

Africa Connected

COVID-19 AND THE EVOLUTION OF DISPUTE RESOLUTION

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Maximizing opportunities

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Connecting you to Africa

COVID-19 and the evolution of dispute resolution in Africa is the theme of this edition of Africa Connected.

In this issue we have articles ranging from third party funding and its implications in African disputes, to the use of virtual hearing platforms across the continent. Jurisdiction-specific articles cover how the global pandemic has affected legal practitioners – and court systems – in Burundi, Kenya, Nigeria and Tanzania.

Please send us your feedback on Africa Connected, including topics you'd like to see covered in future editions.

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Litigation funding in Africa: Maximizing opportunities



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Third-party funding is not new; however, it is about to enter a period of unprecedented global growth – notably in Africa. The measures implemented by governments in response to COVID-19, coupled with the rapid economic downturn and ongoing uncertainty arising from the pandemic, have created the perfect storm. The outlook may seem bleak, but third-party funding offers a ray of hope for beleaguered boardrooms looking to maximize cashflow in this unpredictable period.

Companies are finding themselves under increasing cash flow pressure. On the one hand, CEOs need to keep businesses running, but on the other hand they are experiencing late payments and increased contractual defaults. While some governments have implemented measures to help companies (notably with regard to supporting salary payments for furloughed workers), business interruption in all its forms is resulting in drastic cutbacks in spending to preserve cash. Legal departments are placed under immense pressure to do more work in-house with less budget.

An obvious means of saving is to cut back on legal spend by not pursuing legal claims, with in-house counsel reluctantly accepting

that good claims may have to be put on the shelf, at least for the time being. It is exactly in this situation that companies need to be asking themselves if they should be partnering with a third-party funder to turn their claims (assets) into cash.

Third-party funding myths

First, one myth needs to be dispelled. Third-party funding is often viewed as a product for insolvent companies and class action claimants, and that using funding is a sign of weakness in a legal dispute. Nothing could be further from the truth. Today, third-party funding is a multibillion-USD market. It attracts banks, multinational companies and other listed and highly solvent companies who recognize the benefits of using funding to free up cash for the business that otherwise would have been deployed in legal spend.

Litigation funding has been around for many years, and a number of reputable funds have emerged. The business model is simple: the funder agrees to pay the legal fees incurred by a company (typically as claimant) to pursue a claim. This finance is non-recourse, which means if the company loses the litigation, it bears no cost and any adverse costs order is typically

covered by an insurance policy that is often part of the funding package (after-event-insurance). In return, if the company wins, it pays over a percentage of the winnings to the funder. Not all funders are equal on this last point, and clients are advised to shop around.

In short, litigation funding is a risk-free product for the company. The funding provides ready access to capital to pursue legitimate claims, while removing cost and risk from the balance sheet – a sure way for in-house counsel to bring delight to the faces of CEOs and CFOs alike.

Time to dispel another myth: legal claims are often brought against long-standing commercial partners, and clients fear that using third-party funding will mean they have less control over the claim. The truth is that when claims are funded, the client retains full control over the dispute resolution process; the funder simply provides the funding, though it will be involved in setting the budget and overarching strategy. In many jurisdictions, the funder is, in any event, prohibited from exercising any greater level of influence, given rules on champerty.

What is the relevance of third-party funding to Africa?

THERE ARE FIVE MAIN POINTS:

First, the funding of litigation and arbitration is permissible (or unregulated) in many African jurisdictions. The market is growing at a rapid rate, and funding is increasingly a topic being discussed in boardrooms.

Second, while funders have traditionally focused on markets such as the US, Europe and Australia because of their size and the perceived predictability of their legal systems and enforcement regimes, they have recently become far more interested in Africa. This is because of a variety of factors: the volume and value of many of the disputes in Africa; improved perceptions of many African courts; reliable legal systems based either on English law, or harmonized by the likes of the Organisation for the Harmonisation of Business Law in Africa (OHADA); a developing track record of successful enforcement; and the exponential growth of arbitration as a means of resolving disputes.

Third, funders have adapted their business model. While high-value claims remain attractive, funders are increasingly willing to consider portfolios of lower value claims. This broadens the offering available

in the funding market and allows funders to spread risk across a portfolio of claims.

Fourth, rising litigation costs on the African continent, particularly in large, complex or cross-border matters, often compel companies to abandon or settle good claims at a major discount. Funding provides these companies the opportunity to access first-class legal services and pursue good claims without the cash flow constraints and downside risk of a potentially unsuccessful outcome. It frees up the litigation spend for other priorities such as legal technology or even new legal team hires.

Finally, and relatedly, every African economy has been adversely affected by COVID-19 – some African countries were entering a recession before the first local COVID-19 infection. Boards of directors are seeking opportunities to ensure profitability for shareholders. Relying on litigation funding increases profitability by reducing cost, with the upside of a potential inflow of cash.

Litigation as a business tool

Against a backdrop of global economic uncertainty, new funders are continuing to enter the market. For example, Litigation

Capital Management (LCM), a long-established funder, which is listed on London's AIM exchange, recently entered into an arrangement with DLA Piper and a new DLA Piper-dedicated funder, Aldersgate Funding Limited, to launch a GBP150 million litigation fund, whose reach and investment goals are global. Funders such as LCM and Aldersgate are seeking to take the market to the next level, with best-in-class funding terms and with investment in construction and financial services claims a key focus. With cost constraints often cited as a major impediment in deciding whether or not to pursue litigation, this is an example of a law firm listening to clients and providing them with efficient and innovative business solutions. Litigation funding is now a key tool in the armory of companies across all sectors, which helps them navigate these turbulent economic times and focus expenditure on core business activities.

If you would like to arrange a bespoke training session on how third-party funding can help your business, please email the authors.



The time is now for continental unity in African dispute settlement



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Africa is on the cusp of what could be a break in a decades-long cycle of poverty and economic shortcomings. Whether this cycle will be broken depends on the ability of African nations to put in place policies that attract and protect foreign and intra-African investment. These policies must demonstrate to investors that the rule of law will be upheld; that equitable, local dispute settlement is possible; and that potential gains will be greater than the risks involved. The enactment of the African Continental Free Trade Agreement (AfCFTA) was a huge step in the right direction. This agreement lays a solid foundation for increased intra-African trade in both goods and services and looks to build on the collective strengths of African nations and African citizens.

As AfCFTA comes into full force and effect, one of the most pressing issues is for African nations to provide clear guidance as to which dispute settlement mechanisms are to be used under the agreement. While Africa finds itself at the forefront of a bright economic future, state parties to the AfCFTA must provide more comprehensive guidance as to how the agreement will be implemented for it to be truly

effective. The dispute settlement mechanism detailed for the agreement must strike the right balance between state and investor interests, ensuring that Africa is an attractive place for investment, including intra-African investment, while at the same time protecting the ability of African nations to promote sustainable development, using regulations that defend the public interest.

As will be demonstrated in this article, establishing a permanent dispute settlement tribunal is advisable to build confidence in processes. Before presenting this argument in detail, this article will provide a general overview of the current landscape of dispute settlement on the continent, including governing laws and tribunals. It will then provide a brief summary of the envisioned dispute settlement under AfCFTA to highlight where there is room for improvement.

Current landscape of dispute settlement in Africa

Before considering what could and should exist, it is important to first understand what does exist on the continent. The following is

a brief overview of the existing laws, tribunals and dispute settlement mechanisms used in Africa.

LAWS

In Africa, foreign investments are regulated by host state laws, Regional Economic Communities (RECs), multinational and bilateral treaties and investment agreements.¹ Navigating the pool of differing regulations can prove challenging and lead to confusion or frustration for foreign investors. The domestic investment laws in many countries are relatively weak and were traditionally molded to the needs of foreign investors. Moving away from this, some African countries have recently enacted domestic investment laws aimed at better protecting domestic interests. In 2017, for example, Egypt passed a new investment law focusing primarily on improving the quality rather than the quantity of foreign investment.² In general, this new law helped streamline processes, making Egypt more attractive to foreign investors. South Africa's recent investment law reform arguably went further than all others in protecting domestic interests. In 2015, the country ended its Bilateral Investment Treaties (BITs) with Austria, Belgium,

¹ Ngoben, Tinyiko, "The Relevance of the Draft Pan African Investment Code (PAIC) in Light of the formation of the African Continental Free Trade Area" (January 15, 2019) accessed 25 June 2020.

² Makane Moise Mbengue, "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law" ICSID Review, Vol. 34, No. 2 (2019), 455-481.



Luxembourg, Denmark, France, Germany, the Netherlands, Spain, Switzerland and the UK and issued the Protection of Investment Act of 2015.³ This Act allows the country to balance its own interests with those of investors, allowing it to maintain its sovereign rights.⁴ It would come as no surprise if other countries followed suit and began enacting their own, new domestic investment laws.

Regardless of the strength of domestic laws, BITs remain the leading governing law for investment-related matters. As of 2016, African nations had 853 BITs (157 intra-African and 696 with

the rest of the world).⁵ The intent of African nations in entering into BITs appears, in most cases, to indicate to the developed country counterparty that the country is open to foreign investment and intends to protect investment in their country.⁶ The relationship in developing country/developed country BITs can be seen as more one directional than in those between two developed countries, given that there is an implied – albeit not typically expressed – understanding that the main purpose of the agreement is to increase investment into a developing nation, rather than to and from

both nations. The implications of this perception have arguably hindered greater economic growth in Africa by restricting African nations' ability to issue domestic laws that run contrary to BITs. African governments have expressed frustration about the limitations BITs impose on their sovereignty. African states that enter into BITs with developed nations limit their ability to freely regulate areas that may affect investment, and more often than not submit themselves to the will of international arbitral bodies (as discussed below).⁷

3 Ibid. See also South Africa Protection of Investment Act of 2015.

4 Ibid.

5 United Nations Economic Commission for Africa, "Investment Policies and Bilateral Investment Treaties in Africa" (2016) accessed June 30, 2020.

6 Ibid.

7 Alec R. Johnson, "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa," Emory Law Journal accessed June 30, 2020.

Africa is also home to several Regional Economic Communities (RECs), each of which has its own Regional Investment Agreement (RIAs).⁸ RIAs govern investments in each of the member parties to each respective REC and not only affect investments, but also often have an effect on finance and taxation matters at both national and regional levels.⁹ RIAs in Africa generally cover the same issues addressed in BITs¹⁰ and, at the same time, harmonize the national investment policies of their Member States.¹¹ An important note on RIAs is that they are only binding by and between nationals from the countries that are party to them.¹² That said, Member States have certain obligations derived from their participation in RECs that may limit or otherwise affect their interaction with a foreign investor of any nationality entering their jurisdiction.

Finally, most African nations have signed up to some of the world's largest, most notable multilateral agreements involving international investment. These agreements include, among others, the World Trade Organization (WTO)¹³

Agreement on Trade-Related Measures (TRIMs); the WTO General Agreement on Trade in Services (GATS); the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention);¹⁴ the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁵

While arguably having a more limited impact on investment, these international agreements must also be considered when understanding the complex web of laws on the continent.

TRIBUNALS

When there is no specific law on the books dictating otherwise, local disputes are resolved in local courts. Everyday business in a country, for both locals and foreigners, is governed by local law. Every country on the continent has local, domestic courts that resolve business-related disputes in the same way they resolve disputes between citizens. The size and capacity of these courts ranges dramatically from country to

country. So too does the knowledge of local judges regarding business-related matters.

In those countries where there is an authoritarian government, the independence of the judiciary is most certainly at question. In other, more established democracies, there are robust court systems, which can have a strong influence over business practices within the country.

One of the key benefits of using domestic courts, from the perspective of African nations, is the tremendous understanding of local context that these courts inherently have. There is also an indisputable affordability and convenience to these courts in the eyes of African nations and local investors. As business flourishes on the continent, it is presumed that local courts will also develop their understanding of business-related matters and their repository of business law precedent. That said, inept domestic courts have proven to frustrate even local investors. Foreign investors, particularly non-African investors, in most cases, will outright reject local courts. More often than not, multinational

8 Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime," University of Oregon, accessed June 29, 2020. The African RECs include: the Common Market for Eastern and Southern Africa (COMESA), which has enacted the Investment Agreement for the COMESA Common Investment Area; the Southern African Development Community (SADC), whose governing investment law is its Finance and Investment Protocol, as well as the SADC Model BIT; the Economic Community of West African States (ECOWAS), which has adopted the Supplementary Act adoption Community Rules on Investment and the Modalities for their Implementation with ECOWAS; and the East African Community (EAC) and its Model Investment Code.

9 United Nations Economic Commission for Africa, "Investment Policies and Bilateral Investment Treaties in Africa" accessed June 30, 2020.

10 This includes reciprocal exchange of guarantees and rights of foreign investors, as well as expropriation and most-favored nation.

11 United Nations Economic Commission for Africa, "Investment Policies and Bilateral Investment Treaties in Africa" accessed June 28, 2020.

12 United Nations, "International Investment Agreements: Key Issues" (2004) accessed June 30, 2020.

13 Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime," University of Oregon accessed June 30, 2020. Currently, thirty-nine of Africa's fifty-five countries are party to the World Trade Organization and, therefore, bound by the GATS and TRIMs.

14 Ibid. Fifty-three African nations are currently party to the MIGA Convention, which "provides risk insurance to foreign investors against political risks such as expropriation, transfer restriction, breach of contract, non-honoring of financial obligations, as well as war, terrorism and civil disturbance."

15 Ibid.

corporations, when negotiating transactions on the continent, will insist that disputes be brought outside the respective country, most typically out of the continent as a whole, to neutral international dispute settlement bodies.

The most used dispute settlement forum, particularly when non-African investors are party to an agreement, is international investment arbitration.¹⁶

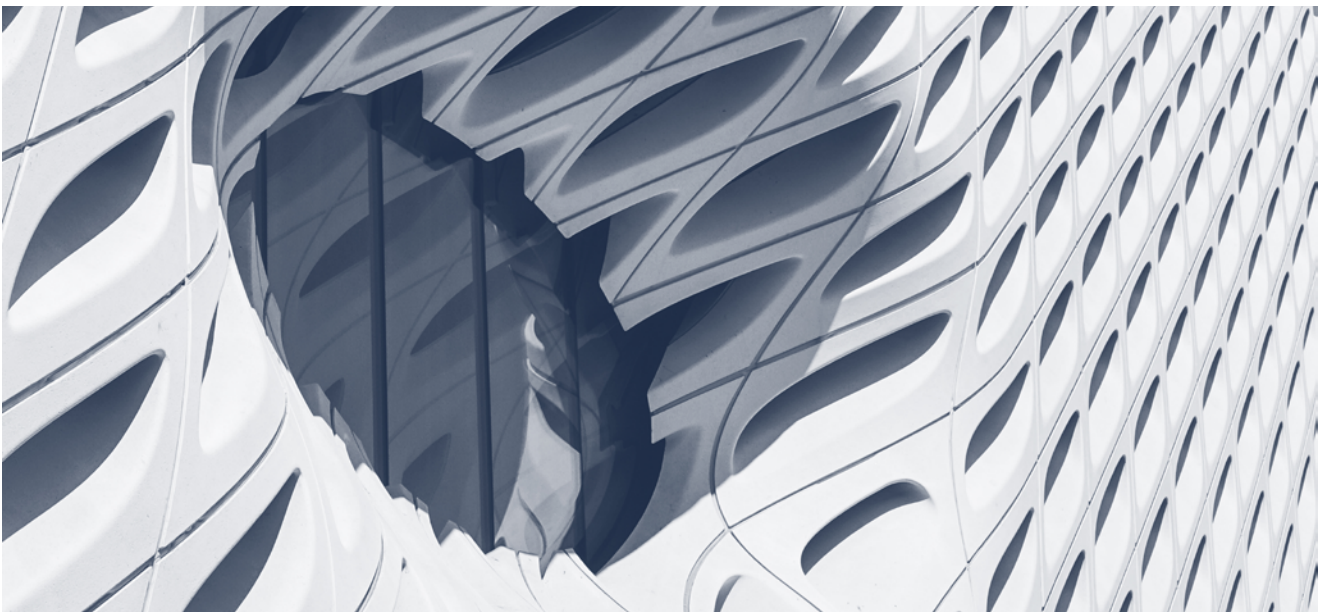
Most bilateral investment agreements between African and non-African countries (as well as intra-Africa agreements) include international arbitration provisions that allow for investment disputes to be brought before an international arbitral tribunal. International arbitration allows a contracting party to bring a claim against the national of another contracting party, which does not allow domestic investors to

bring a claim under this system.¹⁷ The purpose of establishing this type of system is three-fold and includes:

- attracting foreign investment, by allowing for a direct means of enforcement of international disputes on the part of international investors;
- depoliticizing disputes; and
- allowing foreign investors an alternative to domestic courts.¹⁸

Finally, between international arbitration and domestic courts, there are regional arbitration tribunals and regional courts. By way of example, the Organization for the Harmonization of African Business Law (OHADA), in addition to creating a set of uniform laws applicable to 16 Member States, also established a Common Court of Justice and Arbitration (CCJA). This court of 13 judges provides

advice on proposed uniform Acts and serves as a court of cassation. This court is seen as superior to national courts in matters pertaining to the Uniform Acts and allows cases to be presented by either party or a national judge. This court is however still building its reputation and legitimacy to a point where it can be trusted as much as more established centers like the ICC and ICSID, but it is making strides in the right direction.¹⁹ Other regional bodies include the Kigali International Arbitration Centre (KIAC), Mauritius's several arbitral institutions and the still relatively new arbitration systems in Ghana and Kenya. These centers are attracting the attention of other African nations, who have in some cases begun to consider African dispute settlement bodies when choosing the forum for resolving their conflicts.



¹⁶ The most commonly selected international tribunals include the International Chamber of Commerce (ICC) and the International Centre for Settlement of Investment Disputes (ICSID). The United Nations Commission on International Trade Law's (UNCITRAL) Rules of Arbitration are commonly used to govern arbitrations not heard by these two Courts, which both have their own rules and procedures. Other notable international arbitration tribunals include the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC).

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Fagbayibo, Babatunde, "Towards the harmonisation of laws in Africa, is OHADA the way to Go?" *The Comparative and International Law Journal of Southern Africa* (November 2009) accessed June 29, 2020.

Dispute settlement under the AfCFTA

On May 30, 2019, the AfCFTA officially entered into force. This enactment marks a historical opportunity for the African continent and a chance for African nations to put in place a sound dispute settlement system that is more equitable and better meets the development objectives of the continent than the more ad hoc system that has been used to date. According to the United Nations Economic Commission for Africa, the AfCFTA will cover a market of 1.2 billion people and a GDP of USD2.5 trillion.²⁰ The massive economic integration of 52 countries²¹ has been predicted to generate as much as USD35 billion in increased trade between African countries.²² Above all, the AfCFTA will allow African nations to capitalize and build on their collective strengths, by breaking down barriers to the movement of goods, services, people, capital and ideas. This alone is expected to increase the bargaining powers of African nations. At the same time, the agreement is likely to encourage foreign entry into the continent by creating a more attractive single market.²³ This enormous economic potential, however, must be supported by strong dispute settlement.

The AfCFTA includes a Protocol on the Rules and Procedures on the Settlement of Disputes (the Protocol), which closely reflects the current dispute settlement mechanisms of the World Trade Organization.²⁴ The Protocol provides for the establishment of a Dispute Settlement Body (DSB) that will have the power to establish Dispute Settlement Panels and an Appellate Body.²⁵ At the same time, the Protocol provides that the parties may, by mutual agreement, refer disputes to arbitration, bypassing the DSB.²⁶ However, the Protocol does not give details of either the DSB or the arbitration option, including where and under what rules disputes will be settled using either of these mechanisms. The African Union has made clear that the Protocol is to be further developed by Member States, now that the agreement is enacted. This leaves several questions unanswered, but also presents an opportunity for Africa to shape its own future in investment arbitration.

To do so, however, the continent must move swiftly to consider what possibilities exist for dispute settlement under the AfCFTA.

The way forward: the need for a continental tribunal

Taking collectively the strengths and weaknesses of each of the governing laws and each dispute settlement forum in Africa, there is a strong argument that the African Union should establish a permanent tribunal for investment dispute resolution, located on the continent. First and foremost, at this pivotal moment in its history, Africa must demonstrate that it is able to create an amicable environment for investment that will push the continent forward in its development objectives. To do this, when further negotiating the Dispute Resolution Protocol, the AfCFTA Member States must create a forum that will allow for equitable dispute resolution that takes into consideration the needs of states as much as private investors.

A forum located on the African continent with knowledge and experience of the local context within which disputes arise will be crucial in gaining the support of African nations. Having the tribunal in Africa would also reduce costs for African governments. To foster accessibility, the African Union could create various satellite courts of the continental tribunal, allowing cases to be heard in a mutually agreed upon, convenient location for the parties. At the same time, there should be one primary seat where the permanent staff and judges of the court are located on a regular basis. On a continent as big as Africa, geography is crucial in assuring equitable treatment of parties. Moreover, it is essential that the tribunal be located in a stable, democratically strong country where it is less likely to be affected by conflict or turmoil.

20 United Nations Economic Commission for Africa, "Africa Continental Free Trade Area – Questions and Answers" accessed June 30, 2020.

21 Nigeria has not yet signed the AfCFTA, meaning Africa's largest economy is not yet part of the Agreement.

22 Warford, Luke, "Africa is Moving Toward a Massive and Important Free Trade Agreement" The Washington Post (July 14, 2016) accessed June 29, 2020.

23 Golubski, Christina, "Africa in the News: AfCFTA enters into force," Brookings Institute (June 1, 2019) accessed June 29, 2020.

24 International Trade Centre, "A Business Guide to the African Continental Free Trade Area Agreement" accessed June 30, 2020.

25 These bodies are to be comprised of experts in both law and international trade and who are independent from local governments. See "Africa Continental Free Trade Area" Freshfields Bruckhaus Deringer LLP accessed June 30, 2020.

26 Ibid.

Satellite offices will be essential in assuring this equitability; however, it will also be necessary for the continent to carefully select where the principal seat of the tribunal is located.

In developing this continental court, the African Union should also take care to make sure the voices of all African nations are heard. Africa is a continent of 54 different countries, all at varying levels of economic development and each with its own needs. African Member States must consider this when drafting the rules for procedure for this court. Just as African nations do not want the desires of wealthy investors to overshadow their own needs, nor do smaller, less-developed countries want their voices to be silenced by larger, stronger economies. If the continent is to develop collectively, then all countries must have an equal footing when it comes to dispute settlement. Equitable representation in the tribunal must be a top priority.

Judges at this African court should be from different countries across the continent and should have the business knowledge that foreign investors would expect of a tribunal of this stature. This diversity of judges from varying countries would help reduce the bias and corruption concerns that exist with local courts. It will also mean smaller countries are treated equally when in conflict against larger, wealthier countries. Moreover, foreign investors have historically expressed concern that African courts are not familiar with business transactions and this has discouraged them from using local or regional courts.

In developing a continental tribunal, it is important to recognize that there are plenty of African nationals with the capacity to consider complex investment disputes that could serve on a continental court, from even the smallest countries with small economies. Using local human capital from across the continent would achieve one of the key purposes of the AfCFTA, namely that local human resources are better used to meet local needs.

Perhaps the greatest benefit of having a continental tribunal will be the contextual awareness that is added by having local judges who are familiar with the most pressing issues on the African continent. African-bred judges will have greater concern for the impact investments are having on the continent. African judges will be more likely to consider the social, environmental and labor consequences of investments. This will give them a unique perspective on the reasoning behind why states may take certain policy decisions and allow them to balance that reasoning with investors' interests. This will in turn serve the purpose of balancing Africa's sustainable development goals with investment decisions. With this in mind, judges should be carefully selected from each of the AfCFTA Member States. As is provided in the Articles of the current Dispute Settlement Protocol for the DSB process, judges hearing a given case should not be from either of the countries party to the dispute.

As has also been suggested under the Dispute Settlement Protocol, the continental tribunal should have an appeals process which allows parties to challenge decisions based on law or evident misinterpretation of facts. States have long complained of the finality of arbitration decisions rendered by party-selected arbitrators, without any higher-level reconsideration. An appeals process using tenured judges would diminish this concern and build consistency. Again, this appellate tribunal should have clearly defined procedures and directives, defined through the negotiation process of the AfCFTA.

The new AfCFTA dispute settlement system should be primarily focused on the needs of African countries, rather than being built around the desires of foreign investors. The African Union must do better to protect the interests of all its Member States, and must do so through creating a stronger, more equitable dispute settlement mechanism. As Africa moves forward with the implementation of the AfCFTA, it is essential that dispute settlement be at the forefront of discussions. Investors will be looking at how well their rights are protected under the new agreement when deciding how aggressively to move into the continent and, at the same time, governments will be more likely to buy into the agreement if it allows for greater protection of their rights than existing mechanisms.

A timely intervention: A drafter's perspective on the Protocol on Virtual Hearings in Africa



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Concerned about the effects if the COVID-19 pandemic on Africa's dispute resolution landscape, the Association of Young Arbitrators (AYA), bringing together arbitration practitioners in Africa under 40 years of age, launched its [Protocol on Virtual Hearings in Africa](#) (the Protocol) in April 2020. AYA was formed in 2015 with the mission to provide a platform for the young members of the African arbitration community to meet, exchange ideas and learn from peers and more experienced arbitrators and arbitration practitioners.

The Protocol – purpose and objectives

Hailed as a "timely intervention" and nominated by peers for the Global Arbitration Review's special recognition award for response to the coronavirus pandemic, the Protocol was drawn up by a drafting committee of 11 arbitration practitioners (including the author of this article) from various African countries.

Although the Protocol is not the first of its kind in the arbitration space, its unique proposition is that it seeks to address specific challenges and circumstances that may arise in relation to remote hearings in Africa for African practitioners, African arbitration tribunals and African governments.

Some of the issues specific to Africa that concerned the drafting committee included:

- The purpose of the Protocol: It was accepted that the health and safety considerations related to COVID-19 and travel restrictions in many African countries have significantly disrupted arbitration hearings and made it impossible to convene physically in a single location.

Due to the situation, parties, counsel and tribunals should consider whether to proceed with a virtual hearing. However, the Protocol also had to be drafted to be relevant after the effects of the pandemic have subsided.

- The objectives of the Protocol: It was accepted that for the Protocol to be relevant, it would have to promote the application of technology in arbitral proceedings (this in itself a possible challenge due to poor or obsolete telecommunications infrastructure), and to provide for the use of affordable and available technology, software and equipment during arbitral proceedings. Importantly, it would also have to provide for cybersecurity measures or applicable standards on a par with other established institutions, with a view to safeguarding the integrity of virtual hearings.
- Preliminary considerations and logistics: Despite the differences in advancement in telecommunication and high-speed internet capabilities in different African countries, it had to be considered whether or not there should be a minimum quality standard, and where a party did not have access to a minimum

standard, it had to be considered whether the parties should in fact consider other arbitral venues where they could be maintained. Further, it was considered whether technical support personnel should be in attendance throughout the hearing process.

- **Hearing protocol, infrastructure and technical Standard:** It was considered whether to prescribe the minimum bandwidth for an internet connection, including identifying venues that have good internet access (50 Mbps minimum) and whether there had to be an ethernet cable connection rather than relying on Wi-Fi.
- **Conduct of the virtual arbitral hearings:** It was accepted that even with preparations and minimum quality standards for internet connectivity, it could still be possible for video conferencing to be poor. In such instances, it was considered whether the tribunal may terminate the video conference at any time if it deems the video conference so unsatisfactory or if it is concerned that the witness is being assisted, or that it would otherwise be unfair to either party to continue.
- **Security and privacy considerations:** It was considered whether parties or witnesses should be able to connect from home offices bearing in mind that confidentiality could be difficult to monitor and witnesses could be compromised in such circumstances.

What do parties need to do to comply with the Protocol?

Following intense discussions and feedback from the Technical Review Committee chaired by the Dean of the African Arbitration Academy (a sister organization to AYA), Prof. Dr. Mohamed Abdel Wahab (Egypt), and with committee members including distinguished arbitration practitioners in the US, the UK and Africa, AYA unveiled the Protocol in April 2020.

The Protocol is unique in that it recognizes the need to seek the buy-in of African governments. As such, it acknowledges that governments may have their own advisory notes that parties in a jurisdiction may be required to adopt. Further, the Protocol also encourages African governments to “make express references to virtual hearings in arbitration rules and laws, and 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.”

The Protocol is divided into distinct sections covering preliminary considerations, including pre-hearing agreements; conduct of virtual hearings and presentation of evidence; security and privacy considerations; and hearing protocol, infrastructure and technical standards. The Protocol also contains a series of annexes that address Minimum Cybersecurity standards, the Model Africa Arbitration Academy Arbitration Clause (incorporating the virtual hearing option), the Model Africa

Arbitration Academy Virtual Hearing Agreement, the Tribunal Issued Cyber Protocol and the Witness Oath specific to virtual hearings.

THE MAIN RECOMMENDATIONS IN THE PROTOCOL INCLUDE:

- The parties and the arbitral tribunal must agree in advance, as far as possible, on all the procedures, schedules and deadlines to be followed during the virtual hearings.
- The parties and the arbitral tribunal must agree in advance, as far as possible, on all the technology, software, equipment, and the platform to be used by all participants in the virtual hearings. All technology, software, equipment, and the platform to be used in virtual hearings should meet the minimum standards detailed in Annex I of the Protocol. For instance, full network security, audio and video encrypted at 128-bits AES or as recommended/verified by IT support should be required, and the parties, the tribunal, and all other participants must not join the hearing using an unsecured/public Wi-Fi connection.
- Where any of the parties do not have access to the technology, software and equipment to be used for virtual hearings, or cannot meet the minimum standards, the parties may “solicit arbitral institutions or other centers in Africa, suitable to the parties, that can offer their venues for conducting virtual hearings. The technological and connection services offered by arbitral institutions or centers are often

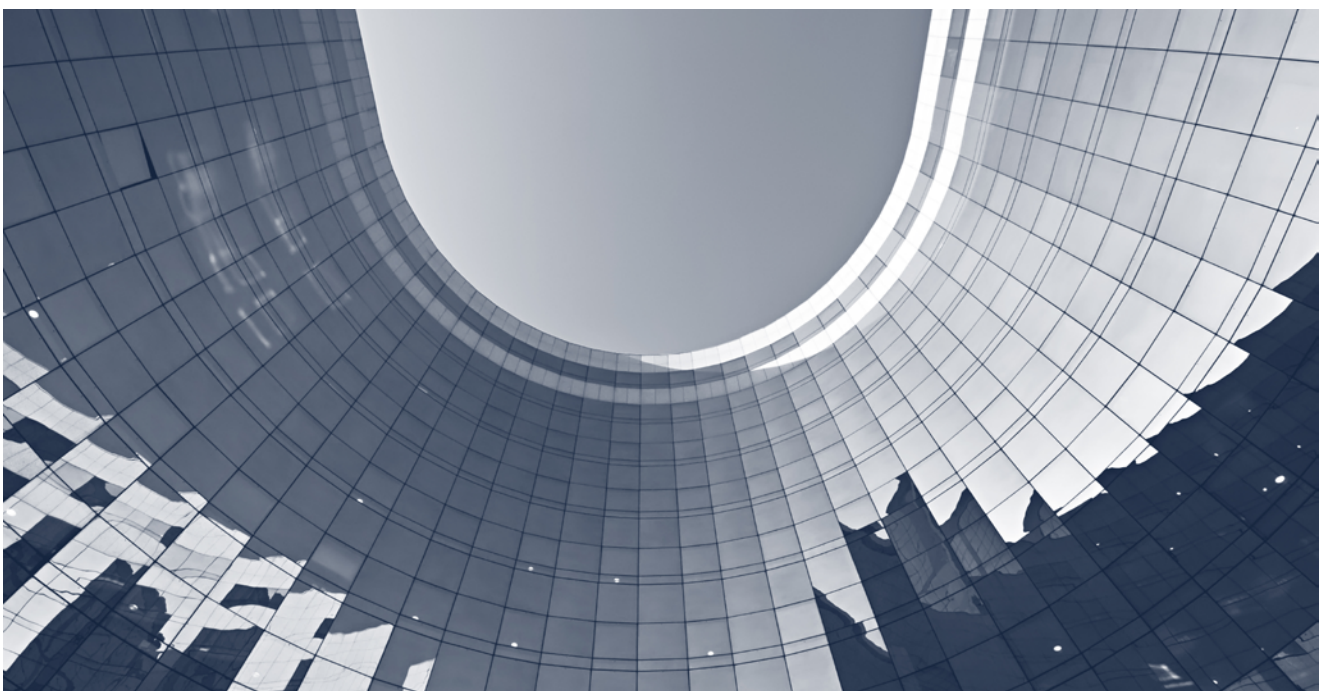
reliable and can provide the necessary equipment, software, high-quality internet connection, and minimal chance of signal interruptions.”

- To dispense with frivolous challenges to arbitral awards rendered in cases where virtual hearings were held, where there is no agreement between parties on the use of virtual hearings and there are no provisions expressly regulating such hearings under the applicable procedural rules governing the arbitration, parties should, before the hearing and to the extent necessary, enter into a Pre-Virtual Hearing Agreement to consent expressly to the use of virtual hearings as per the draft in Annex II of the Protocol. Alternatively, the tribunals should be empowered, where appropriate and after due consultation with the parties, to direct that the evidentiary hearing be conducted virtually as per the draft procedural order in Annex IV of the Protocol.
- Regarding conduct of the virtual hearings, it is recommended that witnesses give evidence under the arbitral tribunal's direction and the arbitral tribunal should be empowered to terminate the video conference at any time if it deems the video conference so unsatisfactory or that it is unfair to either party to continue.
- Although the possibility of home offices being used to conduct virtual hearings was not dismissed entirely, the Protocol recommends that the parties ensure that the rooms used to connect to virtual hearings either at their offices or “in such other locations are well equipped with any equipment necessary for

the virtual hearing,” are isolated and inaccessible to non-participants or unauthorized persons during the virtual hearing and soundproofed as much as possible.

- Regarding the technical standard for holding virtual hearings, the Protocol leaves it to the parties to connect to the virtual hearing platform through locations with reliable internet connectivity that offer seamless and smooth streaming and communications during the virtual hearing. It is further recommended that the minimum technical requirements and any back-up measures or contingency plan(s) must be agreed between the parties and the arbitral tribunal.
- Regarding the audio/video conferencing platform, rather than being prescriptive, the Protocol recommends that any agreed audio/video conferencing platform be licensed with adequate security and privacy standards, and that the technical setup be “secure and user friendly.” The platform should also “meet the requirements of all relevant or applicable laws.”

In conclusion, the Protocol is an excellent example of innovation in international arbitration being led from Africa. The Protocol is being heralded as an important step towards virtual hearings being accepted as the new norm in African arbitration and beyond, and its careful drafting should help it stand the test of time well into the post-COVID-19 pandemic period.



Africa rising: Virtual hearings in international arbitration



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It took a global pandemic to disrupt the practice of litigation and arbitration. Before the COVID-19 pandemic, the legal community was dabbling in the use of virtual hearings in certain parts of the world. However, the imposition of national lockdowns, strict social distancing measures and travel restrictions has forced lawyers to move away from the comfort of traditional, in-person hearings, towards new-age virtual hearings held on electronic platforms.

In May 2020, DLA Piper conducted a global, empirical study on the use of virtual hearings as a result of confinement due to the COVID-19 pandemic. Some clients revealed in the survey that a virtual hearing permits them the opportunity to observe more closely and to feel “more connected” in the proceedings.

Virtual hearings – pros and cons

However, there is varied opinion among external lawyers as to whether virtual hearings are a help or a hinderance in the advancement of African disputes. Some practitioners, particularly in common law jurisdictions, are of the view that virtual hearings have no place in trials requiring cross-examination

of witnesses. Other practitioners believe virtual hearings will replace some physical hearings in African disputes after the pandemic.

On the one hand, virtual international arbitration hearings reduce or avoid the need for legal teams, factual and expert witnesses and arbitrators to travel to the place of the arbitration. Visas are not required. Local immigration law constraints are not an issue.

Virtual hearings therefore substantially reduce the financial cost to the arbitral parties, as well as their carbon footprints. They reduce “wasted” company time and travel time for lawyers. They can also allow more local lawyers to be involved in arbitration hearings pertaining to African disputes. As to the timing of hearings, Africa is well-placed to accommodate hearings at times convenient to other African countries, the UK, the Middle East and Europe. The time zone differences between Africa and the US, or Africa and Asia Pacific are also tolerable. On the other hand, virtual hearings introduce various new infrastructural requirements in terms of hardware and software. They require bandwidth, as well as stable internet and electricity connections.

For example, while the technological and logistical requirements proposed in the Seoul Protocol on Videoconferencing in International Arbitration (Seoul Protocol) can be met in some African countries (e.g. South Africa), it might not be possible for other African countries to meet the requirements. The standard equipment referred to in the Seoul Protocol is also unavailable in some African countries and too expensive in others, be it for some or all of the arbitral parties or the arbitration tribunal itself. Additional training may also be required for the arbitrators, lawyers and witnesses to ensure a smooth hearing – this in itself may discourage the use of technology.

Virtual hearings are also approached with caution given that a witness at a remote hearing room can potentially be coached through their oral evidence, or can refer to crib notes, thereby undermining the integrity and reliability of the evidence, and the fairness of the process.

Various African and overseas arbitration centers have recognized these developments in the practice of law and the associated challenges. Some centers have held virtual hearings during the pandemic under the existing arbitration rules. Some have revised their arbitration rules to provide expressly for the use of virtual hearings – a sign that virtual hearings may also be used after the pandemic. Guidelines have also been issued to assist arbitral parties and arbitrators to facilitate best practice and due process in virtual hearings.

How African arbitration centers have reacted to the demand for virtual hearings

The ability to insist on a virtual hearing in an international arbitration will depend on the terms of the arbitration agreement, the willingness of the parties and the rules of the agreed arbitration center. This is the approach to virtual hearings in international arbitrations adopted by some major African arbitration centers:

Southern Africa	
<p>Arbitration Foundation of Southern Africa (AFSA International)</p>	<p>The current rules are silent on the use of virtual hearings.</p> <p>However, in terms of the proposed revision to the rules:</p> <ul style="list-style-type: none"> • The arbitral tribunal must proceed in as short a time as possible to establish the facts of the case, by all appropriate means, which conceivably includes by remote hearing. • The arbitral tribunal has the fullest authority to establish the conduct of the hearing, including its form and procedure. • Express provision is made for the possibility of the hearing taking place by video or telephone conference or in person, or a combination thereof. <p>Practically, arbitral tribunals are holding virtual hearings in terms of the AFSA International rules, as dictated by the circumstances of the matter in question or agreed by the parties.</p> <p>AFSA International has facilities at their Johannesburg offices to accommodate virtual hearings, should these be required by the arbitral parties or arbitration tribunal. The most commonly used platforms are Zoom and MS Teams.</p>
East Africa	
<p>Mauritius Chamber of Commerce and Industry Arbitration and Medication Centre (MARC)</p>	<p>The arbitration rules of the MARC (and the guidelines issued by the MARC) provide that:</p> <ul style="list-style-type: none"> • Subject to the rules and the agreement of the parties, the arbitral tribunal shall adopt any suitable procedures for the conduct of the arbitration, provided among other things that it affords the parties a reasonable opportunity to present their respective cases. • The arbitral tribunal and the parties must do everything necessary to ensure the fair and efficient conduct of the arbitration. • An oral hearing may be held at the request of a party or direction of the arbitral tribunal. The rules suggest a physical hearing, given the reference to the tribunal directing the “venue” and “place” of the oral hearing. <p>The legal sector has asked the MARC to adapt its rules to allow virtual hearings, as and when appropriate, particularly given that certain appeals to the Judicial Committee of the Privy Council in London have – at least in part – been conducted virtually.</p> <p>During the COVID-19 lockdown period in Mauritius, the Secretariat remained opened but arbitral parties postponed hearings. The MARC is able to collaborate for this purpose with a third party to offer virtual hearing services to users, where appropriate.</p>

<p>Mauritius International Arbitration Centre</p> <p>(MIAC)</p>	<p>The current arbitration rules of MIAC do not refer to the use of virtual hearings. However, the arbitral tribunal may direct, or parties may agree, that witnesses be examined by way of videoconference. The rules provide that:</p> <ul style="list-style-type: none"> • The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and each party is given a reasonable opportunity to present its case. • 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. • The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference). <p>Although the MIAC rules make no express provision for virtual hearings, MIAC is taking steps to facilitate their use.</p>
<p>Nairobi Centre for International Arbitration</p> <p>(NCIA)</p>	<p>The arbitration rules of the NCIA provide that:</p> <ul style="list-style-type: none"> • The arbitral tribunal's general duties include the duty to adopt procedures suitable in the circumstances, and avoid unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the dispute. • The arbitral tribunal has the authority to issue any orders necessary to achieve a fair, efficient and economical resolution of the case. • The parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration. • A hearing or any part of a hearing may be conducted via videoconference, telephone or other electronic means, with the agreement of parties or at the discretion of the arbitrator. <p>The NCIA rules also provided expressly for virtual hearings before the pandemic.</p>
<p>Kigali International Arbitration Centre</p> <p>(KIAC)</p>	<p>The arbitration rules of KIAC do not refer to the use of virtual hearings, and instead suggest that the hearing takes place in person, subject to the discretion of the arbitrator. The rules provide that:</p> <ul style="list-style-type: none"> • The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, with regard to the complexity and value of the dispute. • The arbitral tribunal may hold hearings, meetings and deliberations at any convenient place at its discretion. • When a hearing is to be held, the arbitral tribunal shall summon the parties to appear before it at the place fixed by it, and the parties may appear in person or through duly authorized representatives.

North Africa

Cairo Regional
Centre for
International
Commercial
Arbitration

(CRCICA)

The rules of the CRCICA provide specifically for the holding of virtual hearings:

- The arbitral tribunal may conduct the arbitration as it considers appropriate, provided the parties are treated equally and that each party is given an equal and full opportunity to present its case.
- If any party so requests or if the arbitral tribunal decides, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.
- The arbitral tribunal shall conduct the proceedings efficiently, so as to avoid unnecessary delay and expenses likely to increase the arbitration costs in an unjustified manner.
- The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

West Africa

Common Court
of Justice and
Arbitration

(CCJA)

The CCJA was established to administer arbitrations in terms of the Treaty on the Harmonisation of Business Law in Africa. The rules of the CCJA suggest that a physical hearing must be held.

- The scoping meeting after appointment of the arbitral tribunal may, with the consent of the parties, be held by telephone conference or videoconference (no similar reference is made in the provisions on hearings).
- Unless otherwise agreed, the arbitral tribunal may decide to conduct the hearing and hold meetings and deliberate in any place it deems fit.
- The hearing shall occur at the place fixed by the arbitral tribunal.
- The arbitral tribunal shall proceed as promptly as possible to establish the facts of the case by all appropriate means.
- The parties shall appear in person or be represented by duly authorized persons.
- The arbitral tribunal may also decide to hear witnesses and experts, in the presence of the parties, or in their absence, provided that the latter have been duly summoned.

Guidelines on virtual hearings in Africa

GUIDELINES FROM THE AFRICA ARBITRATION ACADEMY

In April 2020, the African Arbitration Academy published a Protocol on Virtual Hearings in Africa (Africa Protocol). The overarching objectives of the Africa Protocol include to provide guidelines and best practices for arbitrations in Africa, where a physical hearing is impracticable due to health, safety, cost, or other considerations, considering the unique challenges in Africa. African institutions and governments are encouraged to make express reference to virtual hearings in local arbitration rules and laws. The Africa Protocol includes useful templates, sample protocols and model clauses.

The Africa Protocol proposes that parties and arbitral tribunals agree in advance, as far as possible, on all the procedures, schedules and deadlines to be followed, as well as the technology, software, equipment, and platform to be used by all participants in the virtual hearings, in the form of a cyber-protocol.

The Africa Protocol sets out the minimum proposed standards for technology, software, equipment, and platform that will be used for the virtual hearing, specifically bearing in mind the logistical challenges in many African jurisdictions. This includes the minimum requirements for security, privacy and data protection during the virtual hearing.

Given the lack of fast and stable internet connections in some African jurisdictions, where mobile cellular subscriber penetration and internet access is far lower than the global average, the Africa Protocol recommends that parties and

arbitral tribunals have at least one back-up internet service provider and an alternative virtual platform to be used should any technical or communication breakdowns occur.

In an attempt to ensure that arbitral tribunals retain control over the hearing, the Africa Protocol provides that any video witness testimony may be terminated by the tribunal if the connectivity causes the videoconference to be so unsatisfactory that it is unfair to either party to continue.

Where arbitral parties or arbitrators do not have access to reliable infrastructure, the Africa Protocol suggests they approach arbitral institutions or other centers in Africa that can offer their venues to conduct virtual hearings.

GUIDELINES FROM AFSA INTERNATIONAL

In October 2020, AFSA International published its own guidelines on virtual hearings, the Remote Hearing Protocol (AFSA Protocol). The AFSA Protocol is recommended for use in all remote hearings and hybrid-remote hearings conducted by parties in accordance with the rules of AFSA International, to guide the efficient conduct of remote hearings and ensure fairness.

Similar to the Africa Protocol, the AFSA Protocol proposes that parties and arbitral tribunals agree in advance on the technological and logistical issues of the remote hearing.

Insofar as it is possible and as agreed between the parties or ordered by the arbitral tribunal, the remote hearing shall occur from various remote hearing venues. The venues need to comply with the minimum required technical, technological and security requirements which include that: the hearing platform should

have a unique and automatically generated meeting ID; the parties must have secure internet connections; and all parties should have access to quality, high-speed internet networks to allow proper, clear and continuous audio-visual transmission.

Notably, in regard to ensuring the integrity and reliability of evidence given via remote hearings, the AFSA Protocol provides a process for ensuring and certifying that there has been no interference in giving the evidence. It prescribes, in detail, the hardware required by a witness to give evidence remotely (such as a web camera to record the individual and a wide-angle camera to record the environment of the hearing room) and failing access to such equipment, it limits the persons permitted to be present in the hearing room while evidence is being given. It also permits the appointment of an independent legal representative to observe the production of oral evidence by a witness in a remote hearing room.

The AFSA Protocol also contains details of online etiquette and practical hearing practices intended to promote the smooth and efficient conduct of the remote hearing – much of which is now common practice.

Is the approach in Africa in line with international best practice?

There is no doubt that the general approach to virtual hearings in Africa is in line with international best practice.

Some of the major regional arbitration centers in Africa were at the forefront of innovation, having catered for virtual hearings before the COVID-19 outbreak, although the arbitration rules

are often less detailed than the likes of the London Court of International Arbitration (LCIA). Other African arbitration centers are now heeding the call and taking steps to provide for virtual hearings and issue associated guidelines.

This will minimize the number of disputes as to whether or not a virtual hearing is permissible. It will also provide for the principles that are to govern virtual hearings, with a view to ensuring arbitral parties receive a fair hearing, that the appropriate online etiquette is respected, and that the resultant arbitration award is enforceable.

Practical tips and protocols can be gleaned from various international arbitration documents, as well as the cases being decided in the various jurisdictions around the world. For example, the Seoul Protocol provides detailed guidelines on planning, testing and conducting international arbitration via videoconference. The International Chamber of Commerce (ICC) has also published a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, and is expected to release revised arbitration rules in January 2021 that expressly permit virtual hearings.

On October 1, 2020, the LCIA published revised arbitration rules, which now also deal expressly with virtual hearings.

However, the Africa Protocol and AFSA Protocol go further. They provide insightful guidance in the context of arbitrating in Africa and recommendations to address certain challenges in virtual hearings unique to Africa. It has been welcomed as ground-breaking advancements in arbitration in Africa.

Lawyers must familiarize themselves with African and international best practice and engage with their counterparts with a view to agreeing cyber-protocols that ensure that their clients' legal and strategic needs are met. The over-arching consideration must always be to ensure the need to resolve the dispute in an expeditious and cost-effective manner.

Virtual hearings provide an opportunity for the advancement of the arbitration of African disputes. The legal sector must continue to embrace this opportunity, adapt to the change and ensure that clients receive the appropriate quality of legal services.



Technology and the future of dispute resolution



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Technology has transformed our society to a point where we can hardly imagine modern life without it. Technology affects the way we interact with one another, including regarding dispute resolution: it either generates new kinds of disputes which arise out of the new capabilities it offers, or it can help in the resolution of disputes. In this article we focus on how technology can assist in the resolution of disputes and how it can be leveraged in terms of promptness and efficiency.

Trends in dispute resolution

There is a risk of growing disconnect with the people that dispute resolution mechanisms are trying to help if these same mechanisms do not embrace technology. We have noticed a shift from the conventional, court-based dispute resolution to alternative dispute resolution (ADR) mechanisms. For the business community, ADR is no longer an alternative, but rather the norm because maintaining business relationships is critical. On the other hand, the court system has the constraints of an increasing caseload, giving way to delayed decisions and a never-ending appellate mechanism.

Apart from ADR, the trend is also to move to online dispute resolution (ODR), which has been made possible through machine learning and artificial intelligence, which is becoming less artificial and more intelligent. The accelerated pace of technological change has made more people integrate the internet into their daily lives and as such – knowingly or oftentimes unknowingly – people are having recourse to ODR if they file a complaint or dispute on e-commerce or e-payment platforms. These ODR platforms handle hundreds of millions of disputes every year. The range of ODR tools keeps expanding and progressing. They are now able to handle more complex disputes, rather than just the low-value e-commerce disputes they previously handled. ODR enjoys the unique advantage of not being tied to a particular jurisdiction and can be a very effective dispute resolution mechanism for cross-border disputes. But it is accepted that ODR is not a good fit for all kinds of disputes.

Another form of dispute resolution that is becoming increasingly popular is the smart contract, which directly embeds contractual clauses within software. The software executes itself upon the occurrence of certain predefined events. In this way, smart contracts provide for fast and fair redress in cases of disputes.

Another example is when technology is placed at the service of dispute resolution. When disputes arise in international financial centers, the parties are often in different countries. Technology has enabled us to transcend distance and bridge the gap. Parties and witnesses to a dispute can participate in the resolution process from anywhere in the world. The COVID-19 pandemic with its subsequent lockdowns has been a catalyst, unleashing the true potential of technology in dispute resolution. Courts have held sittings via video link to connect geographically separated parties and parties under lockdown.

Case management

Technology can also play a prominent role in case management. Courts have embraced ADR methods and we have seen increased court-mandated mediation. The importance of such a mechanism for the timely dispatch of justice has moved several jurisdictions to set up mediation divisions within the court systems, which are chaired by dedicated judges whose primary role is to act as a mediator and help the parties reach an amicable resolution of their disputes or at least considerably narrow down issues.



Another area where technology will be called on to make a significant contribution is in the presentation of evidence. Online databases and legaltech applications are already an indispensable companion of the law practitioner. Legaltech is a clear example of the confluence between machine learning and the doctrine of stare decisis in the resolution of disputes.

Time for change

It is an opportune time to rethink dispute resolution and unleash the full potential of technological solutions in light of COVID-19, which has called for a fundamental rethinking of every aspect of our lives. For instance, courts and tribunals could not hold physical meetings to hear cases during the lockdown. The important lesson we learned is that this practice of hearing parties and counsel via video conference can continue and will in no way compromise the quality of justice being dispensed. On the contrary, it will save time for all parties, especially

for parties who are abroad and who cannot travel because of restrictions.

The legal world, and particularly lawyers, are traditionally very conservative and resistant to change and innovation. However, a rethinking of how our courts operate and how technology can assist in a meaningful way is needed. The courts will not be replaced by computers or robots delivering judgments, but technology can assist the judge in reaching a decision, just like technology helps the judge in all other walks of daily life. The use of technology in dispute resolution has become the new norm.

Opportunities of big data in law



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The proliferation of mobile phone networks has transformed communications in sub-Saharan Africa and has allowed Africans to skip the landline stage of development and jump right to the digital age. Today, cellphones are as common in South Africa and Nigeria as they are in the US.¹ African markets have clearly shown their willingness to adopt technology and adjust how it works to take advantage of the benefits it offers.

Across many industries, big data is being used to drive more informed and better decision-making. But despite the willingness to adopt new technologies, Africa has been slow to tap into its benefits. For consumers, data is already all-encompassing. Ordinary people are accustomed to and welcome the convenience that insights derived from data bring to their lives, for example:

- When driving, real-time data about traffic congestion is sent to mobile applications such as Google Maps or Waze. This enables drivers to make

better decisions about how to get to their destinations faster.

- When consumers use their computers or mobile devices, algorithms use information about them and about people like them, and present to users choices that match what the algorithms think they want to see. Music streaming platforms use this strategy to help users discover new music they're likely to enjoy.
- When people walk around the cities they live in, it is common for data-driven predictions about crime to inform the level of police protection available in that area.

For law firms, which generally hold large amounts of data spanning several years (e.g. executed contracts, court orders, due diligence reports, as well as the behind the scenes deliberations, drafts, legal research, disclosure documents and matter management),² there is a huge opportunity. Law and big data are the perfect match when it comes to automation and analytics.³

Big data and litigation

Data has always been part of practicing law, and lawyers have always been required to make predictions about the future when advising clients. Historically, these decisions depended on the expertise and experience of lawyers who have practiced and gained knowledge over years; often they rely on their personal experience and judgment.

Any litigator will confirm that the foundation of a case is the litigation strategy. This strategy continually evolves throughout the life-cycle of the case and at several points lawyers – be they in-house or external – must make decisions such as where the case should be filed; how an application is to be responded to; and if settlement should be sought. In making these decisions, few data source alternatives exist to the traditional research methods and current databases like AfricanLII,⁴ Westlaw and Lexis. However, there is an opportunity for systems to be developed to provide insights on case arguments and litigation strategy. This opportunity is being taken across

¹ Pew Research Centre, "Cell Phones in Africa: Communication Lifeline"

² <https://medium.com/dataseries/opportunities-for-big-data-big-law-cd131.841.4497>.

³ <https://legal.thomsonreuters.com/en/insights/white-papers/survival-guide-to-data-analytics-in-the-legal-industry>.

⁴ AfricanLII or the African Legal Information Institute is a project to support the establishment and operation of independent national Legal Information Institute projects in Africa. AfricanLII is a project of the Democratic Governance and rights Unit, Department of Public Law, University of Cape Town.

the world and there is a revolution underway in how litigators decide critical questions of strategy and tactics.

The legal profession is entering a data-driven chapter, empowering lawyers to quantify the prospects of success or the scope of risk for almost every option during a case. The analytics powered by big data take massive volumes of data and strip out irrelevant or redundant information, making it readily searchable. These are tasks that would otherwise take weeks, months or even longer to complete. A lawyer who embraces data-driven thinking can surpass competitors who do not.

FOR LAW FIRMS, DATA AND TECHNOLOGY CAN BE USED TO ANSWER QUESTIONS LIKE:

Should we litigate this matter or settle it?

By assessing outcomes from previous cases; amount of judgments or settlements; and the overall costs of similar matters, data analysis can give a lawyer or a legal team an objective answer to this question based on facts and historical data.

Will we win?

History tends to repeat itself, so looking at the success rates of similar legal questions before the same judge, or in the same types of matters, is a common way to approach this question.

Litigation analytics can result in a more focused and targeted research process and more informed strategic choices. For example, when considering whether an application will be dismissed in a case before a particular judge, in addition to searching for the judge's decisions on the issue, litigation analytics can pull up information about how a judge has dealt with similar issues in the past. It may not be the exact same issue, but it can efficiently narrow the search. Lawyers will have more information to predict the likely outcome of their intended course of action. In Africa, where several countries have their roots in similar legal systems, litigation analytics can allow litigators to draw from decisions from across the continent.

Artificial intelligence (AI) in litigation can go further toward a future with predictive capabilities. AI can show trends over the last three, five or ten years, and eventually draw a dotted line forward to show where that trend line goes.

Litigation analytics can also provide a sense of a judge's experience in a case. The answer can inform the nuances of a high-stakes litigation strategy.

For example, if arguing in front of a relatively inexperienced judge, a litigator must determine how much education is needed during the litigation. Equally, if the judge is more experienced, the lawyer might need to get more up-to-speed, because the judge will have more familiarity with a particular domain.

What are the expected fees?

As alternative billing arrangements become more commonplace in the legal services industry, firms must have comparable data sets about client fees. By looking at matter management and billing data, a firm can know the costs of similar cases and provide an informed fixed-fee proposal.

Can the matter be pursued more efficiently?

Lawyers will be aware of the evolving expectations from clients. Law firms can provide better services by looking at matter or billing data to identify process bottlenecks or tasks that could be performed better or more quickly by other types of professionals. Making this process known to clients could strengthen the client relationship.

Challenges in Africa

Many lawyers use Information and Communications Technology (ICT) for both professional and recreational interactions. They have the skills needed to use common applications, and they appear to take up new applications and increase their skills and confidence with ease. Across the continent many courts and tribunals have introduced e-filing rules, and during the COVID-19 pandemic several courts easily moved their proceedings online.

Despite the willingness to adopt new technology and the promise of significant benefits from adopting big data and AI, lawyers in Africa have been slow on the uptake. It appears that part of this sluggishness is on account of endemic ICT challenges across Africa. While some states such as South Africa, Egypt, Tunisia and Nigeria have demonstrable results to show for their investments in their ICT infrastructure, and occupy the highest rankings on the Network Readiness Index (NRI), such success is not shared by most of the continent's states.

Economic and technological constraints remain prevalent and ICT implementation is still in its infancy in most states. Thus, it can be argued that the many African countries are still struggling to build their ICT infrastructure and bridge the digital divide.⁵

Another challenge African states face is the lack of laws and regulation addressing online activity, such as cybersecurity, data protection, confidentiality,

and the protection of online users. The importance of having an adequate socio-legal and regulatory framework was noted by UNCTAD, which stated the following: “The need for an appropriate legal framework is supportive of and conducive to the practice of e-commerce and has been identified as a prerequisite for the growth of e-commerce in general and ODR in particular.”⁶

Compared to practices in developed countries, many of the business norms in the developing world (particularly Africa) are driven by government intervention through means such as statutory instruments as opposed to market forces. This means that unless governments encourage investment and create the economic conditions that would make the pursuit of this goal tenable, there is not much the private sector can do on its own to instigate change.



5 The term “digital divide” denotes “the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities. The digital divide reflects various differences among and within countries” – cited in Note 5, p.561.

6 UNCTAD, “E-Commerce and Development Report 2003” (2003); Chapter 7: “Online Dispute Resolution: E-Commerce and Beyond,” www.unctad.org/en/docs/ecdr2003_en.pdf.

Embracing electronic court case management systems: Lessons from the Kenyan experience during COVID-19



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The Kenyan court system is anchored in common law, which is characterized by paper-based procedures and physical court appearances. The disruptions caused by the COVID-19 pandemic have shaken the very foundation of the system, forcing the judiciary to come up with measures to mitigate the effects and assure litigants of their right to a fair trial and access to courts.

Some of the measures taken by the Kenyan judiciary include adopting a virtual court and a paperless court case management system. The system, adopted on July 1, 2020, is still in its infancy and has attracted both praise and criticism in equal measure from court users. This article addresses the benefits and challenges experienced by litigants using the court case management system.

Key features

The electronic court case management system supports electronic filing of documents, electronic service, electronic search of cases, electronic payment and receipting and electronic request for extraction of orders. The system has two interfaces: the user interface which is accessible to litigants, and the court interface accessible to judicial officers.

The portal allows for registration of law firms, organizations, self-represented parties, and the state. Once registered, all entities are able to file and serve documents via the portal. The system allows for registration and filing of documents on both existing and new matters. Once these documents are fed to the system, the user is then prompted to input details of the case. A payment prompt appears once documents are uploaded which a party will be required to pay via a mobile money platform.

Upon effective filing of documents, parties have a choice to either serve their documents through the portal, or choose to effect service via email. Service via email is now allowed in Kenyan courts subject to the Civil Procedure (Amendment) Rules, 2020.¹

Legislative framework governing the electronic case management system in Kenya

Before the launch of the system, the Chief Justice gazetted the Civil Procedure (Amendment) Rules 2020 and the Practice Directions on Electronic Case Management. The Amendment to the Civil Procedure Rules mandates parties to provide their postal address, telephone number, email, and physical address when filing their pleadings in court. Further, should any changes be proposed to these details, the court must be notified.² This provision aims to facilitate the proper function of the electronic case management system to avoid instances of parties citing service to the wrong contacts.

¹ Order 5 rule 22B of the Civil Procedure Rules, 2010.

² Order 1 rule 26 of the Civil Procedure Rules, 2010.

The Practice Directions on Electronic Case Management published through Gazette Notice No. 2357 of 2020 provide a comprehensive framework for the functioning of the judiciary e-filing system.

Advantages of the system

Through Gazette Notice No. 2357 of 2020, the Chief Justice indicated that the main objective of the system is to integrate information communication technology (ICT) into judicial proceedings.

The emphasis, according to the Chief Justice, is on efficient electronic filing and service of documents.

The system has transformed litigation by providing digital services for filing, serving documents and requesting court orders.

From a litigator's perspective, the system saves time and resources that would have otherwise been used in filing and serving physical documents. The system has automated the filing and serving process entirely except for the Supreme Court of Kenya, where parties are still required to file and serve physical copies. Travelling time and costs associated with service and filing of documents have also been eliminated.

The system also acts as a link between advocates and the court, making virtual proceedings a reality. In essence, without the system it would have been an uphill task for the courts to effectively implement virtual hearings. It would have been contradictory to conduct proceedings online when parties have to travel to the court to file documents and also serve the documents physically. This would have defeated the purpose of

the implementation of the online proceedings to give parties the right to access courts, and to comply with the government restrictions on COVID-19.

From the court's perspective, the system makes it easier for judges and judicial officers to access court files. Once parties have filed their documents, the system generates a complete copy of the court file. Any documents filed in future will be automatically linked to the file on the system. The system also provides prompts and updates for judicial officers as to when a matter is coming up for a mention or hearing. Judicial officers are therefore able to keep an online diary of their matters with relative ease.

E-payments for filing of documents is another advantage as it promotes accountability. The system effectively minimizes fraud and corruption. With the manual payment and receipting system, the payments received through filing of documents and payment of fines was at risk from parties engaging in corruption and fraud, denying the government revenue. The online system keeps track of all payments and digital receipts are generated for all payments. This ensures a high level of accountability within the judiciary.

Lastly, the system has eased the transmission of judgments and rulings. Once parties have consented to a judgment being delivered via email, the courts proceed on that basis. It therefore saves the courts time that would have otherwise been lost in physical reading of judgments in open court.

Challenges

Despite the benefits of the electronic system, stakeholders have experienced challenges. These challenges are not related to the system itself; they are mainly infrastructural or technical in nature. The challenges arise from the lack of access to proper computers, inadequate training, and poor internet connectivity.

Fast internet is unevenly distributed in Kenya. This poses a challenge for users in accessing the electronic court system. The large number of users creates a lot of traffic on the portal. The problem is compounded for litigants in small towns in rural parts of Kenya where fast internet is largely inaccessible.

The basis for usage of any digital platform is the availability of effective infrastructure – both hardware and software. Effective use of the electronic case management system is also dependent on users' access to compatible computers. This is an extra cost for some court users, especially young lawyers and self-represented parties who have already been adversely affected by COVID-19. With the government encouraging employees to embrace working from home, legal teams (including secretaries and clerks) now require laptops to fulfil their roles effectively.

The unstable electric supply is another hindrance for the effective functioning of the system. Unfortunately, in most towns, consistent power supply is a major challenge. This is either on account of some areas not being connected to the grid or simply on account of frequent power cuts.

The lack of a stable internet connection also means that the parties cannot correctly file their documents, resulting in late filing and service of documents.

Lastly, the implementation of the system is proving difficult in criminal litigation. Accused persons on remand pending the outcome of their decisions have no access to computers and other facilities for virtual hearings. Even if the parties had access to computers, virtual hearings for criminal matters would be difficult as courts need to analyze and examine the character of the accused person, which may not be possible on the online platform.

Lessons from the Kenya experience

The electronic case management system in Kenya is a great tool. It has ensured that courts continue to function during government restrictions on movement and gatherings as a way of preventing the spread of COVID-19.

The system has, however, faced challenges that come with use of technology. Recognizing the pitfalls of technology, the Chief Justice has provided for the use of alternative technology, including approval for manual filing of documents whenever the system collapses: “if for any reason a court cannot access any form of electronic media, the presiding judge or judicial officer may approve the use of an alternative technology or approve

manual filing of any document.”⁴ Since the judiciary is determined to make the system work, courts are only required to allow a party to file a document in person where an oral application is made before the court seeking permission to proceed.

The efficient use of the system also depends on parliament passing laws that effectively govern digital signatures. The system only allows filing of soft copy documents or scanned documents. This raises a challenge in regards to signatures. In jurisdictions where there are no laws allowing for digital signatures, it may be hard to implement the system. In Kenya however, through the passage of the Business Laws (Amendment) Act, 2020, the country has a framework governing digital signatures.⁵ The Kenya Information and Communications Act Cap 411A also enhances the provision on digital signatures provided for in various statutes.⁶ Further, through the practice directions on the use of electronic case management system, the Chief Justice allowed for the use of digital signatures.⁷ Non-electronic signatures are only used in instances where a document is scanned. The directions also provide that any person disputing a digital signature must raise an objection to the court within 30 days. Rules regulating digital signatures are therefore a prerequisite for the effective implementation of the system.

To prevent system failures, a proper backup system is also required.

In Kenya, the Practice Directions governing electronic court system provide as follows: “the Judiciary shall maintain a backup system for the system that shall be located and maintained in the place as the Chief Justice, in consultation with the Judicial Service Commission shall determine.”⁸

In addition, an ICT desk for every court station is a prerequisite for the smooth running of the system. The ICT desk is responsible of the management of the system, ensuring that documents are filed properly. The Chief Justice made it mandatory for every court to establish an ICT-enabled office to help with e-filing or appoint accredited e-filing agents to provide such services.⁹

Finally, local bar associations play a key role in ensuring people accept and get used to using the system. The Law Society of Kenya (LSK) plays a significant role in communicating the concerns and difficulties experienced by members of the bar in their interaction with the system. The bar association further proposes initiatives for improvement of the system, and the LSK also organizes much-needed training for members in conjunction with Judiciary representatives.

4 Rule 4(2) of the Practice Directions on Electronic Case management .

5 See for example amendments to section 3(6) of the Law of Contract Act, section 2 of the Registration of Documents Act, section 2 of the Survey Act and section 44 and 45 of the Land Registration Act

6 Part VIA of the Kenya Information and Communication Act Cap 411 A of the Laws of Kenya.

7 Rule 22(1) of the Practice Directions on Electronic Case Management.

8 Rule 24 (2) of the Practice Directions on Electronic Case Management.

9 Rule 15 (1) and (2) of the Practice Directions on Electronic Case management.

Zimbabwean courts: Catching up to the future



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The COVID-19 pandemic has caused a global shift in the way people work all over the world. There has been greater emphasis on virtual working, putting immense pressure on countries that were not prepared to shift to working virtually in important areas of the economy, with a big spotlight being on the courts.

In Zimbabwe, the courts have been upgrading, albeit slowly, over time and in the midst of this pandemic the much anticipated Commercial Division of the High Court became operational. This article will focus on the changes brought about by the new Commercial Division Rules and discuss how far Zimbabwe has to go before it catches up to the future.

Background

On May 31, 2020, the High Court (Commercial Division) Rules, Statutory Instrument 123 of 2020 (the Commercial Rules) were gazetted in Zimbabwe.

The Commercial Rules came into operation on June 1, 2020, signifying the commencement of a division of the High Court specifically dedicated to the hearing and resolving of commercial matters. This is in line with the drive to increase the ease of doing business. The courts in Zimbabwe now have dedicated divisions to determine tax disputes, labor disputes and commercial disputes. This in an effort to increase efficiency within the courts and the expertise in specific areas of

the law. The Commercial Rules in particular were also widely anticipated as they will indicate the direction in which the courts will take with respect to the use of technology.

One of the most significant changes is found in Rule 58, which states that the Commercial Division will become a fully paperless court and only operate electronically by June 1, 2021, giving the Commercial Division one year to set up the appropriate and secure electronic filing services and portals in the registry and on the internet.

This is a welcome change which will assist in the efficient resolution of commercial disputes. Although the

Commercial Division is supposed to be a fully electronic court, an important aspect to note from the Commercial Rules is that they do not make provision for virtual hearings.

Virtual hearings

In 2020, virtual hearings and how prepared courts and tribunals are for these hearings have become major concerns. The committee for drafting the Commercial Rules in Zimbabwe was established in January 2019 and the first draft was produced in April 2019. At the time of drafting the Commercial Rules, the need for virtual hearings was not urgent. The exclusion of virtual hearings from the Rules, under normal circumstances, is

understandable. This is because, although virtual hearings are convenient and increase efficiency while decreasing costs, especially where a witness or a party is in another country, there are a number of challenges that arise which make them less than ideal. For instance, a *Virtual Hearings Report*¹ published by DLA Piper in May 2020 highlights some of the challenges that are faced when a hearing or a trial is held virtually. The most apparent challenge is that of how to deal with witness evidence during a trial. Generally, witnesses should not be coached, or use notes, or be guided or influenced in any way as they give evidence. When a witness is not in the same room, however, it is difficult to monitor whether the witness is relying on notes, or whether there is someone else in the room assisting the witness with their testimony. Evaluating witness evidence is largely based on non-verbal cues – for example, a witness who is lying might divert their eyes. In a virtual hearing, however, it may well be that the witness diverted their eyes because their child just ran past behind the computer. Furthermore, the tension of physically being in the court room also assists in encouraging witnesses to be honest. If they are being examined while sitting on the couch at home, that tension is lost.

Another challenge is that faced by the legal team, which is most efficient when they prepare together and assist each other as co-counsel throughout the hearing. It is not ideal, therefore,

to have the legal team sitting in different locations. There are further challenges regarding production of evidence and exhibits during a trial. Accordingly, the Commercial Rules do not make provision for virtual hearings, which may well have been a conscious decision after weighing up the benefits and challenges, especially in Zimbabwe where access to reliable internet is not always available. It cannot be escaped, however, that virtual hearings are on the rise and Zimbabwe's neighbors in South Africa are already conducting these hearings and mitigating the challenges presented by them. In order to catch up to the future, Zimbabwe will need to start aligning the court rules and practice to global trends to increase efficiency and reduce costs.

Further important changes

Although the electronic nature of the Commercial Division is still in progress and virtual hearings are not yet on the cards, there are some immediate changes which have already begun to take place in the way of digitalizing the Commercial Division. One of the immediate changes is allowing electronic serving. The Commercial Rules allow court documents to be served via email and fax and to “any address previously disclosed and used between parties in their business transactions” as opposed to strictly by hand delivery. In other courts in Zimbabwe a litigant is required to make an application in order to serve in any other manner than

hand delivery, which causes delays in resolving disputes. This also implies that a failure to serve on the address nominated in the contract as a party's address for serving of all notices and process is no longer considered a defective service. Despite this new development, however, some law firms have continued to serve documents physically. It is not immediately clear why law firms are continuing in this manner; it may be due to force of habit, but it is more likely that there is a lack of trust in the reliability of serving documents and pleadings electronically in Zimbabwe. Many lawyers still use personal email addresses and there is a risk that pleadings will be directed to a spam folder.

The Commercial Rules also allow for the Registrar to sign documents electronically and for electronic allocation of case files to judges. At present, due to the fact that the digitalization process is still underway, these processes are still being done manually.

Rule 46 provides that “the authentication of any electronic communication shall be effected by means of electronic signatures, and certified back-up copies of the communication in paper form or by such other acceptable means. “The Rule is under the heading “Electronic Service,” however, it is apparent that electronic signatures on pleadings that are filed at court and served electronically will be acceptable.

¹ <https://www.dlapiper.com/en/uk/insights/publications/2020/05/virtual-hearings-report/>.

Civil lawsuits in Burundi during COVID-19



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The outbreak of the COVID-19 pandemic is unprecedented. COVID-19 has spread worldwide, and the Republic of Burundi has adopted preventive measures that have affected institutions' activities in different ways.

On March 20, 2020, the Minister in charge of Public Security and Disaster Management released a statement ordering the suspension of flights for seven days and called on the Minister in charge of Transport to implement the measure. Soon after, in a statement dated March 27, 2020, the Ministry in charge of Transport, Public Works, Equipment and Spatial Planning ordered the closure of the airport for flights until further notice. On April 7, 2020, the Ministry of Foreign Affairs announced measures to limit the spread of COVID-19 which resulted in closing borders for cross-border truck drivers from or to Rwanda and the Democratic Republic of the Congo (DRC). On April 15, 2020, the same minister informed that – for the sake of free movement of goods and as agreed

at East African Community (EAC) level – the borders that had initially been closed were to be reopened for goods vehicles. However, Burundi is yet to make a decision enabling courts and tribunals to continue regular activities during the lockdown.

This article explores how COVID-19 has affected civil lawsuits in Burundi, and what measures have been taken to protect litigants and third parties.

How has COVID-19 affected civil lawsuits in Burundi?

Since the beginning of the pandemic, public hearings have not been interrupted. The measures mentioned above have – indirectly – affected the continuity of civil lawsuits. For example, the decision to permanently close Melchior Ndadaye International Airport has prevented passengers who were outside the country from returning and attending cases pending before courts. Likewise,

other countries have imposed measures such as travel restrictions and mandatory quarantine for passengers, or have prevented people from travelling overseas.

As a result, the above measures have affected civil lawsuits in several ways. Below we outline some of the effects.

Files have been put on hold

Appearance before labor courts requires the physical presence of the employee in public hearings.¹ If a party was in lockdown outside Burundi and was not able to appear, the case would be put on hold. The legal framework allows for employment court hearings to be postponed three times, unless the other party agrees to further postponement.² The law does not provide guidelines for when one of the parties is prevented from appearing at a court public hearing due to force majeure, and it requires the judge to assess each case individually.

¹ Article 188, Decree-Law N° 1/037 of July 7, 1993 on the Burundi Labor Code.

² Article 85 (2), the Law No.1/010 of May 13, 2004, on the Code of Civil Procedure.



Delay in court schedules due to cases not being properly served

Cases before the courts involving defendants who are abroad have been pending for a long time because they were not properly served.³ Even though regular procedures are being followed, a malicious defendant could take advantage of the pandemic to delay their trial date. Delaying tactics may include either refusing to appoint a lawyer or using the pandemic as case of force majeure, preventing them from fulfilling procedural obligations.

Issues regarding notification of judgments and exercising remedies

Several issues have emerged regarding the notification of parties of judgments handed down during the pandemic. For example, there

are judgments where one or both of the parties has not assigned a lawyer and need to be served in person or by alternative means provided for by law. This could not be completed for a party under lockdown abroad, making it impossible for them to be properly served, even using alternative means. This needs to be reviewed so law effects can be enforced as the case may be.

What about people who have been locked down after being properly served of judicial decisions rendered against them and who would like to exercise the available remedies?

Under Burundian law, after a judgment is rendered, the time limits to lodge an appeal begin on the next day and there are various time limits for different matters.⁴ The Code of Civil Procedure provides for death as the sole reason for interrupting an appeal

on time limits.⁵ On the other hand, the law governing the Supreme Court extends the grounds for interrupting the time limits for appealing in a case of force majeure but leaves the decision to the court,⁶ which does not constitute a sufficient guarantee for litigants.

In other cases, it is up to the law to determine the fate of individuals who, due to COVID-19, have been unable to appeal decisions.

Communication with lawyers

For anyone who has a pending case or a legal issue that needs attention, communication with a lawyer is crucial, especially during a crisis like COVID-19. This situation affects pending cases as well as cases that require lawyers to lodge appeals.

For pending cases, the courts may require, either ex officio or at the request of one of the parties,

³ Ibid., Article 47 (6).

⁴ The time limits for filing an appeal are 10 days for cases submitted in matters of labor law, 30 days for other matters and 60 days for filing the cassation appeal as well as the review appeal.

⁵ Article 198, the Code of Civil Procedure.

⁶ Article 65 (last para), the Law governing Supreme Court.

a submission of a mandatory document detained by another party⁷ or a third person⁸ during the proceedings or during public hearings. If the party or their lawyer is unable to deliver the document as they are not in Burundi, this could slow down the procedure.

For cases where an appeal procedure or any other strategic action is necessary, difficulties may be faced by lawyers who cannot communicate with their clients because of lockdown measures.

Effects of COVID-19 on litigants' interests and potential measures

As with most levels of Burundian society, COVID-19 has had detrimental effects on Burundian litigants' interests. With no clear end to the global crisis, litigants are facing enormous challenges due to internal and external measures. It is, therefore, important to ask what measures have been taken to help litigants during this unforeseen situation.

First and foremost, the judiciary and relevant legislation state that court decisions will be based on the nation's laws and the Constitution of the Republic of Burundi. Both are vested with the power to enact the legal framework that helps maintain the principle of fair trial. The right to a fair and public hearing in civil proceedings is one of the guarantees in relation to legal proceedings.⁹

The exceptional circumstances caused by COVID-19 have resulted in the postponement of legal deadlines so as not to deprive litigants of the access to justice and the limitation period to bring a case to court.

The law provides for a time limit within which legal action may be taken in the courts to resolve a grievance.¹⁰ The purpose of the time limit is to stop some practices such as negligence and lack of due diligence of litigants who do not assert their rights within the periods provided. But in certain situations, such as this, the limitation period should be extended for people who are unable to attend the courts due to COVID-19 as a case of force majeure. Thus, a law should be enacted to include this special situation.

⁷ Article 82, the Code of Civil Procedure.

⁸ Ibid.

⁹ Article 38, the Constitution of the Republic of Burundi promulgated on June 7, 2018.

¹⁰ Gérard Cornu, *Vocabulaire Juridique*, Paris, Presses Universitaires de France, 2007, P.709

¹¹ Article 35, Supreme court law promulgated on August 3, 2019.

In regard to limitation periods, the appeal time limits should also be amended depending on whether the litigant is unable to challenge a judicial decision that they disagree with. It would be unfair to impose time limits on a party who has been deprived of the right to appeal because of unforeseen circumstances such as lockdown happening outside Burundi. To avoid decisions being based solely on the judge's sovereign appreciation, legal provisions should be adopted by policymakers.

For cases that were already pending before courts and tribunals and where one of the parties cannot physically appear or mandate another person or a lawyer, the fundamental principle that defendants must be heard should be upheld. Therefore, the Supreme Court shall take appropriate measures as vested with administrative and jurisdictional power over other ordinary courts¹¹ and the latter shall draw inspiration from it accordingly.

These suggested measures have not yet been adopted, which puts at risk the interests of litigants affected by the pandemic who can neither bring legal action nor exercise the rights of appeal against judgments not rendered in their favor.

Even though the country has faced COVID-19 challenges, it has not yet implemented legal measures pertaining to legal process in this period of COVID-19. The courts have continued to offer public services to litigants, and one might think that because activities have not been suspended in the judicial sector, that it did not need to implement measures to overcome the effects of COVID-19 – however, this is not true.

The management of certain cases in which one of the parties could not undertake necessary due diligence to defend their rights because of lockdown or their inability to travel to Burundi due to COVID-19 pandemic measures argues in favor of adopting decisions relevant to their particular situation. In addition, litigants whose judicial cases have been hampered by the pandemic should be given an additional limitation period. Thus, no one would be deprived of their right of access to justice to assert their interests or the right to be given a fair trial.

COVID-19: The effects on dispute resolution in Nigeria



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Limited hearings, long adjournments, and restricted access to the courtrooms are some of the major effects of the COVID-19 pandemic on the delivery of justice in Nigeria. These issues have changed judges' and lawyers' attitudes towards the use of technology. Only very few cases have been heard or filed remotely, but several legal frameworks have been adopted to make them work. The journey to full adoption will be slow but it has already started.

Pandemic issues

Some of the ways the pandemic has affected dispute resolution in Nigeria are:

- Long adjournments – in response to the pandemic, several heads of courts, including the Chief Justice of Nigeria, have issued practice directions directing judges and magistrates to cut down on cases listed for hearing in a day. This has caused several cases to be rescheduled and adjourned for a longer period.
- Hearings of urgent cases only – several practice directions only allow face-to-face hearing of time-bound and criminal cases. Unlike before the

pandemic when several cases were listed for hearing each day, only a few cases have been heard since the lockdown. Many urgent and criminal cases were either not heard or heard late. In Lagos State, most magistrate courts were closed. Only a few magistrates were sitting every other day for three hours, hearing remand and bail applications on certain offences. This has caused a build-up of cases due for hearing.

- Access to courtrooms – like most public places, access to courtrooms was restricted. In some courts, only two lawyers were granted access per party.

Virtual court hearings

The most remarkable development since the pandemic in dispute resolution in Nigeria is not the virtual court hearing itself, but the change of attitude towards it. It was almost unthinkable before the pandemic as major developments in administration of justice in Nigeria were mainly in substantive and procedural laws. Little or no technological development had been recorded in the delivery of justice. The pandemic created a problem that could not be solved without the adoption of technology. While some still regard virtual hearings as unachievable, many lawyers and judges have embraced the need for a drastic change, which has led to urgent adoption of practice directions regulating virtual hearings.

However, a constitutional impediment soon threw the effort into crisis. Many lawyers and judges maintained that virtual hearings impeded access to justice, which is a breach of the Nigerian Constitution. The Supreme Court appears to have settled the issue when it confirmed, without ruling on any active case, that virtual hearings are constitutional. This has spurred the drive for their adoption.

Despite this, only a few proceedings have been conducted remotely – namely two criminal judgments. Several problems still need to be solved before full adoption. They include availability of appropriate facilities in court, and training of judges, lawyers and court officials. With the change of attitude, it may not be long before those hurdles are removed.

Electronic filing

Electronic filing and virtual hearings are two sides of the same coin. There is little or no point having one without the other. Courts, such as the High Courts of Lagos State and Rivers State, had been working for some time before the pandemic on platforms for electronic filing. Like many other things, the pandemic sped up the process. Both states have since launched their platforms.

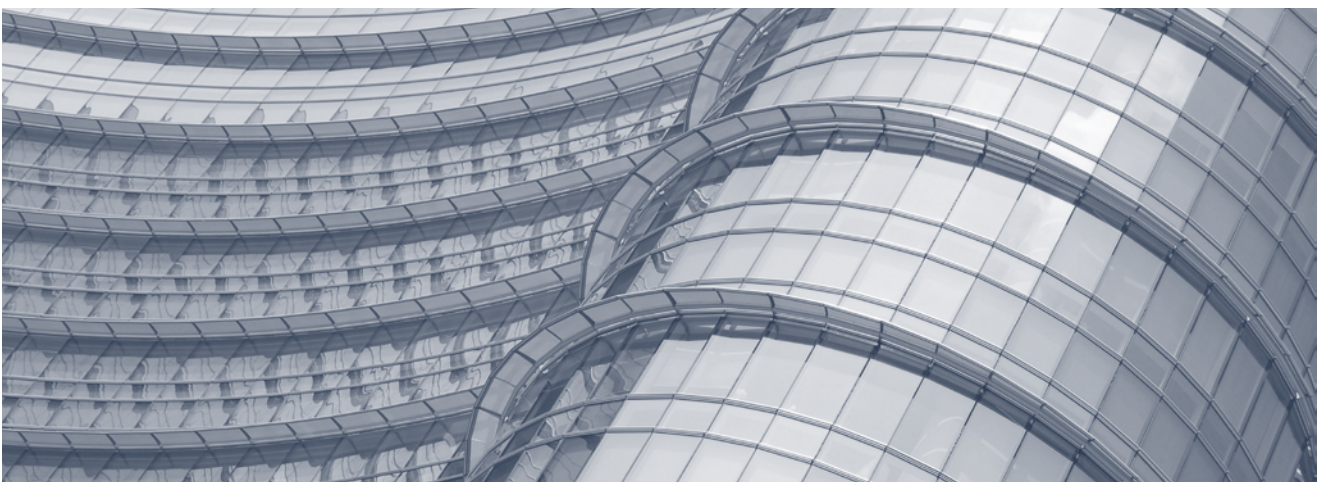
Lawyers are, however, skeptical about adopting this innovation. The new platforms were developed from scratch and specifically for different courts. The platforms have not proved to many lawyers that all existing rules of evidence, such as oath taking, have been complied with. While there has been a great awareness and change of attitude towards innovations, there has not been any significant adoption of electronic filing by stakeholders.

Service of court documents

Before the pandemic, there were few court rules that recognized electronic service of documents. There was a campaign led by the Chief Justice of Nigeria on the use of dedicated email addresses by all lawyers for service of court documents. Several practice directions issued since the pandemic now recognize electronic service, even using mobile instant messaging applications. This has since gained widespread adoption by lawyers.

Other challenges

There are still some grey areas that should be addressed. While several practice directions waived penalties for late filing due to the lockdown, no law has been passed to extend limitation periods. There are also no judicial pronouncements on how hard deadlines in statutes would be dealt with. Some statutory steps that parties should have taken were prevented by the lockdown or limited access to the court. In some instances, the courts have the discretion to grant a time extension. But there are other instances when the application for time extensions should have been made before the time ran out. This includes a claim form that had been taken out but not served before it expired during the lockdown.



Financial services in Tanzania: New consumer complaints handling procedure



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Regulation of financial services in Tanzania is largely conducted by the Central Bank of Tanzania (the Bank).

Consumer Protection Regulations

On November 22, 2019, the Bank issued the Consumer Protection Regulations (the Regulations) in a bid to enhance financial services customers' confidence in the sector and to promote stability, growth and innovation. The Regulations introduce high standards for efficient customer service delivery, market discipline and ensure that consumers are treated fairly by regulated bodies. It is basically the foundation for the establishment of a robust consumer protection regime in the financial sector, thereby enhancing financial inclusion and ultimately creating a stable financial system.

The Regulations apply to all financial service providers (in both Mainland Tanzania and Tanzania Zanzibar), including mobile money operators, licensed by the Bank, except where prescribed otherwise by the Bank in other regulations. At their core, the Regulations seek to create balance in the sector between financial service providers and their authorized agents (FSPs) and consumers of financial services, to ensure fair, inclusive and equitable exchange of products and services. They also aim to improve public financial awareness, (particularly on budgeting, financial planning, savings, investing, borrowing, retirement plans and self-protection against fraud), improve disclosure and transparency on products and services provided, improve consumer asset and data confidentiality, security and integrity, increase competition in the sector through supporting innovation and interoperability, and allow consumers to switch products and services.

Consequently, FSPs are required to develop internal structures of governance such as internal audit and compliance as well as policies and procedures that ensure effective implementation of the Regulations. In addition, the Regulations impose responsibilities on the board of directors and senior management of the FSP in that:

- the board of directors of the FSPs are responsible for approving policies and overseeing their implementation; and
- senior management must have an adequate process in place to monitor the FSP in all aspects of operation to ensure compliance with the Regulations.

Further, it is a requirement under the Regulations that these policies be submitted and reviewed annually by the Bank not later than 30 days following the board of director's approval.

General principles for financial consumer protection

The Regulations have embodied the general G-20 High-Level Principles on Financial Consumer Protection which were developed in 2011 by a special task force of the Organisation for Economic Co-operation and Development (OECD).¹ The principles include:

- equitable and fair treatment of consumers;
- financial education and awareness;

<https://www.oecd.org/daf/fin/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>

- disclosure and transparency;
- behavior/work ethics or responsible business conduct;
- protection of consumers' assets and information;
- competition; and
- complaint handling and redress.

Complaints handling process

INSTITUTION OF COMPLAINT WITH THE FSP

Part IX of the Regulations governs the complaint handling process and redress mechanism.

It requires FSPs to:

- establish clear channels for receiving, processing and determining consumer complaints through channels such as phone lines, help desks, dedicated email addresses and web chats that are free, fair, accessible, timely, transparent and independent;
- develop a fair redress mechanism and compensation policy and procedure (in line with the guidelines issued by the Bank) for qualified consumers for compensation in erroneous debits, excess charges or financial losses incurred by consumers due to negligence or fraudulent activities; and
- avoid conflicts of interest when handling consumer complaints.

To ensure timely determination of complaints, the Regulations prescribe time limits which vary from 6 hours to 14 days depending on the category of product or service offered by the FSPs. However, if the FSP is unable to handle the complaint under the time limit specified under the Regulations, the FSP may seek an extension by notifying the Bank of such failure before expiry of the statutory period.²

ELIGIBILITY OF LODGMENT OF COMPLAINT WITH THE BANK

Where complaints are not resolved by FSPs to the consumer's satisfaction, the Regulations provide that redress is with the Bank provided that the complaint is escalated within 14 days of the complainant receiving notification of the resolution from the FSP. However, before the Bank can intervene, it must be satisfied that the FSP provider handled the complaint to its conclusion and that the complainant has suffered financial loss or material inconvenience.

The Regulations further provide that a written complaint may be lodged directly with the Bank if the complainant has not received a response from the FSP (depending on the time limit, which varies depending on the type of product that is the subject of the complaint).

INSTITUTION OF COMPLAINT WITH THE BANK

A complaint lodged with the Bank must be in a form prescribed under the third schedule of the Regulation. However, the Bank is yet to issue any guidelines or a circular governing receipt, processing and determination of consumer complaints lodged at the Bank.

Further, the Bank may initiate on its own and deal with any issue regarding consumers protection without being initiated by any party.

DETERMINATION OF COMPLAINTS BY THE BANK OF TANZANIA

To ensure quick determination of disputes, the law prescribed time limits in which a matter has to be finally determined by the Bank. They are:

- 30 days for payment products related complaints;
- 45 days for banking products related complaints; and
- 30 days for bureau de change related complaints.

AWARD

The award of the Bank is binding and conclusive provided the complainant or FSP has the option to judicially review the decision.

ORDERS

The Bank has powers to order the following reliefs to the complainant:

- compensation and refund;
- correction of erroneous data, information or statement;
- cessation or desist from conduct that is subject of complaint;
- a formal apology; or
- to do or desist from doing any action as the Bank may deem appropriate.

³ Part IX of the of The Bank of Tanzania (Financial Consumer Protection) Regulations.

Application for revision

The law empowers the governor of the Bank to revise the decision of the Bank if one of the parties requests it. The request to revise must be lodged in the form prescribed under the fifth schedule of the Regulation and the same must be lodged within seven days from the date of the delivery of the determination by the Bank of Tanzania. The governor must reach a decision within 21 days.

Judicial review to the High Court of the United Republic of Tanzania

If they are dissatisfied with the governor's decision, a party may apply for a judicial review to the High Court.³

General sanctions

The Bank of Tanzania may impose the following sanctions for non-compliance with the regulations:

- suspension from operations for a period not exceeding one year;
- a fine or penalty not exceeding TZS20 million;
- suspension or order for withdrawal of financial product or service or advertisement materials;
- suspension of management staff;
- impose conditions, restrictions or cancellation of registration or license provided;
- disqualification of management to carry out regulated activities;
- publication of names of offenders;
- reprimands; or
- other sanctions deemed appropriate.⁴

COVID-19 policy measures

Undoubtedly, the current global health crisis has disturbed the financial sector's stability, and financial service providers have taken measures to deal with the situation. The crisis has created new risks for consumers, increased breaches of law and threatened market integrity as financial service providers may face difficulties in complying with regulatory obligations.

Therefore, the Bank of Tanzania has had to adjust the regulatory requirements, and regulated bodies have had to adjust services and products while complying with legislative obligations.

In addition, the Monetary Policy of the Committee (MPC) of the Bank, following a thorough assessment of the impact of COVID-19 to various sectors, approved the following policy measures:

- to lower the Statutory Minimum Reserves (SMR) requirement from 7% to 6% to provide additional liquidity to banks;
- to reduce the discount rate from 7% to 5%, enabling banks to borrow additional funds from the Bank at a lower discount rate to then lend to their customers at a lower rate;
- to issue reduced haircuts on treasury bills from 10% to 5% and on treasury bonds from 40% to 20%, increasing the ability of commercial banks to borrow from the Bank with less collateral than before;
- to permit regulatory flexibility for banks and financial institutions to discuss restructuring of loans (loan repayment moratorium) with borrowers who are facing financial difficulty because of the pandemic. The granting of loan rescheduling will be granted to institutions conducting business in a transparent and impartial manner and determined on a case-by-case basis
- to increase daily transaction limits for mobile money customers from TZS3 million to TZS5 million as well as increasing daily balance amounts from TZS5 million to TZS10 million for all mobile money platforms in a bid to promote non-cash payments, avoid congestion in public spaces such as banking premises, and use of digital platforms.

The Bank further confirmed that Tanzania has adequate foreign exchange reserves for importation of goods and that it will continue to monitor the situation and take appropriate policy measures to limit the impact of COVID-19.

⁴ Regulation 61 Supra.

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