

Covid-19 Pandemic and the Future of Arbitration Practice in Nigeria

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Pandemic and the Future of Arbitration Practice in Nigeria

The covid-19 pandemic has destabilised global commerce, stock market, in fact, all sectors of life. It has significantly impacted arbitration practice. Behavioural changes imposed by the covid-19 pandemic situation includes strict restriction of movements of persons; people around the world are in quarantine or advised to keep social distance and avoid non-essential travel. Arbitration hearings have been suspended as parties and arbitrators refrain from attending hearings in person.

The arbitration community has responded to the behavioural changes imposed by the covid-19 pandemic by doing the following:

1. Implementing swift and harmonised policy reforms. This includes focusing on timely, proactive and coordinated efforts to ensure that arbitration practice is not brought to a shrieking halt owing to the pandemic.
2. Adopting institutional policy measures. Most if not all, arbitral institutions are working remotely and firmly advising parties and arbitrators that all communications with the secretariat be conducted by email. The arbitration community while making policy measures is doing their best to build confidence in ADR users while increasing their access to justice even when the economy and environment is locked down.

The pandemic will transform arbitration and strengthen its virtue on flexibility. Flexibility which is a significant characteristic of arbitration, would permit the use of technological resources in this challenging period. There will be changes to the arbitration process.

The arbitration community is embracing digital channels like adopting video conferences, teleconferencing and other technology platforms. The use of technological platforms during the pandemic will safeguard the health and wellbeing of everyone involved in the arbitral proceedings. Meetings and even evidentiary hearings will be conducted virtually. The zoom cloud meetings app topped the charts of free apps in the App Store last month, while Google's classrooms and Microsoft teams were also in the top six. These online meeting platforms can be used for arbitration proceedings amid the pandemic.

The use of digital channels in arbitral proceedings can be likened to online dispute resolution. Online dispute resolution (ODR) is a type of alternative dispute resolution (ADR) which employs the internet and web-based technologies to facilitate the settlement of disputes between parties. It is used to resolve conflicts that arose in cyberspace or offline. Online arbitration is an

arbitration where all phases of the proceedings are conducted online. The oral stage of online arbitration is done through video conferencing or parties uploading their evidential documents. It has numerous advantages like lower cost, greater flexibility, convenience, saves time and avoids complex jurisdiction issues. The fact that arbitration relies more on written evidentiary submissions compared to face-to-face parties' interaction makes online arbitration even more convenient. Lawyers and arbitrators must keep abreast with the latest and technological developments to keep up in the fast-paced technology environment. Several arbitration institutes like the International Chamber of Commerce (ICC), American Arbitration Institute and World Intellectual Property Organisation (WIPO) already provide a platform for arbitration proceedings to be conducted online.

Online arbitration is mostly conducted using videoconferencing. The Seoul Protocol on video conferencing in International Arbitration (Seoul Protocol) serves as a useful video conferencing guideline for counsel and arbitrators to adopt for hearings. It contains technical specifications and best practices for the planning, testing and use of video conferencing for arbitration. Appropriate safeguards must be put in place to ensure confidentiality and avoid cybersecurity breaches. It is also important to ensure that the videoconferencing service provider upholds its security duty. For example, zoom, a popular videoconferencing service provider, was caught in cybersecurity debate after a flaw in its systems that anyone with a link to call could view the video call. This means that the whole process is no longer confidential, and trade secrets are vulnerable to other parties. Confidentiality is the bedrock of arbitration, and every step of the arbitral proceedings must uphold the confidentiality of the entire process.

An arbitral tribunal should tackle firstly if electronic evidence is fully admissible under the current legal framework. Lawyers and arbitrators should be abreast with the evidential frontiers on the admissibility of electronic evidence provided in section 84 of the Evidence Act, to avoid relying on doctored evidence. The amended regulations of the United Nations Model Law on International Commercial Arbitration (UNCITRAL) took into consideration the impact of the internet in conducting arbitration proceedings in the area of international trade.

Artificial intelligence has also been considered as a driver for efficiency in international arbitration. Currently, predictive coding, which is an artificial intelligence tool, is used in dispute resolution. Predictive coding is a form of supervised machine learning tool that takes human-based data input about document relevance and applies it to a larger document population. After a senior lawyer with good knowledge of the case reviews the relevancy or otherwise of documents, the algorithm reviews the documents and ranks them in order of relevance. Commentators have argued that it is more efficient than a manual search term-based review. The International Bar Association Arb 40 Guide on Technology Resources for Arbitration Practitioners mentions predictive coding as part of its list of different software tools available for document review. However, it does not address the question of whether predictive coding can be

used in arbitration and if so, under what conditions, including in terms of permission and disclosure to the other parties and the tribunal. These are the areas the arbitration community should work on. Parties and the arbitrators could insist that any of the parties' intending to use predictive coding should disclose this to the other side and seek permission from the tribunal.

Arbitration clauses can be drafted to factor in the use of online arbitration post-covid-19 pandemic. Presently, even if the use of digital channels for the arbitral proceedings was not explicitly stated in the arbitration agreement, it can be incorporated BY AGREEMENT of the parties. Arbitration permits a reasonable degree of party autonomy and procedural flexibility. Also, the arbitral tribunal, parties and providers should ensure that appropriate safeguards are put in place to guarantee confidentiality and avoid cybersecurity breaches. They should be abreast with the Seoul Protocol on Video Conferencing in International Arbitration. For instance, Article 2.1c of the Protocol provides that “The Venue shall be in a location that provides for fair, equal and reasonable right of access to the Parties and their related persons, as appropriate. Similarly, cross-border connections should be adequately safeguarded so as to prevent unlawful interception by third parties...”.

In summary, arbitrators and counsel should be well informed with the 2020 Cybersecurity Protocol for International Arbitration to understand the framework on information security measures for arbitration matters. They should be equally up-to-date with the Seoul Protocol on Video Conferencing in International Arbitration which will serve as a guide for arbitral proceedings conducted online. Most arbitration institutions have published their guidelines on virtual arbitration procedure. For instance, the Nigerian Institute of Chartered Arbitrators recently launched its Guidance Note on Virtual Arbitral Proceedings. The guidance note serves as a template to ensure the competence and appropriateness of the virtual arbitral proceedings. With the guidance notes on remote arbitral procedures armed with the agreement of the parties, the future of arbitration amid the pandemic is not truncated. Parties and the tribunal can conveniently proceed with an existing or future dispute irrespective of the current global health crisis and challenges.