

# Sustainability and Diversity in the Newly Virtual World of International Arbitration

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Climate change and increasing calls for greater diversity in the workplace have been making headlines daily. With the onset of the COVID-19 pandemic, the world, including that of international arbitration, has turned to a virtual setting to conduct many of its operations. While this new terrain has resulted in technical obstacles and challenges, it has also created greater opportunity to adopt environmentally-friendly policies and simultaneously “level the playing field” for historically disadvantaged actors in the field of international arbitration, particularly underrepresented women and minorities. In this post, we explore the opportunities and potential pitfalls that longer-term behavioural changes triggered by the pandemic represent for arbitration from a sustainability and diversity perspective.

## **Sustainability**

Earlier this year, Lucy Greenwood’s brainchild, the Campaign for Greener Arbitrations, was formally launched with the central objective of reducing the environmental impact of international arbitrations. Initial research conducted by Lucy Greenwood and members of the Campaign revealed that just under 20,000 trees would be required to offset the carbon emissions created by a medium-sized

arbitration – four times the number of trees in Hyde Park. A similar study by Herbert Smith Freehills, which looked at the energy usage of proceedings and the carbon emissions of one party’s counsel in a medium-sized arbitration, identified three priority areas to review: energy usage, travel practices and material and electronic waste.

COVID-19 has acted as a natural accelerator for the many behavioural changes which the Campaign seeks to promote, in particular, a move to more virtual settings with less day-to-day travel requirements in the management of arbitral proceedings. However, in order for these behavioural changes to have the desired impact of reducing the overall carbon impact of arbitral proceedings, they need to be implemented in a sustainable way.

Transitioning to increased virtual proceedings in the longer term naturally requires greater energy usage, as our social interactions are making the transition, currently by necessity and perhaps in the longer term by choice, from in person to online. It makes sense that, as a priority, arbitration users and participants looking to reduce their environmental footprint should first review their energy sources and ensure that the energy being used to power their workspaces and home offices is clean and that the tools they are using are energy efficient. This simple measure is perhaps the one with the most significant impact, as the Herbert Smith Freehills study indicates that carbon emissions from non-clean energy sources are the largest contributor of emissions in proceedings. As practitioners are increasingly working from home, this is a personal commitment which can be made by individual practitioners in parallel to those made by law firms, chambers, and service providers.

The second most significant contributor to carbon emissions in arbitral proceedings is travel, in particular air travel. This year, Earth Overshoot Day, the day which marks the date that humanity’s resource consumption exceeds the amount of resources that the Earth can produce in 12 months, came one month later than last year, due to the COVID-19 pandemic – in no small part due to a large reduction in domestic and international air travel. This reduction in travel has not prevented arbitrations from moving ahead. In-person meetings and hearings have, in large part, been replaced by virtual alternatives.

These virtual alternatives, including use of ever more sophisticated means of video-conferencing, will remain suitable following the pandemic and should

continue to be adopted in the longer term. However, transitioning proceedings to a fully virtual setting is not a panacea. This transition also runs the risk, as further explored below, of leaving behind or preventing access to a large pool of skilled practitioners who do not have access to the technological infrastructure required to make these virtual proceedings a success.

It is therefore important to recognise that in the post-COVID world, travel may continue to be a necessity, but that more can be done to ensure environmentally conscious travel, for example by selecting the most environmentally friendly mode of transportation (for instance, travel by high-speed train as opposed to air travel where possible, or by prioritising travel with airlines ranked for their carbon efficiency) and considering, where required, options to offset the carbon footprint associated with travel.

Similarly, there is great potential for the reduction of material waste in arbitral proceedings by choosing electronic communications, filings and bundling over hard copy alternatives – a simple change increasingly endorsed by leading arbitral institutions – e.g. Article 4 of the LCIA 2020 Arbitration Rules providing for electronic communications as a default, or Article 26.1 of the draft ICC 2021 Arbitration Rules providing for virtual hearings.

## **Diversity**

The transition of international arbitration to a virtual setting has also impacted historically disadvantaged and underrepresented women and minorities, creating opportunities for increased visibility and participation while exacerbating existing biases.

Some of the difficulties traditionally experienced by women in male-dominated workspaces may worsen in the digital environment. Some studies suggest that women may have the length of their speaking time cut short, problems with being interrupted (more common in the virtual environment with lag time), difficulty getting a word in, or having their statements ignored or co-opted. Others suggest that networking in the virtual setting is more difficult for women, claiming that women may be more reluctant to make virtual networking requests than their male counterparts, as they do not feel comfortable asking someone for something without having forged a closer connection with them. In its Gender Insights Report,

LinkedIn reported that men are 26% more likely to ask for a referral on LinkedIn to a job they are interested in and recruiters are 13% less likely to click on a woman's profile when she shows up in a search and 3% less likely to send her a message after viewing her profile.

Women may also be disproportionately affected by stay-at-home orders and the increasingly commonplace teleworking environment. Some studies have shown that women are more likely to carry out a host of additional domestic responsibilities while working at home including childcare, cooking, cleaning, care for isolated relatives, etc. on top of their day jobs. This has left them with little to no time to engage in professional extra-curricular activities which contribute to career development such as writing articles, speaking at conferences, or networking online.

Historically disadvantaged and underrepresented minorities may also suffer in the virtual environment. Working from home poses unique challenges for minorities and recent "Zoombombing" incidents show that racism in the virtual setting remains alive and well. The new virtual setting has also amplified technological and access barriers for practitioners from jurisdictions or neighbourhoods which suffer from low bandwidth internet connections, poor video streaming quality, or electricity shortages and power outages. Organizers may decide not to invite speakers who cannot be properly heard due to a low-quality internet connection, often those situated in jurisdictions with lesser access.

This important context must be taken into account when recognizing that the virtual setting may also positively result in increased visibility of underrepresented women and minorities. Indeed, the breakdown in geographical barriers, the increased ease of international virtual networking, and the new norm of virtual communications can contribute to the diversity of international arbitration. It may result in increased appointments of arbitrators from more diverse jurisdictions and of younger ages, and more diverse sized clients may be empowered to bring claims of varying sizes as costs become more manageable. Virtual hearings may allow for greater diversity of languages as new digital features such as simultaneous translation become available and further developed.

Lesser heard voices can be amplified by the effective use of interactive features such as chat, poll, or hand-raising functions, and virtual break-out sessions. Individuals can be presented on a level playing field, regardless of age, gender or

other physical characteristics as sound volumes are generally uniform, physical stature of individuals is less perceivable, and less attention may be paid to “professional” attire in the virtual context.

Virtual conferences, webinars, and networking events have also opened the door to new participants and speakers who might not otherwise have been able to make the time and travel commitment required, for example parents with young children, or individuals for whom the costs associated may have been prohibitive. Indeed, many conference organizers have acted upon the virtual availability of a wider pool of candidates to field more diverse panels and seek speakers from farther jurisdictions.

The pandemic, in many ways, has accelerated certain inevitable trends such as the digitalisation of international disputes, and has allowed a spotlight to be shone even more brightly on important issues such as diversity and climate change. It has afforded us all time to reflect on what the post pandemic world might and should look like and has also highlighted some of the opportunities and problems an increased virtual setting for arbitral proceedings, conferences, and networking presents. These are all issues which we should be mindful of as we decide how to tackle the systemic changes which we are seeing our community undergo.