

Africa Arbitration Academy Takes Over the Baton on Thought Leadership...Launches Virtual Hearing Protocol in Africa, for Africa

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Abayomi Okubote (Queen's University) and Mohamed S. Abdel Wahab (Zulficar & Partners)

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Necessity is the golden chord that lies at the base of every innovation and invention. As countries around the world continue to implement different measures to combat the COVID-19 pandemic and to contain and deal with its ramifications, all stakeholders (including businesses and institutions) are now forced to innovate and make significant changes to the ways they do business. Amongst the main lessons learnt from this crisis are: (i) the international arbitration community's resilience and adaptation in the midst of these challenging times; (ii) the necessity and importance of working together in the face of a common adversary that does not distinguish between distant localities, different ethnicities and diverse societies; (iii) the harmony and unity that arbitral institutions could bring to a COVID-19 threatened world, as is borne out by the joint message published by certain leading institutions and emphasising the necessity of collaboration between

institutions and between parties and arbitrators to discuss the impact of the COVID-19 pandemic in an open and constructive manner, in the hope of finding appropriate means to mitigate the effects thereof while ensuring the fairness and efficiency of arbitral proceedings;[fn]See Alison Ross, “Covid-19: leading institutions speak with one voice”, the Global Arbitration Review, 16 April 2020.[/fn] (iv) the global migration to the virtual world, such that the integration of technology in dispute resolution is no longer seen as a luxury or a distant reality (it has become the new present); and (v) the inevitability of rethinking traditional processes and the indispensability of considering new and novel means for resolving disputes efficiently, through online dispute resolution, which goes well above and beyond moving traditional offline practices to the online world.

In the specific context of international arbitration, users, arbitrators and institutions are considering how best to adapt to this ‘new present’. As part of the ongoing efforts to adapt and respond to the needs of the global dispute resolution community, virtual hearings are increasingly being presented as the plausible option to proceeding with cases[fn]In the words of the renowned Australian arbitrator, Doug Jones, in his discussion with Global Arbitration Review (GAR) on 27.03.2020, “Just as the manufacturers of ventilators are sharing their intellectual property to enable the emergency manufacture of their products by others to save lives around the world, institutions should share their knowhow and work together to identify the most effective ways to conduct virtual hearings and to come up with solutions to some of the current problems with them.”[/fn] as and when appropriate and after due consultation with the parties. This is the golden chord that strikes at the heart of the new Africa Arbitration Academy Protocol on Virtual Hearings in Africa (the **Protocol**).

Being deeply and seriously concerned with the African dispute resolution landscape, the Africa Arbitration Academy realized that it is timely to contribute to the advent of arbitration on the Continent in the midst of the COVID-19 pandemic. The Protocol, in the main, details recommendations on virtual hearings and takes into account the specific challenges and circumstances that may arise in relation to remote hearings in Africa. The overarching objectives of the Protocol are (a) to provide guidelines and best practices for arbitrations within Africa, where a physical hearing is impracticable due to health, safety, cost, or other considerations; (b) to encourage African institutions and governments to make express references to virtual hearings in arbitration rules and laws; and (c) to serve

as guiding standards, principles, and provisions to be adopted by arbitral institutions or governments in Africa when drafting their arbitration rules and laws. We summarise some of the key provisions of the Protocol in the ensuing paragraphs.

Preliminary Considerations, Logistics, and Pre-Hearing Arrangements

The Protocol has useful provisions, directing parties and arbitral tribunals to agree in advance, as much as possible, upon all the technology, software, equipment, and platform to be used by all participants in the virtual hearings. Parties are required to give considerations to the level of cybersecurity required to safeguard the security and integrity of the virtual hearings and to agree to the cybersecurity measures that meet the minimum cybersecurity standards detailed under Annex I of the Protocol.

Notably, given the peculiarity of access to reliable technology in Africa, the Protocol points parties/participants who do not have access to the technology, software, and equipment to be used for virtual hearings, to approach arbitral institutions or other centres in Africa that can offer their venues for conducting virtual hearings.

To dispense with challenges to arbitral awards rendered in cases where virtual hearings were held while there is no agreement between parties on the use of virtual hearings and/or no provisions expressly regulating such hearings under the applicable procedural rules or laws governing the arbitration, the Protocol recommends that parties shall, prior to the hearing and to the extent necessary, enter into a Pre-Virtual Hearing Agreement to expressly consent to the use of virtual hearings. The Protocol provides template Pre-Virtual Hearing Agreements in its Annex II and in Annex III – provides a Model Arbitration Clause (including Virtual Hearing Option) to be used by parties at the contracting stage.

In situations where parties fail to agree to a virtual hearing, but the arbitral tribunal considers that the dispute could be determined fairly otherwise than by physical hearing, the Protocol imbues the arbitral tribunal with power to direct, after due consultation with the parties and upon due consideration of any overriding applicable norms, that the evidentiary hearing be conducted virtually. The Protocol provides a template Cyber Protocol or Procedural Order that may be adapted and

issued in this regard.

The Virtual Hearings and Presentation of Evidence

The Protocol provides important guidance on the conduct of virtual arbitral hearings and recommends that in scheduling hearings, the tribunal should consider the: (i) different time zones of participants; (ii) number of remote locations and the possibility for tribunal members to be in the same physical location; (iii) method of taking evidence from fact witnesses and experts to ensure that the integrity of any oral evidence is preserved; (iv) method for confirming and identifying all participants, including any technical administrator; and (v) possibility of using demonstratives, including shared screen views or electronic hearing bundle hosted on a shared document platform that guarantees access by all participants.

The Protocol prescribes minimum logistical and technical requirements for presentation of evidence by fact witnesses and experts, the use of documents during examination of witnesses, the use of interpreters and interpretation where required simultaneously in multiple languages, the use of recordings of virtual hearing to produce hearing transcripts, as well as the security and privacy considerations during a virtual hearing. A template Oath or Affirmation to be administered to any fact witness or expert in the virtual hearing, is provided in Annex V of the Protocol.

Hearing Protocol, Infrastructure and Technical Standard

The Protocol recommends that the infrastructure and platform for virtual hearings are user friendly, and parties are to ensure that the platform is licensed with adequate security and privacy standards. It further recommends that parties and arbitral tribunals agree on a back-up internet service provider and an alternative virtual platform or such other means for holding the hearing, to be used, should any technical or communications breakdowns occur and threaten the smooth continuation of virtual hearings.

Conclusion

The Protocol, together with its innovative provisions, though, optional and largely dependent on parties' agreement, existing applicable laws, and rules of arbitral institutions; is uniquely designed around Africa and the specific issues of access to reliable technology. It has been described by users of arbitration in Africa as a welcome development and a potential game-changer in Africa's disputes market.