Kluwer Arbitration Blog

Is International Arbitration Going Green? Findings from the 2021 Queen Mary University|W&C International Arbitration Survey

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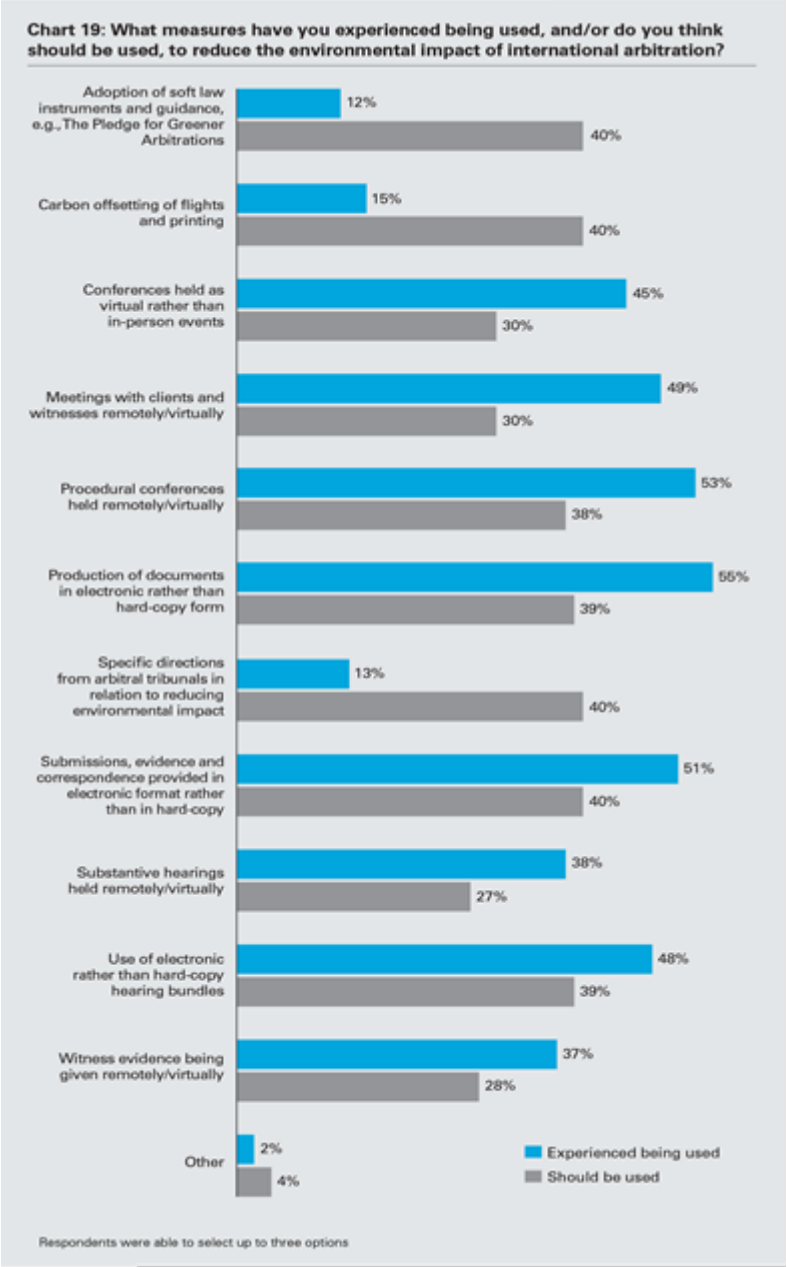
More than a year after the World Health Organization declared COVID-19 a pandemic, we hope we are getting closer to the end of this and will soon be able to enjoy our freedom again in full. However, before going back to "normal" and resuming business as usual, we should think if there are any positive takeaways for international arbitration practice. The twelfth empirical survey of the School of International Arbitration, Queen Mary University of London, the 2021 Queen Mary University/W&C International Arbitration Survey ("the Survey"), aimed among others to identify any "silver lining". The travel restrictions and the move to a new virtual reality have had at least one positive consequence on arbitration practice: they shone a spotlight on the merits of sustainable practices. This post discusses some of the relevant findings.

I. A List of Measures to Reduce the Environmental Impact of International Arbitration

Few, if any, would disagree that reducing the environmental impact of international arbitration is a noble objective. The important questions are how "green" arbitration practice actually is, how COVID-19-related developments have changed attitudes and practices, and whether these short-term revised practices will have a positive lasting impact on sustainability.

The Survey Questionnaire included a list of measures that might be used to reduce the environmental impact of international arbitration. For each option, respondents were asked to indicate whether they had experience of using that measure. They were also asked whether they thought the measure *should* be used going forward. It was not required that respondents have experience of using any given option in order to express their view of whether it should be used. In the qualitative interviews that followed with more than 190 individuals who expressed an interest, many interviewees on the topic explained that they had mistakenly understood when completing the Questionnaire that if they had used a given measure, they did not then need to specify whether they also thought it should be used. While this was not the case for all respondents, the findings from this question (see Chart below) must be assessed in light of this clarification.



II. Embracing paperless practices

As the data shows, the most commonly used measures among the Survey respondents concerned paperless practices. “Production of documents in electronic rather than hard-copy form in document production exercises”, “submissions, evidence and correspondence in electronic format rather than in hard copy” and “use of electronic rather than hard-copy hearing bundles” were chosen by around half of the respondents (55%, 51% and 48% respectively). All three options also ranked highly as measures that respondents felt should be used (between 38% and 40% in each case).

This preference towards more paperless practices was also confirmed in the qualitative interviews (see also Survey Report, p. 35). Several users emphasised the importance of electronic exchanges. Relatedly, in response to another question, respondents indicated that they would be most willing to do without “unlimited length of written submissions” if this would make their arbitration cheaper or faster. Such page-limits were also viewed as a means to print less. Although all

interviewees embraced the positive environmental impact, they often focused more on the cost and efficiency of the arbitration rather than on the environmental benefit of such approaches.

These findings suggest that the time is ripe for a shift to adopting paperless practices by default. Going paperless should be an opt-out rule as electronic communications, filings, and bundling could reduce the material waste in arbitral proceedings. Parties in a given arbitration can choose whether or not to print documents, rather than having to print multiple copies of hearing bundles.

It seems that several arbitral institutions have moved in this direction. For example, the most recent 2020 LCIA Rules, provide for electronic communications as a default (Article 4 in relation to requests of arbitration and the response thereto, as well as to any written communication). In the same vein, the new 2021 ICC Rules have shifted to electronic filing, in addition to the express provision for the possibility of remote hearings (Article 26). Since 2019, SCC arbitrations have been administered on the SCC platform. During the pandemic the SCC also offered an ad hoc platform, which was provided free of charge. ICSID has also been a pioneer in remote administration of arbitrations. In March 2020, it announced that electronic filings would be the default procedure. It expressly linked this decision to its 'ongoing commitment to leverage information technology to make its proceedings more efficient and environmentally friendly'.

III. Guidance from Tribunals and Soft Law Instruments

'Specific directions from arbitral tribunals in relation to reducing environmental impact' is a measure with which only 13% of respondents declared to have experienced. Nevertheless, 40% of respondents said that such directions should be used. This indicates users expect tribunals to promote greener arbitration practices.

The Survey results indicate a widespread need for more guidance. The 'adoption of soft law instruments' (such as the Green Pledge) was chosen as a measure that should be used by 40% of respondents. The merits and demerits of soft law instruments is an often-debated issue (see also on the Blog's coverage here). Interviews also reflected the divergence of views and the difficulty in striking a balance between the need for guidance, on the one hand, and the avoidance of over-regulation through soft law on the other.

Be that as it may, the message seems clear: more concrete guidance is welcome. Such guidance may come from arbitral tribunals, arbitral institutions and their rules, counsel but also other actors, such as service providers and hearing centers. For instance, hearing centers could link environmentally-friendly practices (e.g., use less plastic in disposable items) to a cost reduction (see e.g., the suggestions in the Framework and Green Protocols, Campaign for Greener Arbitrations which was signed by the HKIAC). Going green cannot be an abstract wish, but must be translated to specific choices throughout the arbitral process.

IV. Remote Interactions: Think Before You Travel?

The choice of a virtual rather than an in-person interaction has an impact on sustainability. 'Procedural conferences held via telephone conference, videoconference or virtual hearing rooms', 'meetings with clients and witnesses via telephone conference', 'video-conference or virtual

hearing rooms rather than in person', 'substantive hearings held via video conference or virtual hearing rooms' and 'witness evidence being given via video conference or virtual hearing rooms' were all measures that significant numbers of respondents both reported having experienced and thought should be used. In addition, 34% of respondents identified 'less environmental impact' as a main advantage of virtual hearings. Only 24% of respondents, however, indicated that 'environmental sustainability' is a factor that would make them more likely to choose a virtual rather than in-person format for hearings post-COVID-19.

This last finding is another indication that environmental considerations are a welcome side-effect but not the determinant factor behind the choice between an in-person or a remote interaction (a hearing or another remote interaction). Interviews also confirmed that, although the environmental benefits of remote participation were recognised, this was not the primary motivation behind the decision on whether interactions should be remote or in person. Making the arbitration proceeding cheaper and faster emerged as a perennially important consideration.

If travel in a particular case is unavoidable, one should at least think about the ways in which the environmental impacts can be minimized. As suggested elsewhere, there are ways to reduce the environmental impact by, for example, traveling by train or choosing airlines on the basis of their carbon-efficiency. This is an achievable goal. Nevertheless, the Survey findings show that we are not there yet: only 15% of respondents had experience with 'carbon offsetting of flights,' but 40% think that this is a measure that should be used.

V. Concluding Remarks

Although it has been a long time since 'greener' international arbitration has emerged as a trend, the pandemic may prove to be the opportunity to embrace more ambitious sustainable practices. We hope that these positive changes will remain after the pandemic recedes. After all, going paperless and sustainable travel are not only efficient and cost-effective but also the right thing to do for the sake of the environment. In light of urgent action on climate change being taken across all sectors, the arbitration community must also adapt.

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