THE DEVELOPMENT OF VIRTUAL ARBITRATION AS A WAY TO INCREASE TRANSPARENCY IN DISPUTE RESOLUTION USING THE EXAMPLE OF INTERNATIONAL ARBITRATION CENTERS IN EGYPT (CRCICA), KENYA (NCIA) AND MAURITIUS (MIAC)

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Abstract *– In recent years, the countries of the African continent have been increasing their pace of development in digitalization and virtualization of both the public and private sectors. Increasingly, digital processes are making many African countries attractive as part of investments and partnerships with companies in the region. It remains an absolute fact that in most countries where the digital revolution is beginning to take over the spheres of society and the state itself, legislation is also beginning to develop, which is aimed at quickly regulating not only the digital products themselves that affect the spheres of society and the state, but also making changes to the regulation of dispute resolution between the parties. The article examines the complex development of African virtual international arbitration, which has already been largely developed in the laws of Kenya, Egypt, and Mauritius. Special attention is paid to the practical aspects of transparency of virtual alternative dispute resolution methods, the impact of digitalization on these processes is assessed, and approaches to dispute resolution regulation are compared to determine the potential for applying the experience gained in Russian conditions.*

Keywords: *virtual disputes; Mauritius; Kenya; Egypt; alternative disputes; CRCICA; NCIA, MIAC*. **Table of Contents**

INTRODUCTION

The African continent, which historically represents territories with traditional ways of life, which undoubtedly influenced slower steps in the introduction of technology in various spheres of society, today is one of the most attractive places for the development of investment activity. Many scientists attribute the reason for this phenomenon not only to Africa's key role in the availability of hydrocarbons, natural gas, mineral resources, strategic positions of states in the region, but also to the development of technological capabilities, which is currently represented by a number of African countries.

Let us draw attention to the fact that the process of introducing these technologies into the life of the state and all its citizens is not quite the usual way. For example, in countries such as China and Russia, not only were various technological initiatives introduced, but also the legislative basis for such changes was prepared and the impact of the pandemic to a greater extent only accelerated the pace of development of digitalisation of various spheres of society. The catharsis of technology development in African countries is the necessity to ensure the safety of citizens and stable work of the states themselves during the pandemic. It is worth noting that technological development did take place, but it was very slow. This can be illustrated, for example, by the regulation of litigation based on the May 2020 Directives and localised state practice guidelines [1] in Nigeria, and the existence and full legislative regulation, as of 2018, of internet courts in China [2]. However, African countries have faced challenges in implementing technological tools such as uneven infrastructure development between countries (including stretches of Internet coverage), lack of digital literacy, cyber security, and the not insignificant problem of socio-cultural acceptance of technological solutions in the work of public institutions [3].

However, it was this adaptability to local realities and the challenges of the time that allowed African countries to develop their own distinctive digital path, bypassing the traditional stages of technological progress.

The impressive pace of innovation can be seen, for example, in the public sector, where artificial intelligence-based technology has been introduced in a number of countries [4], aimed at ensuring the security and reliability of electricity transmission (Supervisory Control and Data Acquisition (SCADA) (Uganda) [5]), blockchain technology is playing a major role in the private sector [6], applications for digitalisation of public and private services are emerging [7], Digital Earth South Africa (South Africa), a remote sensing data platform, is operational [8], a system of biometric registration and verification of voters at elections (Automated biometric identification system - ABIS) was introduced [9].

Turning attention to the field of jurisprudence, we note that various countries in Africa have already legislated for the digital notariat (Nigeria) [10], работа цифровых платформ для подачи исковых заявлений и ходатайств (Уганда, Египет, Нигерия, ЮАР и д.р.) [11], virtual trials (Uganda, Nigeria, Egypt, Kenya, etc.) [12], digital evidence (Egypt, Uganda, Nigeria, South Africa, Kenya, etc.) [13].

Thus, the technological age in Africa is already influencing the continent to become one of the key regions where alternative models of economic and social development are actively developing.

The historical friendly and partnership relations between Russia and African countries open up new opportunities for us to exchange experience within the framework of international cooperation. The latter is expressed both in the opportunity to learn from each other's successful development practices in the context of resource constraints, and in the analysis of African experience in digitalisation, which will allow us to build successful cooperation with African countries, and may also offer new solutions for the development of remote and hard-to-reach regions of the Russian Federation. One of the leaders in the regulation and implementation of virtual international arbitration hearings are Egypt, Kenya and Mauritius.

It should be noted that the Russian Federation and Egypt have already signed agreements on a major nuclear project, the El Dabaa nuclear power plant, as well as active co-operation in the oil and gas sector (oil and gas).

El Dabaa nuclear power plant, as well as active co-operation in the oil and gas sector (hydrocarbon production and transportation). The region is also attractive from the point of view of territorial location necessary for trade.

At the same time, Egypt has also applied to join BRICS in 2023, which will undoubtedly expand the impact of co-operation between our countries in the future.

Another interesting partner for most Russian and foreign companies is Kenya. This country has several ports of global importance, and many investments are aimed at creating shopping centres [14]. At the same time, there is a development of partnerships in geological exploration, mining and mineral extraction [15].

In addition, the island state of Mauritius is also attractive in terms of location and the development of trade cooperation in the Russian fertiliser sector.

However, the development of partnership relations is impossible without effective legislative regulation of dispute resolution mechanisms. It should be noted that key projects in these countries are associated with major foreign partners who are interested in preserving trade secrets, protecting business reputation, and flexibility of procedures. In this regard, the most relevant way to resolve disputes will be to turn to alternative methods, namely international arbitration centres.

EGYPT

(Cairo Regional Centre for International Commercial Arbitration (CRCICA))

The Cairo Regional Centre for International Commercial Arbitration (‘CRCICA’) is the oldest arbitral institution on the African continent. However, the current version of the Arbitration Rules (hereinafter

the 2011 Rules) [16] at the time of the pandemic was dated 1 March 2011. However, despite this, the rules enshrined in these Rules still allowed the application of technological tools for virtual hearings.

By virtue of Article 2(2) of the 2011 Rules, notices shall be sent by the arbitral tribunal to the address indicated by a party for receipt or authorised by the tribunal, and delivery of such notice shall be deemed confirmed if sent to that address. Delivery of notices by electronic means, such as fax or e-mail, may be made only to the address designated by the party or authorised by the tribunal [17].

In determining the place of arbitration in accordance with Article 18(2) of the 2011 Rules, the arbitration may be held at any place which the participants consider suitable for the meetings, failing which the arbitral tribunal itself shall determine the place.

Article 17(7) of the 2011 Rules provides that the arbitral tribunal, in exercising its discretion, shall conduct the proceedings efficiently in order to avoid unnecessary delays and expenses that may unnecessarily increase the costs of the arbitration.

A direct reference to the possibility of videoconferencing (VCS) is the provision in Article 28(4) of the 2011 Rules where the arbitral tribunal may order witnesses, including expert witnesses, to be examined by means of telecommunications that do not require them to be physically present at the hearing (e.g. videoconferencing) [18]. Thus, Egypt had direct dispute resolution in CRCICA in a virtual format.

On the technological side, the virtual hearings were held on one of the two platforms recommended by CRCICA - Microsoft Teams or Zoom. However, CRCICA also allowed in-person hearings to be held at its premises. However, in this format, there was a limit on the presence of representatives from each party (one). To enable remote participation, parties were invited to try the process twice before the hearing. The link to the VCS for the hearing was sent via the email addresses provided by the parties. In case this email was forwarded by one of the parties to the proceedings to a person who had not applied for dispute resolution, the IT administrator prohibited him/her from accessing the online broadcast of the proceedings.

In addition, before the proceedings themselves, the arbitrators notify the parties of the recording of the proceedings. If both parties agree, a copy of the hearing recording is sent to the parties at the conclusion of the hearing to their designated email addresses [19].

Despite its effectiveness and CRCICA's ability to operate in a pandemic, we note that the Rules were amended on 15 January 2024.

Note that the 2024 Rules are still based on the UNCITRAL Model Law on International Commercial Arbitration. However, the changes focus on digitalisation of the process, rules on expedited arbitration, rules on emergency arbitrators, consolidation of arbitrations and early dismissal of claims.

Unlike the provision in the 2011 Rules, the 2024 Rules allow parties to file a request for arbitration electronically and receive an online response, eliminating the previous requirement to send paper copies.

Article 2(6) of the 2024 Rules has been amended to provide that parties to proceedings may use electronic means of communication,

unless otherwise prescribed by the rules of the arbitral tribunal on a case-by-case basis, and the Centre shall receive a copy of such electronic communications.

In continuation of this rule, Article 3(6) of the 2024 Rules has been supplemented by the possibility to submit a notice of arbitration using the Centre's special online form on the CRCICA website.

Note that the 2024 Rules do not expressly state, however, that the timely filing of a copy of the certificate of registration of companies (legal entities) in the commercial register is one of the most important conditions for filing a notice of arbitration online on the CRCICA website.

In connection with these changes, the difference from the previous version of the 2011 Rules is the moment of commencement of the arbitration proceedings, which, according to Article 3(2) of the 2024 Rules, is deemed to have commenced on the date of receipt of the Notice of Arbitration by the Centre

(in the 2011 Rules, the moment of commencement of the proceedings was linked to the date of receipt of the notice by the respondent).

The changes aimed at explicitly enshrining remote hearings are reflected in Article 28(2) of the 2024 Rules. Any hearing may be held in person, remotely by videoconference or other appropriate means, or in hybrid form, as the arbitral tribunal shall decide after consultation with the parties [20].

Article 36 of the Rules, which regulates the applicable law in the proceedings, was also supplemented by paragraph 4, which provides that the applicable law shall be the law of the place of arbitration, unless the parties have agreed on the law of the arbitral tribunal.

of the seat of arbitration, unless the parties have agreed in writing to apply other laws or legal rules.

Two new mechanisms were provided for new participants who decided to submit the dispute to CRCICA: the rules of expedited arbitration and the rules of emergency arbitrators.

Expedited arbitration is aimed at resolving simple disputes, the final decision on which is made by a sole arbitrator, by agreement of the parties, within 6 months (Article 11 of Annex 3 of the Rules 2024). If expedited proceedings are necessary, the parties must agree on this procedure.

The institution of emergency arbitrators is of interest. CRCICA provides for the use of this mechanism at any time before the formation of the arbitral tribunal. The emergency arbitrator shall be appointed within 2 days from the date of acceptance by the Centre of the urgent application and shall issue an award within 15 days from the date of appointment (Article 8(2) of Annex 2 of the Rules 2024). In fact, this decision acts as an interim measure. However, the parties are not deprived of the right to appeal to the court (Article 10 of Annex 2 of Regulation 2024). However, the decision may cease to be binding in cases where:

a) The emergency arbitrator or the arbitral tribunal itself makes such an award;

b) The arbitral tribunal makes a final award, unless the arbitral tribunal expressly decides otherwise;

c) The arbitration is not commenced within 10 days of the date of the emergency award;

d.) The case is not referred to the arbitral tribunal within 90 days of the date of the Extraordinary Award (Article 9(4) of Annex 2 of the 2024 Rules).

Thus, CRCICA has not only facilitated virtual hearings during the pandemic with the possibility of participation of foreign arbitrators and recognition of awards in the international field, but also now presents the possibility of electronic document management, online submission of documents and arbitration agreements, digital tools for organising hearings, which provides a complete cycle of virtual (digital) arbitration proceedings.

KENYA

(Nairobi Centre for International Arbitration (NCIA))

Note that in exercising judicial power in Kenya, the courts and tribunals, by virtue of Article 159(2)(c) of the Constitution of Kenya, are guided, inter alia, by the principle of encouraging alternative means of dispute resolution, including conciliation, mediation, arbitration and traditional dispute resolution mechanisms. Furthermore, the issue of minimum judicial involvement has been explored in some detail in the jurisprudence of the courts of Kenya (Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) (2019)) [21].

As a direct reference in the Constitution, the Nairobi Centre for International Arbitration (NCIA) was opened in 2013 [22] to assist in the provision of international arbitrations with a commitment to provide institutional support to the arbitration process as well as hosting a type of alternative dispute resolution such as mediation [23].

The NCIA Arbitration Rules were in force until September 2020 in the 2015 edition (hereinafter - the 2015 Rules).

The 2015 Rules originally contained a number of provisions that provided comprehensive digital support for the resolution of disputes.

By virtue of Rule 14(b) of the 2015 Rules, the arbitral tribunal is required to choose a dispute resolution procedure that takes into account the circumstances of the case, avoiding unnecessary delay or expense in order to ensure a fair and efficient procedure for the final resolution of the dispute.

However, para. 4 of Rule 25 of the 2015 Rules provides that the arbitral tribunal has the power to make any orders necessary to ensure compliance with the fair, efficient and economical resolution of the case. It should be noted that these provisions of the Rules make it possible to conduct virtual arbitration through specialised platforms.

Consideration should also be given to the provisions that provide for an agreement between the parties to undertake comprehensive actions aimed at the fair, efficient and expeditious conduct of the arbitration.

An explicit reference that promotes transparency in NCIA dispute resolution is the provision in Rule 22(5) of the 2015 Rules, which provides that a hearing or any part of the arbitration may be conducted by video conference, telephone or other device as agreed by the parties or at the discretion of the appointed arbitrator.

Note that mediation may also be conducted in virtual format (Rule 11(3)(c) of the 2015 Rules).

However, the date of commencement of arbitration proceedings is the date on which the Registrar receives a complete application for arbitration (Regulation 5(3) of the 2015 Rules).

These provisions have not only enabled the parties to provide an alternative dispute resolution route, but also ensured that the processes themselves are accessible to their own populations and foreign counterparts.

In September 2020, NCIA agreed and published guidelines for the implementation of virtual hearings [24]. These principles were based on the African Arbitration Academy Protocol on Virtual Hearings in Africa 2020 and adapted to the realities of Kenya.

Note that, by Rule 19 of the 2015 Rules, the applicable law to the arbitration procedure is the law of the place of arbitration, unless the parties have expressly agreed in writing to apply a different law and such agreement is not inconsistent with the law of the place of arbitration.

Thus, the virtual hearings were conducted with the involvement of the Registrar, who provided technical support in providing a communication channel for the transmission of messages, documents, evidence, as well as ensuring the continuity of the virtual process between the parties.

All timing of the arbitration, appointment of arbitrators, use of the digital platform and software, as well as the participation of interpreters, witnesses, the parties must agree in advance, namely not later than one month before the hearing (Art. 4 (3) of the Guidelines).

It is also the responsibility of both the parties and the arbitral tribunal itself to agree on an alternative platform to ensure the continuity of the dispute resolution process, in case of information leakage or unstable connection.

Not all the territory of the state is provided with full Internet coverage, so in case of impossibility to provide access to this platform, software, the parties can also apply directly to the NCIA itself, where the representatives of the centre will provide it with a hotel with full technical equipment for arbitration and other dispute resolution procedures (Article 4.6 of the Guidelines).

These rules are aimed at ensuring equal access and rights between the parties.

Please note that in order to convert a face-to-face hearing to virtual mode, a party must submit a request to convert a scheduled face-to-face hearing to virtual mode no later than 21 (twenty-one) days before the scheduled date of the arbitration (Article 5(1) of the Guidelines).

The test connection must also be made no later than 72 hours before the hearing at the arbitration centre (Article 5(2) of the Guidelines).

When exchanging documents, the parties may agree on both cloud storage and messaging and document transmission mechanisms provided by the platforms chosen for the virtual hearing. However, it is the responsibility of the parties to ensure confidentiality, namely in the case of agreeing on cloud storage, documents should be password-protected (Article 9.2.3 of the Guidelines).

In addition, we note that the Guidelines complement and are based on the 2015 Regulations. By virtue of Rule 20(1) of the 2015 Rules, the initial language of the arbitration proceedings shall be the language of the arbitration agreement, unless the parties have agreed otherwise in writing. However, under Rule 20(3) of the 2015 Rules, hearings may be conducted in more than one language.

Where two or more interpreters are required in the dispute resolution process, consideration should be given to the provision of dual-channel and multi-channel provision of simultaneous or consecutive interpretation. Participants have the right to choose one or all of the proposed channels with interpreters (Article 10(2) of the Guidelines).

Article 11(1) of the Guidelines provides for recording of the virtual hearing throughout the proceedings and making it available to the parties to the proceedings, including a transcript of the proceedings.

In addition, we note that the 2015 Rules also provide for interaction with the emergency arbitrator through virtual means.

In view of the above, it appears that virtual processes in NCIA are not only in line with the principle of legality, but also provide easier access to the right to defence, by providing a stable internet connection, technical means that meet security requirements, the possibility of a combined or online format of the process of both the arbitration itself and mediation, which demonstrates transparency in the resolution of disputes between the parties to the conflict.

MAURICIQUE

(Mauritius International Arbitration Centre (MIAC))

The Mauritius International Arbitration Centre (MIAC) was established in 2011 as a joint venture with the London Court of International Arbitration (LCIA-MIAC Arbitration Centre). MIAC supports not only the provision of arbitration but also aims to resolve disputes through alternative dispute resolution methods such as mediation and conciliation.

The current MIAC Arbitration Rules (hereinafter referred to as the 2018 Rules) were adopted in July 2018. However, the 2018 Rules do not explicitly mention the possibility of using videoconferencing, digital platforms.

However, by virtue of Article 17(1) of the 2018 Rules, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that at the appropriate stage of the process each party is given a reasonable opportunity to present its case. The arbitral tribunal shall, in the process of resolving the dispute, take all steps to avoid unnecessary delay and expense by ensuring a fair and efficient procedure.

The enshrinement of this rule not only allows for flexibility in the dispute resolution process, while respecting the principles of fairness, equity and legality, but also allows for the most efficient means of developing the process to adapt to the particular circumstances. Referring to these provisions in the period of the pandemic, fundamental guarantees for the conduct of virtual processes were provided.

However, it should be noted that the 2018 Rules themselves, Article 28(4), provided that the arbitral tribunal may order witnesses, including expert witnesses, to be examined by means of telecommunications that do not require their physical presence at the hearing (e.g. video-conferencing).

It is through this provision that MIAC has provided the technical infrastructure that has helped the development of virtual hearings for arbitration, mediation and conciliation.

By virtue of Article 35(1) of the 2018 Rules, the applicable law in arbitration is the law of the country specified in the arbitration agreement by the parties as applicable to the merits of the dispute. In the absence of such indication in the agreement, the arbitral tribunal itself shall determine the applicable law that it considers most appropriate, including trade customs [25].

It should be noted that the MIAC is equipped with a hearing room that features a modern multifunctional audiovisual system ("AV system"). The AV system facilitates dispute resolution procedures not only in a virtual format but also in a hybrid format [26].

Thus, MIAC seeks to ensure the flexibility and accessibility of virtual hearings, which can save time and guarantee process adaptability. However, among the initial drawbacks, there are challenges such as insufficient regulation of virtual processes, data confidentiality concerns, and overcoming language barriers in virtual proceedings.

Taking the above into account, there is a noticeable difference in the development of virtual arbitration compared to the transition of other alternative dispute resolution methods to a virtual format. At the same time, there is a need to regulate the processes of virtual hearings at MIAC. The most relevant approach to gradual regulation appears to be the experience of NCIA, which involved the adoption of the African Arbitration Academy's Protocol on Virtual Hearings in Africa in 2020 and the adaptation of these provisions to the specifics of MIAC's operations. It is worth noting that the development of technological infrastructure is essential for all international arbitration centers.

Therefore, the implementation of virtual hearings in the alternative dispute resolution process creates new opportunities to foster trust-based partnerships between the international community and countries of the African continent.

ACKNOWLEDGEMENT

The research was supported by Russian Science Foundation grant No. 24-28-01022, https://rscf.ru/project/24-28-01022/

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