Resolving Climate Change Disputes through Arbitration: The ICC Perspective

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Introduction

In November 2019, the International Chamber of Commerce ("ICC") Commission on Arbitration and ADR task force on "Arbitration of Climate Change Related Disputes" released its Report on Resolving Climate Change Related Disputes through Arbitration and ADR ("ICC Report").

While climate change-related disputes and the legal considerations arising therefrom have generally been considered in the context of litigation, they had not received the same attention in an arbitration context. The ICC Report examines the potential use of arbitration and ADR in resolving climate change-related disputes as well as focusing on procedural features of the ICC Arbitration Rules that could aid in effectively resolving such disputes. Disputes arising from or aggravated by climate change will become a recurring theme regionally as well as globally. The ICC Report will be a useful reference point for countries in this region as they seek to make their economies and infrastructure "climate-proof", protecting their populations and ecosystems against climate-related impacts.

The ICC Report identifies six areas where the existing arbitration procedures may be enhanced to accommodate climate change-related disputes and provides further guidance for parties when drafting arbitration agreements in respect of climate change-related disputes. Below is a summary of the key features of the ICC Report.

What are climate change-related disputes?

The ICC Report adopts a broad definition of climate change-related disputes, which includes:

"…any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement."

The ICC Report identifies three distinct categories of climate change related disputes:

- **Disputes arising out of specific transition, adaptation or mitigation contracts:**

  Certain disputes arise out of contracts that are directly related to the UNFCC such as agreements pertaining to transitions to new systems to avoid or minimize the effects of climate change, "climate-resilient" projects (i.e., adaptation) or "low emissions" (i.e., mitigation). An example of this sort of dispute would be where "[a] contractor in a project to supply and erect a wind farm seeks (i) the suspension of the drawing of first demand performance bonds, (ii) deemed final acceptance, and (iii) payment of the balance of the price. The owner alleges that the output does not meet technical economic indicators for definitive acceptance as approved by public authorities financing, based on energy output, efficiency and/or emission targets."

- **Disputes arising out of contracts which do not specifically relate to transition, adaptation or mitigation:**

  An example here would be where “a contractor in charge of construction of a new deep-water harbour disagrees with the owner of the harbor over whether increased salinity of fresh water sources was induced by rising sea-levels, owing to climate change, albeit that other contributing factors may exist. The parties also differ as to the allocation of such risks. Contractor seeks (i) an extension of time to complete the construction and resulting costs, and (ii) additional costs incurred in the importation of sand from a more remote location to counter the impact of increased salinity.”

- **Disputes where the parties have agreed to submit to arbitration after the dispute has arisen (i.e. Submission Agreements):**

  An example of this sort of dispute would be where “a local indigenous population of subsistence farmers, fishermen and associated small businesses located in and around a new REDD+ certified forest carbon project area and bordering coastal region sue the foreign investors in the project and the host State in the local courts, alleging breach of constitutional, indigenous and other human rights and in tort against the foreign investor. The parties may consent to resolve those disputes in a single, specialist forum pursuant to a submission agreement.”

Current and potential use of arbitration in climate change-related disputes

In 2018, disputes arising out of sectors which are expected to be impacted by climate change accounted for around 70% of all new ICC arbitration cases, with approximately 40% arising out of the construction, engineering and energy sectors. With increased efforts by states and private entities to meet the objectives of the Paris Agreement, the ICC Report predicts that climate change related disputes are bound to exponentially increase. For our region, with its ambitious plans for infrastructure development – ranging from the giga-projects in the Kingdom of Saudi Arabia, to coastal and marine development in the UAE, including the construction of seawalls and other longitudinal shoreline infrastructure to respond to stronger storm surges, to the more day-to-day management of water and waste resources – the disruptive force of climate change and strategies to manage this risk will be a core concern for contracting parties and providers of project insurance.

Benefits of arbitration for resolution of climate change-related disputes

In addition to offering the advantage of a neutral forum, the ICC Report notes that arbitration also benefits from worldwide coverage by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) enabling cross border recognition and enforcement of arbitral awards. Additionally, climate change related disputes would benefit from the “accessibility of the tribunal, and the expertise and flexibility as to where an arbitration is hosted”.

Specific features of climate change-related disputes

The ICC Report identifies various specific procedural features of arbitration which could be adapted to better serve the resolution of climate change related disputes. The ICC Report also provides drafting advice for the various specific features identified below.

- **Recourse to appropriate scientific and other expertise**

According to the ICC Report, the ability to ensure that appropriate expertise is available to the parties and the tribunal is arguably the most important feature of arbitration in climate change-related disputes. This expertise can be achieved through appointing arbitrators with appropriate, relevant experience, the use of party-or tribunal-appointed experts and/or the use of expert determination (e.g. pursuant to the ICC Expert Rules).

The ICC Report recommends that the ICC Court of Arbitration maintain a formal list of experts, in line with the practice of the Permanent Court of Arbitration ("PCA"). As of July 2018, the PCA Environmental Rules provides a list of 25 specialist environmental arbitrators and 17 technical and scientific environmental experts. The ICC Court of Arbitration currently only maintains an open database of experts in different areas, e.g., accounting, finance, engineering, information technology, construction and energy.

- **Measures and procedures to expedite early or urgent resolution**

Considering the fast-moving pace of scientific knowledge, innovation and new technology involving climate change, urgency, timeliness and avoidance of delay is paramount for resolving climate change-related disputes. This is also due to the potential environmental impact on the population if disputes are not dealt with at an early stage. The ICC Arbitration Rules and the rules of other leading arbitral institutions offer various features that may be adopted or utilized in order to ensure the prompt resolution of climate change related disputes. Some of the relevant features of the ICC Arbitration Rules in this regard are the following:

- Parties and arbitral tribunals may adopt certain case management techniques, for example, by bifurcating the proceedings or rendering one or more partial awards on key climate change-related scientific, technical or other specialised issues, or identifying climate change-related scientific, technical or other specialised issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing;
- By agreeing to arbitrate under the ICC Arbitration Rules, parties can benefit from the use of the ICC Expedited Procedure if the amount in dispute does not exceed the limit of (a) US$ 2 million, if the arbitration agreement under the Rules was concluded on or after 1 March 2017 and before 1 January 2021, or (b) US$ 3 million, if the arbitration agreement under the Rules was concluded on or after 1 January 2021, or if the parties agree otherwise;
- Other relevant features in place under the ICC Arbitration Rules include: (a) emergency arbitration, (b) interim and conservatory measures and more importantly (b) other time and cost management techniques, including those set out at Appendix IV of the ICC Arbitration Rules.

- **Application of climate change commitments and/or law**

The ICC Report accepts that arbitral tribunals are bound by the governing or applicable law and mandatory rules to which the parties have agreed. However, it suggests that with the evolution of international and national laws in developing climate change-specific commitments and policies, arbitral tribunals are bound to give greater consideration to such instruments. One notable example, in an investment treaty context, is the 2018 Netherlands Model Bilateral Investment Treaty which expressly makes reference to the Paris Agreement.

In the commercial context, certain sectors expressly reference the *lex mercatoria* in the governing law provision of the relevant contract, which may inform the assessment of particular claims. For example, it is not uncommon for parties to specify that the governing law of a contract is not a national law but rather "public international law" or "general principles of international commercial trade", i.e., the UNIDROIT Principles of International Commercial Contracts 2016. In this regard, Article 21.2 of the ICC Arbitration Rules refers to both national laws and *"trade usage"* in relation to the choice of governing law. As the ICC Report notes, "the ICC is currently considering whether to propose further recommendations for guidance to parties and arbitrators in this respect."

- **Increased transparency**

Public interest issues are frequently at stake in climate change-related disputes. To this extent, as the ICC Report notes, "the lack of transparency in traditional commercial arbitration has been viewed as a barrier to its legitimacy as a satisfactory dispute resolution mechanism for climate change related disputes." Therefore, there is likely to be increased pressure for the disclosure of information, even in commercial disputes, because of public policy implications. This is particularly true in the context of climate change as members of the public are at times directly concerned by the dispute.

Increased transparency in relation to climate change-related disputes could be achieved by: (a) opening the proceedings to the public, including in the publication of submissions, procedural decisions and hearings, or (b) publication (or even redacted publication) of awards.

In the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ("ICC Note to Parties"), paragraph 50 states:

> *"The Court therefore endeavors to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties. Transparency provides greater confidence in the arbitration process and helps protect arbitration against inaccurate or ill-informed criticism."*

The ICC has addressed the issue of transparency by providing for the publication of awards two years after notification of the award to the parties, unless the parties agree otherwise.

- **Third party participation**

The complex nature of climate change disputes may benefit from the involvement of third parties, e.g., affected citizens or populations. As with expertise and transparency, any involvement by third parties in the arbitral process requires the express consent of the parties.

Certain benefits for using arbitration for resolving public interest disputes with third parties include: (a) the limitation of multiple proceedings by providing for a one-stop, neutral and efficient forum, and, (b) the offer by an investor of an arbitral forum for claims by potentially affected stakeholders as a means to address local or political opposition to a project or to satisfy certain legal requirements in order to allow the project to go ahead.

Third-party views may also be addressed through: (a) joinder of additional parties or (b) a written *amicus curiae* brief. Unless otherwise agreed, the ICC Arbitration Rules allow parties to seek to join additional parties (Article 7), as well as to bring claims against multiple other parties (Article 8) in respect of multiple contracts (Article 9). Alternatively, with the agreement of the parties to the arbitration, non-parties may be heard in an arbitration arising out of climate change-related disputes through an *amicus curiae* submission. According to paragraph 178 of the ICC Note to Parties, "pursuant to Article 25(3) of the Rules, the arbitral tribunal may, after consulting the parties, adopt measures to allow oral or written submissions by amici curiae and non-disputing parties".

Conclusion

he ICC Report reflects the growing trend and urgency regarding climate change-related disputes, in circumstances where countries in this region will have to prepare for extreme heat, storm surge, sea level rise, water stress, dust and sand storms, and desertification. The Report highlights the importance of making available an appropriate forum to administer such disputes. While the ICC Report does not propose any changes to the existing ICC Arbitration Rules, its recommendations indicate that in future there may be a growing trend towards developing specific procedures that govern climate change related disputes.

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