court conducted its first successful virtual trial in the case of *NBK and RoK v Bank of New York Mellon and the Stati Parties*.¹¹ The United States Supreme Court has heard oral arguments via telephone conference in a limited number of cases with remote participation of justices and counsel¹². The Judiciary in Kenya has also embraced the use of technology with certain cases being heard via videoconference coupled with electronic delivery of judgments and rulings.¹³

2.1 Conduct of Virtual Arbitration Proceedings

Various institutional rules provide for the conduct of virtual arbitration. The UNCITRAL Rules stipulate that the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.¹⁴ This in essence allows the use of technology in the conduct of arbitral proceedings. The Seoul Protocol on Video Conferencing in International Arbitration contains a comprehensive framework intended to serve as a guide to best practice for planning, testing and conducting video conferences in international arbitration.¹⁵ The Protocol contains best practices on

¹¹ Linklaters, Drafting For Virtual Hearings In Arbitration: Helping To Keep Matters Moving In Light Of COVID-19, available at <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/drafting-for-virtual-hearings>, (accessed on 25/05/2020)

¹² Supreme Court of the United States, COVID-19 Announcements, available at <https://www.supremecourt.gov/announcements/COVID-19.aspx> (accessed on 25/05/2020)

¹³ National Council on the Administration of Justice (NCAJ), Judiciary to Upscale Justice Delivery through Increased Use of Technology, Op Cit

¹⁴ UNCITRAL Arbitration Rules (as Revised in 2010), Article 17, available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (accessed on 25/05/2020)

¹⁵ Seoul Protocol on Video Conferencing in International Arbitration, available at <https://www.acerislaw.com/wp-content/uploads/2020/04/Seoul-Protocol-on-Video-Conference-in-International-Arbitration.pdf> (accessed on 25/05/2020)

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matters such as witness examination, video conferencing venue, filing of documents and technical requirements.¹⁶

Virtual arbitration commences where parties agree to refer their dispute to arbitration. The referral can be drawn and sent electronically to the Tribunal with the aid of a secure electronic signature to confirm the identity of the author.¹⁷ Once the Tribunal signifies its acceptance through a letter addressed to both parties, it may request parties to submit an electronic form of the arbitration agreement usually by way of electronic mail.¹⁸ The parties will then be required to produce and exchange their written statements and documents addressed to the arbitrator and the adverse party.¹⁹ Where parties have agreed on a documents-only arbitration, the Tribunal will peruse the documents filed electronically by the parties and render an award without need for a hearing.²⁰ Where there is need for a hearing, videoconference facilities can be organised. However, it is important for the parties to have the same technical capabilities and quality of connection to ensure the success of the process.²¹ This issue can be dealt with during the preliminary proceedings to avoid lapses at the hearing stage.

Where a tribunal is satisfied that the issue of technical capability has been addressed, it can conduct virtual hearing through video conference. However, it must be ensured that the integrity of the process is guaranteed by disclosing the login data only to the

¹⁶ Ibid

¹⁷ Wolff, R., 'E-Arbitration Agreements and E-Awards- Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards' available at <https://poseidon01.ssrn.com/delivery.php?ID=537100100007025085086029106019078000103051006034026016025071111086084006000006069074121007006025119120053087114005088075111064112050061043086007087120083119079087104049034023095029006022019064027071126068112069120072116090027121031106100100001116002118&EXT=pdf> (accessed on 24/05/2020)

¹⁸ United Nations Conference on Trade and Development (UNCTAD), 'International Commercial Arbitration: Electronic Arbitration' available at https://unctad.org/en/Docs/edmmisc232add20_en.pdf (accessed on 24/05/2020)

¹⁹ Ibid

²⁰ Muigua, K., 'Settling Disputes Through Arbitration in Kenya', Glenwood Publishers, 3rd Edition (2017)

²¹ United Nations Conference on Trade and Development (UNCTAD), 'International Commercial Arbitration: Electronic Arbitration, Op cit

respective parties who must be authorized before accessing the proceedings.²² This is to prevent unauthorised access by third parties which may raise confidentiality issues. The tribunal may seek assistance from Information Technology (IT) experts to this extent. Where this has been dispensed with, the tribunal will conduct the hearing following the normal procedure that entails familiarisation with witnesses, administering oaths, examination-in-chief, cross-examination and re-examination.²³

Once, the proceedings have been concluded, the tribunal renders its award. The tribunal can send the electronic award to the parties by way of secure email or a hard copy of the award by way of registered mail due to the security concerns involved in placing the award online.²⁴

2.2 Checklist for Best Practices in Virtual Arbitration Proceedings

In order to guarantee success of the process, the tribunal and the parties have to take into account several preliminary considerations. The Chartered Institute of Arbitrators (CI Arb) Guidance Note on Remote Dispute Resolution Proceedings recommends parties to plan and agree on preliminary considerations such as technology, software, equipment and connection to be used and allocation of sufficient timelines to eliminate possible connection or technical failures once the hearing has commenced.²⁵ It is also recommended for parties and the tribunal to agree on the virtual platform to be used at

²² Ibid

²³ Ibid

²⁴ Wolff. R., 'E-Arbitration Agreements and E-Awards- Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards' Op Cit

²⁵ Chartered Institute of Arbitrators (CI Arb), Guidance Note on Remote Dispute Resolution Proceedings, available at <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf> (accessed on 25/05/2020)

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the hearing at least one month before the hearing to ensure that every participant has access to such platform.²⁶

Further, to avoid possible lapses during the hearing due to limited technical knowhow, the International Chamber of Commerce advises tribunals and parties to schedule a tutorial session or sessions before the merits hearing to enhance their technical capacity.²⁷ This can be in the form of a pre-hearing virtual conference where all technological means to be used at the hearing stage should be thoroughly tested.²⁸ Possible technological lapses should be addressed at this stage and back-ups organised where there is need to do so.

Parties should also agree on the venue of the arbitration taking into account technological and connection services.²⁹ It is advisable that for each location from which participants are joining the virtual hearing, there should be a qualified technician to address any technical concerns that may arise at the hearing stage.³⁰ While organizing the virtual hearing rooms on digital platforms through videoconferencing, it should be ensured that all participants are visible and audible. The assistance of IT experts can be sought towards this end. It is also recommended that breakout rooms be organised for matters such as the tribunal's deliberations which should not be visible or audible to the parties.³¹

²⁶ Africa Arbitration Academy, Protocol on Virtual Hearings in Africa, available at <https://www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf> (accessed on 25/05/2020)

²⁷ International Chamber of Commerce Commission Report, Information Technology in International Arbitration, available at <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf> (accessed on 25/05/2020)

²⁸ Africa Arbitration Academy, Protocol on Virtual Hearings in Africa, Op Cit

²⁹ Walker, J., Virtual Hearings: An Arbitrator's Perspective, Op Cit

³⁰ Africa Arbitration Academy, Protocol on Virtual Hearings in Africa, Op Cit

³¹ Chartered Institute of Arbitrators (CI Arb), Guidance Note on Remote Dispute Resolution Proceedings, Op Cit

Before the hearing stage, the tribunal should ensure that all necessary pleadings and documents including witness statements and exhibits have been exchanged between the parties to avoid disruptions. During witness examination, it is recommended that the video conferencing system at the location of the witness should ensure enough visibility to see the witness and to verify that no unauthorised person is present with them.³² This is in order to eliminate some of the concerns such as witness coaching and ensure credibility of the witness testimony. The tribunal should require the witness to identify all the persons present at the location from where he/she is testifying and affirm that he/she is not receiving assistance from a third party during the testimony.³³ The witness should then give their testimony in the form of examination-in-chief, cross-examination and re-examination under the tribunal's directions.³⁴

It is also important to address the privacy and confidentiality concerns that may arise during virtual arbitration proceedings. It should be ensured that access to all virtual hearing rooms and breakout rooms is strictly limited to the allocated participants.³⁵ The tribunal can also request for affirmation of privacy from all participants at the commencement of the proceedings. Further, when exchanging sensitive data, the ICC recommends that parties should use encrypted emails which reduce the risk of hacking.³⁶

Where all these steps have been complied with, it becomes possible to effectively conduct virtual arbitration proceedings with minimum setbacks.

3 Concerns Associated with Virtual Arbitration Proceedings

³² Africa Arbitration Academy, Protocol on Virtual Hearings in Africa, Op Cit

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ International Chamber of Commerce Commission Report, Information Technology in International Arbitration, Op Cit

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One of the major concerns associated with virtual arbitration proceedings is the risk of technological failure.³⁷ There is the danger of failure of video links or poor internet connectivity that may hinder the success of the process. It further becomes difficult to address such technical issues since participants would be in different locations.³⁸

Virtual arbitration proceedings also create information security concerns. Privacy and confidentiality are essential characteristics of arbitration.³⁹ However, in the conduct of virtual arbitration proceedings, external assistance required to operate technologies during the conduct of arbitration, including reporters and translators create confidentiality concerns.⁴⁰ Further, since virtual arbitration proceedings are normally followed by email communications in the form of witness statements, written submissions and arbitral awards there is potential risks of hacking.⁴¹ In case of hearings conducted by videoconferencing, the log- in details may be accessed by third parties who can gain unauthorised accesses to the proceedings thus raising security concerns. Further, where the tribunal renders an electronic award submitted to the parties via internet, it may be accessed by third parties against the principle of privacy that is central to arbitration.⁴²

Virtual arbitration hearings raise credibility concerns especially when it comes to examination of witnesses. There is a concern that the loss of in-person observation will impair the tribunal's ability to assess the credibility and strength of the evidence

³⁷ Walker, J., Virtual Hearings: An Arbitrator's Perspective, available at <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf> (accessed on 19/05/2020)

³⁸ Ibid

³⁹ Muigua, K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers, 3rd Edition, 2017

⁴⁰ Norton Rose Fulbright, International Arbitration Report, Issue 9, October, 2017. Available at <http://www.nortonrosefulbright.com/files/20170925-international-arbitration-report-issue-9-157156>, (accessed on 19/05/2020)

⁴¹ Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," (2015) 1 *Alternative Dispute Resolution*, pp 133-134.

⁴² Wolff, R., 'E-Arbitration Agreements and E-Awards- Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards' *Op Cit*

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especially on cross examination.⁴³ One of the advantages of in person arbitration hearings is that the Tribunal is able to discern the credibility of a witness by observing his/her body language, facial expressions and tone. This element may be defeated in virtual arbitration proceedings. Further, there could be a possibility that the witness is being coached off- camera or even reading from a script not within the view of the tribunal.⁴⁴

The costs associated with technology necessary to facilitate virtual arbitration proceedings may result in some parties or advocates being locked away from the process.⁴⁵ This would normally require strong internet connection and electronic gadgets such as laptops that may not be within the reach of everyone.

Finally, in the scope of international commercial arbitration, logistical concerns arise especially where participants are from different time zones. Where parties are split across different continents e.g in Nairobi, Kenya and New York, USA, it becomes difficult to find a suitable time falling within the working hours of both participants. Consequently, one of the parties may be forced to sacrifice what would normally be their sleeping time to attend such proceedings.

⁴³ Walker.J., Virtual Hearings: An Arbitrator's Perspective, op cit

⁴⁴ Ibid

⁴⁵ Muigua. K., & Ombati. J., Achieving Expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings, available at <http://kmco.co.ke/wp-content/uploads/2018/12/Achieving-expeditious-Justice-Harnessing-Technology-for-Cost-Effective-Arbitral-Proceedings-17th-December-2018.pdf> (accessed on 19/05/2020)

4 Looking Into the Future: Enhancing the Efficacy of Virtual Arbitration Proceedings

Due to the concerns created by the COVID-19 pandemic on the practice of arbitration, there is need for enhanced adoption of technologies such as virtual arbitration proceedings. Some of the measures that can be adopted to enhance virtual arbitration include.

1. Information Security Protection

The foregoing discussion has demonstrated that virtual arbitration creates information security concerns due to the unregulated nature of the internet.⁴⁶ There is need to enhance information protection in order to retain the integrity of virtual arbitration. Arbitrators can seek the assistance of Information Technology (IT) experts in securing the proceedings and preventing unauthorised access by third parties. The International Chamber of Commerce (ICC) advises arbitral tribunals and the parties to consult and develop a cyber-protocol that lays out the manner in which the virtual hearing will be conducted.⁴⁷ This ensures that the proceedings are safe from malicious attacks and data breaches.⁴⁸

2. Capacity Building

Arbitrators should continue to improve themselves and keep up with the latest technological developments. Technology is increasingly taking centre stage in almost all aspects of life and arbitrators who do not appreciate its impact may find themselves becoming obsolete.⁴⁹ Arbitrators should take individual effort and familiarise

⁴⁶ Norton Rose Fulbright, International Arbitration Report, Issue 9, October, 2017, Op Cit

⁴⁷ International Chamber of Commerce (ICC), 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' available at <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/> (accessed on 23/05/2020)

⁴⁸ Ibid

⁴⁹ Derric YeohY., *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?*, available at

themselves with technologies such as video/audio conferencing, electronic signatures and e-filing that are necessary for the success of virtual arbitration. Arbitral institutions can also step in and provide training on complex technologies that may not be within the knowledge of arbitration practitioners.⁵⁰

3. Flexibility of the Proceedings

The tribunal and the parties should be more flexible in the conduct of virtual arbitration in order to eliminate some of the concerns. Where possible, parties can agree on a documents-only arbitration in disputes involving simple issues of facts and opinion.⁵¹ This eliminates the need for oral testimony of witnesses through hearing thus limiting the security concerns and technological requirements involved in virtual arbitration. The tribunal should also consider different time zones of the participants and schedule the proceedings during flexible hours.⁵²

<http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-futurealternative-dispute-resolution/> (accessed on 23/05/2020)

⁵⁰ Ibid

⁵¹ Muigua. K., 'Settling Disputes Through Arbitration in Kenya', Op Cit

⁵² Africa Arbitration Academy, Protocol on Virtual Hearings in Africa, Op Cit

4. Conclusion

The importance of virtual arbitration is finally being appreciated especially due to the challenges created by the COVID–19 pandemic. However, virtual arbitration is a noble idea which needs to be firmly adopted going forward in order to enhance the efficacy of arbitration. There is however need to address the concerns arising out of virtual arbitration to enable the success of the process.

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