Resolving climate change disputes through arbitration

May 2021

The flexibility of arbitration makes it an ideal forum to achieve swift decisions in disputes related to climate change, when underpinned with the right legislation

Climate change is a global, complex and non-individualistic phenomenon, concern and problem, which affects everyone. Efforts are being made globally to adopt tangible policies which will change the trajectory of the impacts of global warming on rising sea levels and climate extremes. These policies are being felt by businesses in every sector.

While policymaking on climate change ought to be done by legislators, courts and arbitral tribunals also have a role to play. Climate change disputes are a growing trend and will likely proliferate in the future, while disputes may also arise as to the correct interpretation and application of climate change related legislation

Types of climate change disputes

There are a variety of influencing factors behind the anticipated growth in disputes related to climate change. They include:

- the actions of commercial entities giving rise to groups or affected individuals having rights of action;
- climate change inaction – the failure by states to take measures in response to climate change, giving rise to potential inter-state and investor-state disputes, and claims by groups of concerned citizens;
- climate change action – the consequences of taking response measures, giving rise to potential inter-state and investor-state disputes;
- dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations;
- contract enforcement – the private sector is central to climate change mitigation, and there will be a large increase in the number of commercial contracts relating to climate change mitigation and adaptation;
- the coming into effect of the Paris Agreement, which may give rise to arbitration.

Court intervention in the transition to a greener future

Climate change-related litigation against governments is a growing trend. It is the most obvious legal avenue for tackling climate-related problems, and there is a growing body of global cases demonstrating that national courts are willing to hold governments to account.

> Adoption of the arbitration annex at COP26 is a vital means of ensuring the Paris Agreement is respected. It will encourage states to adopt further climate change response measures, and provide parties with a more suitable forum for the resolution of climate change disputes
>
> **Pamela McDonald, Partner**

In February 2021, the Administrative Tribunal of Paris issued a landmark ruling against the French government for failing to achieve commitments made under the 2015 Paris Agreement to cut carbon emissions. Weeks later, France scrapped its Charles de Gaulle airport expansion plans, on the grounds that they did not fit with France's environmental goals.

In November 2019, the Netherlands Supreme Court held that the government had explicit duties to protect citizens, and must reduce emissions by at least 25% compared with 1990 by 2020. The government closed the Hemweg coal plant in 2020 as a result, and paid out €52.5 million compensation in commercial losses to the company running the plant.

Successful climate change-related litigation against companies is likely to follow. One pending case that stands out was brought by Peruvian farmer Saul Luciano Lliuya, who lives below the Palcaraju glacier that is melting and causing rising waters in Lake Palcacocha. He sued German energy utility RWE in 2015 over its role in global warming. In 2017, the German regional court in Hamm admitted the case and asked to see evidence on whether emissions from RWE plants have contributed to global warming. Last month, researchers reached conclusions supportive of Lliuya's case. When decided, this case may be significant for other questions of liability for carbon emissions contributing to climate change impacts in other parts of the world.

Despite these landmark cases, there are many more examples of cases where there has been little or no positive impact on the environment as a result of judicial decisions. At the same time, courts can only act in accordance with the law, and it is not clear that they can provide the right answers to the complex problems that can arise as a result of climate change. Governments, through democratic processes are more able and in the correct position to deal with these problems. Success is not likely to be achieved by judicial intervention, but by cooperation - as can be seen from the Paris Agreement.

The Paris Agreement and arbitration

Arbitration has significant advantages over litigation in dealing with climate change disputes. Arbitrators with the correct mix of expertise can be chosen; multiparty proceedings are manageable; and the New York Convention on Enforcement of Arbitral Awards provides certainty as to enforcement of awards.

In November 2019, an International Chamber of Commerce (ICC) task force published a report on resolving climate change-related disputes through arbitration and ADR. The report examined the potential role for arbitration in the resolution of international disputes related to climate change. It found various potential uses for ICC arbitration to resolve such disputes, and features which could enhance existing procedures for resolving them.

Dispute resolution mechanisms in the Paris Agreement provide for arbitration. The dispute settlement clause of the Paris Agreement refers to the dispute settlement clause in the UN Framework Convention on Climate Change (UNFCCC), which enables parties to declare that they accept arbitration in accordance with the procedures to be adopted by the Conference of the Parties (COP) of the UNFCCC in an "annex on arbitration".

However, procedures for arbitration have not yet been addressed by a COP. At COP23 in 2017, several arbitral institutions, together with the International Bar Association (IBA), seized the opportunity to raise awareness of the potential of arbitration in the field of climate change. The next COP, COP26, takes place this November in Glasgow, and is the most important climate change summit since the Paris Agreement was signed in 2015.

Although the Paris Agreement provides for concrete nationally-determined targets to reduce greenhouse gas emissions, as it stands, implementation and enforcement mechanisms under both the agreement and the UNFCCC are either absent or weak. There is no truly effective mechanism to insist states comply with their obligations, and the international community is reliant on individual states to commit to honour the agreement and monitor compliance.

Adoption of the arbitration annex at COP26 is a vital means of ensuring the Paris Agreement is respected. It will encourage states to adopt further climate change response measures, and provide parties with a more suitable forum for the resolution of climate change disputes.

Other climate change protocols which adopt arbitration as a means of settling disputes include:

- the Montreal Protocol on Substances that Deplete the Ozone Layer, which contains procedures for dispute settlement in article 11 of the Vienna Convention for the Protection of the Ozone Layer (VCPOL). VCPOL itself contains an 'arbitration annex' which has been adopted;
- the UN Convention on the Law of the Sea, which contains arbitration as a means of settling disputes. The convention has a role to plan in maritime-related climate change disputes.

Investment treaty arbitrations and climate change

Since 1959, states have entered into over 3,000 bilateral treaties for the purpose of protecting foreign investments. A majority of these treaties provide for arbitration between investors and the state in cases of potential breach of the investment protection provisions of the treaty. These arbitrations are referred to as bilateral investment treaty (BIT) arbitrations.

Where the treaty basis for the tribunal's jurisdiction is "all disputes relating to an investment", this could include disputes arising in respect of environmental or climate change obligations. Alternatively, state behaviour which harms the environment could constitute a violation of the state's 'protection and security' obligation - to protect the investor's property, including its physical integrity, from actual damage, including by the actions of others in situations where the state has an obligation to exercise due diligence.

In the 2016 case of Allard v Barbados Allard, a Canadian investor, argued that the Barbados government breached its treaty obligations in failing to enforce environmental laws. Allard claimed that the consequence of the government doing so was environmental degradation at an eco-tourism site. The tribunal found against Allard, in favour of the Barbados government, in that case; on the basis that there was no indirect expropriation, failure to protect or secure foreign investment, or unfair or inequitable treatment, and therefore no breach of the Canada-Barbados BIT.

Pamela McDonald
Partner
Risk Advisory Services
+974 442 69222
+974 5030 3480
pamela.mcdonald@pinsentmasons.com