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Chartered Arbitrator & Fellow of the Chartered Institute of Arbitrators

In recognition of the publication of the peer reviewed paper entitled:

12 Practical Ways to Expedite Arbitration

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12 Practical Ways to Expedite Arbitrations

By: Paul Ngotho HSC [*]

Introduction

This article is derived from my presentation in the Law Society of Kenya and Chartered Institute of Arbitrators Kenya Branch (CIArbK) webinar on 20th January 2022. Of the 1,000 participants registered for the course, over 600 attended and many took part in the lively chat, Q&A and the quiz.

A commercial arbitration could take three months. Many arbitrations take one to two years but a few extend to much longer. A friend of mine who retired from arbitration practice 10 years ago, is still holding some arbitral awards because the parties have not picked them due to the outstanding fees. Every Kenyan arbitrator I know is holding at least one award. I know an arbitrator who is holding five. In addition to the arbitrations which are complete, many arbitrations are stuck midway because of the same reason.

Generally, arbitral tribunals are slow to lock out a defaulting party. Proceedings *ex parte* is lawful, but it should be the very, very last option not only because of the interest of justice but also due to the finality of arbitral awards.

Causes and Effects of Delay

That default in payment of the tribunal's fees is one of the major reasons for delay in arbitration is obvious from the arbitration above. Delay in filing various documents and unavailability of the tribunal, counsel and critical witnesses is the other cause of delay.
One cause which is often overlooked is the logistics of a large arbitral tribunal. Appointing a 3-member tribunal typically takes months. Deliberations are also

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time consuming as even issuing very simple directions like on whether to allow a party more time to file a document involves communication back and forth within the tribunal.

The most obvious effect of delay is that justice delayed is justice denied. In addition, the party which is eventually successful suffers because money loses value with time – a shilling today is worth more than a shilling tomorrow, next month and next year.

While disputes are about law and money, law is only a tool or ladder which parties use to reach the money. When the value of the prize is diminished, then even the person who wins is still a loser.

Delay drives also up arbitration costs. Mentions and letters back and forth all take time, which the prudent arbitrator bills accordingly.

Courts and arbitrations are notoriously unpredictable. A party cannot, however, strong or weak its case, predict the outcome. Extended uncertainty is bad for business and it's bad for clients. Delay can reach a point where the parties get exhausted and move on as they are not prepared to invest more time or money in a process which has no end in sight.

The longer the proceedings, the more likely it is that one or both parties will change counsel. Incidentally, younger advocates and associates, who take charge of routine arbitrations in the law firms, are very mobile career-wise as they easily move to another law firm or start their own practice. Another associate takes over the matter.

Change of representation could cause considerable delay as the affected party requires time to recruit a replacement, which also requires time to familialise itself with the matter. However, in my experience, something more important is lost whenever even nominal change of representation changes takes place: the loss of momentum or just the personal knowledge of some facts and of the proceedings, the chemistry with the opposing counsel and with the client. Such loss can't be quantified or captured in hand-over notes, however thorough.

Arbitrators are also affected by delay. Having lost track of the facts and the evidence, they must spend considerable time refreshing their memories through re-reading of documents. However, they also move on to appointments where they are not allowed to carry out private arbitrations. And of course, the longer the proceedings, the higher the risk that an arbitrator might die in the process. Last, but not least, delayed proceedings give both the arbitrator and arbitration a bad name.

My thoughts on this subject to have crystallised into 12 practical ways to expedite arbitration. That list, which is not exhaustive, is drawn from my experience as a sole arbitrator and chairman or member of a larger panels. It is mainly in the context of *ad hoc* commercial arbitrations but much of it is universal.

12 Practical Ways to Expedite Arbitral Proceedings

Expediting arbitration is a joint responsibility of the parties and the arbitrators. However, the parties and their advocates hold most of the aces.

1. Consensual Arbitrator Appointments

In my experience, the best arbitrator appointments are the consensual ones because both parties, or at least both advocates, have a level of confidence in the arbitrator who is appointed. Such appointments produce good arbitrators. The proceedings run smoothly and with little drama, if any. Lawyers should do everything possible to facilitate consensual arbitrator appointments for the benefit of their clients.

2. Early Preliminary Meeting

An arbitrator should, within seven days of receiving the appointment letter, revert to the parties proposing a date for preliminary meeting. Some party representatives keep postponing that meeting, without which nothing much can happen as the various procedural issues are considered in that meeting. Only the most experienced and innovative arbitrators are able to move the proceedings forward if one of the parties is obstructive.

3. Advance Preparation of the Claim

Declaring a dispute, attempting amicable settlement, exploring consensual arbitrator appointment and writing to the independent appointing authority take time. Nothing stops a claimant from drafting the claim and compiling the necessary attachments for filing immediately after the preliminary meeting. Yet there are claimants who request for 42 days after the preliminary meeting and then apply for an extension of time. Such behaviour sets a very slow tempo, as the respondents would also typically as for 42 days to respond.

4. The War Chest

There are Respondents who pay and Claimants who don't. Generally, the Claimant is the first to pay while the Respondent drags his feet.

The Claimant and the Respondent are severally and jointly liable for the tribunal's fees. Therefore, the Claimant should, when filing the case, be ready to pay not only its own share of the tribunal's deposits but also, the Respondent's share in the event of delay or default.

It is difficult for parties to estimate the tribunal's fees in advance, but it is possible especially for those prepared to err on the higher side. In any case, it is just an estimate. The estimation is easier when the fees are based on quantum. Whatever the case, the tribunal should assist the parties in this. I must say I was not successful on the last two occasions when, as a party representative, I asked the sole arbitrators for estimates of their fees. An average arbitration with 2 parties, 2 witnesses of fact and a short list of issues take a sole arbitrator about 100 hours. That assumes there are no expert witnesses, arbitrator challenges, jurisdictional challenges or other side shows.

Parties do not seem to understand that the payment of the tribunal's fee deposits are an integral part of arbitral proceedings. A court[1] recently expressed great displeasure with a tribunal which had withheld decision on a jurisdictional issue due to outstanding further deposits, even though it was aware that the applicable rules allowed for the payment of such deposits and that the

[1] *http://kenyalaw.org/caselaw/cases/view/217490/*

determination of the challenge had the potential of disqualifying the tribunal. Interesting, considering that the court itself would not have heard that application of the applicant had defaulted in paying the necessary filing fees.

Several related questions, which were asked in the plenary sessions will be answered at this juncture.

Q. Arbitration sounds like an elitist court. Does arbitration serve the ordinary person or and SME in Kenya?

A. Another description of arbitration is "designer justice". I am just being honest. The view that arbitration saves costs has to be understood in a certain context. Court fees are minimal, while the services of the judge, registrar and the clerks are paid for from public coffers. In arbitration, the parties pay the arbitrator. It can be pretty expensive, depending especially the seniority of the arbitrators and other choices which are made either by or on behalf of the parties. In addition, the CIArbK Arbitration Rules of 2020 provides for expedited arbitration which cap arbitrator fees to a certain percentage of the disputed amount.

Q. What happens when arbitration fees are so high that they are disproportionate to the subject matter - e.g if the subject matter is ksh.3m but the arbitrator fee is Kshs.2m? Is there option to challenge the fee? How best do you keep arbitrator's fee low or reasonable or cap maximum fee?

A. Generally, arbitrators in Kenya are paid on the time they spend on a matter. Some low-value disputes are in fact quite complicated and take much time to determine.

You cannot negotiate the fees mid-way or at the end.

Several options are available when a party is faced a low-value dispute. One is the expedited procedure, which caps arbitrator's fees. Two, choosing a less experienced arbitrator. Three, persuading the other party to attempt mediation even if there is no pre-existing agreement to mediate. Further options of challenging the fees are available in administered arbitrations. Finally, s. 32B.(4)

of the Act provides a mechanism for taxation of the tribunal's fee by the High Court.

5. Arbitrator and Jurisdictional Challenges

Challenges on the tribunal's alleged bias or lack of jurisdiction should be short and rare. Assuming each party can say all it has to say in two pages and that the tribunal's decision can fit in 5 pages, then routine challenges would involve minimal time and fees.

But if the parties decide to go for full-blown applications written submissions, highlighting, witnesses and all that, then determining the matter could cause considerable delay and cost. A sole arbitrator's fee could be about Ksh. 1 m (40 hours at 20,000/= plus VAT and minimal disbursements) and much more if the tribunal has 3 members or if the issues for determination are complicated.

6. ***Diversions Ahead!***

All arbitration legislations and rules give the parties the option of going to court or to other fora in the course of arbitration, if necessary. Applications to court are not only costly and disruptive but, in my experience, fail 95% of times. It is shocking that advocates go to court so easily and with so much pomp when their success rate is just about 5%. No wonder some arbitrators are of the view that most such applications are motivated by advocates' financial needs.

There is another reason why parties should not go to court recklessly. When parties go to court, especially alleging arbitrator bias, they put in some exaggeration and outright lies under oath. The arbitrator gets to know what a party said about him or her. Arbitrators are trained to be civil when the arbitral proceedings resume counsel are, apparently, quite experienced in going on as if nothing happened. But there's always a level of discomfort, which can be avoided by simply not making unwarranted court applications.

7. The Stay Pending Court Decision

The first prayer when a party goes to court is to stay the arbitral proceedings pending the determination of the substantive issues. Courts generally grant such orders, and for good reason. Read together, sections 14.(8) and 17. (8) of

the Arbitration Act of Kenya 1995 (the Act) stipulates that while an application under the applicable subsection is pending before the High Court,

> "the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful." (Emphasis added.)

These provisions allow the parties to decide whether or not they wish to proceed with the arbitration pending the determination of the court case. They also stipulate what should happen to the tribunal's award vis-à-vis the cost judgment. It is a difficult choice for the parties especially if the arbitral proceedings are at an advanced stage because of the cost implications should the court application succeed. That is a commercial decision for the parties to take. However, even if the parties agreed to continue, the tribunal might be reluctant to do so especially if one party has made personal or scandalous allegations about the arbitrator in court.

8. Expedited Arbitration Procedures

All arbitration rules, including those regularly used in domestic arbitrations in Kenya, provide for expedited procedures, which set strict time limits for the parties and for the tribunal for various activities. Expedited procedures are very unpopular for reasons which I will not discuss here. Suffice to say that experience in construction adjudication and dispute boards demonstrate that due process is over-rated.

9. Bifurcation

Bifurcation is quite common in investment disputes but, unfortunately, rare in commercial arbitrations, especially the domestic ones. It is the practice in which arbitral proceedings are, with the consent of the parties, divided into two or three successive stages each of which produces an award. The first one or two stages produce partial awards, which determine some of the issues in dispute.

The most common basis for bifurcation is to determine liability first and then, if necessary, address the quantum. Furthermore, the early and separate

determination of liability opens a window for the parties to agree on the quantum amicably, saving time and costs.

10. The Tribunal Size

A sole arbitrator is sufficient in many commercial disputes apart from the ones which are extremely complicated, require multiple skills and have very high quantum.

11. Busy Arbitrators

Some arbitrators run very busy professional practices or multiple businesses while others take long prescheduled holidays locally or abroad. Arbitrators should not take up appointments if they cannot, within the foreseeable future, dedicate necessary time.

Parties which are concerned about delay should feel free to send a remainder to the arbitrator, ask for directions about the delivery of the award or suggest a mention. Arbitrators are sensible and responsible people and would not hold such requests against any party.

12. Post- award Issues

The less the time the corrections, additional awards etc take, the better for everybody so that the parties can move to the next stage.

Parting shot - Arbitration Quiz

Question 1: *Can an arbitrator nullify a marriage under Kenyan law?* Yes, or No?
Question 2: *Are disputes on the custody of children arbitrable under Kenyan law?* Yes, or No? Please mark for yourself. Write your answer to each question on a piece of paper. This is quiz is absolutely confidential. Nobody else will know what you score.

The answers to both questions, ladies and gentlemen, believe it or not, are "Yes". My authority is the Court of Appeal bench of Musinga, Gatembu, and Murgor

JJ.A in *TSJ v. SHSR Civil Appeal No. 119/2017*[2]. The judgment dated 18th November 2019 interrogates and dismissed all the arguments which suggest that such things were not arbitrable and must be reserved for ordinary and Kadhi courts. It upheld an arbitral tribunal's award, which dissolved a marriage and decided on the custody of children.

Congratulations those of you who got 100%. Those of you who got 50% gave it a fair try. To those who scored zero, not to worry because, with all due respect, herd mentality among Kenyan lawyers, family law practitioners and arbitrators is that those matters are not arbitrable. Courtesy Musinga, Gatembu, and Murgor J J. A, we all now know better.

[2] *http://kenyalaw.org/caselaw/cases/view/185178* last accessed on 20th January 2022.