

Sustainable Arbitration Along the Belt and Road Initiative: The Green Model Clause

Zhang YUYING*

While there may be developments in the substantive obligations in green arbitration, it is difficult to say the same for the procedural aspects. Many have voiced concerns over the huge environmental impact in cross-border arbitration as a result of flights necessary for hearings and countless bundles of documents (just to name two examples). A select number of arbitral institutions have implemented climate-friendly practices in their rules and practice (whether pre- or during the COVID-19 pandemic), but such initiatives are far from sufficient. Although the new norm of virtual hearings has become common, some are concerned about their adoption, alleging a violation of the right to a physical hearing and consequently access to justice. Yet a relevant report released by the International Council for Commercial Arbitration ('ICCA') has definitively concluded otherwise. In this article, the Belt and Road Initiative ('BRI') provides the backdrop as one of the biggest infrastructure projects in the world that utilizes international arbitration. There are various initiatives within the BRI that gather major stakeholders, with the most relevant project here being the Beijing Joint Declaration by Arbitration Institutions for the BRI (the 'Beijing Declaration'), which was issued by major arbitral institutions around the world and pushes for innovative changes in arbitration. Building on green practices in the arbitration community and the confirmation by ICCA that virtual hearings in and of themselves do not encroach on access to justice, the author suggests that arbitral institutions involved in the Beijing Declaration or along the BRI could pioneer changes in green arbitration by launching a Green Model Clause, which could operate as a clause for parties to adopt alongside carbon emissions scorecards, with the scorecards setting out a framework on the relevant factors for the tribunal to consider in the process of cost optimization.

Keywords: Belt and Road Initiative, model clause, arbitration, arbitration institutions, arbitral rules, Campaign for Greener Arbitrations, access to justice, virtual hearings, carbon emissions scorecards, climate change

1 INTRODUCTION

In recent years climate change has unequivocally been one of the issues discussed with increasing urgency, with the United Nations calling for a move 'towards climate-resilient development' and 'outlining a clear path to achieve net-zero emissions'.¹

* Research Associate, Singapore International Dispute Resolution Academy. The author acknowledges and is grateful for the support of the Singapore International Dispute Resolution Academy BRI Program. Email: yuyingzhang@smu.edu.sg.

¹ Goal 13: Take Urgent Action to Combat Climate Change and Its Impacts, United Nation Sustainable Development Goals, [https://www.un.org/sustainabledevelopment/climate-change/#:~:text=IF%](https://www.un.org/sustainabledevelopment/climate-change/#:~:text=IF%20)

Leaving climate change unchecked could undo the progress made. The attention to climate change has led to a more pressing focus on sustainable development, with various initiatives and agreements commenced over the years. One of the most prominent initiatives is the 2015 Paris Agreement, with 196 countries coming together to limit the global temperature increase to 1.5°C.²

Closer to home in the arbitration community, a similar emphasis can be found in new arbitral rules and regulations, as well as in international investment agreements ('IIAs'), with a global trend building on investor responsabilization. At the core of this change is the focus on inclusive growth and sustainable development.³ One example of this trend can be found in China's IIAs, which recently started incorporating provisions relating to social and environmental obligations of investors. As welcoming as this progress in substantive obligations may be, sustainable procedural guidelines are generally still underdeveloped when it comes to the arbitration of cross-border commercial disputes. Although arbitration has entrenched itself as the de facto mode of dispute resolution of international disputes⁴ and is well-poised to tackle environmental issues with its inherent flexibility, speedy resolution of disputes and the ability to choose appropriate expert adjudicators,⁵ it has made a name for being a double-edged sword in climate change. The cross-border nature of international arbitration demands multiple trips and generates voluminous amounts of paper. Such requirements have quietly crept up as creatures of stress on the environment.⁶

This is a problem, especially with one of the biggest infrastructure projects in the world – the Belt and Road Initiative ('BRI') – seeking to establish 'a vast network of railways, energy pipelines, highways, and streamlined border crossings, both westward – through the mountainous former Soviet republics – and southward, to Pakistan, India, and the rest of Southeast Asia'.⁷ The reach of the BRI is

20left%20unchecked%2C%20climate%20change%20will%20cause%20average%20global%20temperatures,which%20can%20lead%20to%20conflict (All websites in this article accessed 3 Jan. 2024).

² *The Paris Agreement*, United Nations Climate Change, <https://unfccc.int/process-and-meetings/the-paris-agreement>.

³ Kun Fan, *A Review of China's Sustainable Development Goals Through International Investment Agreements*, 3 ICC Disp. Res. Bull. 29 (2022).

⁴ Current Choices and Future Adaptions, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, White & Case LLP (6 May 2021), Current choices and future adaptations | White & Case LLP (whitecase.com); see also Nadja Alexander et al., *Singapore International Dispute Resolution Academy, International Dispute Resolution Survey: 2022 Final Report* 64 (2022).

⁵ Lucia Bizikova, *On Route to Climate Justice: The Greta Effect on International Commercial Arbitration*, 39(1) J. Int'l Arb. 79, 94–95 (2022), doi: 10.54648/JOIA2022004.

⁶ Stephan Wilske, *The Impact of COVID-19 on International Arbitration – Hiccup or Turning Point?*, 13(1) Contemp. Asia Arb. J. 7, 9 (2020); see also Stephan Wilske & Zeld Bank, *Is There an (Emerging) Ethical Rule in International Arbitration to Strive for More Climate Friendly Proceedings?*, 14 Contemp. Asia Arb. J. 155, 157 (2021).

⁷ James McBride, Noah Berman & Andrew Chatzky, *China's Massive Belt and Road Initiative*, Council on Foreign Relations (2 Feb. 2023), <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative>.

staggering, with ‘147 countries – accounting for two-thirds of the world’s population and 40 percent of global GDP – [that have signed] on to projects or have indicated an interest in doing so’. Given such a massive commitment, it is inevitable that disputes will run rampant – both actual⁸ and potential,⁹ especially with increased scrutiny over these projects resulting in delays and, more prominently, the debt trap that has become synonymous with the BRI. Nuances in various jurisdictions (such as culture, political and investment environments, and legal practice and traditions) will only serve to amplify the risk of disputes arising as well as the process of dispute resolution.¹⁰ While Western parties generally favour adjudicative and contentious processes and Chinese parties may ‘prefer processes that are more consultative and preserve long-term relationships’,¹¹ China itself encourages ‘arbitration as the appropriate method of dispute resolution for BRI projects’.¹² China’s second-generation bilateral investment treaties (‘**BITs**’) provide investors with the option to utilize international arbitration as a form of dispute resolution with states.¹³

Worryingly, the Campaign for Greener Arbitrations – helmed by Lucy Greenwood in 2019 – found that for medium to large-sized arbitrations, ‘just under 20,000 trees could be required to offset the total carbon emissions resulting from just this one arbitration. Long-haul flights alone can contribute over three quarters of these total carbon emissions’.¹⁴ Building on this, the panel presiding over the Casablanca Arbitration Days in 2020 found that even ‘offsetting the carbon emissions of the caseloads of all major arbitral institutions in one year would require planting a forest eleven times the size of Paris’.¹⁵ There have been

⁸ *Cooperation Mechanism of Belt and Road Arbitration Institutions Gains More International Recognition*, Ministry of Justice of the People’s Republic of China (15 Nov. 2023), Cooperation mechanism of Belt and Road arbitration institutions gains more international recognition (moj.gov.cn).

⁹ Mingchao Fan, Briana Young & Anita Philips, *Belt and Road: Supporting the Resolution of Disputes*, Kluwer Arbitration Blog (16 Apr. 2018).

¹⁰ Henneke Brink, *Dispute Resolution in the Chinese Belt and Road Initiative*, 45(51) Corp. Mediation J. (2021), doi: 10.5553/CMJ/254246022021005002004, Dispute Resolution in the Chinese Belt and Road Initiative · Corporate Mediation Journal · Eleven Journals.

¹¹ John Sabet, *Paris Arbitration Week Recap: Belt and Road Initiative – Recent Evolutions, Western Reactions, and Dispute Resolution*, Kluwer Arbitration Blog (23 Apr. 2022), <https://arbitrationblog.kluwerarbitration.com/2022/04/23/paris-arbitration-week-recap-belt-and-road-initiative-recent-evolutions-western-reactions-and-dispute-resolution/>.

¹² Patrick M. Norton, *China’s Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. Pa. Asian L. Rev. 72, 88 (2018).

¹³ Jiangyu Wang, *Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda*, 8(1) CJCL 4, 12 (2020), doi: 10.1093/cjcl/cxaa016.

¹⁴ *A Significant Impact*, Campaign for Greener Arbitrations, <https://www.greenerarbitrations.com/impact>.

¹⁵ Thomas Granier, Jacob Grierson & Sacha Karsenti, *Is Arbitration Helping or Hindering the Protection of the Environment and Public Health?*, 38(3) J. Int’l Arb. 237, 334 (2021), doi: 10.54648/JOIA2021016; see also Wilske & Bank, *supra* n. 6, at 158.

initiatives taken by arbitral institutions, such as the incorporation of green practice, or international efforts like the Campaign for Greener Arbitrations to promote climate-friendly practices in arbitration. This has led to the evolution of green arbitration, where ‘experts and stakeholders are trying to adopt the best practices to reduce carbon footprints and minimize the environmental damage that takes place during an arbitration’.¹⁶ The efforts have been commendable and recognition has been given when due, yet the impact of such endeavours could perhaps find a still more solid footing in the arbitration community. This is an especially pivotal point in the greening of industry in general, given that the pandemic-driven alternatives to working at the office (such as working from home, virtual meetings, and a shift towards going paperless) are generally in line with sustainable practices. As we settle into more flexible working arrangements, the challenge is to maintain ‘these positives from a sustainability perspective’.¹⁷

This paper thus seeks to first set out, in Chapter I, the changing trends in sustainable arbitration and the dynamics between public and private entities. Chapter II will then discuss whether there is a legal or ethical obligation to adopt climate-friendly practices, looking at various sources of laws such as national rules and regulations, arbitral rules and institutional practice, and soft law instruments. Following which, Chapter III will delve into concerns regarding whether there is a right to physical hearing and consequently if the push for virtual hearings might deny access to justice. Chapter IV will then outline the author’s suggestions for how institutions can provide guidance through the implementation of an alternative green model clause coupled with carbon emissions scorecards, with examples based on the arbitration communities along the BRI. Chapter V concludes.

2 CHANGING TRENDS IN ARBITRATION

As support for sustainable arbitration grows, the question arises of who bears the burden of regulation. Lord Robert Carnwath, a former justice of the Supreme Court of the United Kingdom (UK), recognized the unprecedented nature of the changes in our climate, calling for the legal community to play a part in ‘ensuring that the whole machinery of the law, public and private, is brought in line with the objective of a just transition to a climate-resilient and net zero emissions economy’.¹⁸ This section will seek to lay down, first, the

¹⁶ Tariq Khant, *Green Arbitration: The Uncharted Road Towards Sustainable Arbitration*, SCC Online Blog (24 Aug. 2022), <https://www.sconline.com/blog/post/2022/08/24/green-arbitration-the-uncharted-roa-towards-sustainable-arbitration/d>.

¹⁷ Maria Connolly, *A Greener Strategy: Broadening Your Horizon*, 164 *Solic. J.* 36, 39 (2021).

¹⁸ Lord Robert Carnwath CVO, *Foreword to The Chancery Lane Project: Green Papers of Model Laws 4* (Feb. 2020), <https://chancerylaneproject.org/wp-content/uploads/2021/03/TCLP-GreenPaper-sofModelLaws-1stEdition3.pdf>.

shifting perceptions in embracing green practices in arbitration, and second, the appropriate legal entity to helm these changes.

2.1 A PERCEPTION SHIFT IN EMBRACING GREEN PRACTICES

With the acceleration of technology in various aspects of arbitration hearings during the pandemic, it is prudent to look at how this shift is perceived among the arbitration community. The 2021 Queen Mary International Arbitration Survey posits an increased awareness of the benefits of virtual hearings, such as the ‘potential for greater availability of dates for hearings’, ‘greater efficiency through use of technology’, and ‘greater procedural and logistical flexibility’.¹⁹ Respondents were also open to using paperless filings²⁰ and, more importantly, there was an almost unanimous agreement on imposing page limits.²¹ Remote interactions and carbon offsetting also received results along the same lines.²² Similarly, 86% of the respondents of the SIDRA Survey Final Report 2022 also prioritized the quality of virtual hearing facilities in arbitral institutions, and 80% found additional facilities like electronic presentation of evidence ranking among their top choices when choosing an arbitral institute.²³ Generally, there seems to be a ‘willingness to adopt paperless practices, such as production of documents in electronic rather than hard-copy form; providing submissions, evidence and correspondence in electronic form; and the use of electronic hearing bundles’, and respondents are open to ‘more “green” guidance, both from tribunals and in the form of soft law’.²⁴

Despite the overall acknowledgement of the environmental benefits of remote participation and the need to embrace more sustainable practices, respondents of the 2021 Queen Mary International Arbitration Survey were alive to the fact that the environmental benefits of remote participation do not in themselves constitute the primary motivation behind such choices; rather, the ‘reduction of environmental impact is a welcome side-effect of their choices throughout the arbitral process, rather than a priority in and of itself’.²⁵ Regardless of whether the push behind such changes is green or otherwise, however, the fact remains that going virtual does have an environmental impact.

¹⁹ White & Case LLP, *supra* n. 4, at 5.

²⁰ *Ibid.*

²¹ *Ibid.*, at 15.

²² Wilske & Bank, *supra* n. 6, at 9.

²³ Alexander et al., *supra* n. 4, at 19.

²⁴ White & Case LLP, *supra* n. 4, at 5.

²⁵ *Ibid.*

2.2 INTERPLAY BETWEEN PRIVATE AND PUBLIC ENTITIES

Brekoulakis and Devaney succinctly set out the interaction between private and public arbitration over the past few years. Despite arbitration being traditionally used by private entities, with the downfall of the doctrine of non-arbitrability, the scope of arbitrators' authority has greatly expanded to include the power to determine statutory claims that may have societal consequences.²⁶ They noted that a comparable pattern also arises in investment law, where arbitrators 'regularly review investor claims concerning government measures, including financial and environmental measures, which concern the regulatory sovereignty of the host nation and would normally fall within the exclusive jurisdiction of national courts'.²⁷

Taking a step back from the legal aspect of this public-private interaction, the synergy between economic and ideological factors has produced a tighter interrelation between public and private sectors, where there is an 'increased reliance on private actors to perform public functions in virtually every industrialized state'.²⁸ One example of such dependence can be found in the commercial arrangements made between private and public entities, where private parties are entrusted with the legal responsibility to provide services to achieve a certain public function²⁹; for example, where contractors engage in competitive tendering to build infrastructure meant for the public good such as hospitals and public transport. Examples on an international scale include organizations like the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), which are developed as both 'complements and deliberate policy alternatives to established inter-governmental organizations ("IOs")'³⁰; they can be 'legally constituted under national private law, mimic the broad lines of IOs, and are responsible for making decisions capable of affecting large numbers of people across multiple national jurisdictions'.³¹

The call for public and private convergence for various international mutual purposes is nothing new, with the 'standard international law narrative of IOs record[ing] significant private involvement in institution-based functional co-operation from at least the middle of the nineteenth century, through to the interwar period'.³² Despite this preference being on the rise, the general consensus

²⁶ Stavros Brekoulakis & Margaret Devaney, *Public-Private Arbitration and the Public Interest under English Law*, 80(1) MLR 22, 23 (2017), doi: 10.1111/1468-2230.12241.

²⁷ *Ibid.*

²⁸ *Ibid.*, at 23–24.

²⁹ *Ibid.*

³⁰ Davinia Aziz, *Global Public-Private Partnerships in International Law*, 2 Asian J. Int'l L. 339, 339 (2012), doi: 10.1017/S2044251312000148.

³¹ *Ibid.*

³² *Ibid.*, at 344.

is that ‘public-private partnerships are a more efficient and effective option for delivering ... public goods, relative to treaty-based IOs’.³³ Additionally, the UK Department for International Aid conducted a Multilateral Aid Review in 2011 which sought to ‘ensure that the UK gets maximum value for money for UK aid through its contributions to multilateral organizations’; this study concluded that organizations such as the Global Fund were well received, similar to IOs like the World Bank.³⁴

Henceforth, it would appear that having purely private or hybrid inter-governmental private bodies exercise public governance functions relating to green practices might be more welcomed as opposed to designating such functions to solely governmental public bodies or even treaties. In the context of arbitration, it would be the arbitral institutions (whether created or encouraged by the government,³⁵ operating as not-for-profit non-governmental institutions,³⁶ or functioning in other ways³⁷) that would be best positioned to deliver public goods – in this case, reducing the environmental impact of arbitration. It is also not that far-fetched to require such institutions to do so, since arbitrators have already begun determining claims that have societal consequences.³⁸

3 ETHICAL OR LEGAL OBLIGATION TO ADOPT CLIMATE-FRIENDLY PRACTICES: IS IT APPROPRIATE?

Wilske and Bank argue that whilst ‘demonstrating the aspiration and desire of arbitration participants to turn to more climate friendly practices would certainly be both comforting and uplifting, **change can only be induced through**

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Alexis Moure (President of the International Court of Arbitration), International Chamber of Commerce (ICC), *Standards for Arbitration Institutions*, Keynote Address at the Global Arbitration Live Istanbul (20 Jun. 2019), <https://journal.arbitration.ru/analytics/standards-for-arbitration-institutions/>. An example is the Indian government which created the Srikishna in Dec. 2016, a government committee with the ‘mandate to institutionalize arbitration, notably by grading arbitral institutions, by promoting a national arbitration centre, by creating an arbitration bar and by accrediting arbitrators’. Another example is Turkey, where the Istanbul Arbitration Centre (‘ISTAC’) has been described as benefitting from the ‘support of the Turkish government, which is actively promoting it as a place to arbitrate disputes involving foreign investors’.

³⁶ *Arbitration & Institutions, Singapore International Arbitration Centre*, Singapore Law Watch, <https://www.singaporelawwatch.sg/About-Singapore-Law/Civil-Practice-ADR/arbitration-adr-institutions>. The Singapore International Arbitration Centre was established in Jul. 1991 as a not-for-profit non-governmental organization.

³⁷ *What are Arbitral Institutions, and Why Do They Matter?*, MoloLamken LLP (2021), <https://www.mololamken.com/knowledge-what-are-arbitral-institutions-and-why-do#:~:text=The%20vast%20majority%20operate%20on,LCIA%2C%20ICC%2C%20ICDR>).

³⁸ Stavros Brekoulakis, *The Protection of the Public Interest in Public Private Arbitrations*, Kluwer Arbitration Blog (8 May 2017).

concrete actions and obligations' [emphasis added].³⁹ Despite the push for firm guidelines in executing reform, the 'general uncertainty over [the] rules govern [ing] the conduct of [arbitrators]'⁴⁰ has resulted in arbitration being frequently referred to as an 'ethical no-man's land'.⁴¹ In order to establish the type of regulation suitable for international arbitration, Wilske and Bank suggest sieving through 'national [rules and regulations] to rules set by arbitral institutions and even to soft law' at first instance.⁴² While their focus is on the conduct of arbitrators, the same approach can be used to determine the type of regulation best suited to address concerns regarding sustainable practices in arbitration.

3.1 NATIONAL RULES AND REGULATIONS

Domestic rules and regulations are the natural starting point when it comes to determining the state of the legal profession in a particular jurisdiction, given their ability to regulate and sanction lawyers; counsels in arbitration proceedings have been taken to task in domestic courts for their shortcomings, which suggests that that local laws could very well provide a sufficiently solid grounding in policing their conduct.⁴³ However, as attractive as this school of thought may be, V. V. Veeder QC lamented the inherent difficulties when it comes to international cases – 'what are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by New York lawyers?'⁴⁴ Not only are there complications in determining which set of national laws to apply, but issues relating to extraterritorial application also arise⁴⁵; that is, if Indian rules apply to an Indian lawyer participating in an arbitration, are they also applicable when the arbitration is held in a foreign jurisdiction? Such confusion has hindered the understanding of the interrelation between national laws and international arbitration.

³⁹ Wilske & Bank, *supra* n. 6, at 160.

⁴⁰ Stephan Wilske, *International Arbitration and the Infamous 'Ethical No-Man's Land': A Status Report Inspired by Edward St Aubyn's 'Patrick Melrose Saga'*, Austrian Y.B. Int'l Arb. 191, 191 (Christian Klausegger et al. eds, 2019).

⁴¹ Wilske & Bank, *supra* n. 6, at 162.

⁴² *Ibid.*, at 163; see also Catherine A. Rogers, *Ethics in International Arbitration* 86 (2014); see also Felix Dasser, 'Soft Law' in *International Commercial Arbitration*, 44 *The Pocket Books of the Hague Acad. Int'l L.* 243–246 (2021), doi: 10.1163/9789004462908_009.

⁴³ *Landmark Ventures, Inc. v. Cohen*, No. 13 Civ. 9044 (JGK), 2014 WL 6784397 (S.D.N.Y. 25 Nov. 2014); see also Douglas Thomson, *Counsel Sanctioned Over ICC Lawsuit*, *Global Arbitration Review* (1 Dec. 2014), <https://globalarbitrationreview.com/article/1033912/counsel-sanctioned-over-icc-law-suit>; see also Wilske & Bank, *supra* n. 6, at 163.

⁴⁴ V. V. Veeder, *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18(4) *Int'l Arb.* 431, 433 (2002); see also Wilske & Bank, *supra* n. 6, at 163.

⁴⁵ Rogers, *supra* n. 42, at 258.

At the point of writing, China has proposed amendments to the Arbitration Law of the People's Republic of China ('**Arbitration Law**') that 'expressly [allow] arbitration proceedings to be conducted online or by documents only, and provide[s] more flexibility with respect to the cross-examination methods and delivery methods, which supports the development of online arbitration'.⁴⁶ While this change is driven by the desire to adapt to the digitalization of arbitral proceedings, it nevertheless remains the fact that doing so reduces the environmental impact of arbitration.

Even though there are no binding laws or rules that stipulate counsels, law firms or other related legal professions *must* be green, it remains possible to derive some guidance from ethical rules or codes of conduct. For instance, whilst the American Bar Association ('**ABA**') Model Rules for Professional Responsibility ('**ABA Model Rules**') do not explicitly mention the obligation to be green, counsels are nonetheless required to take heed of not only the 'law but [of] other considerations such as moral, economic, social and political factors ... that may be relevant to the client's situation'.⁴⁷ When read together with the subsequent initiatives by ABA touching on sustainable practices in the legal sector (e.g., setting up committees like the Climate Change, Sustainable Development, and Ecosystems Committee, and the ABA Section of Environment, Energy, and Resources (SEER)),⁴⁸ one can logically conclude that going green is far from being ignored, and all it requires is a nudge in the right direction.

Given the lack of rules and regulations addressing lawyers, it is also possible to look at the situation regarding fiduciary duties and corporate social responsibility for those outside the legal profession.⁴⁹ There has been an interesting paradigm shift, with a 2019 survey carried out by The Economist Intelligence Unit on behalf of Clifford Chance highlighting that 49% of its respondents (which consist of 200 board members from large businesses and a variety of industries around the world) were worried about environmental risks – a significant increase from 16% in 2014. About half of the respondents had taken action to address investor or employee-inspired climate change activism and other climate-change interruptions or even regulatory requirements. It thus looks like one of the push factors for climate-inspired action stems from changes to the legal compliance standard. This is echoed by calls (from important figures such as Lord Sales, Justice of the UK Supreme Court) for 'company law to require directors to have regard to climate change

⁴⁶ Kun Fan, *The 2021 Proposed Amendments to the Arbitration Law: A New Era of Arbitration?*, 3 ICC Disp. Res. Bull. 21, 24 (2021).

⁴⁷ Model R. Prof'l Conduct 2.1 (Am. Bar Ass'n. 2023).

⁴⁸ Climate Change Committee, https://www.americanbar.org/groups/environment_energy_resources/committees/ccsde/; see also Section of Environment, Energy, and Resources, https://www.americanbar.org/groups/environment_energy_resources/.

⁴⁹ Wilske & Bank, *supra* n. 6, at 166–167.

effects and adopt climate risk management as part of their fiduciary duties'.⁵⁰ Some jurisdictions have begun to solidify and even codify corporate social responsibility. For instance, the duty of vigilance law in France 'requires companies with more than 5,000 employees in France or more than 10,000 employees worldwide to develop, disclose, and implement a vigilance plan to identify and prevent, among other things, environmental damage'.⁵¹ However, the degree of regulation varies in the jurisdictions that police green behaviour. This translates to a greater reliance on soft laws and best practices instead – so as to ensure easier compliance globally – since it remains vital to balance the pursuit of commercial objectives against the failure to comply with green practices. All in all, this is nevertheless a step in the right direction to enforce green practices – even if not in the legal industry.

Despite the absence of domestic laws regulating counsels' climate-friendly conduct in international arbitration or in arbitral institutions, such laws nevertheless provide a necessary starting point in determining the trend of obligations in these proceedings – especially since arbitral rules tend to follow the gist of such laws.

3.2 ARBITRAL RULES AND INSTITUTIONAL PRACTICE

Arbitral rules may also elucidate possible ethical or legally binding obligations for a greener arbitration.⁵² By developing their own codes of conduct and arbitral rules, institutions can control the direction of their arbitral rules and regulations. They can also be updated according to the existing trends to include duties and obligations to tackle issues that affect the industry.

Of particular interest is the Scottish Arbitration Centre ('SAC'), with its newly revised 2022 Rules revealing a modern and eco-friendly approach to arbitration, amongst other changes.⁵³ Article 23 of the SAC Rules on environmental impact requires that 'parties, their counsel or other representatives, the Arbitral Tribunal and the Centre shall be mindful of the environmental impact of the arbitration, and in particular shall, at the commencement of proceedings, consider the application of Green Protocols as developed by The Campaign for Green Arbitration [*sic*] and as amended from time to time'.⁵⁴ As of 20 September

⁵⁰ Felicia Cheng & Dominique Yong, *Hong Kong Arbitration Week Recap: Is Arbitration Sustainable?*, Kluwer Arbitration Blog (24 Oct. 2019), <https://arbitrationblog.kluwerarbitration.com/2019/10/24/hong-kong-arbitration-week-recap-is-arbitration-sustainable/>.

⁵¹ Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World*, The CLS Blue Sky Blog (20 Nov. 2020), <https://clsbluesky.law.columbia.edu/2020/11/20/mandatory-corporate-social-responsibility-legislation-around-the-world/>.

⁵² Wilske & Bank, *supra* n. 6, at 168–169.

⁵³ Rules of the Scottish Arbitration Centre (2023).

⁵⁴ *Ibid.*, Art. 23.

2023, it appears that the SAC is the first and only institute that has included an express duty requiring those involved in arbitrations under the rules to consider the Green Protocols.⁵⁵ Based on an interview the author conducted with a representative from the Campaign for Greener Arbitrations, the Campaign now has nearly 1,500 signatories, including over 380 institutional signatories from around the world. Around 200 global and regional representatives have been pushing for the incorporation of the Green Protocols worldwide. The Campaign has actively encouraged various institutions to adhere to the sustainability principles of the Campaign. The SAC's express reference to the Green Protocols is confirmation of those efforts.

There have been shifts in how arbitral proceedings themselves are carried out as well. Arbitral institutions have started leaning towards virtual hearings and going paperless of late; for example, the London Court of International Arbitration ('LCIA'),⁵⁶ the International Centre for Settlement of Investment Disputes ('ICSID'),⁵⁷ and the International Chamber of Commerce ('ICC') have all made electronic filing the default.⁵⁸ Moreover, the Vienna International Arbitration Centre ('VIAC') has announced the implementation of the VIAC Portal – an online case management system – to promote and enable greener arbitrations.⁵⁹ Other arbitral institutions that have implemented similar online case management systems include the Hong Kong International Arbitration Centre ('HKIAC') Case Connect,⁶⁰ and the World Intellectual Property Organization ('WIPO') eADR.⁶¹ Many of these changes arose during the height of the pandemic, with significant challenges brought forth at 'a human, logistical and financial level', though 'the disruption has also brought about a fundamental shift in how we work, proving that we can work in a more sustainable way'.⁶² Some arbitration institutions in China have also adopted online arbitration rules, or

⁵⁵ Based on a search on the internet and also the author's interviews with leading arbitration centres like the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre, as well as with a representative from the Campaign for Greener Arbitrations.

⁵⁶ London Court of International Arbitration Rules (2020), Art. 4.

⁵⁷ *ICSID Makes Electronic Filing Its Default Procedure*, International Centre for Settlement of Investment Disputes World Bank Group (News & Events) (13 Mar. 2020), <https://icsid.worldbank.org/news-and-events/news-releases/icsid-makes-electronic-filing-its-default-procedure>.

⁵⁸ Michael Polkinghorne & Andrew de Lotbiniere McDougall KC, *New 2021 ICC Arbitration Rules*, White & Case LLP (7 Dec. 2020), <https://www.whitecase.com/insight-alert/new-2021-icc-arbitration-rules>.

⁵⁹ *VIAC Has Signed the Green Pledge*, Vienna International Arbitration Centre News-Archive, <https://www.viac.eu/en/service/news-archive/viac-has-signed-the-green-pledge>.

⁶⁰ *Case Connect*, Hong Kong International Arbitration Centre, <https://www.hkiac.org/arbitration/case-connect>.

⁶¹ *WIPO eADR*, World Intellectual Property Organization, <https://www.wipo.int/amc/en/eadr/wipoeadr/>.

⁶² Connolly, *supra* n. 17, at 39.

guidelines on virtual hearings.⁶³ In 2022, about one-third of the cases (1,340 cases) reviewed by the China International Economic and Trade Arbitration Commission ('CIETAC') were filed online and half of the hearings were also conducted online (1,906 cases).⁶⁴ These cases involved parties from forty-nine countries and regions. Also worthy of note is the Netherlands Arbitration Institution, given that the 2015 version of their arbitral rules establish electronic communication as the norm (as opposed to hard copy), and the 2022 version is considering e-awards – as permitted under the Dutch Arbitration Act.⁶⁵

In the same vein, the Green Pledge (developed by the same Campaign for Greener Arbitrations) sees its fair share of supporters, with almost a hundred institutions such as the HKIAC and the VIAC – amongst other groups of individuals, services providers and law firms – promoting more sustainable arbitral practices.⁶⁶

A steady increase in green events can also be observed over the past few years. For instance, the Singapore Institute of Arbitrators ('SIArb') held a seminar in September 2020 on low-emissions technology on the journey to net zero. His Excellency Mr Will Hodgman, the Australian High Commissioner to Singapore and Premier of Tasmania from 2014 to 2020, provided insightful remarks on the subject – especially significant as Tasmania became the first jurisdiction in Australia to achieve net-zero emissions.⁶⁷ The Berlin Dispute Resolution Days event was held in September 2022, with the theme being 'ESG – Dawn of a New Era of Disputes in International Arbitration?'.⁶⁸ One of the emerging themes was the host State's right to regulate in the context of investment law – the latest trends in

⁶³ Kun, *supra* n. 46, at 24; see also CIETAC Online Arbitration Rules (2009), Provisions on Virtual Hearings (Trial) 2020, Shenzhen Court of International Arbitration Rules (2019), and BAC/BIAC Guidelines on Virtual Hearing (Trial) 2020.

⁶⁴ CIETAC 2022 Work Report and 2023 Work Plan, China International Economic and Trade Arbitration Commission, <http://www.cietac.org/index.php?m=Article&a=show&id=18848&l=en>.

⁶⁵ Georgios Fasfalis & Bo Ra Hoebeke, *The Future of International Arbitration: The Road to Greener Arbitration and Reflections on the upcoming 2022 NAI Arbitration Rules and Recently Revised Arbitration Rules*, Kluwer Arbitration Blog (6 Oct. 2021), <https://arbitrationblog-kluwerarbitration-com.libproxy.smu.edu.sg/2021/10/06/the-future-of-international-arbitration-the-road-to-greener-arbitration-and-reflections-on-the-upcoming-2022-nai-arbitration-rules-and-recently-revised-arbitration-rules/>.

⁶⁶ *Supporters of The Green Pledge*, Campaign for Greener Arbitrations, <https://www.greenerarbitrations.com/institutional-supporters#63063551f085851420973e2f>.

⁶⁷ Chan Leng Sun SC, *Beyond Arbitration: Global Perspectives: 'Climate Action: Low-Emissions Technology and The Journey to Net-Zero'*, Singapore Institute of Arbitrators (2 Sep. 2021), <https://www.siarb.org.sg/events/past-events/506-beyond-arbitration-global-perspectives-climate-action-low-emissions-technology-and-the-journey-to-net-zero-2-sep-2021>.

⁶⁸ Laura Reichen & Jacky Hui, *Berlin Dispute Resolution Days 2022: ESG – Dawn of a New Era of Disputes in International Arbitration?*, Kluwer Arbitration Blog (30 Nov. 2022), <https://arbitrationblog.kluwerarbitration.com/2022/11/30/berlin-dispute-resolution-days-2022-esg-dawn-of-a-new-era-of-disputes-in-international-arbitration/>.

‘treaty negotiation practices and modernization efforts have focused on including standalone provisions in that regard or entire chapters in trade agreements on the environment’.⁶⁹

3.3 SOFT LAW

Where national laws and arbitral rules may be insufficient to identify the overall trends in sustainable arbitration, soft law could prove useful. Soft law is the ‘transitional stage in the development of norms’, and ‘anticipate[s] the legality of tomorrow’.⁷⁰ It reflects the grey zone of the law. This helps to address slow developments in the law, especially where time is of the essence in tackling urgent issues. Soft law fills the lacuna. States and IOs can also adopt resolutions promulgated by soft law, thus nudging the law in the right direction.

3.3[a] *Campaign for Greener Arbitrations*

One of the best-known projects in sustainable arbitration is the Campaign for Greener Arbitrations spearheaded by Lucy Greenwood in 2019, an effort to reduce the stress of international arbitrations on the environment.⁷¹ Greenwood had started off with what she called her ‘Green Pledge’ to minimize the environmental impact on her arbitration practice. The initiative quickly caught the attention of the wider global arbitration community, and she then brought together representatives of the key stakeholders in international arbitration to launch the Campaign for Greener Arbitration. It is a ‘global movement advocating for environmentally sustainable practices in international arbitral proceedings and day-to-day legal practice’,⁷² and is drafted based on the Steering Committee’s practice experience in arbitration.⁷³

There are two main prongs to this campaign, the first being the Green Pledge – a ‘general commitment to greener practices’, with some of the key principles including promoting virtual hearings as an alternative to traveling, and going digital.⁷⁴ Second is the Green Protocols – six sets of voluntary guidelines for

⁶⁹ *Ibid.*

⁷⁰ Wilske & Bank, *supra* n. 6, at 170–172.

⁷¹ *Driving Sustainable Change in Arbitration*, Campaign for Greener Arbitrations, <https://www.greenerarbitrations.com/>.

⁷² Patricia Snell, *The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration*, Daily Jus, <https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>.

⁷³ *Green Protocols*, Campaign for Greener Arbitrations, <https://www.greenerarbitrations.com/green-protocols>.

⁷⁴ Snell, *supra* n. 72.

various arbitral stakeholders – which were developed by the working group of the Steering Committee to ‘expand upon the key commitments of the Green Pledge by providing detailed practice guidance and recommend[ed] the best-practices for reducing the carbon footprint of international arbitration’.⁷⁵ These guidelines can be implemented through the Framework for the Adoption of the Green Protocols.⁷⁶

This project has been well-received. It was granted the Global Arbitration Review (‘GAR’) Award for Best Development in 2020,⁷⁷ and a special ‘Green’ award in 2021 in recognition of its contributions in encouraging climate-friendly practices.⁷⁸ It has spurred the development of similar efforts in litigation and mediation, such as the Greener Litigation Pledge⁷⁹ and the Mediators Green Pledge.⁸⁰ In a similar vein, the legal profession has also sought to improve their sustainable development attempts, with the Net Zero Lawyers Alliance (‘NZLA’) being introduced to ‘mobilize commercial lawyers, law firms and the law to accelerate the transition to net zero’ by 2050.⁸¹ The NZLA even established a Carbon Calculator for their members, which ‘enables members to understand their firms’ emissions profile, set a 2030 and 2050 emissions reduction target, and make plans to achieve their targets’.⁸²

3.3[b] *The Chancery Lane Project*

Another project of relevance to this paper is The Chancery Lane Project (‘TCLP’) that was made a reality during the London Climate Action Week in July 2019. It is a ‘collaborative initiative of international legal and industry professionals whose vision is a world where every contract enables solutions to climate change’, with a Net Zero Toolkit – a ‘collection of clauses, glossary terms and tools which enable lawyers to align their work with a decarboni[z]ed economy’.⁸³ The bulk of TCLP’s work involves contractual clauses, though they do dabble in amending

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Virtual Awards Ceremony Draws Global Audience*, Global Arbitration Review (10 Jul. 2020), <https://globalarbitrationreview.com/article/virtual-awards-ceremony-draws-global-audience>.

⁷⁸ *GAR Awards 2021 – the Green Award*, Global Arbitration Review (11 May 2021), <https://globalarbitrationreview.com/article/gar-awards-2021-the-green-award>.

⁷⁹ *The Pledge*, Greener Litigation, The Pledge – Greener Litigation.

⁸⁰ *Mediators Green Pledge: An Introduction*, World Mediators Alliance on Climate Change, Mediators Green Pledge: An Introduction – World Mediators Alliance on Climate Change (womacc.org).

⁸¹ *Mobilising Commercial Lawyers, Law Firms and the Law to Accelerate the Transition to Net Zero*, Net Zero Lawyers Alliance, Net Zero Lawyers Alliance.

⁸² *Ibid.*

⁸³ *About the Chancery Lane Project*, The Chancery Lane Project, About The Chancery Lane Project | The Chancery Lane Project.

model laws and legislations (e.g., addition of green lease obligations to the 1954 Landlord and Tenant Act).⁸⁴

Under the category of ‘Dispute Resolution & Arbitration’, TCLP’s model clauses include provisions for low carbon arbitrations (Mia’s Clause), avoiding excessive paperwork in dispute resolution (Toby’s Clause), green litigation and arbitration protocols (Emilia’s Protocols), and a choice of green governing law clause (Leo & Molly’s Clause). The use of children’s names in labelling the clauses ‘encourage[s] long-term thinking and a focus on the next generation, who will be most affected by the climate crisis.’⁸⁵

3.3[c] *Policy Reports*

Relevant reports could also make a difference in driving policy change. Many bar associations and law societies – such as the International Bar Association (‘IBA’), the Law Society of England and Wales, and other European Bars – have recognized in joint international climate change meetings in March 2022 that lawyers can lead ‘climate justice to protect the rule of law, access to justice and the public interest’.⁸⁶ The Climate Change Resolution of the Law Society of England and Wales of November 2021 reflects similar sentiments. Reports like the IBA’s Report on Climate Change Justice and Human Rights or the ICC’s Dispute Resolution and Climate Change: The Paris Agreement and Beyond are also welcome developments.⁸⁷ Such initiatives could provide the guidance that users of arbitration seek for sustainable practices.⁸⁸

While it is clear that the arbitral community may not be at the same stage as law societies when it comes to going green, this nevertheless remains a topic that they are aware of. It is thus not far-fetched to hope that perhaps more guidelines, arbitral rules or even model clauses will reflect green practices in the future.

⁸⁴ Jennifer Ramos, *Shifting the Mindset of Commercial Lawyers to Rewire Contracts, to Mitigate Climate Change More Effectively in Practice: The Chancery Lane Project*, 23(1) *Envtl. L. Rev.* 3, 6 (2021), doi: 10.1177/14614529211000152.

⁸⁵ Practical Law Corporate Transactions, *The Chancery Lane Project: Model Climate Clauses*, Thomson Reuters Practical Law, The Chancery Lane Project: model climate clauses | Practical Law (thomson-reuters.com).

⁸⁶ Vesselina Haralampieva, *The Role of In-House Counsel in Driving the Climate Agenda*, Vol. 2, Intergovernmental Org. In-house Couns. J. 26, 27 (2022).

⁸⁷ Lucy Greenwood & Kabir A. N. Duggal, *The Green Pledge: No Talk, More Action*, Kluwer Arbitration Blog (20 Mar. 2020), <https://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/>.

⁸⁸ White & Case LLP, *supra* n. 4, at 5.

4 CONCERNS ABOUT SUSTAINABLE ARBITRATION: VIRTUAL HEARINGS DO NOT DENY ACCESS TO JUSTICE

Sustainable arbitration is exciting, but concerns nevertheless remain as to its feasibility and the legal implications that may arise. This section will discuss whether the push for going virtual violates the right to a physical hearing and whether access to justice will be affected.

An issue that many are concerned about is whether the push for virtual hearings (as the recent trends of various arbitral institutions reflect) violates the right to a physical hearing. Although, at the time of writing, the report released by the International Council for Commercial Arbitration (the '**ICCA Report**') found that none of the seventy-eight New York Convention jurisdictions surveyed actually provided an express right to a physical hearing, this section will nonetheless proceed to look at the arguments both for and against virtual hearings.

The onslaught of the COVID-19 pandemic has been paradigm-shifting. Virtually all aspects of our lives have been affected by the pandemic, and one of the main adjustments that stood out was the rapid shift to an online world. With the pandemic forcing us to use technology in a more thoughtful and considered manner,⁸⁹ virtual hearings became the status quo for arbitrations at the height of the pandemic. As the world learns to straddle the fence between adapting to the 'new normal' and returning to its comfort zones, one of the more frequently mentioned cases against virtual hearings is that parties should have a physical right to be heard.

As a starting point, it is generally undisputed that parties should not be denied access to justice. Access to justice is comprised of 'proper and fruitful access to a body with a procedure that ensures certain fundamental conditions for justice', and access to justice can be assured by guarantees such as 'due process, the right to present one's case, and [the right] to defend oneself'.⁹⁰ Being able to present a case before a tribunal assures a parties' right to be heard.⁹¹ This right can be further protected by securing the parties' access to the court or tribunal, known as access to justice. There are two main ideas underlying access to justice: (1) 'access to some form of procedure for dispute resolution' – whether physically or digitally; and (2) 'conditions that such procedure will, as far as possible, produce a just outcome'.⁹² This section will focus on the former relating to form of access.

⁸⁹ Greenwood et al., *supra* n. 87.

⁹⁰ Giacomo Rojas Elgueta, James Hosking & Yasmine Lahlou, *The ICCA Reports No. 10: Does a Right to a Physical Hearing Exist in International Arbitration? Investigating the Legal, Conceptual and Practical Implications of Remote Hearings in International Arbitration*, The ICCA Reports No. 10, at 49–50.

⁹¹ *Ibid.*, at 45.

⁹² *Ibid.*, at 50.

A common argument against virtual hearings lies with the difficulties in cross-examining witnesses. Limited by the confines of the screen and being able to see only the upper half of witnesses, it becomes much harder to perceive body language cues and social behaviour.⁹³ Witnesses may also attempt to sidestep their obligations to answer the questions posed to them by claiming technical problems. There have even been instances where courts overturned awards after witnesses were caught being coached to give specific answers.⁹⁴

Another concern is whether virtual hearings could potentially result in an imbalance in the parties' access to arbitration.⁹⁵ Where a party may not have access to the requisite telecommunications infrastructure, its ability to conduct a disruption-free hearing may be severely restricted. If such a situation arises, the tribunal and parties should agree on alternatives in order to ensure a fair trial. Courts have also upheld that alternatives to videoconferencing such as phone calls did not defeat the party's right to cross-examination.⁹⁶ Australian courts noted that, even if there were disruptions to the hearing due to technical difficulties, videoconferencing 'does not in and of itself produce "real unfairness" or "real practical injustice"'.⁹⁷

Other sources of unease include the danger of security and confidentiality breaches due to cyber attacks.⁹⁸ The University of Toronto's Citizen Lab released a report in 2020 detailing the vulnerability of the waiting room of the popular Zoom teleconference application.⁹⁹ With numerous countries opting to use Zoom as its main platform for online proceedings, it comes as a shock to many that Zoom's encryption scheme is not as safe as once thought. While the Zoom features are meant to be simple and reduce friction in meetings, these designs also result in reduced privacy or security. This created the phenomenon also known as 'Zoom Bombing', where external parties are able to join meetings and take control. The Citizen Lab report strongly discouraged the use of Zoom for sensitive topics that require strong privacy and confidentiality, and mentioned especially '[a]ctivists,

⁹³ *Ibid.*, at 65.

⁹⁴ *Nuvasive, Inc. v. Absolute Medical, LLC*, No. 22-10214 (11th Cir. 2023); see also *Barksdale School Portraits LLC v. Williams*, No. 2-cv-11391 (D. Mass. 2020).

⁹⁵ Elgueta et al., *supra* n. 90, at 64.

⁹⁶ *Nuyen v. Hong Thai Ly*, 74 F. Supp. 3d 474, 482 (D.D.C. 2014); see also *Venetian Nominees Pty Ltd v. Weatherford Australia Pty Ltd* [2021] WASC 137.

⁹⁷ *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd* [2016] FCA 1131.

⁹⁸ Saudamini Amare, *The Switch to Sustainable and Greener Arbitration: How the 'New Normal' Revolutionizes Procedural Aspects in Arbitration*, Indian Journal of Projects, Infrastructure and Energy Law (27 Jul. 2021), Indian Journal of Projects, Infrastructure and Energy Law, <https://ijpiel.com/index.php/2021/07/27/the-switch-to-sustainable-and-greener-arbitration-how-the-new-normal-revolutionizes-procedural-aspects-in-arbitration/>.

⁹⁹ Bill Marczak & John Scott-Railton, *Move Fast and Roll Your Own Crypto, A Quick Look at the Confidentiality of Zoom Meetings*, The Citizen Lab (University of Toronto) (3 Apr. 2020), <https://citizenlab.ca/2020/04/move-fast-roll-your-own-crypto-a-quick-look-at-the-confidentiality-of-zoom-meetings/>.

lawyers, and journalists working on sensitive topics'. Zoom subsequently responded that they acknowledged these issues, and have taken steps to redress them accordingly.¹⁰⁰ Beyond Zoom, arbitral institutions also seek to remedy these apprehensions through reports like the 'ICC' Guidance Note, the HKIAC Guidelines, and the Seoul Protocol, all of which provide guidance regarding encryption, recordings, video conference software, backup systems for hearings, and video conferencing quality and standards.¹⁰¹

Despite these concerns over the possible pitfalls of remote hearings, the ICCA Report concluded that none of the seventy-eight New York Convention jurisdictions surveyed actually provided a right to a physical hearing, with two jurisdictions surveyed (the Netherlands and the United Arab Emirates (excluding the Dubai International Financial Centre)) that even saw their arbitration laws expressly vesting the arbitral tribunal with the power to order remote hearings. However, a minority (such as Venezuela and Zimbabwe) suggested an implied right.¹⁰² The Venezuelan Commercial Arbitration Law of 1998 limits the right to a physical hearing in an arbitration to the first procedural hearing. Article 23 stipulates that "the tribunal [is to] notify the parties about the **place** 'where [the first hearing] is to be held'" (emphasis added). Interestingly, this right is not inferred from the *lex arbitri* in Zimbabwe, but rather from 'within the current Zimbabwean context'. The Zimbabwean national report stated that 'it is impossible as a practical matter to hold virtual [i.e., remote] hearings ... at the moment, so the right to an oral hearing established under Article 24(1) of the [UNCITRAL] Model Law [on International Commercial Arbitration ('**Model Law**')] is arguably a right to a physical hearing'. The position in other jurisdictions, like the People's Republic of China ('**PRC**'), remains unsettled.¹⁰³ What these jurisdictions have in common is their adoption of the Model Law; Article 24(1) provides that the tribunal has the discretion to 'decide whether to hold oral hearings', with some confusion over whether 'oral' necessarily referred to physical hearings. The Svea Court of Appeal clarified that section 24 of the Swedish Arbitration Act (modelled on Article 24 of the Model Law) 'is technology neutral and that the provision does not exclude the possibility of remote participation in a hearing'.¹⁰⁴ It remains to be seen if other jurisdictions facing the same issue will follow suit.

¹⁰⁰ Eric S. Yuan, *Response to Research From University of Toronto's Citizen Lab*, Zoom Blog (3 Apr. 2020), <https://blog.zoom.us/response-to-research-from-university-of-torontos-citizen-lab/>.

¹⁰¹ Amare, *supra* n. 98.

¹⁰² Elgueta et al., *supra* n. 90, at 11–17.

¹⁰³ *Ibid.*, at 17–19.

¹⁰⁴ *ICA Sverige AB v. Bergsala SD AB*, Case No. T 7158–20 (Svea Court of Appeal) (30 Jun. 2022), https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Court-of-Appeal/Court-of-Appeal/Court-of-Appeal/d_4730001-judgment-in-the-svea-court-of-appeal-30-june-2022.-case-no-t-7158-20.

Other than the Model Law, the 2020 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (**ICC Guidance Note**) addresses Article 25(2) of the ICC's Rules of Arbitration 2017 (**ICC Rules 2017**), which obligated the tribunal to 'hear the parties together in person'.¹⁰⁵ Interestingly, the ICC Guidance Note took a similar position to the Swedish courts and interpreted the language as 'parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place "in person" by virtual means if the circumstances so warrant'.¹⁰⁶

ICCA also cautioned against the automatic assumption that remote hearings 'create a situation where there is no access to justice'.¹⁰⁷ The spectrum is wide in determining whether technology used to conduct the arbitral proceedings will impact a claim for lack of access to justice. At one end of the spectrum, most jurisdictions give effect to party autonomy by allowing awards to be set aside if the tribunal decides to hold hearings online against parties' wishes, or where doing so would prejudice the parties.¹⁰⁸ Some jurisdictions give a little more leeway, and allow for the tribunal to strike a balance with other competing interests such as keeping to the statutory time limit (e.g., under the Singapore International Arbitration Act a party only has 30 days to appeal against a ruling on the tribunal's jurisdiction¹⁰⁹) or to conduct the proceedings without undue delay.¹¹⁰ At the other end of the spectrum, there have been situations where the tribunals can override parties' agreement and conduct hearings online. The Austrian Supreme Court held that this does not amount to a violation of Article 6 of the European Convention on Human Rights, which refers to the right to a fair trial.¹¹¹ The court noted that 'the use of videoconference is a manifestation of the right to be heard and as a result, secures the legal remedies'. Videoconference also 'offers an option based on the rule of law when a pandemic brings the administration of justice to a standstill'.

Additionally, virtual hearings are not new. Baroness Hale of Richmond in *Polanski v. Conde Nast Publications Limited* aptly noted that '[n]ew technology such as VCF [videoconference] is not a revolutionary departure from the norm to be

¹⁰⁵ Pratyush Panjwani, *Chapter 2 The Impact of the COVID-19 Pandemic on International Arbitration Practices: Greener Arbitrations with Reduced Due Process Paranoia?*, 2 *International and Comparative Business Law and Public Policy* 28, 31 (2022).

¹⁰⁶ *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, International Chamber of Commerce (9 Apr. 2020), para. 23, <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>.

¹⁰⁷ Elgueta et al., *supra* n. 90, at 62–64.

¹⁰⁸ *Ibid.*, at 26–29.

¹⁰⁹ International Arbitration Act, s. 10(3).

¹¹⁰ Elgueta et al., *supra* n. 90, at 29–31.

¹¹¹ Oberster Gerichtshof [OGH] [Supreme Court] 23 Jul. 2020, ONc 3/20s No. 18 (Austria).

kept strictly in check but simply another tool for securing effective access to justice for everyone. If we had a rule that people such as the appellant were not entitled to access to justice at all, then of course that tool should be denied him. But we do not and it should not'.¹¹² Similar sentiments have been echoed in various rules and regulations across jurisdictions. Rule 43(a) of the Federal Rules of Civil Procedure in the United States stipulated that '[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location'. The situation in arbitration is not dissimilar, and arbitral institutions have been quick to adapt to the pandemic. Article 26(1) of the 2021 ICC Arbitration Rules ('**ICC Rules 2021**') allows for hearings to be conducted via 'video conference, telephone or other appropriate means of communication'. The Singapore International Arbitration Centre ('**SIAC**') also published a guide to remote arbitrations in 2020.

These concerns over remote hearings are not just mere grumbles; they are legitimate disquiets and should be taken into consideration when conducting proceedings online. Perhaps more could be done in the future to ensure privacy and confidentiality, as well as the fairness of the process for those involved. However, at time of writing, it is undisputed that the express right to a physical hearing does not exist in most jurisdictions. As such, encouraging remote hearings (for the purposes of complying with green practices) would be unlikely to breach any rule of law or deny access to justice if carried out properly.

5 RECOMMENDATIONS FOR A GREEN ARBITRATION CLAUSE

The discussion above outlined the green practices that arbitral institutions have adopted and the various green initiatives at large in the legal community. Buttressed by the finding that virtual hearings in and of themselves would not encroach on access to justice (given that there is no express right to a physical hearing), it is apt at this juncture to explore if more could be done to foster a greater uptake in green practices in arbitration. As mentioned at the beginning of the article, because BRI is a cross-border project of vast magnitude a vortex of different cultures and traditions (legal or otherwise), it will set the ground for a hotbed of actual and potential disputes. The transborder nature of BRI disputes is very much in line with the suitability of arbitration for cross-border disputes given its flexibility and freedom to decide on aspects of the dispute resolution process. Coupled with the Chinese government's push for arbitration, it is not surprising that many BRI disputes have been brought to various arbitral institutions not just in Asia, but across the world.

¹¹² *Polanski v. Conde Nast Publications Limited* [2003] EWCA Civ 1573, at [68].

In addressing the demand for resolution of BRI disputes, a number of initiatives have been put in place. The HKIAC has launched ‘specific BRI arbitration clauses and administered arbitration rules to deal with BRI disputes’.¹¹³ The ICC also created the Belt and Road Commission to focus on the dispute resolution needs of the full Belt and Road spectrum, particularly in China.¹¹⁴ At the first BRI Roundtable Forum for Arbitration Institutions held in November 2019, CIETAC led the discussion with eight renowned global arbitration institutions¹¹⁵ to issue the *Beijing Joint Declaration by Arbitration Institutions for the BRI* (the ‘**Beijing Declaration**’).¹¹⁶ This declaration recognizes that with ‘more and more diverse participants in arbitration activities, traditional, single and conservative arbitration services can no longer meet the needs of the times’, and that ‘[i]nnovation ... [is] the future development [direction] of international arbitration’. While on its own this phrase could be read as a reference to general innovation in arbitration, other green initiatives such as the Beijing Initiative for Belt and Road Green Development and the Green Investment and Finance Partnership highlight a growing focus on green practices along the BRI.¹¹⁷ Henceforth, the arbitration institutions participating in the Beijing Declaration, or even just within the BRI, could then sensibly be utilized as examples of how sustainable arbitration could be improved along the BRI routes.

The author suggests that arbitral institutions can provide a green model arbitration clause, rather than inserting such references into arbitration legislation. The applicability of national legislation in arbitration is uncertain due to arbitration’s cross-border nature. Additionally, legislating references may result in inflexibility due to difficulty in amending such legislations (i.e., should unforeseen circumstances arise that require the modification or removal of such references,

¹¹³ Catherine Smith, *The Belt and Road Initiative: Dispute Resolution Along the Belt and Road*, Holfman Fenwick Willian Briefing (Aug. 2018), <https://www.hfw.com/The-Belt-and-Road-Initiative-Dispute-Resolution-along-The-Belt-And-Road>.

¹¹⁴ *Belt and Road Commission*, International Chamber of Commerce, <https://iccwbo.org/dispute-resolution/thought-leadership/belt-and-road-commission/#:~:text=ICC%20created%20the%20Belt%20and,Road%20spectrum%2C%20particularly%20in%20China>.

¹¹⁵ *China: A Special Interview with Mr Wang Chengjie, Vice Chairman & Secretary General of China International Economic and Trade Arbitration Commission (CIETAC), China*, CIARB Singapore, Chartered Institute of Arbitrators Singapore China: A Special Interview With Mr Wang Chengjie, Vice Chairman & Secretary General of China International Economic And Trade Arbitration Commission (CIETAC), China – Chartered Institute of Arbitrators Singapore (ciarb.org.sg). Arbitral institutions participating are the International Chamber of Commerce Arbitration, German Arbitration Institute, Hong Kong International Arbitration Centre, Stockholm Chamber of Commerce Arbitration, Singapore International Arbitration Centre, Cairo Regional Centre for International Commercial Arbitration, Vienna International Arbitration Centre, Korean Commercial Arbitration Board, and Asian International Arbitration Centre.

¹¹⁶ Annual Report on International Commercial Arbitration in China (2020–2021), at 38, 6154261524149.pdf (cietac.org).

¹¹⁷ *Chair’s Statement of the Third Belt and Road Forum for International Cooperation*, Embassy News, Chair’s Statement of the Third Belt and Road Forum for International Cooperation (china-embassy.gov.cn).

it could result in confusion and difficulty). Furthermore, the fundamental principle in arbitration is party autonomy. To impose a compulsory consideration of particular practices could encroach on a party's ability to consider what is important to them, and unwittingly diminish the popularity of the jurisdiction as a seat for arbitration.

Accordingly, having a green model arbitration clause provides a starting point as well as a framework for parties looking to adopt sustainable practices in their arbitration process. In order to encourage the uptake of the green model arbitration clause, this article suggests that carbon emissions scorecards and carbon offset credits could be utilized as a form of cost optimization.

5.1 INCLUSION OF TCLP CLAUSES IN MODEL ARBITRATION CLAUSES: THE 'GREEN MODEL CLAUSE'

Although there are arbitral institutions that have incorporated green practices, whether in their rules or guidelines, more could be done to encourage a higher degree of involvement from the disputing parties and counsels. The author suggests an alternative model clause, one where the TCLP dispute resolution provisions are incorporated into the model clauses provided by arbitral institutions. Providing a green model arbitration clause is not that much of a stretch, since TCLP has had a hand in drafting new model laws in various areas such as leases, as well as the English Companies Act 2006 which requires members to consider the environment.¹¹⁸

TCLP would be an appropriate starting point to glean some guidance, given that it aims to 'enable every contract, law, law firm, legal actor and lawyer to take action to realize its vision of a world where every law and contract enables solutions to the environmental crises facing our planet'.¹¹⁹ As mentioned above, the Net Zero Toolkit in TCLP has clauses embedded with 'climate and environmental considerations from the top of the investment and finance chain with investor- and lender-level obligations that set the tone and framework' of future developments. It also has an online toolkit, 'Using Model Clauses', to 'aid lawyers to evaluate, adapt and deploy TCLP drafting across their contracts'. TCLP has also organized events such as 'The Big Hack' (amongst others) which encouraged participants from Asia-Pacific, Europe and the Americas to generate ideas. This event culminated in 100 new content ideas and twenty-five fully developed ones. Furthermore, as of October 2022, over 83,000 users have downloaded content from TCLP; this is a significant increase from 2021, where 63,000 users utilized

¹¹⁸ Ramos, *supra* n. 84, at 6.

¹¹⁹ *Ibid.*, at 5.

content from TCLP.¹²⁰ TCLP is growing, and there is no time like the present to build on this expanding sphere of influence and bring sustainable arbitral practices closer to arbitration communities along the BRI.

The four TCLP dispute resolution clauses have been around since the launch of the project, but have undergone revisions recently to keep abreast of the times.¹²¹ Of particular note to this paper is Emilia's Protocols – Green Litigation and Arbitration Protocols, and Mia's Clause – Low Carbon Arbitrations. Interestingly, dispute resolution lawyers 'have reviewed and updated the Protocols to refer to the Campaign for Greener Arbitrations' Green Protocols for Arbitral Proceedings and add more specificity into the drafting'. These clauses combine two of the biggest green arbitration projects, TCLP and the Campaign for Greener Arbitrations, signaling a positive move forward in sustainable arbitration.

The author will now seek to lay down a sample revised model clause based on ICC's Model Clause. ICC is chosen as it is one of the most popular arbitral institutions for cross-border disputes,¹²² and it even has a Belt and Road Commission that focusses on the 'dispute resolution needs of the full Belt and Road Spectrum, particularly in China'.¹²³ The standard ICC Arbitration Clause provides that:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.¹²⁴

Drawing inspiration from Mia's Clause, the proposed new model clause would look like this (the '**Green Model Clause**'):

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The parties agree that any arbitration commenced pursuant to clause [●] of the present contract, shall be conducted having regard to the Campaign for Greener Arbitrations' Green Protocol for Arbitral Proceedings with a view to reducing the environmental impact of disputes.

At the outset of any arbitration, the parties shall consult and agree which provisions of the Green Protocol for Arbitral Proceedings shall be adopted during the proceedings, and the tribunal may also consider such conduct relevant in the determination of costs.

¹²⁰ *Impact Report (Oct. 2022)*, The Chancery Lane Project, at 8.

¹²¹ *Clause Updates: Dispute Resolution*, The Chancery Lane Project, <https://chancerylaneproject.org/updates/clause-updates-dispute-resolution/>.

¹²² Alexander et. al., *supra* n. 4 at 18.

¹²³ International Chamber of Commerce, *supra* n. 115.

¹²⁴ *Standard ICC Arbitration Clause*, Rules and Procedures (Arbitration Clause), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/arbitration-clause/#anchor-standard-icc-arbitration-clause>.

The decision for parties and counsels to only consider green practices (as opposed to compelling them to) stems from the concern that being compelled to go green may inevitably create additional grounds of challenge against the award or arbitrator; for example, if parties are forced to engage in only electronic submissions, this may be unfair to those who lack access to similar infrastructure. Parties and counsels can be further encouraged to adhere to green practices by incorporating a cost incentive; this is where the tribunal has discretion to conclude whether a discount on costs should be given and, if so, the quantum. As to how the tribunal can determine costs, the idea of carbon emissions scorecards and carbon offset credits suggested by Mangan and Lim would prove useful in cost optimizing.¹²⁵

5.1[a] *Using Carbon Emission Scorecards and Carbon Offset Credits*

Mangan and Lim first introduced the carbon emissions scorecards and carbon offset credits in 2022, and suggested that an arbitral tribunal take into consideration the scorecards (amongst other factors) in their determination of costs for the proceedings.¹²⁶ By quantifying carbon emissions, this increases awareness in the arbitration community regarding the size and causes of its carbon footprint, thus providing an impetus for net zero arbitration. This also aligns the arbitration community with the goal of going net zero promised by corporations, states, and investors. While disputing parties are unlikely to be directing their energy to reducing carbon emissions, it is nevertheless high time to explore how this approach can be integrated into the system, such that doing so is no longer a chore but part of the arbitral process.

Details for deliberation in the scorecard could comprise the scope of activities to be considered, the method for calculation carbon emissions, the verification of such calculations, and the weighting given to the parties' environmental performance.¹²⁷ The tribunal could rely on the scorecards to conclude how many carbon offset credits the parties should purchase (as part of their costs) to render the arbitration carbon-neutral. While Mangan and Lim opened the floor to the institution, parties and the tribunal to determine what should be included in the scorecards, the author is of the view that perhaps, as a new initiative, it might be more appropriate for the institution to build a firm foundation first by laying down clear guidelines. As the institution sees more usage of the scorecard, suitable tweaks and amendments could be carried out so as to allow the components of the

¹²⁵ Mark Mangan & Lukas Lim, *The Pursuit of Net Zero Arbitration With the Aid of Carbon Emissions Scorecards*, 39(5) J. Int'l Arb. 719, 720 (2022), doi: 10.54648/JOIA2022031.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, at 728, 732.

scorecard to keep up with what parties and counsels deem relevant at a point in time. Once the scorecard solidifies itself, more leeway could then be given to tribunals and parties. Too much discretion at the beginning of a new venture could potentially muddy the waters. A template of the carbon emissions scorecard developed by Mangan and Lim is set out in Annex A, which gives an idea of the numbers that can be used for calculations.

A common concern related to this approach is the increase in time and cost to an already expensive process.¹²⁸ However, this should not be significant and ought to decrease as the scorecard preparation becomes more familiar. The same goes for the Redfern Schedule and other procedural innovations ‘that have become second nature through their use’. Most of the work can be done via carbon cost calculators such as the Carbon Calculator developed by NZLA (as mentioned above). Another monster lurking behind the goodwill nature of the scorecards is the danger of inflation of self-reported numbers, especially when there is a cost incentive. However, this can be countered by having counsels certifying the authenticity of these numbers and relying on the scrutiny of opposing parties or the tribunal – as is done with reporting of monetary costs. There are also organizations that audit carbon emissions.

However, merely having carbon emissions scorecards is insufficient to truly reduce emissions.¹²⁹ Carbon offset credits could be used to further encourage the parties and counsels accordingly. Parties could be incentivized to include them in their emissions scorecards by increasing their chances of being awarded some or all of their costs. Alternatively, tribunals could order the losing party (or parties) to purchase a certain number of credits (based on the scorecards) so as to render the arbitration carbon-neutral. While there may be pitfalls where methodologies used to calculate the credits may vary across the world, arbitral institutions can take the lead by setting a ‘carbon price’ for each emission unit.

5.2 INCLUSION OF GREEN PRACTICES IN ARBITRATION RULES AND REGULATIONS

Another possible option would be to look at the SAC’s move to include the Green Protocols in their arbitration rules. As in the author’s suggestion above, parties are not compelled to follow the Green Protocols. They are simply required to be ‘mindful of the environmental impact of the arbitration, and in particular shall, at the commencement of proceedings, consider the application of Green Protocols as developed by The Campaign for Green Arbitration and as amended from time to time’. However, as aforementioned, simply incorporating a reference to these

¹²⁸ *Ibid.*, at 731–733.

¹²⁹ *Ibid.*, at 733–724.

green guidelines is insufficient to create a significant change; there is no incentive or drawback in failing to comply. Nevertheless, it remains a possible option for arbitral institutions to consider in the future, whether as a mandatory rule or as an opt-out feature.

An alternative could be to encourage tribunals in ad hoc arbitrations to adopt the Green Protocol for Arbitral Proceedings and Model Green Procedural Order during the proceedings. Similarly, the tribunal may direct the parties to prepare the carbon emissions scorecard as part of the cost optimization process.

6 CONCLUSION

It is high time for change, and as Sir Winston Churchill once said, '[h]ear this young men and women everywhere and proclaim it far and wide. The earth is yours, and the fullness thereof. Be kind but be fierce, you are needed now more than ever before. Take up the mantle of change, for this is your time'.¹³⁰ A similar sentiment is echoed by the Secretary-General of the United Nations, Antonio Guterres, who pointed out that 'the climate emergency is a race we are losing, but it is a race we can win'.¹³¹

With the vast network of the BRI projects spanning numerous countries and continents, and the Beijing Declaration tying together major arbitral institutions around the world, there is no better starting point than looking at how dispute resolution can be made 'climate-friendlier' in this particular venture. As mentioned above, arbitration is the preferred mode of dispute resolution for BRI disputes and also the de facto mode for general cross-border disputes. Thus, arbitration is a suitable dispute resolution mechanism to set the backdrop for climate-friendly practices because it would best address the high environmental costs that come with cross-border disputes.

Arbitration institutions would be best poised to tackle such issues, since the establishment of such bodies may be encouraged by the government, operating as not for profit non-governmental organizations, or operating under a variety of other structures. This interconnect between public and private entities has been driven by the synergy between economic and ideological factors, and propelled reliance on private actors to perform public functions. This is reflected not only in international organizations, but also in arbitrators deciding on statutory claims that may have societal consequences or where they review investor claims that involve

¹³⁰ Ardys Zoellner, Medium (27 Mar. 2018), <https://medium.com/@Ardysez/hear-this-young-men-and-women-everywhere-and-proclaim-it-far-and-wide-e1d05ed5f8fd>.

¹³¹ *The Climate Crisis – A Race We Can Win*, United Nations, <https://www.un.org/en/un75/climate-crisis-race-we-can-win#:~:text=Rising%20temperatures%20are%20fueling%20environmental,acidifying%2C%20and%20forests%20are%20burning>.

government measures that concern the regulatory sovereignty of the host nation and would normally be decided by national courts.

Though there may not be national laws and regulations that expressly require arbitrators or institutions to implement green practices, there are clear examples in arbitration rules, institutional practice and soft law instruments. Quite a number of arbitral institutions have either implemented new rules or taken up some form of green practice, such as virtual hearings or going paperless. Regardless of whether the motivation behind doing so is driven by climate change, it is undisputed that such changes do help the environment in one way or another. However, some have argued that requiring parties to opt for virtual hearings may violate the right to a physical hearing. It is important to note that the ICCA Report has concluded that none of the seventy-eight New York Convention jurisdictions surveyed has actually stipulated an express right to a physical hearing, and cautioned against the automatic assumption that remote hearings deny access to justice.

Building on the practice in the arbitration community and the confirmation in the ICCA Report that virtual hearings do not deny access to justice, the author recommends a Green Model Clause by drawing inspiration from the sample TCLP dispute resolution clauses and the Campaign for Greener Arbitrations. In order to encourage uptake of the Green Model Clause and increased compliance, the use of carbon emissions scorecards suggested by Mangan and Lim could be combined with the clause. Other suggestions include incorporating the Green Protocols in arbitral rules, or perhaps even encouraging ad hoc tribunals to take up the Green Model Clause and the carbon emissions scorecards for their cases.

7 ANNEX A

<i>No.</i>	<i>Activity</i>	<i>Agreed Source of Calculating Carbon Emissions per Unit</i>	<i>Specific Details</i>	<i>Carbon Emissions Calculations (kg of CO₂)</i>
1.	Flights (including for kick-off meetings with client and witnesses, procedural hearings, merits hearings, etc.)	Passenger per km (international non-UK, business class) = 0.40578 kg of CO ₂ Passenger per km (long-haul to and from UK, business class) = 0.42668 kg of CO ₂	<ul style="list-style-type: none"> • Class of travel (business, economy, etc.) • Origin and destination (unless privileged) • Number of flights 	

<i>No.</i>	<i>Activity</i>	<i>Agreed Source of Calculating Carbon Emissions per Unit</i>	<i>Specific Details</i>	<i>Carbon Emissions Calculations (kg of CO₂)</i>
2.	Hotel stays	Guest per night in Singapore = 37.8 kg of CO ₂	<ul style="list-style-type: none"> • Location of hotel (unless privileged) • Number of nights 	
3.	Local transport	Passenger per km (medium sized car, petrol) = 0.18717 kg of CO ₂	<ul style="list-style-type: none"> • Type of transport (car, bus, rail, etc.) • Class of vehicle (small, medium, large) • Fuel type (diesel, petrol, etc.) 	
4.	Printing (submissions, bundles, etc.)	1 page (on average) = 0.005 kg of CO ₂ 1 kg of paper = 1 kg of CO ₂	<ul style="list-style-type: none"> • Weight of paper • Number of sheets • Type of paper (unrecycled, recycled) 	
5.	International and local delivery	International: variable, depending on km travelled and weight of parcel Local: parcel per km = 0.19914 kg of CO ₂	<ul style="list-style-type: none"> • Type and class of transport • Weight of parcel • Origin and destination 	
6.	Emails	1 email = 0.004 kg of CO ₂	<ul style="list-style-type: none"> • Number of emails 	
<hr/>				
Total				