Kluwer Arbitration Blog

Where Efficiency and Sustainability Meet: A Model Clause to Align In-House and External Counsel on Carbon Emissions Reduction

Cherine Foty (Covington & Burling LLP) and Michael McIlwrath (MDisputes) · Saturday, March 18th, 2023

Every arbitration starts as a dispute that arises months or even years before the tribunal is constituted. Well in advance of filing a request for arbitration, or an answer to one, parties may begin taking steps to prepare, including by conducting a preliminary cost/benefit analysis, gathering and reviewing documents, interviewing witnesses, identifying and meeting with potential experts, meeting to confer and developing strategy, and drafting case assessments and initial pleadings.

In many instances, parties will have retained outside counsel to perform all or most of these steps. If the party – the client – wishes to pursue environmentally-sustainable practices, then the formal engagement of counsel for the arbitration is the optimal moment to ensure this is addressed. The terms by which clients engage their external counsel will frequently spell out their expectations for how that counsel should perform work throughout the arbitration.

Previous blog posts about the Campaign for Greener Arbitrations have focused on the Campaign's Green Protocols and the critical importance of sustainability in the context of virtual proceedings. This post will focus instead on the newly released Model Clause for Company Outside Counsel Retention, which has the aim of advancing implementation of the Campaign's principles to a time well in advance of the issuance of the tribunal's first procedural order for a sustained impact in the course of the arbitration.

The Role and Responsibility of In-House Counsel for Arbitrations

As the voice of the client, corporate counsel possess an unique ability to shape arbitration proceedings. This is true even if – as is commonly the case – the in-house lawyers are not themselves experts in international arbitration. Indeed, there appears to be a growing expectation for in-house counsel to exert an active role in the arbitration process.

By way of example, the IBA Guidelines on Party Representation in International Arbitration of 2013 expressly included a party's "employees" in the definition of representatives; the DIS Arbitration Rules of 2018 introduced Rule 27.3 that encourages outside counsel to attend the case

management conference with an in-house representative; and recently, the President of the ICC Court of Arbitration, Claudia Salomon, has stated she "would like to see ICC tribunals take basic, but potentially impactful, steps like encouraging, where desired, party representatives/in-house counsel to be copied into all communications from the tribunal, and to attend early procedural conferences where there may be scope to influence the shape and timetable of the arbitration."

Thus, in-house counsel and external lawyers will naturally wish to ensure they are aligned with the company's corporate objectives. The increasing adoption of ESG requirements at the corporate level have permeated into the client-counsel relationship. In relation to diversity, for example, some companies, such as Facebook, HP, Macy's, MetLife, and Microsoft, now require that law firm counsel teams and even law firm pitches contain sufficiently diverse representation. The "environmental" prong of ESG is receiving similar attention with corporate decarbonisation, the transition to net-zero emissions, and sustainability commitments becoming commonplace. It has been reported that 826 of the 2,000 largest publicly-traded companies in the world by revenue have made net zero or other de-carbonization commitments.

Being able to demonstrate environmentally sustainable conduct which furthers those commitments is an important objective of many companies today. Several major companies link executive pay to ESG performance. For example, the board of Danone has linked 30% of its CEO's long-term incentive bonus to its environmental rating by a third party, and 20% of the CEO's direct compensation to the achievement of a "measurable social/societal or environmental impact." As reported elsewhere, other such companies have followed suit including Apple, BHP, British Petroleum (BP), Intel, McDonalds, PepsiCo, Rio Tinto, Shell, Siemens, Starbucks, and Unilever.

Background on the Principles of the Campaign

The Guiding Principles of the Campaign revolve around three main objectives:

- Questioning the need to fly,
- Reducing waste (for example, by eliminating hard copy filings altogether), and
- Using green energy sources.

These principles were embodied in a set of six Green Protocols and a Model Green Procedural Order issued in 2020 and targeted to various stakeholders in the arbitration community: arbitrators, institutions, law firms and service providers, hearing venues, and conference organizers. They provide easy-to-use, practical guidance and best practices to each. The Campaign calls on international arbitration stakeholders to promote sustainability by signing the Green Pledge, and adopting a Green Protocol, and/or committing to a Green Action.

Notably, the stakeholders who bear the costs of arbitrations – the parties – were not the subject of a dedicated Green Protocol, although they were undoubtedly impacted by the content of the Green Protocol for Arbitral Proceedings.

The Addition of a Model Clause for Outside Counsel Retention

The Model Clause was developed by the Campaign's Corporate Task Force and released in

February 2023. Consisting of current and former corporate counsel, the Task Force considered not only how to raise awareness of the Campaign's objectives among in-house teams but how best to align around shared objectives with external counsel for reducing or avoiding the environmental impact associated with the arbitration. In doing so, the Model Clause links energy efficiency with procedural efficiency.

What is wasteful environmentally in an arbitration is likely to be wasteful in terms of costs. While many of the Campaign's principles suggest alternatives to traditional procedural steps – such as conducting a hearing in part or fully by videoconference – in-house counsel are in a position to question or encourage external counsel to consider whether the step should be taken at all. The lowest environmental impact of any procedural step may be a sensible decision not to take it.

In what circumstances would the Model Clause for Company Outside Counsel Retention be used? While it may be adopted in any engagement of external counsel, it was intended primarily for company legal departments to include in their engagement letters with law firms (also called retention letters). Alternatively, the Model Clause may be included in a company's outside counsel policies or guidelines that apply to all external lawyers acting on behalf of the company, or as part of a law firm panel qualification.

The Model Clause begins with the premise that the company "is seeking to reduce carbon emissions and other environmental impacts associated with a number of activities, including resolving disputes." It then states that "[o]utside counsel will make efforts, consistent with [the corporation's] objectives, to minimize the impact of the resolution of disputes on the environment[.]"

Guided by a recognition that the overarching goal of parties and counsel will be to attain a positive outcome through a final award or settlement, the Model Clause encourages outside counsel to "consider" steps three distinct areas that have a significant impact on carbon emissions. Notably, the Scottish Arbitration Centre, the first arbitration institution to expressly reference the Green Protocols in its rules, also requires participants to *consider* their application in its Rule 23.

Travel

The nature of international arbitration is such that it has traditionally involved a great deal of travel. Yet airplane transit has the highest carbon impact by a wide margin. And when external lawyers travel – frequently in teams – not only to attend hearings but also to meet with witnesses, experts, and clients, they also generate significant costs for the client that might otherwise be avoided.

As a result, the Model Clause addresses the full range of activities associated with preparing for an arbitration by encouraging outside counsel "to consider and question the need to fly or the number of people who will fly." It provides as an alternative "the use of virtual meeting and hearing technology, including for document review, witness interviews, client meetings, and hearing participation."

The fact that less travel should result in cost avoidance in addition to reduced carbon emissions should make it all the more attractive to in-house counsel with strained budgets.

Where travel is necessary, the Model Clause suggests the use of lower-carbon generating alternatives to flying "where available and appropriate," suggesting outside counsel "consider the use of train travel as a lower-carbon emitting alternative to flying." If airline travel is deemed necessary, the Model Clause suggests outside counsel "mak[e] reasonable efforts to offset the carbon emission of any flights taken on company's matters."

Documents

Transportation causes hard-copy documents to generate much higher carbon emissions than what goes into producing the paper on which they are printed. Typically, pleadings and exhibits make their way to clients, opposing counsel, arbitrators, and institutions via carbon-intensive air freight shipping. The Model Clause seeks to nudge those who remain in the paper-based world into the twenty-first century, calling on counsel to "whenever reasonably possible, conduct correspondence through electronic means unless hard copy documents are expressly required under the circumstances."

It also encourages counsel to "whenever possible, discourage the use of hard copies of documents in arbitrations and instead encourage the use of electronic documents." Even those who remain deeply entrenched in the paper-based world may be swayed to adopt environmentally-friendly practices when the parties jointly insist on its importance, and the Model Clause helps ensure that at least a conversation will take place.

Hearings

The Model Clause goes an innovative step beyond the Green Principles by seeking to align considerations of carbon reduction with procedural efficiency when determining how to put on the best possible case. The clause recommends that outside counsel question the necessity of hearings as to certain issues, their modality, and their duration, by:

- Determining which issues genuinely require a hearing. The Model Clause encourages outside counsel to consider whether some issues may be decided on the basis of documents and written submissions alone. This does not mean substituting the entire hearing, although that may be considered as well. If a tribunal can decide a significant issue before the main hearing, for example the admissibility of a counterclaim or the effect of a limitation of liability, it may lead to a truncated main hearing with a substantially reduced carbon and cost impact.
- Questioning whether all or portions of the hearing should be in-person. Even where a hearing is necessary or advantageous, the Model Clause encourages counsel to consider whether physical, in-person attendance is necessary.
- Consider having some participants participate virtually. This would avoid, for example, flying one or more witnesses halfway around the world for a half day of their testimony.

Conclusion

Because it touches on the entire life of a dispute, the Model Clause may help reduce carbon

emissions even for those cases that, for a variety of reasons, never result in an arbitration or settle in advance of a tribunal being constituted.

As corporate counsel play an increasingly present and influential role in arbitration, the CGA's Task Force is focused on ensuring they have the necessary tools to participate in arbitrations sustainably. But the Task Force also recognizes that not all companies rely on law firms for all of the work in arbitrations. Even when they do retain external counsel, in-house teams often handle much of the work internally. Therefore, the Task Force plans to issue further guidance this year to assist corporate counsel in their internal management of disputes.

** Cherine Foty is the Global Vice-President and Michael McIlwrath is the Corporate Task Force Chair of the Campaign for Greener Arbitrations Global Steering Committee.*

This entry was posted on Saturday, March 18th, 2023 at 8:42 am and is filed under Green Arbitration, IBA Guidelines on Party Representation, In House Counsel
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.