

# Should arbitration agreements be amended to include sustainability measures?



**Yes**, arbitration agreements should be amended

## 1 Key facts

- 80% of World Bank Group's carbon emissions (pre-COVID) comes from business travel
- 20,000 trees to offset a \$30 million-\$50 million arbitration
- App. 31 long-haul flights per arbitration, generating app. 293 million kg of CO2 annually

## 2 Easy implementation

- COVID-19 has led the way
- Parties need to consider proactive measures
- Formalization necessary for implementation
- Clearly and formally signals parties' intention to adopt green practices

## 3 Amendment not difficult

- Model clauses exist (e.g., the clauses proposed by [Chancery Lane Project](#))
- Measures are relatively easy to implement and can be kept simple
- Incentives for the parties to commit:
  - Reduction of arbitration costs
  - ESG requirements

## 4 Inclusion could especially be justified:

- When adopted by a single major player for reputational and policy purposes
- If the chosen institution has a bad record when it comes to environmental considerations
- Post-dispute, in ad hoc arbitration agreements
- If briefly and unobtrusively expressed



**No**, arbitration agreements should not be amended

## 1 Unrealistic

- Arbitration clauses are midnight clauses
- Lack of focus results in generic clauses rather than clauses adapted to parties' needs
- Stipulated measures superseded as technology and laws governing arbitral proceedings evolve
- Arbitration agreements should remain short and simple

## 2 Counterproductive

- Flexibility of arbitration impeded
- Increases rather than decreases complexity
- Consequences of a breach uncertain
- Difficulty measuring or verifying a party's compliance in the absence of standardization or consistency in
  - ESG metrics
  - Risk of increased costs from need to audit, measure or benchmark compliance
  - Risk of discrimination against less well resourced parties without access to high-grade technology
  - Risk of satellite litigation over interpretation or compliance

## 3 Unnecessary

- Measures can be adopted through other means or at other moments:
  - Voluntarily at the start of the arbitration, taking into account current sustainability trends and the nature of the dispute, making the measures fit for purpose
  - Alternatively, by adopting arbitration rules that already include sustainability measures
- Clients already expect adoption of sustainable practices (e.g., remote hearings, paperless submissions) as part of their own ESG commitment and/or as a way to reduce costs

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