Kluwer Arbitration Blog

Climate Change, the Environment and Commercial Arbitration

Susan Field, Helin Laufer (Herbert Smith Freehills LLP) · Monday, March 9th, 2020 · Herbert Smith Freehills

The legal considerations arising out of climate change and environmental matters more generally have been considered extensively in the context of worldwide litigation, and, to some extent, in investment treaty arbitration. However, such issues have not been subject to the same level of public debate in the commercial arbitration sphere. This post analyses how environmental considerations arise, and are treated, in commercial arbitration, and explores some developments and initiatives in this space.

Background

The concepts of environmental protection and climate change are broad and disputes arise in these contexts in a myriad of forms. Such disputes range from claims against governments and major carbon emitters to investigations launched by governments themselves. Some types of environment and climate change-related disputes may of course not lend themselves to arbitration. Nonetheless, disputes with an environmental component may also arise in the context of contractual and commercial disputes that are typically resolved through commercial arbitration.

Before discussing such disputes in more depth, recent developments in investor-state dispute settlement ("**ISDS**") should be noted, as environmental considerations have gained increasing momentum in recent years in this realm. In particular, recent bilateral investment treaties ("**BITs**") such as the 2016 Morocco – Nigeria BIT or the 2018 model Dutch BIT expressly mention the environment, or sustainable development and social responsibility. On the jurisprudence side, various recent investment arbitration awards demonstrate that tribunals' attitudes are changing, as environmental considerations are becoming increasingly present and important in their reasoning. For instance, in the *David Aven v. Costa Rica* and *Cortec v. Kenya* cases, the tribunal grounded its reasoning at least in part on environmental considerations, which, in the *Cortec* tribunal's words, were of "fundamental importance". While there is clearly movement on the ISDS front, it is interesting to query whether the same can be said regarding the commercial arbitration sphere.

Climate change in commercial arbitration

The inherent flexibility and internationalism of the arbitral process makes commercial arbitration an ideal dispute resolution method for climate change and environment-related disputes, which almost invariably have an international dimension. In a recent related International Chamber of Commerce ("**ICC**") report, the ICC highlights the unique advantages of arbitration in this context. For instance, the parties' flexibility in choosing arbitrators enables them to select tribunals with adequate knowledge of the regulatory and technical issues involved in such disputes. In addition, commercial arbitration provides the option of choosing a neutral forum for resolving sensitive disputes, as well as seamless award enforcement possibilities worldwide given that the overwhelming majority of States have signed and ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Decisional trends are difficult to predict in commercial arbitration given the prevalence of confidentiality arrangements between the parties. However, issues relating to climate change action and environment-related regulatory compliance may become increasingly common in commercial arbitration given the industry sectors which have a strong preference for arbitration, such as the energy and construction sectors.

In addition, according to the Grantham Research Institute on Climate Change and the Environment, as at 2018, there were already over 1,500 climate change-related laws and policies worldwide. Following the entry into force of the Paris Agreement, climate change-related action and regulations have increased dramatically. The natural consequence of these legislative developments may be an increase in environment-related commercial arbitrations in the future.

To refer to just one example, in their efforts to achieve the goals of the Paris Agreement, a number of states have introduced additional or enhanced environmental footprint-related reporting obligations. For instance, the UK Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 require certain companies to make disclosures regarding their annual quantity of emissions in tonnes of carbon dioxide resulting from activities for which they are responsible, and from the purchase of electricity for their own use.

Non-compliance with such reporting requirements could result in breaches of common commercial contractual provisions, such as conditions precedent or warranties which require compliance with applicable laws and regulations, and to ensure that other companies involved in the performance of the contract do so as well. In theory, non-compliance with such reporting requirements could also support allegations of breaches of provisions requiring compliance with HSSE policies, depending on their content. Such breaches can give rise to arbitrations where the parties have chosen this dispute resolution method. As such, it is entirely conceivable that arbitral tribunals might be in a position where they would have to assess whether parties' disclosures (and potentially their underlying climate change prevention strategies) satisfy applicable reporting requirements and standards and company HSSE policies.

Further environment-related arbitrations could arise in situations where the parties to a contract breach or seek to avoid commercial obligations by raising force majeure arguments on the basis of climate change effects, or where commercial parties pursue claims against other companies on the basis of their climate change-related contributions causing harm to the claimants' operations.

Institutional support for the arbitration of environmental disputes

While most arbitral institutions with a focus on commercial arbitration have largely remained silent on the issue of arbitrating environmental disputes, some have shown a varying degree of adaptability and support vis-à-vis environment-related arbitration. For instance, the American Arbitration Association has expressly listed environmental disputes, which include "pollution control, environmental clean-up, and chemical regulation for chemical plants, landfills, and other types of industrial projects", as one of its areas of expertise.

In addition, the ICC has engaged with the questions posed by environment-related arbitrations by creating a task force on "Arbitration of Climate Change Related Disputes" to explore, among other things, how ICC arbitration can be used to tackle climate change-related disputes. The ICC indicated great willingness to accommodate and administer such disputes, and concluded that it is uniquely positioned to do so.

SCC Arbitrator Guidelines

An interesting development in relation to the process, rather than subject matter of arbitrations, from an environment perspective, occurred in October 2019, when the SCC issued its revised arbitrator guidelines (the "**Guidelines**") which cover questions frequently raised by arbitrators including on costs and expenses. A notable feature in these Guidelines is the SCC's new approach to expenses. In particular, the Guidelines provide additional detail on the reimbursable travel-related expenses, which now include the "standard costs of climate compensating for the [arbitrators'] flights", *i.e.* the arbitrators' costs of carbon offsetting their flights to and from case-related proceedings.

Although only the SCC specifies the recoverability of carbon offsetting costs, this does not necessarily mean such expenses are not recoverable under other arbitral institutional frameworks.

Although phrased differently, the permissible expense guidelines adopted by many other arbitral institutions are worded so as to suggest that carbon offsetting costs could be recoverable. By way of example, the London Court of International Arbitration, the Korean Commercial Arbitration Board and the China International Economic and Trade Arbitration Commission all provide for the reimbursement of reasonable costs or expenses reasonably incurred, which could include carbon offsetting costs. Other institutions use slightly more restrictive wording, which could be interpreted to exclude the reimbursement of carbon offsetting costs, in particular

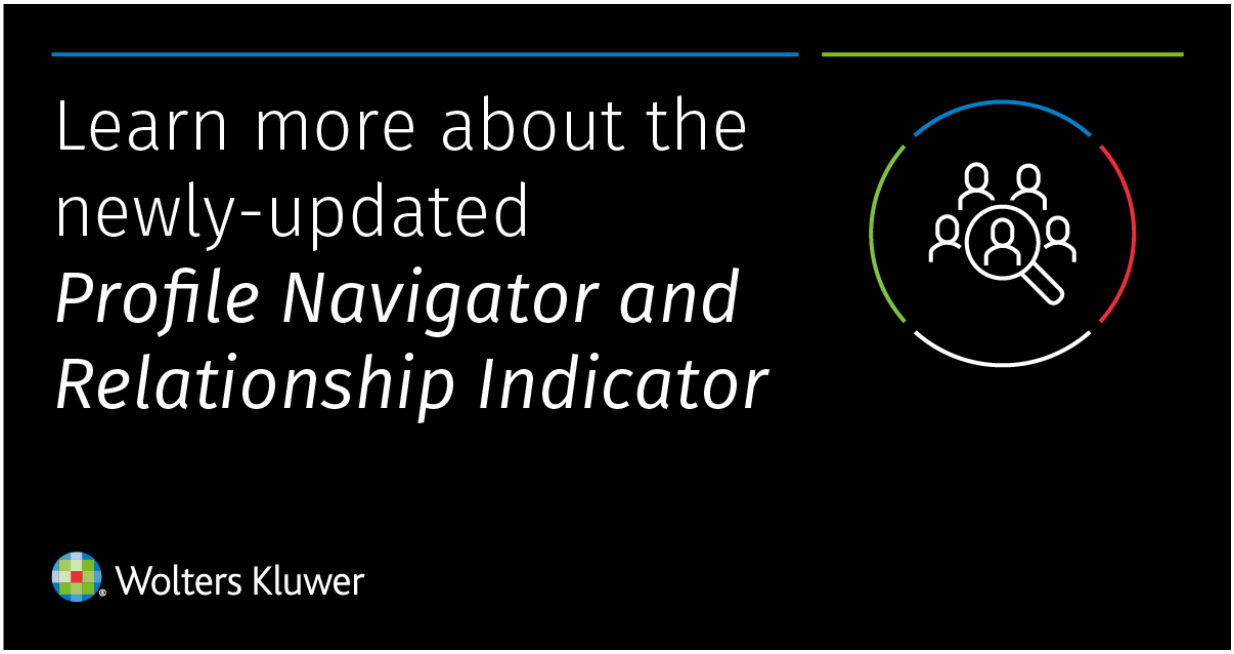
where the relevant institutional guidelines refer to the “actual” or “necessary” costs of the arbitrators’ travels.

Given how recent the SCC Guidelines are and, in light of the pressing international focus on climate change action, it is easy to understand why the SCC opted for this explicit approach to carbon offsetting costs. It will be interesting to see whether and how, if at all, other arbitral institutions will adapt their permissible expense policies in the future. In any case, nothing would prevent the parties to a dispute from agreeing (for example, at an early procedural conference) that such costs may be claimed by the tribunal in question, irrespective of the applicable institutional rules or guidance.

An overall appraisal

Given that the vast majority of commercial arbitrations are confidential, it is difficult to identify trends with respect to tribunals’ treatment of environment-related considerations. However, such considerations are becoming increasingly prevalent and relevant in the commercial arbitration sphere, as they pervade the substance of some arbitrations, as well as the arbitral process.

The global push for increased transparency in commercial arbitration may result in increased publication of awards, which might allow interested parties to follow the treatment of environment-related considerations in commercial arbitration more easily and closely in the future.



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