Kluwer Arbitration Blog

When the Answer is Becoming the Question: Impact of Arbitrations on the Environment

Mohit Mahla and Kabir A.N. Duggal (Columbia Law School) · Sunday, November 29th, 2020

For a long time, the word 'environment' occurred in the realm of arbitration only when disputes between parties had some connection to it. Lately, however, there has been a shift from environment only being a subject-matter specific issue in arbitrations to a more diverse theme of discussion among the global arbitration community. Credit for this shift goes to, among others, the awareness raised by the GAR's "Best Development Award 2020" winning initiative – the Campaign for Greener Arbitrations – an initiative spearheaded by International Arbitrator, Lucy Greenwood along with members of the Steering Committee, on the issue of the negative impact of arbitrations on the environment.

Resolving Environment Related Disputes through Arbitration

Environmental protection has been the underlying theme of a series of regulatory frameworks, including international declarations, treaties and national legislations. Disputes over environmental issues were earlier often seen in State-to-State context (under international treaties such as United Nations Convention on the Law of the Sea (UNCLOS), or bilateral relationship between nations), but swiftly made their way into other domains including investor-State (often concerning disputes where the protections granted to investors under a bilateral or multilateral investment treaty clashed with the host State's regulations aimed at environment protection) and commercial contractual disputes.

Given that there is no permanent international court for resolution of environment-related disputes, the International Court of Justice (ICJ), since its establishment in 1945, was often perceived to be the primary forum for resolving such disputes. With the evolving nature of environmental laws and global recognition for the need to provide an effective dispute resolution framework, however, there has been a rise in the number of forums for resolving environment-related disputes – to name a few, Permanent Court of Arbitration (PCA); International Tribunal for the Law of the Sea (ITLOS); WTO Dispute Settlement Body; ICSID arbitral tribunals, etc. A steady increase in environment-related disputes witnessed formulation of specialised arbitral rules to deal with such disputes (*See* PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources). Various associations and bodies also volunteered to be at the vanguard of legal and institutional reforms to integrate the existing environmental framework with the dispute resolution procedure (*See* IBA Climate Change Justice and Human Rights Task Force Report).

Certain arbitral institutions have also made notable efforts to "*enhance the existing procedures to further improve their effectiveness for resolving climate change related disputes*" (*See* ICC Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR).

A cumulative effect of having advantageous features such as flexibility of choosing specialised and experienced arbitral tribunal; choice of procedural rules (including specialised rules for environment-related disputes); robust enforcement mechanism for arbitral awards globally (under enforcement mechanism of ICSID Convention or New York Convention); and the above-mentioned efforts made at multiple fronts, has certainly made arbitration an attractive forum for resolving environment-related disputes and its use is likely to go up in the future.

Environmental Impact of Arbitration

At this juncture, it may seem that the arbitration community is effectively playing its part in resolving environment-related disputes. However, due to its negative impact on the environment, as will be seen below, that part is only half addressed. One might wonder how arbitration can harm the environment. When looked in isolation, carbon emission figures of one arbitration may not seem that drastic, however, when the cumulative effect of all the arbitrations is taken into account, the numbers are alarming. To put things into perspective, a study conducted by Dechert LLP last year revealed that carbon footprint of one medium-size arbitration could be around 418,531 Kg CO2e – which may require planting up to 20,000 trees to offset its effect on the environment. This figure was reached by adding the carbon emissions of various individual constituents of an arbitration such as long and short-haul flights; printing of hearing bundles; couriers; hotel stays etc. The study noted that flying contributed the most to carbon emissions. Whilst this figure may not be the same for every arbitration and would go higher or lower depending on the underlying constituents, nature and size of the arbitration, but it certainly gives a sense of how high the carbon emission of one arbitration could be.

The scale of carbon emissions in environment-related disputes – which usually involve complicated technical issues often requiring parties to present expert evidence – are set to be even higher, since a higher number of expert witnesses (either appointed by the parties or by the arbitral tribunal) would invariably require more number of flights for cross-examination hearings and therefore would add up carbon emissions. Even looking conservatively at the yearly number of institutional arbitrations in the year 2019 (leaving aside *ad hoc* arbitrations and arbitration events etc.), it is clear that the overall impact of the arbitral community on the environment is significant.

Anecdotally, a photograph reproduced in the Decision on Counterclaims (at pg. 22) in *Burlington Resources Inc. v. Republic of Ecuador*, showing a 'site visit' to the Amazon region of the Ecuadorian Oriente by the tribunal, its secretary and assistant, party representatives, counsel, experts, witnesses, and interpreters, could give a clear idea of the complicated nature of environment-related disputes, requiring the involvement of multiple technical experts, witnesses etc. The level of carbon emissions released from only flying for that one single 'site visit', may come as surprise to some.[1)]

Way Forward

The mammoth scale of carbon footprint of the arbitral community poses a serious question, now more than ever, as to whether, and if so, how it can be reduced. The short answer to the former is a big 'yes'. The latter requires examination of some solution-driven options, which can help in achieving that goal. In the present times, where the world is facing the profound impact of COVID-19 pandemic, the arbitral community is not untouched. However, unlike others, it has remarkably embraced the 'virtualization'. An important aspect here is whether the fundamental changes brought in conducting arbitrations due to the pandemic are there to stay when the pandemic is over? The answer to this surely lies in the future, but from the carbon emissions point of view, it is imperative that at least some (if not all) changes are seamlessly embodied in the conduct of arbitrations even in the post-COVID-19 era.

- **Avoid flying unless necessary**

Flying, as noted above, is the most carbon emission contributing constituent of an arbitration. Whether done for hearings, evidence preparations meetings, or any other aspects of the arbitration, flying could be (or rather should be) avoided, or at least done only where absolutely necessary. As has been seen in the past few months, conducting all aspects of the arbitral process (including witness cross-examinations and even final hearings) virtually is seamlessly possible. In arbitrations of environment-related disputes, where the number of technical experts and witnesses can be substantially higher than usual, conducting witness examinations virtually through video conferencing could rein in the need of flying. Even for circumstances where, due to the technical nature of disputes, flying to take stock of the situation on the ground is unavoidable, use of technology – such as videography or live streaming from the site (as opposed to flying the entire team to the site), could avoid flying and ultimately help in reducing carbon emissions.

- **Avoid printing of documents**

Printing is another aspect of arbitration, which adds up to carbon emissions. Need for paperless arbitrations has been urged in the past here. In practice, however, it seemed like a unicorn dream, until the advent of the unprecedented COVID-19 times, which turned this dream into reality (or at least brought it closer to reality). Printed hearing bundles, which were commonplace in the practice of arbitration globally, are substituted by the filing of soft copies through online e-filing platforms and other electronic means. This practice, even though a result of necessity imposed by the pandemic, if continued to be followed, will go a long way in reducing the carbon footprint of arbitrations. Particularly, in arbitrations of environmental-related disputes, where the disputes are technical and usually involve presentation of evidence in the form of scientific data by the parties – which can run into thousands of pages, soft copy filing would certainly help in saving paper and in-turn reducing carbon emissions from printing.

- **Offsetting your carbon footprint**

Achieving 'net-zero' arbitrations (with zero carbon emissions) may be a tad too optimistic –

especially because it may not be possible to completely cut-down carbon emissions released in arbitrations by energy consumption, use of emails and other means of communications etc. To reduce its carbon footprint, the arbitral community has to therefore consider offsetting the remaining carbon emissions, which despite best efforts may still be released into the environment. Offsetting should be considered at both individual (by arbitrators, counsels, witnesses, experts etc.) as well as the organisational level (by law firms, arbitral institutions, arbitrator chambers etc.). Offsetting can be tricky and it is important therefore to identify genuine offsetting projects being offered by a surfeit of service providers in this field (a study conducted by Öko-Institut (Berlin) in partnership with Infras (Switzerland) and Stockholm Environment Institute (USA) suggested that "*85% of the covered [offsetting] projects and 73% of the potential 2013-2020 CER supply have a low likelihood of ensuring environmental integrity*". It is also important to bear in mind that offsetting should not be equated to the medieval notion of 'indulgences' (a way to reduce the amount of punishment one has to undergo for sins) and the primary focus should be on reducing the carbon footprint by changing the way arbitrations are conducted.

Conclusion

To be an effective and efficient dispute resolution forum for environment-related disputes, the time has now come for the global arbitral community to realise the negative impact of its activities on the environment and act to reduce it. Small behavioural changes at the individual level i.e. avoiding flying and printing can be a good start. At an organisational level, more comprehensive and robust steps to reducing carbon footprint of arbitrations, such as the use of renewable and clean energy; reuse and recycling; reducing and composting of food waste etc., should be considered.

Recently, the Financial Times reported that even emails are responsible for thousands of tonnes of carbon being pumped into the atmosphere. The arbitration community must be mindful of this reality as well.

The Authors being part of the Steering Committee encourage the readers to support the Campaign for Greener Arbitrations by clicking here.

References

?1 As per the Authors' calculation, the air travel for the 'site visit' would have released around 159,451 Kg CO2e – requiring planting of more than 7000 trees to offset its impact on the environment.

This entry was posted on Sunday, November 29th, 2020 at 4:54 am and is filed under Arbitration, Environment, International arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.