

# **Institutional Arbitration in Africa Post-COVID-19**

**By**

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## Introduction

Arbitration is a means of resolving disputes pursuant to an arbitration agreement. It can also arise from a statute or treaty. It can even be customary. Arbitration has many distinguishing features and underlying principles - principle of party autonomy, principle of separability, principle of arbitrability - objective and subjective, competence of the arbitral tribunal to rule on its own jurisdiction and principle of minimal judicial intervention.

In exercise of the powers either under the arbitration agreement, statute or treaty, the parties constitute the arbitral tribunal. Arbitral proceedings are also guided by the principle of natural justice - hear the other side and give the parties equal opportunities to present their cases. In consequence the arbitral tribunal must be impartial and

independent and when one is approached to be appointed an arbitrator, there is duty to disclose the level of independence and impartiality.

Arbitration can be domestic or international. It can also be *ad hoc* or institutional. There are several arbitral institutions: some with their own rules and others without their own rules but adopt the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). In a Survey carried out by the School of Oriental and African Studies (SOAS), University of London by Dr Emilia Onyema and her team, it was established that there are ninety one (91) arbitral institutions in the continent of Africa.<sup>1</sup> In a continent of 54 countries, the number appears inadequate. However, as compared with other jurisdictions, how effective are these African arbitral institutions? Or are they mere arbitration centres and not institutions?

On 30<sup>th</sup> January, 2020, the World Health Organisation (WHO) declared a public health emergency of international concern, that is, an extraordinary event which is 'serious, unusual or unexpected', carries transnational implications and may require immediate international action. On 11 March, 2020 the WHO declared it a pandemic<sup>2</sup> while the first index case recorded in Nigeria on 27 February, 2020. Since the declaration, the whole world has not been the same. The virus has already destabilized commerce, hit company earnings worldwide and prompted significant drops in global stock markets. This has also

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<sup>1</sup> Available at <https://researcharbitrationafrica.com/files/List%2520of%2520non%2520+Arbitration%2520+Institutions%2520in%2520Africa%252020200404.pdf> accessed 17<sup>th</sup> September, 2020. See also page 11 of the Study.

<sup>2</sup> See generally Federica Paddeu and Kate Parlett, 'COVID.19 and Investment Treaty Claims', *Kluwer Arbitration Blog*, March 30, 2020 available at <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/> accessed 17 September, 2020

impacted on either litigation or arbitration with investors opting for private forums and not public.<sup>3</sup>

The virus has affected the way evidence is created, gathered and transmitted. It has affected how arbitral proceedings are conducted. Already, there has been curtailment of papers sent through mail and courier. Reliance has been more on virtual communication, artificial intelligence and other technologies.<sup>4</sup> It would seem that the analogue era is over as those who will be gainfully employed and act as counsel or arbitrators will be those digitally knowledgeable. Ultimately, the definition of work, office, place and hearing will change. So also is the appropriate dispute resolution mechanisms.<sup>5</sup>

In this presentation, therefore, we intend to examine the face of institutional arbitration in Africa post-COVID-19.

### Types of Arbitration

Arbitration can be domestic and international. Section 57(2) of the Nigerian Arbitration and Conciliation Act, 1988<sup>6</sup> provides that an arbitration is international if

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<sup>3</sup> See also <https://researcharbitrationafrica.com/arbitration-fund-for-african-students/blog/> accessed 17 September, 2020

<sup>4</sup> See generally Gary Benton, 'How will the Coronavirus Impact International Arbitration?', *Kluwer Arbitration Blog*, March 13, 2020 available at <<http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/>> accessed 17 September, 2020

<sup>5</sup> See also <https://researcharbitrationafrica.com/arbitration-fund-for-african-students/blog/> accessed 17 September, 2020

<sup>6</sup> Now Cap A18, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as "the ACA")

*(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries; or*

*(b) one of the following places is situated outside the country in which the parties have their places of business-*

*(i) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement;*

*(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*

*(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country; or*

*(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.*

In consequence, every other arbitration is domestic, for example two Nigerian entities (P&ID Limited, Nigeria and Nigerian Ministry of Petroleum Resources). We must stress that different consequences flow from this categorization. Thus in a domestic reference, the issue of seat of arbitration (legal seat not physical location of oral hearing) is not fundamental as Nigeria will be the seat.<sup>7</sup> However in choosing a seat (or place of arbitration) in international arbitration, some factors are critical, namely,

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<sup>7</sup> It should be noted that the choice of a seat of arbitration may determine the law governing the procedure, as opposed to the substance of the arbitration, determine the national courts that have a supportive and supervisory jurisdiction over the proceedings, including jurisdiction to hear an application to set aside the award and affect the enforceability of an award in another jurisdiction.

- a) how modern is the arbitration law of that country?
- b) how modern are the arbitral institutions?
- c) does the contemplated jurisdiction respect the principle of party autonomy or restrict the role of the local courts or minimize the grounds upon which an award can be set aside; and
- d) is the contemplated jurisdiction a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award?

It is noteworthy that section 32 of the new Arbitration & Mediation Bill now before the National Assembly has clearly drawn a line between seat and place of arbitration. This is also captured in Art 22 of the JICAM Arbitration Rules being launched today.

Arbitration can also be *ad hoc* or institutional. *Ad hoc* - not conducted under the auspices of an arbitral institution or without the involvement of an arbitral institution. Such references generally adopt the UNCITRAL Arbitration Rules<sup>8</sup> or the parties will draft their own rules of procedure subject to mandatory norms. One seemingly irreducible problem of *ad hoc* arbitration is that the arbitrators set their own fees while the benefit is that the parties can draw their own rules to suit their purpose.

Arbitration is institutional if conducted under the auspices of arbitral institutions like the International Chamber of Commerce (ICC) Rules of Arbitration, established in 1923; Arbitration Rules of the London Court of Arbitration (LCIA), founded in 1892; the ICSID Arbitration Rules, first adopted in 1967 and Arbitration Rules of the Janada International

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○ <sup>8</sup> See the Queen Mary University Survey of 2018 available at <http://www.arbitration.qmul.ac.uk/research/2018/> accessed 17 September, 2020 where it was found that the UNCITRAL Arbitration Rules are the most popular choice for *ad hoc* arbitration.

Centre for Arbitration and Mediation (JICAM), established in 2015. Again, there are several benefits derivable from institutional arbitration including the provision of arbitral rules, administration of the rules by specialist staff, acting as appointing authorities, acting as account holders and supervision of the conduct of the arbitration.

### Institutional Arbitration in Africa

The five most preferred institutions according to *Queen Mary University's 2018 Survey: The Evolution of International Arbitration*<sup>9</sup> are:

- ✓ The International Chamber of Commerce's International Court of Arbitration, or ICC;
- ✓ The London Court of International Arbitration, or LCIA;
- ✓ The Singapore International Arbitration Centre, or SIAC;
- ✓ The Hong Kong International Arbitration Centre, or HKIAC;
- ✓ The Arbitration Institute of the Stockholm Chamber of Commerce, or SCC

while the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva.

It was also found that the respondents continue to prefer these institutions primarily for their general reputation and recognition. Preferences are also decisively shaped by an assessment of the quality of administration and of the institutions' previous experience.

Others arbitral institutions are:

- ✓ The International Centre for Dispute Resolution, or ICDR; and

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<sup>9</sup>Ibid.

- ✓ The International Centre for Settlement of Investment Disputes, or ICSID.

One can then ask, where are African arbitral institutions? The Asian-African Legal Consultative Organization (AALCO), originally known as the Asian Legal Consultative Committee (ALCC), was constituted on 15 November 1956.

One of the major achievements of AALCO in its programme in the economic field was the launching of its Integrated Scheme for Settlement of Disputes in the Economic and Commercial Transactions in 1978.

Pursuant to that Scheme, it was decided to establish Regional Arbitration Centres under the auspices of AALCO, which would function as international institutions with the objectives to promote international commercial arbitration in the Asian-African regions and provide for conducting international arbitrations under these Centres.

Five such Centres have been established so far, which are located at Kuala Lumpur (Malaysia [1978]); Cairo (Arab Republic of Egypt [1979]); Lagos (Nigeria [1980 but inaugurated in 1989 and law passed in 1999]); Tehran (Islamic Republic of Iran [1997]) and Nairobi (Kenya [2013]). The respective hosts Governments recognize their independent status like an international organization and have accorded privileges and immunities to these Centres.

AALCO provides its expertise and assistance to its Member States in the appointment of arbitrators and other matters related to the

conduct of arbitration. Its centers provide the opportunities for training of arbitrators as well. The Rules for arbitration under the auspices of the Centre are the UNCITRAL Arbitration Rules of 1976 with certain modifications and adaptations. Each Centre has its own unique facilities.<sup>10</sup>

In June 2020, Dr Onyema published the *Arbitration in Africa Survey 2020*<sup>11</sup> that focused on arbitration centres and seats. Africa has 91 arbitration centres<sup>12</sup> and 54 countries. 350 responses were received from individuals in 34 countries across Africa, Asia, Middle East, North America and Europe.

Out of this number, 83% have participated in arbitration in Africa; 60% have participated in institutional arbitration in Africa and 48% have participated in *ad hoc* arbitration. Expectedly, the top five arbitral centres in Africa as determined by an independent coding exercise are: Arbitration Foundation of South Africa (AFSA), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Ouagadougou Arbitration and Mediation & Conciliation Centre (OAMCC), OHADA Court of Justice and Arbitration Centre (CCJA) and Kigali International Arbitration Centre (KIAC [established in 2012]). However, the top five arbitral centres as chosen by the respondents are AFSA, CRCICA, KIAC, Lagos Court of Arbitration (LCA [launched in 2012]) and Nairobi Centre for International arbitration (NCIA) with AFSA, CRCICA, LCA, NCIA and CCJA having the best support facilities. One is tempted to ask: Where is the Lagos Regional Centre inaugurated in 1980?

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<sup>10</sup> AALCO available at <http://www.aalco.int/> accessed 25 September, 2020

<sup>11</sup> SOAS Survey (n 1) 11.

<sup>12</sup> *ibid*



Similarly the top five African cities that host arbitration are Johannesburg, Lagos, Cairo, Cape Town and Durban; and the top five African countries that act as seat of arbitration are South Africa, Nigeria, Egypt, Rwanda and Cote d'Ivoire. It is noteworthy that Abuja is not in the group while South Africa has three cities.

According to this Study, although there are 91 centres, *'some of these centres do not administer arbitration cases but provide facilities including hearing rooms to support the private dispute resolution process; while some effectively act as appointing authorities and again do not administer arbitration references'*.<sup>13</sup> I share the view that Africa has many arbitration institutions but the real question is whether they are really arbitral centres providing effective services for arbitration and other alternative dispute resolution processes. For instance, Nigeria has at least six centres, South Africa also has six while Egypt has three.<sup>14</sup> One of the centres in Nigeria is the International Centre for Arbitration and Mediation, Abuja (ICAMA was established in 2012). ICAMA has adequate audio, video and other facilities for *ad hoc* and administers institutional arbitration; has a list of panel of arbitrators and acts as appointing authority.

Unlike Egypt and South Africa that adopted the UNCITRAL Model Law on International Commercial Arbitration in 1994 and 2017 respectively, Nigeria adopted the Model Law in 1988 and the Lagos State Government passed its Arbitration Law in 2009. Why is Nigeria not leading in terms of arbitral centres and seat of arbitration? From my personal knowledge, most hearings in Nigeria are either held in hotels or law

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<sup>13</sup> *ibid*

<sup>14</sup> See Gregory Travaini, 'Arbitration Centres in Africa: Too Many Cooks' available at [http://arbitrationblog.kluwerarbitration.com/2019/10/01/arbitration-centres-in-africa-too-many-cooks/?doing\\_wp\\_cron=1595492007.6317770481109619140625](http://arbitrationblog.kluwerarbitration.com/2019/10/01/arbitration-centres-in-africa-too-many-cooks/?doing_wp_cron=1595492007.6317770481109619140625) accessed 17 September, 2020. The five Centres are the Lagos Regional Centre, Maritime Arbitrators Association of Nigeria, Lagos Court of Arbitration Centre, Lagos Chamber of Commerce International Arbitration Centre, ICAMA and JICAM.

offices of the Legal Practitioners. Such hearings whether domestic or international are not documented. This probably accounts for the poor performance of Nigeria in this survey report. This is without prejudice to the fact that issues of security, facilities, infrastructure and integrity of the Nigerian courts may also be factors responsible for the poor ranking of Nigeria in the continent.

The above lends credence to the establishment of JICAM. JICAM is not only an arbitral centre but will perform arbitral services as it has its own Rules of Arbitration and Mediation. These Rules are modern and comparable to other Rules like that of ICC and LCIA. Indeed they are a blend of both.

### Impact of COVID-19 Pandemic on Arbitration

Arbitration is largely party driven - principle of party autonomy. In Nigeria, we have the Arbitration and Conciliation Act, the Arbitration Laws of the States and their Rules. We also have the High Court (Civil Procedure) Rules providing for arbitration. One common feature of arbitration is privacy and confidentiality (though the issues of transparency have arisen now). Ordinarily, the ACA in section 15(1) provides the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules. Subsection (2) provides where the Rules are silent, the arbitral tribunal, **may subject to the ACA conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing thus there is a duty to conduct arbitration in an expeditious and cost-effective manner - underlying principle.**

Similarly, Art 25(4) of the Arbitration Rules provides that **hearings shall be held in camera unless the parties agree otherwise;** the arbitral tribunal is free to determine the manner in which witnesses are examined - establish the facts of the case by all appropriate means while

Art 25(5) of the Rules provides that evidence of witnesses may also be presented in the form of written statements signed by them eg documents only arbitration. Lastly on this point, Art 25(6) provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. (See also Section 15(3) of the ACA).

Arbitration in Nigeria does not suffer the effect of the Evidence Act (s256(1)(a), the Constitution (s36(3) & (4) and the judicial pronouncements on hearing in public. Prior to the COVID-19 pandemic, I have used Skype, audio and video-conferencing at JICAM and ICAMA, Abuja and LCA, Lagos.

Section 16 of the ACA provides thus:

*(1) Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*

*(2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.*

It is now settled that the place referred to in subsection (1) means the seat and not a physical place but that subsection (2) refers to place of (or venue for) hearing. Fortunately, this subsection (2) did not make reference to physical place of hearing. Thus in exercise of the powers conferred on the Arbitral Tribunal under section 15 of the ACA, the

place referred to in subsection (2) of section 16 can be physical place or virtual place.

Prior to the pandemic, in 2004, the International Chamber of Commerce (ICC) published the *Use of Information Technology in International Arbitration*, updated in 2017.

In 2007, the ICC published the *Techniques for Controlling Time and Costs in Arbitration*, re-issued in 2012 - recommended telephone and videoconferencing.

However, with COVID-19 on 8 April, 2020, ICC issued *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*. It provides guidance notes to parties, counsel and tribunals on possible measures to be adopted.

On 18<sup>th</sup> March, 2020 the **Seoul Protocol on Video Conferencing in International Arbitration** was published - intended to serve as a guide to best practice for planning, testing and conducting video conferences in international arbitration.

In April 2020, the Africa Arbitration Academy published its *Protocol on Virtual Hearings in Africa* which gives a structured approach to conducting virtual hearing.

On 23 April, 2020, CIArb, Nigeria published *Guidance Note on Remote Dispute Resolution Proceedings* to provide a guide for conducting arbitral proceedings where parties cannot meet.

There are others:

- AAA-ICDR's COVID-19 Update - *Best Practices Guide for Maintaining Cybersecurity and Privacy, Virtual Hearing Guide for*

*Arbitrators and Parties, Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom, Model Order and Procedures for a Virtual Hearing via Videoconference*

- *ABA SIL's Arbitration Subcommittee's COVID-19 Quick Reference Guide*
- *CPR's COVID-19 Resource Center and Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings*
- *Delos' Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19 and take the Survey of Experiences with Remote Hearings*
- *HKIAC's Guidelines for Virtual Hearings*
- *IBA's Cybersecurity Guidelines*
- *ICCA-IBA's Joint Task Force on Data Protection in International Arbitration Proceedings*
- *ICCA-NYC Bar-CPR's Protocol on Cybersecurity in International Arbitration*
- *ICC-SICANA's COVID-19 Messages, Interim Measures: Practical Considerations for Arbitrators.*

Essentially, virtual hearing is the use of audio and videoconferencing and it is about case management. We must stress that virtual hearing has always been with us but compounded by COVID-19.

### The Way Forward

What do users of Arbitral Centers want. This was addressed in the 2020 SOAS Study.<sup>15</sup> The users require the following facilities:

- ✓ convenient location;
- ✓ spacious hearing rooms and breakout facilities
- ✓ recording and transcription equipment;
- ✓ convenient facilities;

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<sup>15</sup> SOAS 2020 Study (n 1) 11

- ✓ professional staff;
- ✓ clear rules of arbitration;
- ✓ support in appointing arbitrators;
- ✓ cost effectiveness;
- ✓ Arbitration rules in different languages with explanatory notes;
- ✓ efficient case management;
- ✓ access to efficient and modern technology; and
- ✓ neutrality and high reputation.

JICAM has taken the lead in meeting these requirements. For example, the Arbitration Rules provide for video and audio conferences and virtual hearing. Accordingly Art 35 of the JICAM Arbitration Rules provides thus:

### ***Hearings***

1. *In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof. Unless the parties have otherwise jointly consented, hearing will held not later than 60 days from the commencement of the arbitration. The oral hearing shall be for a maximum of two days.*
2. *Witnesses, including expert witnesses, may be heard and questioned in the manner and under the conditions set forth by the arbitral tribunal.*
3. *Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the sequestration of any witness or witnesses, including expert witnesses, during the testimony of other witnesses, except*

*that a witness, including an expert witness, who is a party to the arbitration, shall not in principle, be asked to step out of the proceedings.*

4. *The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication (including video or audio conferencing) that do not require their physical presence at the hearing.*
5. *Where it is impracticable to hold oral hearing, the arbitral tribunal, with the consent of the parties, may conduct virtual hearing for the whole or part of the arbitral proceedings.*

However, quite unlike physical hearing, we must prepare adequately for virtual hearing. This is the challenge post-COVID. For African arbitration institutions to survive, they must have facilities for virtual hearing side by side the existing facilities for physical hearing. There are enough Protocols, Guidelines, Guidance Notes, etc on this as highlighted above. Thus several issues will arise before, during and after the arbitral proceedings that must be carefully addressed.

Arbitration Rules that have not provided for video conferencing or virtual hearing should be amended accordingly. For example,

- ✓ LCIA, Art 19.2 provides for video or telephone conference
- ✓ **Art 24(4), ICC Rules, 2017 and Art 3.5 of the Expedited Rules (Appendix VI, ICC Rules, 2017)** -The ICC rules explicitly permit the use of videoconferencing and virtual hearings for case management conferences, hearings in an emergency arbitration, and hearings in an expedited procedure

- ✓ Section 18(3) of the Arbitration and Conciliation Bill 2019 provides for Emergency Arbitrator with powers to conduct hearing by video, telephone or similar means of communication.
- ✓ ICDR - Art 9 of the Expedited Procedure - video conference

Indeed, prior to the COVID-19 pandemic, audio or video conferences have been used for Preliminary Meetings/Case Management Conferences. Similarly, unlike in litigation where the issue of hearing being in public was an issue, arbitral proceedings were held either virtually or physically or a combination of both.

We must stress that although there may be no express provision on video conferencing or virtual hearing in other rules, the rules generally give powers to the arbitral tribunal to **“conduct the arbitration in such manner as it considers appropriate,”** provided that the conduct of the proceedings is formulated **“so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”**.

### Concluding Remarks

In the Queen Mary University Survey of 2018, 97% of respondents indicated that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%). Certainly, JICAM will be influenced by the outcome of this Survey.

Other than the Lagos Regional Centre that adopted the modified version of the UNCITRAL Arbitration Rules and Lagos Court of Arbitration that has its own Arbitration Rules, JICAM is the third in Nigeria to have its own Arbitration Rules. JICAM is not only an arbitral centre but renders full arbitral services including being an appointing authority and fund manager. I think that this is commendable.



However, the services can only be utilized if parties expressly provide for the use of JICAM Arbitration and/or Mediation Rules in their arbitration agreements. JICAM represents one of the faces of institutional arbitration in Africa.

If we must 'Africanize' arbitration in Africa and sustain the **Africa Promise** (seeks to increase the number of Africans appointed as arbitrators especially those originating from Africa in order to ensure fair representation and diversity)<sup>16</sup> deepening institutional arbitration in Africa is the way to go. The **African Promise** is effectively a pledge by counsel, corporate end-users, States, arbitral institutions, academics, and others to "improve the profile and representation of African arbitrators especially in arbitrations connected to Africa".

I belong to the 'Born Before Computers' (BBC) age, we have moved from postal mail, later to telefax, and then to email. Perhaps 70% of Arbitrators are of the BBC age!! I have used manual, electric and electronic typewriters and now computers. But the keypad in the manual typewriter has remained the same - up to our phones. In all these, there was no noise.

COVID-19 has generated its own noise due to its sudden restrictions, dislocations and disruptions but with several advantages and challenges. We must think differently and do things differently. The definitions of work, office, place of work, place of hearing, conduct of arbitral proceedings, etc have changed. The arbitral institutions that will survive are those with modern rules and facilities for both physical and virtual hearings. The arbitrators that will be in business are those who are innovative, creative and digitally knowledgeable.

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<sup>16</sup> Available at <https://researcharbitrationafrica.com/the-african-promise> accessed 25 September, 2020

Must we travel for a hearing? Do we need to spend so much money on hotels? Do we need long hearings? Do we need large number of witnesses? How can we save costs in arbitration? However, how do we manage differences in time zones? On a lighter side, we should show off our offices and homes. All these are side attractions of COVID-19 pandemic.

Thank you for your attention.