

ONPOINT / A legal update from Dechert's International Arbitration group

The Road to Net Zero Arbitration

Written by Mark Mangan and Lukas Lim

October 2021

Dechert
LLP



The Road to Net Zero Arbitration

October 2021 / Written by Mark Mangan and Lukas Lim

Key Takeaways

- While every arbitration is different, a 'typical' mid-size arbitration would generate anywhere between 30 and over 400 metric tonnes of carbon dioxide emissions depending on the number of submissions and hearings involved.
- Just as the remuneration of corporate executives is increasingly being linked to their ability to deliver on climate change goals, similar incentives could be put in place to encourage a reduction of emissions associated with the practice of international arbitration.
- Specifically, it is proposed that disputing parties could produce 'carbon emission scorecards' relating to their participation in an arbitration, which the tribunal could take into account when allocating costs (along with other factors such as the arbitration result and procedural conduct).
- Likewise, a portion of the fees paid to legal counsel, arbitrators, experts and other service providers could be tied to their green credentials consistent with the remuneration of corporate executives.
- Carbon emissions scorecards will educate parties, counsel and other participants on the environmental impact of arbitrations and thereby help reduce emissions.

Introduction

This weekend 197 world leaders will gather in Glasgow for the UN Climate Change Conference 2021 (COP 26) to continue discussions on how to prevent severe climate change. In addition to the participating states, the corporate world has responded to the call for action. One fifth of the world's 2,000 largest public companies have committed to reducing their carbon emissions.¹ Many companies are starting to link their compensation packages for senior management and executives to their ability to achieve publicly declared environmental targets.²

Arbitration participants should also strive to track, reduce and then at some point in the future eliminate the carbon emissions associated with the practice of arbitration.

Achieving the goal of 'net zero arbitration' within a reasonable time frame will require a range of initiatives, some of which are already being pursued. It is proposed in this OnPoint briefing that parties could submit 'carbon emission scorecards' at the conclusion of an arbitration, which the tribunal could take into account when allocating the costs

¹ <https://www.forbes.com/sites/dishashetty/2021/03/24/a-fifth-of-worlds-largest-companies-committed-to-net-zero-target/?sh=4d38a9c4662f>.

² <https://www.investopedia.com/terms/u/un-principles-responsible-investment-pri.asp>. See also, for instance, <https://www.riotinto.com/-/media/Content/Documents/Invest/Reports/Climate-Change-reports/RT-climate-report-2020.pdf?rev=c415a8138bd7408496ccb3834511abc0>.

of the proceedings. Effectively, carbon market forces could be brought to bear on the arbitration process in order to encourage a profound shift towards net zero arbitration.

With that said, one cannot be naive and assume that disputing parties will focus their energies merely on reducing the carbon emissions associated with resolving a dispute. The objective of arbitration is of course to win. The thesis of this briefing, however, is that a strategy based purely on the relative strengths and weaknesses of a case and the likely monetary cost is incomplete. Environmental costs should also be weighed up by parties and counsel when making their strategic choices.

The carbon footprint of international arbitration

Arbitration is by no means a leading cause of greenhouse gases. Nonetheless, it does have a carbon footprint,³ generated principally through transportation of goods and people and, to a much lesser degree, electricity usage.

A 'typical' mid-size arbitration is estimated to generate between 30 and over 400 metric tonnes of carbon dioxide emissions (CO₂) depending on the assumptions made, including the length of the arbitration, the number of submissions, the location of the hearing and the number of participants. On any view, it has a significant impact on the environment, particularly when one considers that there are thousands of international arbitration cases per year. It would take between 2,000 and 20,000 trees to absorb the level of CO₂ emitted into the atmosphere from a single arbitration.

The journey to net zero arbitration

Arbitration stakeholders can take a range of steps to reduce their carbon emissions. First, the quicker a dispute can be resolved, naturally the fewer carbon emissions it will generate. Thus, the sound reasons that already exist for seeking to resolve commercial disputes amicably, including savings in time and monetary cost,⁴ are reinforced by the potential environmental benefits of avoiding a protracted dispute.

Second, for those matters that do proceed to arbitration, the participants should conduct the proceedings as efficiently as possible. This could include the adoption of an expedited procedural timetable, the appointment of an emergency arbitrator and requests for summary dismissal of a claim or defence. Even for standard arbitrations that continue for the long-haul through to a contested merits hearing, more can be done to resolve them quickly.

Third, the transportation of persons and documents are the biggest causes of carbon emissions in international arbitration. Thus, parties could agree to conduct procedural and substantive hearings remotely wherever possible (subject to any overriding need for a physical hearing to avoid a party's due process rights being prejudiced). Alternatively, arbitrators could be selected in part based on whether they reside in close proximity to a majority of the parties or the intended venue for a physical hearing (which ideally would be the same place). And electronic hearing bundles could be used rather than voluminous hard copies which would usually have to be couriered over long distances.

Fourth, parties could commit, either in their arbitration agreement itself or in a fresh agreement after a dispute has arisen, to abide by the Model Procedural Order developed by the Campaign for Greener Arbitrations.⁵ The Green

³ The term 'carbon footprint' was first coined by BP for an advertising campaign in 2005 and refers to the amount of carbon dioxide and other carbon compounds emitted through a person / company's use of fossil fuels.

⁴ For a more in-depth discussion about minimizing the time and cost of the arbitration process, see Dechert's 2020 broadcast 'Pursuing Arbitration Claims on a Shoestring': <https://www.dechert.com/knowledge/event-and-webinar/2020/5/the-lockdown-series---part-three--pursuing-arbitration-claims-on.html>.

⁵ <https://www.greenerarbitrations.com/green-protocols/model-green-procedural-order>.

Model Procedural Order prescribes comprehensive measures for minimising the environmental impact of arbitrations. The protocol encourages:

- a. all communications, written submissions and documentary evidence to be sent electronically wherever possible, with hard copies only used sparingly;
- b. the use of shared electronic platforms for hosting documents;
- c. any necessary printing to be done in an environmentally friendly manner (e.g., using recycled paper, A5 copies, double-sided, etc);
- d. witness preparation to be conducted remotely, where possible;
- e. hearings to be conducted virtually unless impractical or inappropriate; and
- f. to the extent air travel is necessary, offsetting the carbon cost of the flights, including those taken by tribunal members.

Parties may also agree their own bespoke green arbitration provisions, which could regulate the preparation, length and filing of submissions, the length and conduct of hearings, and document production, among other matters. Alternatively, arbitrators could prescribe green provisions within their procedural orders. Parties could also consider the green credentials of counsel, arbitrators, experts, transcribers, translators and other service providers when making the relevant appointments.

The fifth and most innovative suggestion for reducing the carbon footprint of international arbitration takes its inspiration from what is already happening in the corporate world. Leading corporations that have linked executive compensation to Environment, Social and Governance (ESG) targets include Apple, BHP, BP, Danone, Intel, McDonalds, PepsiCo, Rio Tinto, Shell, Siemens, Starbucks and Unilever.⁶ BP, for instance, uses an 'annual bonus scorecard' for executives which includes a 20% weighting for environmental targets.⁷ Danone also links 20% of its executive annual variable compensation to its ESG goals (specifically 10% for employee sustainability and 10% for its climate ambitions). Siemens applies a 20% weighting in its share bonus scheme to a 'ESG/Sustainability Index', which expressly includes reductions in CO₂ emissions. Rio Tinto, for its part, allocates a 15% weighting in its 'Short-Term Incentive Plan' to ESG performance, including the implementation of its climate change initiatives such as low carbon vehicle trials and the adoption of renewable power options.⁸ Similarly, BHP uses a 'Cash and Deferred Plan scorecard' for executive remuneration, 10% of which is linked to the delivery of its climate change strategy 'on the pathway to net zero emissions' from its own operations while also addressing so-called Scope 3 greenhouse gas emissions associated with its products.⁹ Furthermore, entire companies are being valued in part based on their contributions to decarbonisation, with those further along the path reportedly being rewarded with a valuation premium by investors.

Similar market forces could be applied to the practice of arbitration. Specifically, parties could agree to submit 'carbon emission scorecards' as part of their costs submissions at the conclusion of an arbitration, which the tribunal could consider when allocating the costs of the arbitration (along with other traditional factors, such as the result and the parties' procedural conduct). The parties could agree in advance what should be included in the

⁶ <http://www.perillon.com/blog/17-major-companies-linking-executive-pay-to-esg-performance>.

⁷ <http://www.perillon.com/blog/17-major-companies-linking-executive-pay-to-esg-performance>.

⁸ <https://www.riotinto.com/-/media/Content/Documents/Invest/Reports/Climate-Change-reports/RT-climate-report-2020.pdf?rev=c415a8138bd7408496ccb3834511abc0>.

⁹ <https://www.bhp.com/sustainability/climate-change/governance>.

scorecards, whether they should be verified to ensure accuracy, and even what weighting should be given to environmental issues by the tribunal in its assessment of costs.

Clients could go further and link the remuneration of counsel in part to their ability to achieve agreed carbon emission targets set for the arbitration. Likewise, arbitral institutions could require arbitrators to present their own carbon emission scorecards to be considered by the institution when fixing arbitrator fees. And there is no need to stop there. Other participants such as experts, translators, transcribers and a multitude of service providers could be subjected to similar financial incentives. Arbitral institutions could also be encouraged to report their carbon emissions, which in turn could influence whether they are chosen for future arbitrations.

The adoption of carbon emission scorecards in arbitration has two key benefits. First, those participating will be incentivised to minimise their carbon footprint. Secondly, and just as importantly at this stage of the decarbonisation journey, those having to produce the scorecards will gain a greater understanding of their carbon impact and what could be done to reduce it in the future.

Finally, even if all the above measures are taken, some greenhouse gases will inevitably still be emitted unless sufficient renewable energy can be sourced, which is unrealistic at this time for most participants in international arbitration. Even a simple email (and this briefing) will require the burning of hydrocarbon fuels either at its source or on the path to its destination or place of storage. Thus, achieving net zero arbitration in the foreseeable future is likely to require the purchase of carbon offsetting credits, especially for any necessary flights including those taken by the arbitrators.

Parties could be incentivised to invest in offsetting credits by allowing any offsets to be included in their carbon emission scorecards. Thus, the reduction or elimination of a party's environmental costs of an arbitration could increase its chances of being awarded some or all of its monetary costs.

Conclusion

In the final analysis, taking the necessary steps to achieve 'net zero arbitration' within a reasonable timeframe is surely preferable to 'zero arbitration', which might be the consequence if concrete steps are not taken to align the practice of arbitration with the journey to net zero that many users of arbitration have already embarked upon, and which others will undoubtedly follow.

Written by Mark Mangan and Lukas Lim. For more information and guidance on these issues, please contact anyone within the Dechert international arbitration group across our network of offices, including the following members of the Singapore international arbitration team:



Mark Mangan

Partner
Singapore
+65 6730 6983
mark.mangan@dechert.com



Lukas Lim

Associate
Singapore
+65 6730 6962
lukas.lim@dechert.com



Daniel Gaw

Associate
Singapore
+65 6730 6972
daniel.gaw@dechert.com



Ananya Mitra

Associate
Singapore
+65 6730 6970
ananya.mitra@dechert.com

© 2021 Dechert LLP. All rights reserved. This publication should not be considered as legal opinions on specific facts or as a substitute for legal counsel. It is provided by Dechert LLP as a general informational service and may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. We can be reached at the following postal addresses: in the U.S.: 1095 Avenue of the Americas, New York, NY 10036-6797 (+1 212 698 3500); in Hong Kong: 31/F Jardine House, One Connaught Place, Central, Hong Kong (+852 3518 4700); and in the UK: 160 Queen Victoria Street, London EC4V 4QQ (+44 20 7184 7000). Dechert internationally is a combination of separate limited liability partnerships and other entities registered in different jurisdictions. Dechert has more than 900 qualified lawyers and 700 staff members in its offices in Belgium, China, France, Germany, Hong Kong, Ireland, Luxembourg, Russia, Singapore, the United Arab Emirates, the UK and the U.S. Further details of these partnerships and entities can be found at dechert.com on our Legal Notices page.