



NIGERIAN INSTITUTE OF CHARTERED ARBITRATORS

GUIDANCE NOTE ON VIRTUAL ARBITRAL PROCEEDINGS



Guidance Note on Virtual Arbitral Proceedings

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BACKGROUND

The COVID-19 pandemic has caused unprecedented disruptions to socio- economic and commercial activities globally. In order to prevent the spread of the COVID-19 virus, governments globally have enacted a number of regulations and public health measures, including locking down cities, grounding local and international flights, shutting down schools, places of worship and restricting movement and public gatherings. As a consequence of the various measures enacted to curtail the spread of the COVID-19 virus, people have been forced to work remotely, and activities that would normally take place physically have, to the extent possible, been moved online. Consequently, working from home has become the new normal.

International commercial arbitration has already been making use of remote hearing technologies even before COVID-19 for the conduct of proceedings. However, the exigencies brought about by COVID-19 and the uncertainty regarding how long it will last have made it imperative to ensure that tribunals are able to conduct all phases of arbitration, including evidentiary hearings by remote means. This Guidance Note sets out some practical matters that parties and tribunals are encouraged to consider for adoption when structuring a virtual hearing.

PURPOSE

In offering this Guidance Note, Nigerian Institute of Chartered Arbitrators (NICArb) aims to provide guidance on virtual arbitration proceedings generally as may be agreed by the parties or in circumstances where, as a result of government measures or other circumstances or exigencies beyond the parties' control or contemplation, it becomes difficult or practically impossible for proceedings to take place physically. . Thus, this Guidance Note serves as a template, which arbitrators and the parties can adopt or modify to fit the specific needs of a particular case. The guidance provided in this Note should be observed in accordance with public policy provisions and laws applicable to the parties and the dispute resolution procedure agreed on.

Article 18.2 of the NICArb Arbitration Rules provides that: “The tribunal may hold hearings and meetings by any means it considers expedient or appropriate, and at any location, it considers convenient or appropriate. Accordingly, both the parties and tribunals have a shared duty to consider and adopt procedural measures that can mitigate delays and promote efficiency in arbitration. The NICArb Rules, in particular Article 18.2, gives them the flexibility to achieve efficiency and expediency through whichever measures the parties and tribunal consider appropriate for the process.

NICArb encourages parties and tribunals to undertake Online Dispute Resolution (ODR) procedures, which rely on technology to facilitate alternative dispute resolution methods such as arbitration, negotiation, mediation, conciliation, etc. The measures to be taken regarding ODR include, among other options, audio and videoconferences, emails, and online file sharing.

Article 1. Agreement to Resolve the Dispute Virtually

- A. The parties and the tribunal should agree that the arbitral process, including the hearing, will be conducted virtually, preferably via video conference as it most resembles the working environment typical of arbitral proceedings. Parties and the tribunal should further confirm that the hearing in all virtual proceedings will be deemed to have taken place in the country or city agreed on by the parties as to the place of arbitration.
- B. The parties are encouraged to carry out their own investigation as to the suitability and adequacy of the agreed virtual platform of choice for its proposed use for the virtual hearing, as well as any risks of using the platform including any risks regarding security, privacy or confidentiality. Where the parties agree that a given platform is suitable, they should agree to use it for the hearing.

Article 2. Order for Virtual Hearing

- A. The tribunal may order that the hearing in this case be conducted virtually in accordance with the procedures set forth below if all parties in the proceedings do not agree on a virtual hearing. The tribunal may further confirm that the hearings in all virtual proceedings will be deemed to have taken place in the country or city agreed on by the parties as the place of arbitration.
- B. The tribunal should note any objections to holding the hearing virtually made by the claimant or respondent. Where the tribunal finds, however, that conducting the arbitral proceedings virtually is a reasonable alternative to a physical hearing in light of exceptional circumstances, then proceedings may be initiated or progress virtually.
- C. The tribunal finds that virtual conference technology will provide the parties with a fair and reasonable opportunity to present their cases, save costs and allow the hearing to move forward on the dates previously scheduled instead of postponing the hearing to a future date or indefinitely.

Article 3. Commencement of Proceedings

- A. As soon as the tribunal has been appointed in accordance with the agreement between the parties or by NICArb, it should formally notify the parties of the appointment via email and request that it be provided with any information that would be required in its preparation of the terms of reference for the arbitration proceedings within three (3) days of receipt of the email.

B. Within seven (7) days of receipt of the requisite information from the parties, the tribunal should send to the parties a document defining its Terms of Reference for the arbitral proceedings and the Schedule of proceedings.

C. The Terms of Reference shall include the following particulars:

- i. The names in full, description, contact addresses, email addresses and other contact details of each of the parties and any person(s) representing a party in the arbitration;
- ii. The names, contact addresses, email addresses and telephone numbers to which notifications and communications arising in the course of the arbitration should be made to;
- iii. A summary of the parties' respective claims and the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
- iv. A list of issues to be determined unless the tribunal considers it inappropriate;
- v. The names in full, contact address, email address, telephone numbers and other contact details of the arbitrator(s);
- vi. The name(s) in full, contact address, email address and other contact details of the Registrar and/or the Secretary (where appointed) of the tribunal;
- vii. The seat of the arbitration and particulars of the applicable procedural rules;
- viii. The arbitration fees and payment schedule for the parties;
- ix. The schedule for the filing of pleadings by the parties as well as for interim applications including objections, if any;
- x. The virtual platform to be used by the parties for the proceedings and the hearing proper; and
- xi. Any other detail deemed necessary by the tribunal or parties.

D. The Terms of Reference shall be endorsed and adopted by the parties and the tribunal within seven (7) days from the date of receipt, subject to any additions or corrections the parties or tribunal may wish to make therein.

E. If any of the parties refuse to take part in the drafting of the Terms of Reference or endorse or adopt it, the Terms should be submitted to the President/Chairman of NICArb for approval. When the Terms of Reference have been signed or approved by the President/Chairman of NICArb, the arbitration shall proceed.

- F. All pleadings and accompanying documents should be filed and served by the parties via email on the email address provided by parties under Article 3 (c) (ii) of this Guidance Note and all parties to the proceedings copied in accordance with the Terms of Reference.
- G. All email communication and/or any other written communication by the tribunal or parties should be delivered via the email addresses provided. All parties to the proceedings and any additional contact information or phone numbers provided by the parties under Article 3 (c) (iii) should be copied in the said communication in accordance with the Terms of Reference.

Article 4. Hearing Records and Recording

- A. The parties and tribunal may agree that the Registrar or Secretary of the tribunal will record the hearing. Where no Registrar or Secretary is appointed, the parties may appoint a qualified transcriber to transcribe the records of the proceedings. The parties and tribunal should agree that the records of the Registrar or Secretary (or in the case of an appointed transcriber, the Transcriber's records) will be the official record of the hearing. Regardless of remote attendance, the Registrar, Secretary or Transcriber may interrupt attorneys, witnesses, or the tribunal as needed to clarify items for the record.
- B. The parties and tribunal should agree that the audio and video of the hearing will be recorded through the virtual platform agreed on by the parties under the Terms of Reference. The parties and tribunal should agree that the recording available through the videoconferencing platform will be the official record of the hearing if a Transcriber is not transcribing the hearing. The parties and tribunal should agree that the recording will be made available electronically to all counsel and tribunal members as soon as is practicable at the close of the hearing each day. The tribunal will control when the hearing is on and off the record and will communicate this to the parties immediately.
- C. The parties and counsel should agree that they will not make a record, via audio, video, screenshot, or other means, or permit any other person to record, via any of the means mentioned, the hearing in part or in full, except as is provided for in the Terms of Reference. The parties and counsel should ensure that each additional participant at the hearing for which that party is responsible also acknowledges and agrees to this prohibition of recording.

Article 5. Technical Aspects

A. Invitations to Access Hearing: The Registrar, Secretary, tribunal or Chairman (where there is a tribunal of 3 arbitrators) should invite participants via email to join the hearing via the agreed platform. To ensure the security of the hearing, access to the hearing will be password-protected and limited to authorized participants only. Hearing participants should not forward or share the hearing link or password with any uninvited persons. The parties should circulate to the tribunal a list of each participant's name, e-mail address, and phone number at which they can be reached on the day(s) of the hearing no later than fourteen (14) days to the hearing date. This is to ensure that e-mail invitations or links to the agreed online platform are sent out well in advance of the hearing.

B. Advance Testing of System:

- i. At least one week before the hearing, parties and the tribunal should test the agreed videoconferencing system to ensure that all the invited participants or participants can connect to it and that the audio-visual quality of the agreed platform is adequate. All participants should note the camera settings, lighting, delays/time lags, clarity, volume, feedback, and other sound disruptions.
- ii. Each party will be responsible for testing the videoconferencing system with each of their witnesses, including any third-party witnesses that party has subpoenaed, who will be attending virtually as opposed to in the office of the counsel. Each party is also responsible for ensuring that all logistical requirements for the hearing are satisfied.
- iii. The videoconference should be of sufficient quality to allow for clear video and audio transmission of all participants.
- iv. Each participant should test their equipment to determine their best audio connection, e.g. whether by phone, through their computer speakers or microphone, and with or without a headset.

C. Back-Up Conference Call Line: The parties and the tribunal should agree on an optional dial-in conference call number to use in case the audio of the device(s) of one or more participants is of poor quality. Parties should ensure that they have exhausted all measures to improve the audio connection, e.g. trying the audio link through the computer with and without a headset and by phone, before using the back-up line.

D. Participants at the Hearing:

- i. Each party should inform the tribunal and all other parties and their counsel of the names of all persons who will attend or otherwise be able to hear any communications in the hearing using the agreed platform (including any technicians assisting the party or counsel) fourteen (14) days before the hearing. The parties may agree that no persons will attend, participate in or otherwise be

allowed to listen in on the hearing without the prior consent of all parties and the tribunal.

- ii. If the tribunal wishes to have a technician present or available to assist them in person, they should communicate to the parties' counsel and the other tribunal members the technician's name and the organization that he/she is affiliated to, if any at least fourteen (14) days before the hearing.
 - iii. Each participant at the virtual hearing should disclose all persons in the room with him/her at the start of each hearing session. Should an individual join the participant after the hearing session has begun, that person should be identified to counsel and the tribunal at the earliest opportunity.
 - iv. During the videoconference, the participants and/or any witness should always be in full view of the camera. If two or more people are attending the hearing from the same location, they should use a single camera, which should be placed in such a way as to provide, to the extent possible, a full view or view of a reasonable part of the room
 - v. At the tribunal's request, unknown participants should identify themselves by showing a piece of identification to the camera or by responding to the tribunal's questions regarding their identities.
- E. Ensuring Good Audio or Video Quality: Participant should make their best efforts to ensure that there will be clear video and audio transmission during the hearing. In this regard, the participants are encouraged to:
- i. Consider steps that may be taken to establish a high-speed internet connection. If possible, a hard-wired internet connection should be used instead of a wireless internet connection;
 - ii. Use the computer microphone, with or without a headset, for audio transmission or use a phone to dial into the audio portion of the platform or if it becomes necessary, use the back-up conference call number if the device and platform audio are of poor quality;
 - iii. Eliminate any background noise;
 - iv. Consider camera positioning and lighting, e.g., avoid sitting near a window and positioning a light in front of, instead of behind, the participant;
 - v. Access the agreed platform via desktop or laptop rather than through a smart phone or tablet;

- vi. Ensure that devices to be used are adequately charged and that power cables or back-up batteries are available as may be necessary; and
 - vii. Refrain from joining the hearing from a public setting or using unsecured, public Wi-Fi to ensure the privacy and security of the hearing.
- F. All counsel should endeavour to speak one at a time and not while another is speaking, other than as may be required to interpose an objection to a question asked or to alert other participants of technical difficulties.
- G. All participants who are not actively being questioned as a witness, asking questions of a witness, defending a witness, or providing or responding to opening statements, closing arguments, or other arguments, should maintain their audio on mute to limit potential interruptions. The video hearing host and co-host, if any, will also have the ability to mute and unmute any participant if needed.
- H. For each person participating in the videoconference, there should be sufficient microphones to allow for the amplification of the individual's voice, as well as ensure the accurate transcription or recording of the participant's speech as appropriate.
- I. Each participant in the hearing should have access to a computer or other devices with email, and a printer to which the device can print exhibits or other documents, if needed.
- J. Parties are advised to keep important procedural documents in both hard and soft copies signed by participants where necessary. Arbitral awards and other relevant documents should be stored in both hard and soft copies, as some courts may not recognize documents solely produced electronically. Electronic copies can be signed using various digital signature platforms.

Article 6. Witnesses and Exhibits:

- A. Except for the parties' corporate representatives and expert witnesses, who may attend the entirety of the hearing, all witnesses are to be sequestered until they testify. Witnesses shall be advised in advance by the party, calling them that their testimony will be recorded.
- B. The parties and the tribunal may consider adopting any of the measures set out below with respect to witness testimonies:
- i. A witness should give evidence sitting at an empty desk or table, and the witness' face should be visible in the video.
 - ii. To the extent possible, the webcam should be positioned at face level, relatively close to the witness.

- iii. Witnesses may not use a “virtual background.” Instead, the remote venue from which they are testifying must be visible.
 - iv. Witnesses should speak directly to the camera while testifying.
 - v. Witnesses should avoid making quick movements.
 - vi. All non-party or expert witnesses should sign-off from the agreed virtual platform after their testimony has been delivered.
- C. At any time, the tribunal may ask a witness to rotate his or her webcam to provide a 360-degree view of the remote venue in order to confirm that no unauthorized persons are present.
- D. The tribunal should instruct each witness about:
- i. What to do in the event of a disconnection or other technical failure; and
 - ii. The impermissibility of any unauthorized observers or recordings of the hearing.
- E. Hearing exhibits:
- i. Before the hearing, counsel should provide each witness with a clean, unannotated hard copy set of exhibits and a copy of his or her unannotated witness statement, if any, to be referred to during the witness’ evidence. At any time, the tribunal may ask a witness to display the set of exhibits and/or witness statement and verify that they do not bear any annotations.
 - ii. The parties may agree on using a shared virtual document repository (i.e. a document-sharing or storage server) to be made available electronically at all participants’ locations, provided that the parties make their best efforts to ensure the security of the documents. If possible, a separate display screen or window other than the screen or window used to display the video transmission should be used to show and display the relevant documents to the witness during the presentation of direct evidence and cross–examination.

Article 7. Hearing Schedule & Logistics:

- A. The hearing should commence on a date and time agreed on by the parties and tribunal with consideration of any difference in time zones. It is recommended that all participants access the virtual hearing room early on each agreed day of the hearing.
- B. The tribunal has the discretion to determine when it is appropriate to have morning, lunch, and afternoon recesses, and the hearing should continue on the next agreed

date as may be necessary. The Tribunal may take additional recesses and adjust the hearing schedule, in its discretion, to facilitate a smooth and efficient hearing.

- C. The hearing schedule, and the daily schedule, will take into account that extra time may be needed if there are technical problems that cause delays.
- D. Upon joining the agreed platform for the virtual hearing, participants will be admitted to a virtual Waiting Room if available on the platform. The tribunal will admit all participants to the hearing at the same time. To avoid delay and difficulty in reconnecting, participants should not disconnect from the agreed platform during any recess. However, the tribunal may choose to mute the participants or move them to “break-out” rooms and/or the virtual Waiting Room during this time.
- E. The tribunal should disable the private “chat” function on the agreed platform and instead use a virtual break-out room to confer privately. Additionally, the tribunal may use virtual break-out rooms to facilitate private conversations between other participants as may be appropriate. For example, upon a request to the tribunal, members of a party’s legal team may be allowed to discuss with each other directly, outside of the presence of the arbitrator, tribunal and witnesses.

Article 8. Technical Failure:

- A. Should the internet connection of one party or participant fail, the tribunal should request the counsel remaining on the videoconference to mute their audio and to turn off their video to avoid concerns regarding potential ex-parte communications between the tribunal and the counsel who remain connected to the hearing platform. Once the tribunal or arbitrator sees that the dropped participant has rejoined the videoconference, the remaining counsel should unmute their audio and turn on their video.
- B. If a participant is disconnected from the videoconference or experiences some other technical issues and connection cannot be re-established within a 5-minute interval:
 - i. The tribunal should take steps to “pause” the hearing, which may include moving participants into a virtual waiting room or one or more separate break-out rooms. The parties should agree to pause proceedings as needed to accommodate any reconnections or technical issues;
 - ii. Each participant should e-mail all participants to the hearing by ‘replying all’ to the agreed platform invitation circulated by the tribunal, and shall monitor his or her email for any further directions from the tribunal. The parties and participants may also use telephone communication to indicate if any party, attorney or witness has disconnected from the hearing due to a connection problem or other technical issue. The Registrar, Secretary or the Technician appointed by the tribunal and the reserved Back-Up Conference Call Line agreed by the parties according to Article

5 (c) of this Guidance Note will be the designated person and number to contact if parties, counsel, or witnesses are disconnected.

- C. The tribunal should reschedule the hearing or take any other appropriate steps as may be necessary to ensure the fairness and integrity of the proceedings if the virtual hearing or videoconferencing system persistently fails to work such that the hearing cannot take place as scheduled; if the tribunal determines that the virtual hearing or videoconferencing system otherwise does not allow the parties to present their cases adequately; or if it would be unfair to any party to continue the hearing virtually.

Article 9. Costs of Virtual Hearings:

- A. The parties may agree that the costs, if any, of using the agreed platform for the proceedings (including technical support costs incurred during and jointly in preparation of the proceedings) will be divided equally between the Claimant and Respondent.
- B. The parties further agree that the costs aforementioned are to be included in the costs of the arbitration, as specified in the NICArb Arbitration Rules and subject to allocation by the tribunal in any final award.

Article 10: Post-Hearing Proceedings

- A. At the end of the hearing, parties shall agree on the date and/or time for the final submission in the arbitral proceedings.
- B. The parties and tribunal should agree to have the post-hearing submission virtually via videoconference. The proceedings for the final written submission shall be guided by the same rules and procedures applicable to the arbitral hearing under Articles 4, 5, 7 and 8 of this Guidance Note.

Or

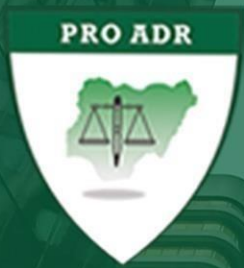
- C. The parties and tribunal may agree that the final written submissions be filed, served and adopted by parties via email in accordance with the provisions of Article 3 (f) of this Note.
- D. The tribunal will deal with other issues that may arise post-hearing via email, except for issues concerning the recall of a witness or bringing in additional witnesses.

Article 11: Final Award

A. The parties and tribunal may agree to have the Final Arbitral Award delivered to them virtually via videoconference. The proceedings for the delivery of the Final Arbitral Award should be guided by the same rules and procedures applicable to the arbitral hearing under Articles 4, 5, 7 and 8 of this Guidance Note.

Or

B. The parties and tribunal may agree that the Final Arbitral Award be delivered to the parties via email in accordance with the provisions of Article 3 (g) of this Guidance Note.



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