Kluwer Arbitration Blog

Tuesday for Future – Arbitration and Climate Change: DIS40 Autumn Conference

Fabian Bonke (Hogan Lovells) · Wednesday, October 2nd, 2019

As the world marched in support of global action on climate change, the German DIS40/below 40 arbitrators' group showed its support for the cause at a conference on Arbitration and Climate Change on 10 September 2019. After a warm welcome by DIS federal coordinator *Jennifer Bryant (Noerr)* the conference started off with a panel discussion on *"How Climate Change can result in disputes involving States"*.

How Can Climate Change Result in Disputes Involving States?

As the first speaker, *Ulrich Kopetzki (DORDA)* gave an overview of the scientific foundations of climate change and the warming effect of carbon emissions. He examined how arbitration could actually be used as a tool to fight climate change. He focused on the sociological question of how arbitration could be used to transform conflicts arising from climate change. According to the socio-legal scholars *Felstiner/Abel/Sarat*,[1)] the emergence and transformation of disputes can be divided into the stages of *naming*, *blaming* and *claiming*. In this context, climate change would be classified as an injury, attributed to the fault of another individual or social entity, *e.g.*, States, and eventually someone with a grievance would have to voice this injury and claim a remedy. If the claim is rejected, this would cause a dispute to be resolved, for example, by way of arbitration proceedings. *Kopetzki* then explained that arbitration would also exist in inter-state disputes, such as maritime border disputes or even investor-state disputes under bilateral investment treaties ("BITs"), which investors could invoke either as means of protection against restrictive environmental regulation ("*shield*") or, potentially, as means to request the implementation of such measures to protect their investments.

Levent Sabanogullari (Permanent Court of Arbitration, "PCA") then led the audience through the PCA practice and involvement in climate change-related cases. After a brief historical outline of the PCA and its establishment by the Hague Convention for the Pacific Settlement of International Disputes (1899), he informed that there are currently 166 cases pending in total of which some contain a climate change-related element. This would be the case in some inter-state disputes, such as Iron Rhine (Belgium vs. Netherlands) of 2005, Indus Waters Kishenganga (Pakistan vs. India) of 2013 and South China Sea (Philippines vs. China) of 2016. *Sabanogullari* gave an overview on those climate-change cases under contracts involving a state or other public entity which would be mainly about the so-called Clean Development Mechanism which allows a country with an

emission-reduction commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries. For all arbitrations *"relating to natural resources and/or the environment"*, the PCA provides for special environmentally tailored dispute resolution procedural rules which include, for example, lists of specialised arbitrators or experts.

The panel was completed by *Nicola Peart (Three Crowns)*, who led the gathering through the legal basis of climate disputes. She started off with Art. 2 United Nations Framework Convention on Climate Change ("UNFCC") of 1992, which defines the stabilisation of greenhouse gas concentration at certain levels as its objective. In particular, the developed countries have committed to support climate change activities (Art. 4), which was then specified in the Kyoto Protocol (1998) and the Paris Agreement (2015). As an example, *Peart* cited the recent *Urgenda* case brought against the Dutch government, in which the District Court (The Hague), and confirmed by the Court of Appeal (The Hague) obliged the Dutch government to cut emissions by at least 25% by the end of 2020. It is anticipated that the state measures taken to implement such obligations might then serve as basis for investor-state disputes which are already currently being prepared by one investor against the Dutch state.

In the ensuing debate, an interesting question raised from the audience was whether there is a need to classify climate change disputes as such. The concern was raised on if such a classification already implied a certain position, while others might classify these disputes as questions of security or economic freedom. The panellists seemed to agree that such a classification is not necessary and that in fact a wide range of disputes (human rights, commercial, and others) would be covered. DIS federal coordinator *Markus Altenkirch (Baker McKenzie)* argued that the categorisation would only make sense if these disputes would share common characteristics that set them apart from other disputes. However, the panellists seemed to agree that the term *"climate change disputes"* would, in any case, be a useful labelling for activist groups.

How Can Climate Change Result in Disputes in Commercial Arbitration?

As the first speaker of the second panel on "*how Climate Change can result in disputes in Commercial Arbitration" Sunny Kapoor (Clifford Chance)* gave a global statistical overview on climate change cases. He distinguished between *"direct"* cases – in which a claimant affected by climate change raises an accusation that the respondent is responsible, and *"indirect"* cases – in which the subject matter touches on climate change relevant topics. As one prominent example of a "direct" case, *Kapoor* discussed the *Lliuya vs. RWE AG* case which is currently before the Higher Regional Court (OLG) Hamm.[2)] In this case, a Peruvian farmer sued the German energy company RWE because of melted glaciers and increased flood risks for his hometown. *Kapoor* expressed his surprise that the competent court considered the action to be plausible *(schlüssig)* since it would not be possible to establish a causation link between the emissions from one particular emitter and the effect on one particular claimant. *Kapoor* continued with an overview of different fields of climate-change relevant cases heard by commercial arbitral tribunals. Potential cases would include those about security measures to be taken, such as storm protection, increased cooling, shortage of natural resources, cases arising from necessary technological transitions, disputes about contractual and statutory compliance caused by stricter regulation, or disputes caused by shifted stakeholder expectations leading to requests to amend contracts (*e.g.*, product specifications).

Dodo Chochitaichvili (Modo Law) held a presentation on how class actions can be a successful

tool in fighting climate change. She started off with cases in which plaintiffs tried to hold governments accountable to their climate policy commitments. Besides the *Urgenda* case (see above) she mentioned, in particular, the similar case of VZW *Klimatzaak v. Kingdom of Belgium* which is supported by approximately 60,000 co-claimants. As a further particularly interesting case she referred to the Australian case Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7, which confirmed the rejection of an application for a coal mine. A prominent case, in which a high number of private claimants and NGOs request an enterprise to reduce its carbon emissions, she discussed Milieudefensie et al. v. Royal Dutch Shell, which is pending before the Hague Court of Appeals. *Chochitaichvili* argued that although most of the cases are decided by state courts because of the absence of arbitration agreement, arbitration might potentially be an attractive tool because of its features such as flexibility, the decision makers' expertise and reliable enforcement. As a potential improvement for arbitration as one forum to resolve these disputes, she suggested following the initiatives engaged in establishing international arbitration as a method of resolving disputes over obligations arising out of business-related human rights abuses (click here, here and here to read more on this topic on KAB).

Tanja Stooß (CMS Hasche Sigle) concluded with a presentation on the financial structure of the mitigation measures taken in relation to climate change and of the adaptations needed to reduce risks from climate change. According to estimates, these would amount to USD 100 bn/year starting from 2020. To this aim, the UNFCC set up a new fund, the Green Climate Fund (GFC) with available funds of approx. USD 5.2 bn, and more than 100 projects worldwide financed. By way of example, she explained in detail the Tuvalu Coastal Adaption Project, which aims at protecting the Oceanian island of Tuvalu from rising sea levels and cyclone events. *Stooß* explained that disputes might arise and be subject to arbitration with regards to the United Nations Development Programme ("UNDP") as the operating UN unit and the contractors mandated by the UNDP.

Conclusion

There can be no doubt that climate change will increasingly give rise to disputes because of its strong impact on people, state regulation and commerce. In recognizing this, the interesting conference was thus a trendsetter. The event however also showed that it is questionable whether these disputes need to be qualified as *"climate change disputes"* since they concern many different fields of law and have few in common.

In disputes involving States, transparency and the involvement of non-state actors (*e.g.*, NGOs) were pointed out as key challenges. It was, however, rightfully argued that the frequently addressed concern of limited transparency would in some cases not be an issue since some hearings are already been broadcasted and transcripts published.

For commercial disputes, one recurring issue discussed during the event was how to hold individual emitter accountable for damaging effects from carbon emissions. As a first step, the emissions would have to be qualified illegal. As a second step, it would be required in most jurisdictions under the current legislation to prove that individual emitter would be responsible for the exact emissions that caused damage (which will in practice be impossible to prove). As a potential way out, it was suggested to introduce a concept similar to the American model of *"market share liability"* to these cases, which would relieve the claimant to prove this direct link

but would allow holding the emitter liable based on its global contribution to carbon emissions.

Lastly, it needs to be mentioned that the disputes discussed during the event were primarily cases treated by state courts. This is in particular due to missing arbitration agreements, but it also seems that public *fora* are preferred by the activist groups promoting these actions to attract public attention. However, because of the overreaching effect of climate change, it goes without saying that more than a few cases between States or in commercial disputes, will be also be heard in arbitrations.

References

?1 Law & Society Review Vol. 15, No. 3/4, Special Issue on Dispute Processing and Civil Litigation (1980-1981), pp. 631-654.

?2 OLG Hamm, File Number I-5U 15/17.

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