

Webinar of 16 May, 2020:  
A Guide to Virtual Hearing in  
Arbitration

Prof Paul Idornigie, SAN, PhD, FCIS, C.Arb  
Nigerian Institute of Advanced Legal Studies  
Abuja, Nigeria

# Outline of Presentation

- Introduction
- Online Dispute Resolution
- Virtual Hearing - Meaning
- Various Instruments on Virtual Hearing
- Provisions in the Arbitration and Conciliation Act
- Preparation for Virtual Hearing and ODR
- Concluding Remarks

# Introduction

- You have been an advocate for virtual Arbitration and Online Dispute Resolution (ODR) before the outbreak of the current pandemic. What are these concepts and how should an Arbitrator prepare and conduct these proceedings?
- Let me start with Online Dispute Resolution (ODR).
- In 2004, I published an article titled 'From ADR to ODR: Evidential Issues'.

# Online Dispute Resolution

- Conventionally courts are seen as the main forum for dispute resolution.
- My argument in that paper was that from settling disputes in a court to adopting other alternatives called, ADR, settlement of disputes has moved from a fixed place called a court to any place.
- Hence we can have hearings in hotel rooms, lawyers offices, etc.

## ....ODR

- From ADR we have moved to ODR – settling disputes in outer space by adopting information technology.
- Conceptually, therefore, ODR is a means of settling disputes with the use of IT.
- In other words, ODR is the online version of ADR.
- ODR can be used for negotiation, mediation, arbitration, automatic settlement systems, complaints assistance, credit card charge bank, among others.

# Virtual Arbitration

- Reminds me of virtual court sitting and section 36(3) of the Constitution.
- Is a law office or judge's chamber a public place or court?
- The contention is whether a Practice Direction, Guidelines, Policy Statements, etc issued by Heads of Courts override constitutional provisions bearing in mind that we are in an emergency?

## .....Virtual Hearing

- In 2004, the International Chamber of Commerce (ICC) published the ***Use of Information Technology in International Arbitration***, updated in 2017 where issues like what should be contained in the IT Agreement, conduct of arbitral proceedings, issues relevant to hearing, specific issues relating to the parties, tribunal and counsel are highlighted. Also has an Appendix with templates
- In 2007, the ICC published the ***Techniques for Controlling Time and Costs in Arbitration***, re-issued in 2012 – recommended telephone and videoconferencing

# .....Virtual Hearing

- Art 19.2 of LCIA 2014 – a hearing may take place by video or telephone conference or in person (or a combination of all three)
- Art 24(4), ICC Rules, 2017 [case management conference] and Art 3.5 of the Expedited Rules (Appendix VI, ICC Rules, 2017) allow for videoconferencing, telephone or similar means of communication).
- Section 18(3) of the Arbitration and Mediation Bill provides for Emergency Arbitrator as in Art 24(4) of ICC Rules
- On 18 March, 2020 the Seoul Protocol on Video Conferencing in International Arbitration was published to serve as a guide for planning, testing and conducting video conferencing in international arbitration



## .....Virtual Hearing

- On 8 April, 2020, ICC issued ***Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic***
- It provides guidance notes to parties, counsel and tribunals on possible measures to be adopted
- In April 2020, the Africa Arbitration Academy published its *Protocol on Virtual Hearings in Africa* which gives a structured approach to conducting virtual hearing
- On 23 April, 2020, CIArb, Nigeria published Guidance Note on Remote Dispute Resolution Proceedings to provide a guide for conducting arbitral proceedings where parties cannot meet.
- Essentially, virtual hearing is the use of audio and videoconferencing

## .....Virtual Hearing

- To properly locate this, we have to look at how arbitral proceedings are conducted and the place where they are conducted.
- Sections 15 and 16 ACA and Arts 16 and 25 of the Arb Rules are relevant here.
- Section 15(1) – in accordance with the Rules and 16 place of arbitration.
- Does place mean ‘physical place’ or ‘virtual place’? Whatever is the meaning, it is for the parties to determine it and if they fail, then the tribunal.

## .....Virtual Hearing

- Luckily the Soeul Protocol defines 'venue' as a video conferencing location including the hearing venue and the remote venue(s)
- When the Rules provide that the tribunal can hold hearing at a place it deems appropriate, is that physical or virtual place?
- Art 25(4) provide that hearings shall be in camera unless the parties decide otherwise.
- Is the camera, the webcam in my laptop?

## .....Virtual Hearing

- The tribunal is to determine how witnesses are to be examined and evidence may be presented in written form signed by the parties.
- Section 15(2) - may conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing – also give parties equal opportunities to present their case
- Section 15(3) – tribunal has the power to determine admissibility, relevance, materiality and weight of evidence.

# .....Virtual Hearing

- When we look at various arbitral enactments like the ACA and Rules like the ICC, LCIA, ICSID, SCC, etc, we find provisions empowering the tribunal to adopt appropriate procedures like video or audio conferencing – virtual hearing
- I have had hearings on Skype, audio and video conferencing – even before COVID-19.
- Thus virtual hearing is audio or video hearing.
- With stay at home orders, travel restrictions and health and safety challenges, COVID-19 has made virtual hearing imperative
- The link between ODR and virtual hearing is the use of IT.

# Preparation for Virtual Hearing

- Agreement of the Parties – principle of party autonomy
- The Technology, platform, the equipment, the software
- Articulation of the roles of the arbitral tribunal, the parties, counsel and witnesses; managing Legal Teams, Arbitral Tribunals and different time zones
- How to examine witnesses
- Presentation of Evidence
- Presentation of Documents
- Cybersecurity, privacy and confidentiality
- Logistics – virtual hearing arrangements, support staff
- Interpretation, Recording and Transcripts
- Virtual Hearing works but requires a lot of preparation and cooperation

Preparation for ODR (UNCITRAL in 2016,  
published Technical Notes on ODR dealing with  
the following

- Principles – need to resolve disputes in a simple, fast, flexible and secure manner without the need for physical presence at a meeting or hearing
- Used for cross-border low value sales and service contracts concluded using electronic communications
- Stages of ODR
- Scope of ODR Process
- Commencement of ODR proceedings
- ODR processes – negotiation, mediation, etc
- Appointment, powers and functions of the neutral, etc

# Concluding Remarks