

DIALOGUE ON VIRTUAL COURT HEARING IN NIGERIA- OPPORTUNITY FOR CONTRACT ENFORCEMENT AND COMMERCIAL DISPUTES SETTLEMENT REFORM

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Introduction

The coronavirus COVID-19 pandemic (COVID-19) disrupted the traditional ways of interactions and the conduct of business globally. Perhaps the most significant proof of the disruption is the routine adoption of virtual channels for the transaction of businesses and hosting of institutional functions. In Nigeria, even the conservative institution for justice administration embraced this new normal. As part of their efforts to cushion the effect of the COVID-19 pandemic, the Nigerian Justice Administration system under the leadership of the various Heads of Courts introduced emergency rules for the use of virtual court hearings (VCH) in the resolution of disputes. As we shall see in the review of the rules, they are limited in scope with the goal being empowering the courts to determine urgent matters during the subsistence of the pandemic.

Beyond the stop-gap measure, the introduction of VCH in the administration of justice in Nigeria offers a rare opportunity for reforming the justice delivery system particularly for contract enforcement and commercial dispute resolution. COVID-19 provides a unique opportunity for us to rethink the way commercial disputes are resolved with a view to, increasing efficiency and saving costs and ultimately adding to the ease of doing business drive in the country.

This paper looks at the opportunities provided by a full adoption of VCH post-COVID-19 in the resolution of commercial and investment disputes and how this can serve as a catalyst for further improvement of the investment climate in Nigeria. It analyses the traditional hurdles to VCH and contends that the hurdles are of less significance in relation to commercial disputes. It also makes recommendations on how VCH can be better deployed or structured to solve the perennial

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problem of delays in the effective resolution of commercial disputes and enforcement of contract in Nigeria.

Difficulties in the resolution of commercial disputes and contract enforcement and its effect on the investment climate in Nigeria

There is no doubt that one of the major constraints to ease of doing business in Nigeria and ultimately, the investment climate, is the near absence of an effective Administration of Justice system capable of resolving commercial disputes in real-time due to inordinate delays occasioned by administrative, infrastructural and other challenges.

Investors, whether local or foreign, measure the viability of investments on the ease of contract enforcement in the event of a dispute. According to the Organization for Economic Co-operation and Development (OECD), the ability to make and enforce contracts and resolve disputes is fundamental to proper market functioning. This is because an effective enforcement procedure enhances predictability in commercial relationships and reduces uncertainty by assuring investors that their contractual rights will be upheld promptly by local courts².

The procedure for contract enforcement in Nigeria is not only bureaucratic and cumbersome, in practical terms; it is almost impossible, frustrating and lacking commercial utilitarian value. Under the current system, it takes years to resolve simple contractual disputes and by the time a matter is concluded and appeal process concluded, the transaction would have been rendered valueless.

Many factors contribute to the precarious state of our contract enforcement process. They include inadequate funding for infrastructural upgrade, too few Judges and support staff, lack of judicial autonomy, archaic law and rules, attitude of lawyers etc. In reality, by far the greatest challenge is the lack of proper case management process and zero automation. This is mainly the reason efforts such as the fast-track system for commercial cases in some states have not yielded any result.

Today, a large chunk of judicial time is expended on issues such as service of court processes and hearing notices. There is the difficulty in the production of witnesses in court, including obtaining experts' testimony in serious commercial disputes especially when they are outside the jurisdiction of the Court. There is also the practice where when judges are transferred from one

²<https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm>

division of the court to another, the cases they were handling in their former division is started *de novo* even though they had made considerable progress to the frustration of litigants.

Court users spend the whole day in court for a matter that may not take more than 20 minutes. There is nothing more frustrating than to keep litigants and lawyers in Court without an approximate indication of when their matters will be called. The cost is unimaginable. Sometime when the court is unable to sit for whatever reasons, court users would have wasted the cost of attending the court for the day.

While investors now prefer to refer their disputes to arbitration, in many cases the court cannot be avoided and awards made in arbitral proceedings must be given judicial imprimatur in an enforcement process.

The Opportunity offered by VCH for quick dispensation of commercial disputes

The adoption of VCH would go a long way in addressing some of the problems beleaguering the Justice system especially in relation to resolution of commercial disputes and enforcement of contracts. VCH will facilitate the ease of doing business in Nigeria for the following amongst other reasons:

- a. VCH will encourage the automation of the Justice Administration System and processes.
- b. The opportunity for seamless electronic communication between the court and the parties, and between the parties which VCH provides would ultimately reduce the time spent on procedural matters and appeals arising therefrom.
- c. Timely delivery of judgement and rulings and easy access to records owing to the availability of modern recording devices on VCH platforms.
- d. Reduction in time and cost of producing witnesses in court especially where parties are not resident within the jurisdiction of the Court. This will also curb dishonest requests for adjournments which is one of the major factors causing delays in justice delivery.
- e. Transparency in commercial dispute resolution. Compared to physical hearing, VCH is more likely to boost and increase the public's interest and access to the courts. This is because, with appropriate measures and platforms available for accessing court proceedings, members of the public can easily attend court hearings. This will encourage openness and transparency.
- f. Time-based adjournments which will reduce the time people spend in courtrooms and make the business of the court more business-like. The present practice where litigants and lawyers attend Court without an approximate indication of what time their matters will be called is very cumbersome. Experience has shown that often parties and their lawyers can spend an

entire day in court without their matters being heard at all. With VCH, matters are adjourned to a specific time with links to joining the meeting sent out to parties and their counsel.

- g. Reduction in the cost of prosecuting a matter. Litigants, counsel and witnesses will be able to conduct cases from the comfort of their offices with no transportation and incidental costs.
- h. VCH provides a solution to the problem of starting a matter *de novo* upon the transfer of a judge to another Division. With VCH, a judge would be able to hear and conclude a matter from any division effectively putting an end to the incidence of matters starting *de novo*.
- i. Focused hearings: VCH is more focused as all interested parties particularly legal practitioners strive to make their position clearer, more concise and within the shortest possible time. This will likely make the issues in dispute easily defined and judgments shorter and simpler.
- j. A major feature of the modern dispute resolution process is the parties' agreement on procedural issues. This includes agreement on issues such as timetable and scheduling and submission of agreed draft orders for the Court's approval where possible. This reduces the need for hearings or issues for determination at hearings. VCH will encourage this practice to take root in Nigeria in settlement of commercial disputes.

The Nigerian court system must be reformed to fully embrace these opportunities. There is, therefore, the need to comprehensively review the existing legal and infrastructural framework to formulate generally accepted principles in line with international best standards on VCH in commercial disputes and contracts enforcement.

Review of Legal Framework for VCH in Nigeria

Until COVID-19, no serious thought was given to VCH in Nigeria. Hence, there is no express provision in the substantive laws and rules that formed and govern the superior courts in Nigeria. Indeed, the entire gamut of the enabling laws and rules contemplates only physical hearing in public³ in line with the provisions of the 1999 Constitution as amended⁴. Even in the few instances where electronic filing has been incorporated in some of the rules⁵, there is currently no infrastructural mechanism to support the practice. It must, however, be noted that the Lagos State judiciary has been experimenting with the use of videoconferencing though it has not been expressly provided for in the rules.

The shutdown of court due to COVID-19 forced the judiciary to introduce VCH. There is a common thread in the directions perhaps because they adopted the Guideline issued by the National

³ See order 49 of the Lagos High Court (Civil Procedure) Rules, 2019, Order 58 rule 2 of the National Industrial Court (Civil Procedure) Rules, 2017, Order 46 of the Federal High Court (Civil Procedure) Rules

⁴ Section 36 (3)

⁵ See for example Order 58 of the Federal High Court (Civil Procedure) Rules, 2019, section 44 of the Federal High Court Act

Judicial Council under the hand of the Chief Justice of Nigeria. Below are the features of the Practice Directions:

Nature of matters for VCH

Urgent matters, time-bound matters, bail applications, matters that do not require the taking of evidence to be heard remotely. All judgments, Rulings and Directives may be delivered or rendered remotely.

Method/Platform

Video Conferencing or any other method including Zoom, MS365, Google Meetings, Skype or any other audio-visual platform approved by the Court.

Public Access

Court to ensure that the Remote Court sitting is accessible to the public except where it involves Ex-Parte Applications. Live streaming of all Virtual Court Proceedings through a publicized Uniform Resource Locator (URL) or the Web address of the court or any other Social Media Channel so that members can observe the proceedings

Post-COVID-19 Use of VCH

The current Practice Directions are limited because their focus is on COVID-19. There is no substantive provision enabling the use of VCH post-COVID-19.

Legal basis for Practice Direction and the Constitutionality of VCH

Though there are no substantive provisions in the statutes establishing the various courts on videoconferencing or VCH generally, there is no doubt that the heads of the various courts which issued the Practice Directions have the constitutional powers to do so. Section 236 of the 1999 Constitution of the Federal Republic of Nigeria (the constitution) empowers the Chief Justice of Nigeria to make rules for the Practice and Procedure of the Supreme Court. Section 248 of the constitution empowers the President of the Court of Appeal to make rules for the Practice and Procedure of the Court of Appeal. Section 254 of the constitution empowers the Chief Judge of the Federal High to make rules for Practice and Procedure of the Federal High Court. Section 254 F (1) of the constitution empowers the President of the National Industrial Court to make rules for the regulating Practice and Procedure of the National Industrial Court (NIC). Section 274 of the constitution empowers the Chief Judge of a State to make Rules for the regulation of Practice and Procedure of the State High Court.

The major concern expressed by many when the Practice Directions were issued was whether or not a virtual hearing qualifies as a hearing in public as contemplated by the Constitution. This

argument may have been put to rest as the Supreme Court recently held in test cases filed by Lagos and Ekiti States that VCH was not unconstitutional. In any case, the Directions make room for allowing the public to participate in the proceedings. It is safe to say that a virtual court hearing may even be more public than a physical hearing as more people would have access to the Hearing more easily than they would in physical hearing.

However, beyond the question of whether VCH satisfies the constitutional requirement of public Hearing or not, there is need for the process to be structured in a manner as to meet the test of a fair trial. This requires express provisions on minimum standards for a VCH. There is also the challenge that the rules were targeted at addressing the courts' shutdown due to COVID-19. There is, therefore, the need to fashion out a more substantive rule and even a law on VCH with detailed provisions on all aspects of the process.

Lessons from other jurisdictions

The lack of substantive law or rules on VCH beyond the Practice Directions specifically designed in response to COVID-19 may be a major stumbling block to VCH post-COVID-19. This is not the case in other jurisdictions. In a survey of 25 countries carried out by the Library of Congress in April 2020, many countries had substantive provisions enabling the use of video-conferencing before COVID-19⁶. With the occurrence of the Covid-19 pandemic, these countries only strengthened the existing substantive provision on video-conferencing. In the United Kingdom, for example, the Coronavirus Act, 2020 made copious provisions for VCH even in criminal proceedings⁷. In Kenya, before the pandemic, courts already put in place guidelines and rules allowing virtual proceedings. Under the guidelines, parties and counsel were allowed to file applications and submissions via email and the judgement is posted to them.

Under the Federal Court of Australia Act, the court may allow or direct witness testimony or submission to be made via video link. The parties are at liberty to request for hearing via video link. The Act contains provisions on administration of oath and procedure for admissibility of documents. The provisions were strengthened to facilitate virtual hearing during COVID-19. This is the same in Austria, Canada, Ukraine and many other countries.

Generally, the following are lessons to be learnt from the practice on VCH in other jurisdictions:

⁶ See <https://www.loc.gov/law/help/virtual-civil-trials/virtual-civil-trials.pdf>

⁷ See sections 53-57

1. Parties' Consent: The rules allow parties to consent to VCH. This can be achieved by requesting litigants to indicate whether or not they want their commercial disputes to be determined in a VCH at the time of instituting the action or filing a defence.
2. Case by case application: the practice in other jurisdiction recognizes that not all cases may be suitable for VCH. The court has discretion in determining whether a particular case qualifies for VCH. **Most commercial disputes and cases on enforcement of contract should qualify for VCH since they are largely document based.**
3. Detailed provision on administration of oath and admissibility of documents.
4. Substantive law or rules supporting the practice.
5. Court connected VCH facilities which can be used by parties with minimal cost.

Challenges to VCH in the resolution of commercial disputes and contract enforcement

Constitutionality of VCH

On July 14, 2020, the Supreme Court, in suits filed by Lagos and Ekiti States, decided that VCH is not unconstitutional. This decision is an advisory opinion because the cases which invited the court to decide the point were withdrawn and struck out. There is, however, ongoing efforts to amend the 1999 Constitution to expressly accommodate VCH. Perhaps a much faster approach would be to define the word 'public' in reference to Court Hearing in the Interpretation Act to include the Virtual Court Hearing Platforms⁸. This will dispense with the rigorous constitutional amendment process.⁹ However, while commending the efforts to provide expressly for VCH for the purpose of certainty, it may be safe to say that there is nothing in our laws which expressly preclude VCH provided it is conducted in such a manner as to ensure fair hearing.

Data Security and Confidentiality

There has also been a concern that commercial and contractual documents may not be safe in a VCH and that there is an increased chance of breach of confidentiality. However, documents filed in court and used in proceedings, whether physical or virtual, are ordinarily, public documents and generally accessible to members of the public. It is therefore doubtful whether this is a real concern that should affect the adoption of VCH in the resolution of commercial disputes. The

⁸See Section 318 (4) of the Constitution of the Federal Republic of Nigeria

⁹See Section 9(3) of the Constitution of the Federal Republic of Nigeria. The provision Public Court Hearing being a matter in Chapter IV of the Constitution, requires the approval votes of not less than four-fifths majority of all the members of each House, and also resolution of the House of Assembly of not less than two-thirds of all States.

Constitution also has room for situations where court hearings cannot be accessible to members of the public. Parties can take advantage of those circumstances in appropriate cases.

Public Access

Best practices and public policy demands that members of the public should be able to access the proceedings through live streams on platforms like YouTube and Facebook. The facilities that enable members of the public to be part of VCH are essential to fair hearing in view of the Constitutional provision on public access. The fear has also been expressed that VCH may shutout litigants who are not tech savvy or who cannot afford the requisite facilities. However, practically everyone with a Smartphone today can access VCH. Parties should also be allowed to agree to the practice and a system can be put in place to allow small claimants to access court connected facilities for VCH.

Trial and examination of witnesses

There is a clear challenge in dealing with trial which requires that evidence be produced live, and hearings involving multiple parties. Many have, quite rightly, raised issues about the difficulty in analyzing and assessing a witness' demeanour in VCH to determine the truth and accuracy of testimonies. This cannot simply be wished away. In many cases like criminal trials, complex cases involving extensive cross-examination and matters involving the welfare of children, the problem is real. However, commercial disputes are largely based on documentary evidence. There are existing rules which enable parties to agree on a document-only resolution by courts and rules¹⁰ can be formulated to regulate such hearings and setting out minimum standards on lighting and the environment in which parties and their counsel conduct trials. The key requirements are fairness, openness and transparency of the process. Parties in commercial disputes should also have room to agree to the process. In a judgment delivered by the English Commercial Court¹¹, the court commented on the success of a trial which was conducted via video conference. The claim was worth over five hundred million United States Dollars (\$500,000,000) and the hearing involved expert witnesses, with participants from four different jurisdictions. The hearing was however shown on a screen in the courtroom and made available for viewing online.

Infrastructure and Requisite Skills

¹⁰ See for example the Lagos State Expeditious Disposal of Civil Cases Practice Direction, 2019

¹¹ National Bank of Kazakhstan the Republic of Kazakhstan v The Bank of New York Mellon SA/NV London & Ors [2020] EWHC 916 (Comm). Available online at <https://www.bailii.org/ew/cases/EWHC/Comm/2020/916.html>

Lack of technological infrastructure needed to support VCH in many courts across the country is a major challenge. There are also skills gap in personnel needed to make it work both at the bar and bench. The good news, however, is with modern technology, not much investment will be needed to make VCH a reality. States can simply designate commercial courts with the requisite technological infrastructure to support VCH. Given the importance of quick dispensation of justice to the investment environment, priority should be placed on resource allocation to developing and acquiring up-to-date technological facilities for VCH and secure data management for the sharing of large data. Public private partnership should also be explored for funding.

Admissibility of Documents

The Evidence Act, 2011, is the principal enactment on evidence in Nigeria. A combined reading of the Act would suggest that it contemplates the physical tendering and admission of documents. Though there are copious provisions on admissibility and proof of execution of electronically generated evidence¹², it may be argued that the Act does not envisage a situation where documents will be admitted in a VCH. There is also the issue of the label to place on a document filed and tendered electronically, is it primary or secondary evidence? These doubts would require the amendment of the Evidence Act to expressly make provisions on admissibility of documents in a VCH.

Few judges and Courts in Rural Areas

For all the benefits of VCH, it cannot address the main problem of fewer judges compared to cases in our courts. Many of our courts are in rural areas without quality access to the internet. These are fundamental issues that must be addressed for VCH to thrive on a large scale. For VCH to be effective, one requires access to a computer/Smartphone, a good internet connection and electricity. Many people in the rural areas cannot afford this. However, we can start off the process with big commercial cases where the parties and counsel can afford these facilities.

Attitude of lawyers

Despite the decision of the Supreme Court on the constitutionality of VCH, many lawyers still hold the view that VCH cannot ensure a fair trial. There is the real chance that they may jump at it as an excuse to appeal decisions. This may further frustrate the system. However, the requirement of parties' consent would go a long way in addressing that possibility. There is also the need for continuous professional development centered on dispute resolution in modern

¹²See sections 41, 51, 84 and 93(2) of the Evidence Act, 2011

times. A lot of the legal gymnastic in court do not aid dispute resolution. The Nigerian Bar Association should be encouraged to carry out a massive education in this regard.

Conclusion and Recommendations

The importance of effective and quick dispensation of justice especially for commercial and investment disputes cannot be over emphasized. The adage that Justice delayed is justice denied still holds true. While the challenges beleaguering the Justice Administration process are multifaceted, it is certain that the adoption of VCH will address a good number of the challenges. There is therefore a call on the law makers, heads of Court, members of the bench, lawyers, officers of the court and all stakeholders in the justice system to put heads together to fashion out an effective structure for the adoption of VCH as an acceptable and preferable means of adjudication in the Nigerian Courts.

While it is conceded that there are challenges to the use of VCH, the challenges are surmountable and manageable in relation to commercial disputes. VCH is suitable for commercial disputes and contract enforcement because they are substantially based on documentary evidence. Though VCH cannot solve all the challenges facing justice administration, proper case management which it engenders would ensure that the wheels of justice grinds a little bit faster and with less frustration along the way in the resolution of commercial disputes and enforcement of contracts.

COVID-19 has taught us that there is no legal work and court proceeding that cannot be done virtually. Modern technology makes VCH possible with ease and at minimal cost. What is needed is the fine-tuning of the legal architecture to facilitate the process. Below are the summary of recommendations on how Nigeria can deploy VCH in resolving commercial disputes and ultimately boosting the ease of doing business in Nigeria:

1. Nigeria needs to create/redesign commercial division of courts with requisite technological gadgets to support VCH. States and federal courts can immediately create at least one division with requisite infrastructure and personnel as a test case for VCH in settlement of commercial disputes.
2. The starting point for VCH is functional electronic registries for courts. Many rules of court now have provisions on electronic filing and communication but in practice, they are not functional. A well-equipped online registry is sine qua non in supporting VCH. Electronic service of processes should become the rule rather than the exception. Electronic filing and court management system for judicial officers and litigants that is user friendly and effective must be designed for the judiciary.

3. There is need for substantive rules of court and practice direction on VCH post Covid-19. There is perhaps the need to amend the enabling laws setting up the various superior courts to incorporate virtual hearings with detailed provisions to ensure certainty and uniformity.
4. Parties should be required to consent to VCH by signing appropriate forms. The court should adopt a system where commercial cases are screened for suitability for VCH. We can take a cue from the practice in places like where cases are screened for suitability for Alternative Dispute Resolution.
5. Gradual adoption of the process starting with case management and preliminary hearings
6. Continued Professional Development for lawyers by the NBA not just on the subject of VCH but also on the effect of the practice and conducts of practitioners on the ease of doing business metrics and generally the business environment.
7. Skill acquisition and continued professional development for registrars and paralegals. The judiciary and other institutions with interest in justice delivery should partner with institutes such as Institutes of Paralegal Studies and others to train and retrain court registrars and paralegals.
8. To remove the constitutionality overhang, the interpretation Act should be amended to define public hearing to include virtual court hearing where the link is shared in the notice board of the court. The process of constitutional amendment is more time consuming.
9. We also need to rework our practice on admissibility of documentary evidence to facilitate VCH. This means a review of the Evidence Act is expedient. For, example, parties should be mandated to indicate before trial, which documents they will be objecting to. The unopposed documents should be admitted by consent while arguments on the opposed documents should be reserved till final address. After all, parties are allowed to raise admissibility issues in the final address even after the objection was taken at trial. The practice in this regard by the NIC is commendable and should be adopted.
10. Apart from allowing members of the public to have access, registered members of the press can be allowed to participate in VCH thereby acting as the eyes and ears of the public.