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Environmental Issues in Dispute Resolution

How “Green” Have International Arbitrations Become? Reflections on Arbitral Practice Post-Pandemic

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Prior to the lockdowns and the disruption of the COVID-19 pandemic, international arbitration involved significant travel—e.g., to attend hearings, meet with clients, conduct witness interviews, and network at conferences—as well as printing and dispatch of hard-copy submissions and hearing bundles. However, propelled by necessity due to travel restrictions, arbitration practitioners embraced technological advancements by conducting meetings and hearings virtually and by opting for paperless proceedings. This sudden reduction in global travel and widespread reliance on digital infrastructure coincided with increased interest among corporations in Environmental, Social, and Governance (ESG) initiatives and the formal launch of the Campaign for Greener Arbitrations (Campaign).

Headed by Lucy Greenwood and supported by a steering committee composed of private, institutional, and industry practitioners, the Campaign called upon the arbitration community to be mindful of the profession’s carbon footprint. A case study conducted by the Campaign found that 20,000 trees would need to be planted to offset the carbon emissions of a medium-sized, \$30 million–\$50 million international arbitration, with approximately 93 percent of those emissions attributable to travel, and over 75 percent to long-haul flights alone.¹ The Campaign introduced the Green Pledge—a general commitment to environmentally sustainable practices—that has since been endorsed by hundreds of signatories.² The Campaign also introduced six Green Protocols

(translated into several languages), which expand on the Green Pledge by offering detailed recommendations and best-practices to key stakeholders, including arbitrators, law firms, counsel, legal service providers, and arbitral institutions.³ Comparable initiatives in the litigation and mediation context have also emerged, such as the Greener Litigation Pledge (in the UK) and the Mediators’ Green Pledge.

The Queen Mary 2022 *Energy Arbitration Survey* noted that the COVID-19 pandemic “changed the nature of international arbitral practice for the foreseeable future,” with arbitration becoming more “economical, efficient, and accessible” through the use of innovation.⁴ The Queen Mary survey also asked practitioners to identify specific priority areas in line with the Campaign. The most popular sustainability measure for reducing carbon emissions—selected by 81 percent of survey respondents—was the increased use of videoconferencing for meetings and hearings.



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ARBITRATIONS**
DRIVING SUSTAINABLE CHANGE

Other sustainable practices included avoiding unnecessary travel, particularly flights (69 percent), and using electronic bundles at hearings (66 percent).⁵

As an arbitration community, where do we go from here? With the re-emergence of international travel and a return to “business as usual,” while practitioners may express wide-ranging support for “greener practices,” it remains to be seen to what extent sustainable measures will continue in day-to-day practice. Taking stock of current practices and preferences among stakeholders, we anticipate a number of trends towards increased sustainability in international arbitration.

Complementary Technological and Sustainability Developments in Arbitral Institutions

The COVID-19 pandemic fast-tracked the adoption of technology by arbitral institutions, with many issuing guidance notes clarifying how their existing rules permit remote hearings and explaining how to conduct such hearings. Concurrent with the adjustment across the legal profession to paperless and virtual proceedings, arbitral institutions committed to the Green Pledge and issued guidance facilitating sustainable practices. Notable developments by arbitral institutions throughout the pandemic and post-pandemic include the following updates to institutional rules, guidance notes, and initiatives.

- The updated Article 26.1 of the 2021 International Chamber of Commerce (ICC) Arbitration Rules expressly provides that the tribunal may decide that a hearing will be conducted remotely. The ICC’s 2021 *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration* provides that the Request for Arbitration and the Answer must be sent to the Secretariat electronically and that hard copies are no longer required (paragraph 10).⁶ In October 2022, the ICC introduced a digital case management platform, ICC Case Connect, which permits parties to communicate with the Secretariat as well as share and store files. Described by the ICC as “a single platform, providing a one-stop-shop to manage ICC Arbitration cases,” ICC Case Connect permits parties to communicate with the Secretariat and to share and store files.

- The new Stockholm Chamber of Commerce (SCC) Arbitration Rules, in force as of January 1, 2023, expressly provide for the possibility of hearings by videoconference or other means of communication (Article 32(2)). The SCC’s *Guidelines for Arbitrators* provide that all new SCC arbitrations (since September 2019) are to be administered on the SCC Platform for communication and file-sharing between the SCC, the parties, and the tribunal. The SCC is perhaps the most progressive in its approach to greener arbitrations, as it proposes in its Guidelines that arbitrators may claim as expenses the carbon offsetting costs of their flights (“standard costs of climate compensating for the flights”).
- The new International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, in force as of July 1, 2022, also have implications for greener arbitrations. For instance, the default position is that documents are to be filed electronically (Rule 4(2)). Rule 29(2) expressly permits remote hearing of the first session, while Rule 32 broadly empowers the tribunal to determine the method of holding the merits hearing.
- The International Centre for Dispute Resolution (ICDR) International Arbitration Rules, as revised in March 2021, expressly provide that a hearing may be held by video, audio, or other electronic means when agreed by the parties or if the tribunal determines that doing so would be appropriate (Article 26(2)).
- The Swiss Rules of International Arbitration, as updated in June 2021, expressly provide that any hearings may be held remotely by videoconference (Article 27(2)), including the examination of witnesses or experts (Article 27(5)).
- Under the revised 2020 London Court of International Arbitration (LCIA) Arbitration Rules, electronic communications with the LCIA and the tribunal are the default position, and the parties are to submit their Request for Arbitration and Response in an electronic format (Article 4.1). Article 19.2 expressly provides that a hearing may take place by conference call, videoconference, or other communications technology.

- The 2020 Revision of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration introduced a provision (Article 8.2) empowering the tribunal, after consulting with the parties, to order that the evidentiary hearing be conducted remotely. In its Commentary on the 2020 Revision of the IBA Rules, the IBA encourages tribunals to specifically consider time, cost, and environmental concerns when determining whether an evidentiary hearing should be held remotely.
- Although the Singapore International Arbitration Centre has not updated its commercial arbitration rules since 2016, it published guidance in August 2020 on “Taking Your Arbitration Remote.”
- In October 2021, the Hong Kong International Arbitration Centre (HKIAC) launched its online case management platform, HKIAC Case Connect.

Returning to In-Person Arbitration Conferences with Virtual/Hybrid Options

As the pandemic recedes, we expect to see increased attendance at in-person networking events and travel to major arbitration conferences. One need only look at the impressive turnout for last year’s Opening Night Cocktail at Paris Arbitration Week and the International Council for Commercial Arbitration (ICCA) Congress in Edinburgh. After years of limited in-person interactions, it is unsurprising that arbitration practitioners will seek out opportunities to connect with colleagues. Given the international nature of this profession, in-person attendance at major conferences is especially valuable to those based outside major arbitration hubs. Therefore, while practitioners may be mindful of greener practices, the rebound of face-to-face networking is expected given the limitations of break-out rooms on videoconferencing platforms.

In line with the Green Protocol for Arbitration Conferences, conference organizers should consider offering online and hybrid options that run concurrently to in-person events. This format can also reach a wider and more geographically diverse audience. For instance, the 2022 Canadian Arbitration Week events were offered both remotely and in-person, while the 2023 Paris Arbitration Week schedule includes hybrid /

remote events. Further, uniquely online initiatives, such as ArbitralWomen’s Mute Off Thursdays, ArbitralWomen Connect, and Delos’ Remote Oral Advocacy Programme have persisted in the virtual space.

Reducing International Travel, but Retaining In-Person Merits Hearings

We expect that arbitration practitioners will continue to conduct client meetings, initial witness interviews, and procedural arbitral hearings on a remote basis, chiefly where this represents increased efficiency in time and reduced cost to clients.⁷ Concerns about an arbitral tribunal’s authority to conduct remote hearings have largely been addressed. For instance, the ICCA released a comprehensive report on the right to a physical hearing, concluding that most jurisdictions do not expressly provide for the right to a physical hearing in arbitration.⁸ However, we anticipate that counsel will revert to in-person final merits hearings so as to engage more effectively with witnesses under cross-examination and gauge the arbitral tribunal’s receptiveness to oral arguments.

Indeed, the 2022 ICC *Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* asked practitioners about their expectations regarding post-pandemic use of IT solutions.⁹ The report identified various IT solutions most likely to be used post-pandemic, including videoconferencing for case management or other procedural conferences (83 percent) and online case management platforms or virtual data rooms (71 percent). As to pre-pandemic use, 85 percent of respondents were already using teleconferencing for case management or other procedural conferences, and 96 percent were exchanging communications and submissions electronically.¹⁰

Similarly, respondents to the Queen Mary 2021 *International Arbitration Survey: Adapting Arbitration to a Changing World* indicated a preference for virtual procedural hearings due to the greater availability of dates and greater efficiency through use of technology.¹¹ However, the survey reported various concerns from arbitration stakeholders, including (1) accommodating multiple time zones; (2) the difficulty of counsel conferring during sessions; (3) challenges controlling the witnesses and assessing witness credibility; (4)



the fallibility of technology; (5) screen fatigue; and (6) confidentiality and cybersecurity concerns.¹² While respondents to the survey acknowledged the environmental benefits of remote participation, this was not their primary motivation. Rather, practitioners focused more on the cost and efficiency of these measures.¹³

Advanced Legal Technology for International Arbitration Disputes

While firms and arbitral institutions have enhanced their technological capabilities since the start of the COVID-19 pandemic, we expect arbitral practice to use ever more sophisticated legal technology. The normalization of virtual hearings and the increased use of remote hearing technology is demonstrated by the 2021 Queen Mary survey, which reported that 72 percent of respondents used virtual hearing rooms “sometimes,” “frequently,” or “always.”¹⁴ In stark contrast, the pre-pandemic 2018 Queen Mary survey reported that 64 percent of respondents had “never” used a virtual hearing room.¹⁵

We recommend that legal practitioners explore different technology options for case management, electronic filings, videoconferencing, and e-bundles so as to make procedures user-friendly and accessible to the tribunal. Ease of review and access by the arbitral tribunal will be paramount as firms invest in new legal technologies. There is a wealth of legal tech offerings for electronic submissions and hearings, and service providers are more than happy to provide training sessions to firms.

We also recommend that arbitrators familiarize themselves with technological offerings and, consistent with the Green Protocol for Arbitrators, consider proposing the use of such technologies in the first procedural order (the Campaign offers a Model Green

Procedural Order with draft language for this purpose). Cybersecurity risks go hand in hand with increased use of technology. Therefore, we expect practitioners will take information security best-practices into account in their matters, such as those proposed in, for instance, the ICCA-NYC Bar-CPR *Protocol on Cybersecurity in International Arbitration* (updated in 2022).

Parallel Technological Trends in the Courts

The move to electronic filings and virtual hearings has also been observed in the litigation space, although these innovations are more motivated by efficiency of the court system and not necessarily by environmental considerations.

For instance, the English Commercial Court and the Technology and Construction Court issued guidance in September 2021 providing that remote hearings are the default position for hearings lasting under half a day.¹⁶ Accordingly, procedural hearings in the English courts are more likely to be remote, whereas final hearings are likely in-person. Electronic bundles have been typical in English commercial court practice over the past few years, but these were in addition to physical bundles in the hearing room. The Commercial Court’s guidance now specifies that electronic bundles are the default format, such that hard copy bundles should not be lodged unless specifically requested by the judge. Parties are also advised to attempt to minimize their own use of hard copy bundles.¹⁷

ESG Initiatives as a Priority for Corporate Clients

The Campaign for Greener Arbitrations has been widely embraced by arbitration practitioners, as is evidenced by the introduction of a specific “green”

award category at the 2021 Global Arbitration Review Awards. While recognition within the arbitral community is important, client buy-in to sustainability measures will be critical to their uptake in arbitral proceedings. There is certainly interest in ESG goals among corporate clients as major corporations increasingly link the remuneration of senior management and executives to ESG targets.¹⁸ Further, in-house counsel are participating in climate change initiatives such as The Chancery Lane Project and the Net Zero Lawyers Alliance. Therefore, we recommend discussing with clients the possibility of incorporating, where appropriate, environmentally sustainable measures into arbitration proceedings, and emphasizing the corresponding efficiency gains and alignment with corporate ESG targets.

Post-pandemic, international arbitration has experienced a cultural shift. Practitioners are embracing technology and seeking out more efficient means to resolve disputes and broaden their networks—objectives that complement the Campaign’s aim of reducing carbon emissions. We would encourage arbitration users to consider signing the Green Pledge and implementing some of the recommendations from the Green Protocols. Echoing the Campaign for Greener Arbitrations’ slogan—“now is the time for actions, not words.” ■

Endnotes

1 Lucy Greenwood, *The Canary Is Dead: Arbitration and Climate Change*, 38 J. of Int’l Arb. 320 (2021).

2 Campaign for Greener Arbitrations, Supporters of the Green Pledge, <https://www.greenerarbitrations.com/institutional-supporters>.

3 Campaign for Greener Arbitrations, Green Protocols, <https://www.greenerarbitrations.com/green-protocols>.

4 Queen Mary University of London, *2022 Energy Arbitration Survey* at 39, <https://arbitration.qmul.ac.uk/research/2022-energy-arbitration-survey/>.

5 *Id.* at 36.

6 This contrasts with the 2019 ICC Note which stated that the Request for Arbitration and Answer “must be sent to the Secretariat in hard copy as well as in electronic form by email.”

7 A study conducted by Hebert Smith Freehills compared the cost of an in-person arbitration hearing versus that of a virtual hearing, finding a cost saving of six percent for virtual hearings, through savings on flights and hotels and through reduced administration time for coordinating hard-copy hearing bundles and travel time. See *Virtual vs. In-Person Hearings: A Review of the Costs and Carbon Footprint of*

Each (April 2022), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/hsf_case_study_-_highlights_april_2022.pdf.

8 International Council for Commercial Arbitration, *Does a Right to a Physical Hearing Exist in Commercial Arbitration?* (2022), <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

9 ICC Commission Report: *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* (2022), <https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf>.

10 *Id.* at 42.

11 Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, <https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>.

12 *Id.* at 24.

13 *Id.* at 26. Thirty-six percent of respondents identified “environmental sustainability” as what would make them more likely to choose a virtual rather than in-person format for hearings post-COVID-19, while 61 percent identified “time and cost savings compared to in-person hearings.”

14 *Id.* at 21.

15 Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, <https://arbitration.qmul.ac.uk/research/2018/>, at 32.

16 HM Courts and Tribunals Judiciary, *Remote Hearings Guidance to Help the Business and Property Courts* (Sept. 15, 2021), <https://www.judiciary.uk/remote-hearings-guidance-to-help-the-business-and-property-courts-2/>.

17 HM Courts & Tribunals Service, *The Commercial Court Guide* (2022), <https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition-1.pdf>, Appendix 7.

18 Mark Mangan & Lukas Lim, *The Pursuit of Net Zero Arbitration With the Aid of Carbon Emissions Scorecards*, 39 J. of Int’l Arb. 724-727 (2022) (citing Apple, BHP, British Petroleum (BP), Danone, Intel, McDonalds, PepsiCo, Rio Tinto, Shell, Siemens, Starbucks, and Unilever).



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