An Examination of The Adequacy Of The Nigerian Arbitration And Mediation Act 2023 On Electronic Proceedings

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Abstract

Electronic proceedings in arbitration gained increased attention following the outbreak of the Covid-19 pandemic. However, as in-person appearance in proceedings became impracticable and the nature and form of documents to be used in proceedings became more electronic, the promotion of electronic case management; adoption of virtual hearings; and examination of witnesses by remote means became the dynamic trend not only to satisfy the emergency needs in arbitration, but to establish a paradigm dictated by technology. The Nigerian Arbitration and Mediation Act, 2023 (AMA) repealed the Arbitration and Conciliation Act (ACA) Cap A18, LFN 2004 which made no far-reaching provisions on electronic proceedings. The AMA being a post Covid 19 legislation is expected to make valuable provisions in respect of effective utilisation of electronic proceedings as well as adequate protection of parties' and third parties' data and cyber rights. Using the doctrinal method, this paper assesses the adequacy of the provisions of the AMA in respect of electronic proceedings in arbitration. Appreciating the increasing need and necessity of the evolutionary involvement of electronics in arbitral proceedings, the paper suggests that there is the need for a regulatory framework for key issues relating to data protection, cyber security, party equality in electronic proceedings in arbitration, which the AMA and the Rules made thereunder might not have adequately addressed and therefore suggests amendments in respect thereto.

Keywords: Arbitration, Virtual Hearing, Electronic Proceedings, Data Protection, and Party autonomy

1. Introduction

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Alternative Dispute Resolution (ADR), especially arbitration, is the preferred means of resolving international commercial disputes owing to its flexibility and preference for party autonomy. Prior to the Covid-19 pandemic, the utilisation of *ad hoc* and permanent arbitral institutions to resolve disputes considered less the possibility of restrictions and hindrances to human movements across borders. In deciding place, mode and applicable legal regime to dispute resolution therefore, parties hardly viewed time and distance as limitations to arbitration. Based on party autonomy and fairness, they select any law to regulate and guide their transactions as well as regulates settlement of dispute between them; decide on any place as the seat of dispute resolution and also determine any time as appropriate for the resolution of disputes based on their conveniences, preferences and desires.

A variation to the above paradigm became noticeable upon the outbreak of the Covid 19 pandemic. Existing agreements as to ADR mechanism and modalities to be adopted were not only distorted by it; the practicability of relying on existing laws and rules to resolve disputes through ADR processes became illusive.[1] Covid 19 pandemic made in-person appearance in ADR proceedings impracticable as well as limited the nature and form of documents to be used.[2]This led to the promotion of electronic case management tools; adoption of virtual hearings; and the promulgation of guidelines relating to procedure, processes and proceedings in ADR.[3] From submission of request for arbitration to the final award, the pandemic led to the emergence of a dynamic trend towards electronic and technology based resolution of international commercial dispute.

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[1] S Wilske, 'The Impact of COVID-19 on International Arbitration-Hiccup or Turning Point?' (2020) (13) *Contemp. Asia Arb. J.* 7; ML Moses, 'The Principles and Practice of International Commercial Arbitration.,' (Cambridge University Press, 2017)

[2] E Ekpenyong and J Otakpor, 'Effect of COVID-19 Pandemic on Litigation And Dispute Resolution in Nigeria in 2021,' <https://www.mondaq.com/nigeria/arbitration--dispute-resolution/1053048> accessed 16 September 2023

[3] Law.com, 'How the COVID-19 Crisis is Reshaping Alternative Dispute Resolution,' <https://www. law.com/therecorder/2020/03/27/how-the... > accessed 6 November 2023

The conduct of modern international commercial activities through electronic communication and the Covid 19 pandemic made electronic evidence and the presentation of evidence in electronic form relevant to ADR processes in the resolution of international commercial disputes. The essence of evidence in trials is to establish relevant facts for the purpose of proving or disproving facts in issue.[4] In ADR, party autonomy is paramount; and accordingly, subject to the agreement of the parties, while admissibility, relevancy and materiality of evidence in ADR is as determined by the tribunal. Arbitral institutions either adopt electronic-only or hybrid means of conducting specific stages of proceedings. The challenges posed by the pandemic and the solutions advanced however became sources of statutory reformation for ADR processes, especially arbitration. The emergency measures and legal changes to arbitral processes generated sufficient attention that influenced subsequent legislation and as at the time the AMA 2023 was passed into law, the simmering chaos orchestrated by the pandemic had subsided and adequate lessons learnt from the legal structure adopted to combat its impact on arbitration.

By implication therefore, even though parties establish their cases through evidence; no strict rules have developed to differentiate or distinguish between electronic and non-electronic evidence in arbitration. The UNCITRAL Rules[5] states that each party shall have the burden of proving the facts relied on to support its claim or defence. Witnesses may testify on issues of fact or expertise and may do so orally or through written statements duly signed. Certain issues arise in respect of electronic evidence that require closer attention. Issues of data protection, e-discovery, cybersecurity and equal access to technology by parties are germane issues that any law on arbitration ought to address.

[4] F Badiei, 'Online arbitration definition and its distinctive features,' in M Poblet and Others (eds), *Proceedings of the 6th international workshop on online dispute resolution 2010*, (Liverpool, UK: Institute of Law and Technology Political Sciences and Public Law Department 2010)

[5]UNCITRAl Rules, art. 27 (1) and (2)

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The paper considers the impact of Covid 19 Pandemic in shaping the legal regime for electronic proceedings in ADR processes, particularly as regards arbitration. Although the paper adopts a comparative analysis of the issue of electronic proceedings in arbitration, its basic focus is the Nigerian Arbitration and Mediation Act, 2023. The paper proceeds to evaluate the state of electronic proceedings in arbitration prior to and during the pandemic; considered the necessity for a new law on arbitration in Nigeria and centred on electronic proceedings under the AMA 2023. The paper evaluates generally, the use of electronic proceedings in arbitral processes and procedure, especially as it regards filings, notices and evidence. The assessment of the challenges of electronic proceedings in arbitration was done so as to give a fair evaluation of the provisions of AMA 2023 on electronic proceedings, and upon which recommendations were made.

2. Recognition of Electronic Proceedings as influenced by the Covid 19 Pandemic

Arbitral institutions generally favour whatever procedure promotes fairness and party autonomy. Accordingly, inchoate electronic proceedings in arbitration were already cognisable and gaining ground prior to Covid 19. Arbitral institutions were already adopting measures favouring electronic initiation of arbitral processes; service of processes; and conduct of proceedings. One may however admit that this, in some instances, was limited andnon-compulsive. Covid 19 compelled most arbitral institutions to adjust their rules and applicable legislation to reflect a necessary adherence to electronic proceedings, at least, to a certain degree.

Rules were adjusted to allow request for arbitration be filed through online filing system or by email.[6]This includes applications for expedited formation of arbitral tribunal, emergency arbitrator or expedited appointment of replacement of arbitrator.[7]While some Rules insists that some of these processes must be pursued purely through

[6]London Court of International Arbitration, LCIA Rules 2020, art. 9
[7] LCIA Rules, art. 9

electronic means,[8]others treat them as preferential[9] and do not intend to eliminate totally, non-electronic means.

Apart from the request for arbitration, there was also a trend for other submissions in the arbitral process to be made by electronic-only filing. For example, the ICC's Guidance Note[10] made provision for electronic submissions. While there is no mutually congruent rule binding or enforceable by all arbitral tribunals in respect of electronic submissions, the parties or the arbitrators have since the Covid 19 pandemic favoured electronic submissions. This inclination also extends to evidence, both in form, presentation and witness hearing.

3. The Provisions of AMA 2023 on Electronic Proceedings in Arbitration and Mediation

The Arbitration and Mediation Act[11] was signed into law on May 26, 2023. The rules of evidence applicable to arbitration in Nigeria are regulated generally by the AMA 2023 and the Arbitration rules made there under; which replaced the repealed Arbitration and Conciliation Act (ACA) Cap A18, LFN 2004. This is true in respect of arbitrations to which that legislation applies; in other cases, it is the arbitration rules applicable to the arbitration or adopted by the arbitrators, or as may be specifically made for the forum before which the arbitration is conducted or as may be legitimised by the arbitral agreement to be enforced. The Act applies throughout Nigeria and was made in pursuance to sections 4(4)(b), 12(2), 19(d) and items 62 and 68 of the Second Schedule to the 1999 Constitution.[12] ADR processes now form part of the multi-door court house procedures of several states in Nigeria,[13] and are in most cases inherently provided for within the civil procedure rules of courts.[14] States have also made substantive

[8] ICSID Convention, art 25, SCC art. 5
[9]Vienna International Arbitral Centre (VIAC)Rules, 2021, art. 12, para 2
[10] ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic dated April 9, 2020
[11]AMA 2023
[12]*CG Geophysique v Etuk* (2004) 1 NWLR 853 at 20
[13] Rivers State Multi-Door Court House Law No. 9 of 2019, ss 17-21
[14] Rivers State High Court (Civil Procedure) Rules, 2023, Order 27

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legislation on issues of ADR procedure, especially, arbitration, conciliation and mediation.[15]For example, Lagos State Arbitration Law[16] and Lagos Court of Arbitration Law[17] provide for arbitration within Lagos state. By virtue of section 2 of the Rivers State Arbitration Law,[18] all arbitration in Rivers State shall be governed thereby except where the parties expressly agree that another arbitration law shall apply. Arguments as to the scope of application of such laws[19] has now been settled by the provisions of the AMA 2023, specifically sections section 1(5) and (6) which state that the AMA 2023 applies to international commercial arbitration; inter-state commercial arbitration within the Federal Republic of Nigeria; and commercial arbitration within the Federal Republic of Nigeria. AMA 2023 also applies to mediation[20] where it relates to international commercial mediation; domestic commercial mediation; domestic civil mediation; domestic and international settlement agreements by parties to resolve a commercial dispute by mediation; and where parties agree to mediation under AMA 2023.

In the absence of any exception provided under the AMA 2023 as to the existence of any law by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with the provisions of that other law,[21] international or

[15]Lagos State Arbitration Law No 8 of 2009, Rivers State Arbitration Law No 10 of 2019; N Ikeyi and O Amucheazi, 'Applicability of the Arbitration and Conciliation Act: Which Field Does the Act Cover?' [2013] (57) (1) *Journal of African Law* 126

[16] No.8, Laws of Lagos State, 2009, hereinafter 'Lagos Law'

[17] No. 10, Laws of Lagos State, 2009

[18] No. 10 of 2019

[19] JO Olorunfemi, Appraisal of Nigerian Arbitration and Conciliation act Towards a Better Reform,' being a PhD Thesis, submitted to the Faculty of Law, University of Nigeria, Enugun Campus, December 2015; CA Candide-Johnson and O Shasore, *Commercial Arbitration Law and International Practice in Nigeria*, (Durban: LexisNexis 2012) 248; A Rhode-Vivours, 'The Federal Arbitration Act and the Lagos State Arbitration Law: A Comparison,' <*http*\www. drvlawplace.com/media> accessed 2 January 2024; O Bakare, 'Issuesof Legislative Competence: Lagos State Arbitration Law,'<www.treasurethegreatblogspot.com/.../lagos-state-arbitration-law-2009-issues> accessed 21 January 2024

[20] AMA 2023, s 67(1)

[21]AMA 2023, s 65

interstate commercial arbitrations are subject to the AMA 2023;[22] be it statutory[23] or contractual; mandatory or by mutual agreement. The AMA 2023 was based on the UNCITRAL Model Law on Arbitration;[24] and also incorporates the UNCITRAL Arbitration Rules[25] with slight modifications.

Two cardinal principles regulate arbitral proceedings under AMA 2023. They are equality and fairness.[26] Accordingly, it confers power on the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence.[27] There are dynamic implications to this provision. Whereas AMA 2023 and the Rules thereunder mentioned applicable procedure to certain forms of evidence receivable in arbitral proceedings, no specific mention of electronic evidence was cognisable thereunder. As regards documentary evidence, the arbitral tribunal may order that documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[28] No attempt was also made under AMA 2023 to defined documents to include electronic documents, except it is incorporated by necessary inference. This is more so as by the combined reading of sections 15, 30 and 31 of the AMA 2023, the parties are at liberty to determine rules for the conduct of arbitration. Under section 30 therein, in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are treated equally and that each party is given reasonable opportunity of presenting its case; and accorded a fair resolution of the dispute without unnecessary delay or expense.

[22]AMA2023

[23]JF Olorunfemi, 'Section 11 of the 2004 Nigerian Petroleum Act is empty,' (2010) (2) (1) *Nigerian Journal of Petroleum, Natural Resources and Environmental Law* 1

[24] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, <https://uncitral.un.org/sites/uncitral.un.org/...> accessed 23 February 2024

[25] The text of the 2010 UNCITRAL Arbitration Rules, <http://www.uncitral.org/pdf/english/texts/ arbitration/arb-rules-revised/ arb-rules-revised-2010-e.pdf> accessed 23 February 2024

[26] AMA 2023, s 30 (1) and (2)

[27] AMA 2023, s 31 (3)

[28] AMA 2023, s 35 (3)

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From request to arbitrate to the enforcement of the arbitral award, certain processes have been influenced by electronic technology. Of this, giving of notices, filing of necessary papers and evidence are most likely to be impacted by electronic technology. AMA 2023 specifies that electronic notices as well as filings are acceptable. This is deduced from the express provisions of the AMA 2023 and the Rules thereunder, and impliedly from the liberty of the arbitrators in the conduct of arbitration as well as the principle of party autonomy that repose in the parties the liberty of choosing a procedure suitable to them.

It must be stated also that the parties are not restricted as to the mode and nature of evidence that may be adduced;[29] and indeed, evidence in other proceedings which are relevant are admissible.[30]At the hearing, subject to a contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings would be conducted by holding or a hearings for the presentation of evidence or for oral arguments, and whether the arbitration would be decided on the basis of documents and other materials; or by a combination of the methods.[31]Evidence that would be inadmissible was expressly enumerated therein.[32]

With respect to mediation, a party to the mediation proceedings, the mediator and any third-party, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceeding rely on, introduce as evidence or give testimony or evidence regarding an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings. Again, views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute; statements or admissions made by a party in the course of the mediation proceedings; proposals made by the mediator; the fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator cannot be admitted

[29] AMA 2023, s 36 (3)
[30] AMA 2023, s 77
[31] AMA 2023, s 38
[32] AMA 2023, s 77

in evidence. Documents prepared solely for purposes of the mediation proceedings are also inadmissible.[33]

The above does not preclude from admissibility evidence that is otherwise admissible in arbitral or judicial or similar proceedings as a consequence of having been used in mediation.[34]It is therefore obvious that the AMA 2023 made no distinction between electronic and non-electronic evidence in arbitration and mediation. Receipt of evidence in ADR has always been limited to what is expedient and agreeable by mutual preferences of the parties or as dictated by the rules adopted for the arbitral tribunal.[35]

Even though as stated, no distinction is made for electronic evidence and other forms of evidence, and no specific mention of electronic evidence appeared under AMA 2023; certain developments brought to the fore the relevance of electronic evidence in arbitration and the need to make specific rules in that respect, although limitedly on certain issues, has been compelling. As with litigation, testimony in arbitration may be oral testimony, deposition or written statement; any of these could be on oath or otherwise. Further, documentary or real evidence may be received for the purpose of establishing a fact in issue before an arbitral tribunal.[36]

In the process of arbitration, parties may be required to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine and it is within the powers of the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the evidence offered as hitherto stated.[37] A better appreciation of the issues of electronic impact, both on processes and evidence in arbitration demands the categorisation of the subject into

[33] AMA 2023, s 77(3)
[34] AMA 2023, s 77(5)
[35] C Pilkov, 'Evidence in International Arbitration, Criteria for Admission and Evaluation,' (2014) (80) (2) *Arbitration: The International journal of Arbitration, Mediation and Dispute Management* 147
[36] *Desputeaux v Editions Choutte*(1987) inc., Supreme Court, Canada, 21 March 2003, (2003) 1 SCR, 178, 2003 SCC 17
[37] UNCITRAL Rules, art. 27 (3) and (4)

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the use of electronics in filings and services; the use in the presentation of evidence in arbitration, and evidence in electronic form in arbitration.

4.1 The use of electronic means in filing and service of processes

Covid 19 results in the accommodation in arbitral proceedings of electronic initiation of arbitration, electronic filing and service of processes and notices.[38]The use of electronic means enhanced such processes as the applications for expedited formation of arbitral tribunal, appointment of emergency arbitrators or expedited appointment of replacement of arbitrators.[39] AMA 2023 recognised that an arbitration agreement may be in any form and incorporates electronic communication as means of creating enforceable arbitral agreement.[40] The condition for the recognition of a notice as validly given of any communication and to establish that it is rightfully transmitted and received is that it is in a form that provides for or allows a record of its transmission. This accommodates electronic communications and notices in the arbitral process.[41]

4.2The use of Electronic Devices in the Presentation of Evidence in Arbitration

Most rules relevant to arbitral processes now provide for the use of technology in the presentation of evidence. The UNCITRAL Rules provides that the arbitral tribunal may direct witnesses, including expert witnesses, to be examined by electronic means through telecommunication that do not require physical presence of witnesses at the hearing.[42] The same position applies under the AMA Rules.[43]The ability of arbitrators to permit witnesses to give their evidence through electronic platforms resonates in all arbitral rules of procedure. The London Court of International Arbitration Rules (LCIAR) provides for electronic documentation and virtual proceedings.[44] As it regards the

[38] London Court of International Arbitration, LCIA Rules, art. 9
[39] LCIA Rules, art. 9
[40] AMA 2023, s 2(3) and (4)
[41] AMA 2023 Rules, art. 2(1)
[42] *Ibid*, art. 28 (4)
[43] *Ibid,* art. 29 (4).
[44] LCIA, art. 1 (3)

testimony of a witness, the arbitral tribunal may decide that the witness submit a written testimony to be exchanged between the parties.[45]But the arbitral tribunal or any of the parties may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal.

Where the Arbitral Tribunal orders a party to secure the attendance of a witness and the witness refuses or fails to attend the hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances.[46]

4.3 Evidence in Electronic Form in Arbitration

Both the AMA 2023 and the AMA 2023 Rules made no specific reference to electronic evidence in arbitration. But as have been noted earlier, it could be inferred that electronic evidence is admissible thereunder. Rules of arbitral institutions hardly make specific provisions as to electronic evidence. For example, apart from provisions relating to the giving of evidence through electronic means, the LCIA Rules in articles 20 and 21 relating to witnesses and experts made no provision expressly, specifically or exclusively to electronic evidence. The UNCITRAL Model Law on Arbitration and the UNCITRAL Rules also made no such provisions. The LCIA Rules however makes more elaborate provisions by conferring additional powers on the arbitral tribunal. Section22 thereof permits the arbitrators to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal;[47] and to order any party to produce documents or copies of documents in their possession, custody or power as may be relevant.[48] It is only reasonable that by inference, one may assert that documents and sites could include electronic documents and web sites.

[45] LCIA, art. 20 (3) and (4)
[46] LCIA, art. 20(5)
[47]LCIA, art. 22 (1) (4)
[48]*Ibid.*, art. 22 (1) (v)

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Under the International Chamber of Commerce (ICC) Arbitration Rules, 2021, similar provisions as contained in the LCIA Rules 2020 as discussed above were also provided.[49] ICC Rules states that in consultation with the parties, and on the basis of the relevant facts and circumstances of the case, the arbitral tribunal should determine whether hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication. The 2023 Rules of the Stockholm Chamber of Commerce Arbitration Rules, 2023 (SCC Rules),[50] provides that admissibility, relevance, materiality, and weight of evidence shall be for the Arbitral Tribunal to determine.[51]The Arbitral Tribunal may order a party to identify the documentary evidence it intends to rely on and specify the circumstances intended to be proved by such evidence.[52] Parties may request the tribunal to order the production of documents that may be relevant to the case and material to its outcome.[53] Hearing may also be conducted remotely in whole or in part with the consent of the parties;[54] and witnesses may submit written statements.[55]

The American Arbitration Association International Centre for Dispute Resolution (ICRD) Rules 2021 appears more elaborate on issues of electronic processes and remote hearing.[56] In the conduct of the proceedings, the ICRD Rules[57] provides that the tribunal should discuss cyber security, privacy and data protection with the parties in order to provide an appropriate level of security and compliance in connection with the case. The ICRD Rules also makes helpful resources available to the parties in respect of Best Practices Guide on cyber security checklist. Article 32 of the ICRD Rules provides that electronic

[49] ICC Rules, art. 26(1)
[50] SCC Rules, art. 31
[51] *Ibid.*, art. 31(1)
[52] *Ibid.*, art. 31(2)
[53] *Ibid.*, art. 31(3)
[54] *Ibid.*, art. 32
[55] *Ibid.*, art. 33
[56] E Stein, 'Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings,' in Maxi Scherer and Others (ed.), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International, 2020) 170
[57] ICRD art. 22

signatures may be used in respect of awards, except the applicable law requires a physical signature, or the parties agree that a physical signature is necessary, or the arbitral tribunal or Administrator determines that a physical signature is appropriate.

Under the Code of Sports-related Arbitration (CAS) in force as from 1 July 2020 applicable to the Court of Arbitration for Sport, the use of tele-conference and video-conference in hearing is also permitted,[58] with the agreement of the parties. Generally, the evidentiary proceedings are as ordered by the Panel; however, a party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant. If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step.[59]

A general trend in the Rules analysed above shows that the arbitral rules do not make separate or special provisions for electronic evidence. The challenge with this is that rules on relevancy and admissibility of electronic evidence are usually based on principles which may not be relevant for other forms of documentary and non-documentary evidence. The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, 2020 and the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) 2018 are very relevant to the issue of electronic evidence in arbitration. They both provide template for evidentiary issues before an arbitral tribunal.

One major clarification of the IBA Rules is the express definition of document to include all forms of electronic and digital evidence. The IBA Rules defined documents to mean ‘a writing, communication, picture, drawing, program or data of any kind, whether recorded or

[58]Cas Rules, r44(2)
[59]CAS Rules, r44(3)

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maintained on paper or by electronic, audio, visual or any other means.' Under the IBA Rules,[60] the arbitral tribunal determines the efficient, economical and fair process for the taking of evidence in consultation and agreement with the parties. Issues to be considered include the level of confidentiality protection to be afforded to evidence in the arbitration and the treatment of any issues of cyber security and data protection.[61] Documents maintained by a party in electronic form shall be submitted or produced in the form most convenient or economical to it and reasonably usable by the recipients.[62]

Under article 3(a)(ii) of the IBA Rules, a request to produce electronic documents shall be accompanied by the identification of specific files, search terms, and individual or other means of searching for the documents in an efficient and economical manner. The parties should consider if metadata will form part of the disclosure. This identification is to be requested by the requesting party or the arbitral tribunal. Article 9 of the IBA Rules however specified grounds to reject evidence by the Tribunal; which include lack of relevance; legal impediment or privilege; unreasonable burden; considerations of procedural economy or efficiency.

The Prague Rules states that documents shall be submitted or produced in photocopies and/or electronically.[63]The submitted or produced documents are presumed to be identical to the originals unless disputed by the other party.[64]Article 4(2) of the Prague Rules relating to documentary evidence states as a general rule that the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery. This suggests that e-discovery is a possibility in arbitral proceedings if it becomes necessary, although discouraged.

4. Challenges and Inhibitions to Electronic Proceedings

[60] IBA Rules, art. 2
[61] *Ibid.*, art. 3(1)
[62] *Ibid.*, art. 3(9)
[63] *Ibid.*, art. 4(7)
[64] Prague Rules art. 4(7)

The introduction of procedural amendments to accommodate remote hearing through video communication and other means of audio-visual messaging raised questions regarding due process rights of the parties;[65] which are fundamental to the validity of resolution mechanism. Granted that arbitral filings can be effectively done online with little or no hitches, same is not totally true of hearing processes. In arbitration, just as in litigation, evidence is critical to the outcome and there are instances where examination of witnesses and test of their veracity may be necessary, such may be impaired by remote hearing.

Article 18 of the UNCITRAL Model Law on Arbitration recognises that parties have right to be treated with equality in the presentation of their cases; a tribunal's insistence on virtual hearing could be seen as a compromise, except the parties agreed on this. The general portrait of an effective dispute resolution mechanism envisages certain minimum level of procedural fairness,[66]which has been projected to possess such elementary qualities as right and access to notice of the case against it; opportunity to present its case and defend that put against it; assurance of impartiality and independence of the tribunal and security of equal treatment.[67]

Again, in international commercial disputes; parties, arbitrators and witnesses could be in different jurisdictions and time zones, making geographical barriers an issue in remote hearings.[68] Further challenges in the deployment of virtual technology in dispute resolution has been identified[69]and could encompass such issues as lack of technical-know-how in respect of the utilised technology; inhibitions in tendering of

[65] T Adebanjo, 'Trends in Mitigating the Effects of COVID-19 on International Arbitration,' (2020) <https://doi.org/10.2139/ssrn.3724375> accessed 12 March 2024

[66] Gary Born, International Commercial Arbitration, (3rd ed., Kluwer, 2021) 3828

[67] Lucy Reed, 'Ab(use) of due process: sword vs shield,' [September 2017] (3) *Arbitration International* 33

[68] EP Rusakova and E Young (2023). 'The Impact of Digital Technologies on Arbitration Courts,' in SG Maximova and others (eds) *Advances in Natural, Human-Made, and Coupled Human-Natural Systems Research*, Lecture Notes in Networks and Systems, (2023) vol 250 (Springer, Cham.) <https://doi.org/10.1007/978-3-030-78083-8_43> accessed 23 March 2024

[69]*Ibid*

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exhibits, cross-examination and anxieties regarding privacy breaches and cyber security threats. That these inhibitions are better sorted by mutual agreement of parties to avoid invalidating the whole process,[70] rather than through legislative intervention could be the reason for restrictive provisions in AMA on electronic proceedings.

The use of technology for any purpose is usually subject to certain inhibitions, which include availability, uniformity of platform and technical know-how. These issues would most often arise as to the use of technology in arbitration. When and where they do arise, they would always generate issues regarding procedural fairness, platform accessibility and hindrances in compliance.[71]Virtual hearing is almost wholly technology dependent and as such, concentration may be hindered by disruptions occasioned by failures in technology. This could lead to prolonged hearing thereby hindering focus and concentration.

Further, internet availability, internet security and internet reliability are not proportionate as they are largely dependent on municipal laws and the level of technological advancement and access within each state. Electronic proceedings in arbitration could be vulnerable to online fraud, cyber insecurity and information leak. The 2020 International Arbitration Cyber security Agreement was adopted to deal with this.[72] This Protocol was adopted by the International Council for Commercial Arbitration (ICCA), New York City Bar Association (NYC Bar) and International Institute for Conflict Prevention and Resolution (CPR). It was reviewed in 2022.The purpose for the Protocol was to provide a

[70] P Damodaran, 'Consolidation of Arbitration Without Parties' Consent: A Threat to Party Autonomy?' (July 28, 2020) <https://ssrn.com/abstract= 3662152 or http://dx.doi.org/10.2139/ ssrn. 3662152> accessed 22 March 2024; GW Ghikas, 'Consent to Arbitration, Party Autonomy, and Non-Signatories: A Review of Procedural, Analytical, and Substantive Approaches under Canadian Laws,' (2021) *Canadian Journal of Commercial Arbitration* 1

[71] O Ikubanni and A Abiola, 'Impact of Technology on Alternative Dispute Resolution in Nigeria and the Birth and Challenges of Online Dispute Resolution,' [2013] (10) (4) *Global Journal of Politics and Law Research* 113

[72]Protocol on Cyber Security in International Arbitration, <https://drs.cpradr.org/rules/protocols-guidelines/...>, accessed 22 March 2024

'framework for determining reasonable information-security measures for individual arbitration matters and increasing awareness about information security in international arbitration.'[73] Scope of security issues covered includes prevention of loss of information due to unauthorized access; integrity of information through security against unauthorized change and availability of necessary information in relation to information related to arbitration proceedings.[74]

It must however be appreciated that electronic processes like electronic signature, digital signature, cyber security are subject to municipal laws;[75] hence the validity of measures adopted by the arbitral tribunals, except where the parties acceded to it, could also become issue under municipal laws.[76]

4.4 Rationale for limited specific provisions regarding electronic proceedings in Arbitration

One major advantage of arbitration is that it defies national limits in the approach to dispute resolution by allowing flexibility and party autonomy. It would appear that no rule or law prescribes separate or distinct rules of admissibility of electronic evidence in arbitral proceedings to give room for party autonomy, procedural flexibility and discretion of arbitrators.This much could be garnered from the ICC Commission Reports on the Techniques for Managing Electronic Document Production when it is permitted or required in International Arbitration (The Report). It was stated therein that:[77]

> It does not seem necessary to prescribe specific "rules" or "guidelines" applicable specifically to the production of electronic documents. Furthermore, it may be undesirable to

[73] Foreword to the Protocol on Cybersecurity in International Arbitration, 2022
[74] *ibid*
[75] *Ibid*
[76] KA Alshakhanbeh, 'The Impact of Covid-19 on International Commercial Arbitration: Challenges and Solutions,' (2022) (10) (1) *Global Journal of Politics and Law Research* 23-32
[77] ICC Commission Reports on the Techniques for Managing Electronic Document Production When it is permitted or Required in International Arbitration, <https://library.iccwbo.org/content/dr/ COMMI SSION...> accessed 25 March 2024

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> do so to the extent that such rules or guidelines may compromise the parties' and arbitrators' flexibility to address issues in light of the particular circumstances of each case. In particular, the production of electronic documents, if any, should not jeopardize the efficient and cost-effective use of arbitration and thus its attractiveness as a method of dispute resolution.

The Report identified two major means of adducing documentary evidence as reliance on document in the custody of the producer and those that are in the custody of the opponent. Accordingly, the pace with which the production of document is achieved will affect the speed of the ADR process. The discretion of the arbitrators to determine specificity, relevance, materiality and proportionality is therefore understood to apply to the production of both paper and electronic documents. Since party autonomy, efficiency and speed is most desired in arbitration processes, it would appear quite appropriate, to avoid developing any special rule for electronic evidence.

The advantage this pose to arbitration processes is that the tribunal can identify only relevant and material documents electronic documents for production or necessary materials for e-discovery. The Report suggests that the identification of necessary materials, the rule as to best practice, the speed of production; whether the requested production would be likely to impose an unreasonable burden on the producing party; the benefits of production, cost and other relevant considerations would guide the tribunal in deciding on whether production is necessary.

The rational for jettisoning strict evidentiary requirements for authentication of electronic evidence is to ensure that the objectives of arbitration are not defeated by rules. Accordingly, where there is no rigid, detailed and binding standards limiting the liberty of the parties and tribunal to resolve issues in dispute expeditiously, mutually and in a friendly and effective manner, without creating

new sets of legal issues relating to documentary discovery and production, such a means is adopted.

The relevant conclusion to be drawn therefore is that the arbitral institutions as well as writers on the issue of electronic evidence in ADR favour the approach that permits the parties and the arbitrators to adopt procedures that avoid e-disclosures. The ICDR Rules,[78] for example, suggests that arbitrators avoid litigation-styled discovery practices in reference to electronic evidence. Even the IBA Rules that is most detailed on issues of electronic evidence provides in the accompanying commentary that 'Expansive American or English style discovery is generally inappropriate in international arbitration.'[79]

Nonetheless, one may observe that some Rules have deliberately developed relevant provisions to protect parties where electronic processes and procedures are utilised. Amongst these are the Prague Rules, the IBA Rules and the American Arbitration Association International Centre for Dispute Resolution (ICRD) (2021) Rules. The provisions under these Rules preserve the confidence of parties where there arises the need for the use of electronic evidence and electronic hearing.

5. Conclusion and Recommendations

Granted that most of the arbitral rules give the arbitral tribunal the power to determine admissibility, relevance, materiality, and weight of evidence; electronic discoveries and electronic evidence usually require specific principles for its admissibility which appeared not adequately recognised under AMA and the AMA Rules but of which sufficient provisions are cognisable under the Prague Rules, the IBA Rules and under the ICRD Rules. In the conduct of proceedings, the ICRD[80] provides that the tribunal should discuss cyber security, privacy and data protection with the parties in order to provide an appropriate level of

[78] ICDR Rules, preamble

[79] E Shirlow, 'E-Discovery in Investment Treaty Arbitration: Practice, Procedures, Challenges and Opportunities, (2020) (11) (4) *Journal of International Dispute Settlement* 549–588

[80] ICRD Rules, art. 22

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security and compliance in connection with the case, the ICDR also makes helpful resources available to the parties in respect of Best Practices Guide on cyber security checklist. This is very crucial for a post Covid 19 rule on arbitral proceedings and one would have expected that such provisions would have influenced the AMA 2023 when it comes to security of electronic proceedings. Additionally, tests for admissibility of electronic evidence would generally include tests for validity of the electronic information or statement; integrity of device; accuracy and authentication. Conceding that proof and weight is to be determined by the arbitral tribunal, no principle is decipherable under AMA 2023 or the AMA 2023 Rules to determine the basis upon which the tests of admissibility of electronic evidence or e-discovery can be pursued in arbitration. This leaves a panel constituted under the AMA 2023 and the Rules thereunder with no choice than to rely on experience and external rules as guide. This position may not only lead to disagreement between parties, it could also complicate the arbitral process. It would appear that the legislature took less attention of the developments in international laws and rules regulation arbitral processes as at the time AMA 2023 was passed into law.

Innovations in arbitration suggests that there is increasing need and necessity of the evolutionary involvement of electronics in proceedings. This on its part creates the basis for regulatory framework for key issues relating to data protection, cyber security, party equality as regards electronic access and use in arbitration proceedings; and also, as it regards artificial intelligence in arbitral proceedings. It is therefore recommended that there is the need to alter the present provisions of AMA 2023 and the Rules thereunder to recognised data protection and cyber security strategies. This prevents overreliance on municipal laws and external rules. Further, the need to recognise electronic evidence as done electronic communications in section 91 of AMA 2023 is necessary.