

Kluwer Arbitration Blog

From Vancouver with Love: Insights on the “Arbitration of Energy and Climate Change Disputes” from the Joint Young ICCA and YCAP Event

Dina Prokic (Senior Assistant Editor) (Woods LLP) · Thursday, June 29th, 2023

During the first days of June, the scenic Canadian city of Vancouver hosted several events of interest to the arbitration community. The biggest of these was the June 2 [joint conference](#) organized by the Vancouver International Arbitration Centre (“VanIAC”) and the International Council for Commercial Arbitration (“ICCA”), which will be discussed in a separate blog post tomorrow. On the eve of that conference, ICCA’s young practitioners group (“[Young ICCA](#)”) and the Young Canadian Arbitration Practitioners (“[YCAP](#)”) joined forces to convene an [event](#) concerning the “Arbitration of Energy and Climate Change Disputes” at the offices of Blake, Cassels & Graydon. [Maanas Jain](#) (Three Crowns) moderated the panel discussion during which [Jessica Crow](#) (Arbitra / University of Cambridge), the Hon. [Barry Leon](#), FCIArb (Arbitration Place, 33 Bedford Row and Caribbean Arbitrators, and VanIAC Arbitrator and Mediator Panel member), [Arvindran Manosegaran](#) (Omni Bridgeway) and [Kirsten Odynski](#) (White & Case) considered the particularities of climate change and energy transition disputes, the best fora for resolving them, as well as the impact of third-party funding.

The panelists also judged an “arbitration shark-tank” during which three pre-selected speakers briefly presented their views on the most significant decision related to both energy and international arbitration since the signing of the [Paris Agreement](#) in 2015. [Glenn Gibson](#) (Borden Ladner Gervais) focused on the dissenting opinion of Prof. Philippe Sands KC in *Eco Oro Minerals Corp. v. Republic of Colombia*, wherein he opined that international investment tribunals had to recognise the need to proceed with caution in light of the generational challenge faced by climate change. [Claudia Garcia Bustamante](#) (Rodriguez Angobaldo Abogados) presented her take on the *State of the Netherlands v. Urgenda Foundation*, while Joanne Nelima (NGO) shared her views on *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*.

This post presents some highlights from the program and their relevance to broader discussions on these topics.

Arbitrating climate change disputes: What does this entail?

As malleable as the phrase “climate change disputes” may seem, arbitration circles have reached a general consensus on its meaning. According to the [ICC Task Force](#), climate change disputes “arise 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.”

At the outset of the session, Jessica Crow and Kirsten Odynski distinguished the types of disputes that are likely to come up in arbitration from those bound for other fora. Highlighting the litigation risk for both “climate aligned” and “climate unaligned” industries, Jessica Crow explained how many of the traditional users of international arbitration (based on the data compiled by arbitral institutions) are likely to be first in line to feel the bite of tightening international and domestic climate regulations as GHG mitigation targets become more ambitious. This is where regulation is likely to have a knock-on effect on international investors or on existing commercial relationships, which may already have an arbitration agreement in place.

Both panelists touched upon the main features of climate change regulation and highlighted some of its consequences, such as: regulatory instability for both fossil and renewable investors, the obsolescence of certain industries and industry players, asset stranding, increasing due diligence standards for companies under hard and soft ESG regulations and greenwashing. Some of these are reflected in the recent French court case involving [TotalEnergies](#) and the Hague District Court decision in *Milieudefensie v. Shell*.

The impact of climate change disputes on global climate governance and on international arbitration

Climate change disputes generate widespread effects that transcend individual cases and jurisdictions. Crow noted that strategic climate litigation, defined as lawsuits that aim to produce ambitious and systemic impact beyond the individual case, has been on the rise since the Paris Agreement was concluded in 2015. Litigants are relying on a range of strategies, including human rights, constitutional rights, and tort law to gain standing before domestic courts and bring cases against governments that challenge the overall ambition of domestic commitments and policies to mitigate climate change. In a similar vein, cases which seek to compel private companies to align corporate strategy with the overarching temperature goal of the Paris Agreement are also on the rise, as are cases against corporates and financial institutions on due diligence grounds. While climate change disputes can have immediate, real-world impact on domestic policies and corporate strategies, they also produce knock on effects with potential to give rise to both investor-State and commercial arbitration. As such, climate litigation merits our close attention.

While we are unlikely to see “strategic climate arbitration”, strategic climate litigation is likely to prompt new causes of action and counterclaims in industries where arbitration is already frequently used. For example, considering that 8% of global emissions come from concrete, new causes of action are to be expected in construction arbitrations.

More climate change-driven contractual language is also foreseeable. Kirsten Odynski referred to environmental clauses in [FIDIC contracts](#), as well as in standard contracts created by the UK Institution of Civil Engineers, which now contain [clauses](#) aimed at incentivizing carbon reduction initiatives on future builds. She also referred to the [Chancery Lane Project](#), described as the largest global network of lawyers and business leaders using the power of climate contracting to deliver

decarbonisation. One of the model clauses available on the Chancery Lane Project’s website is a [climate-friendly governing law clause](#) which requires that the governing law be interpreted in a manner consistent with the objectives of the Paris Agreement and the UNFCCC:

1.1. This Agreement shall be governed by, and all disputes relating to or arising in connection with this Agreement or the subject matter thereof shall be resolved in accordance with, the laws of [chosen jurisdiction]. The parties agree that this Agreement shall be construed in a manner that is consistent with the Climate Objective and any dispute shall be resolved in the manner most closely aligned with the Climate Objective.

1.2. The Parties agree that in the case of inconsistency between the Climate Objective and the laws of [chosen jurisdiction], the Tribunal should interpret and/or modify [chosen jurisdiction] law so that it is aligned with the Climate Objective. Where that is not possible, the Tribunal shall be empowered to disregard those laws, regulations, guidelines, practices or other directives that are incompatible with the Climate Objective, save for mandatory rules of [chosen jurisdiction] law.

Climate change-related policies, however, impact not only the substance of arbitration, but also its process. Part of it could be what the Honorable Justice Brian J Preston SC, the Chief Judge of the Land and Environment Court of New South Wales, called “[climate conscious lawyering](#)”. The climate conscious approach in daily legal practice can be achieved in several ways, including by appreciating climate change and its consequences in all aspects of legal practice and providing advice that is consonant with the goals of [Sustainable Development Goal 16](#).

The Hon. Barry Leon reminded the audience of another element having the potential to impact the arbitral process: the [Campaign for Greener Arbitrations](#) which Lucy Greenwood [launched](#) three years ago and which now has nearly 1500 signatories. While there are several facets to the Campaign, the respondents to the [2022 QMUL Survey](#) identified the following items as most popular ways of reducing carbon emissions: “using videoconferencing for meetings and hearings” (81%), “avoiding unnecessary travel, particularly flights” (69%), and “using of electronic bundles at hearings” (66%). Though a slim majority (52%) of respondents indicated that “green” arbitration credentials would not impact their choice of arbitral service providers, it is not unreasonable to expect that the scales may tip the other way in the coming years.

The influence of climate litigation on litigation funders (and vice versa)

Similar to the players in other industries, litigation funders are affected by climate change-related policies and climate litigation. By way of example, Arvindran Manoosegaran referred to ESG screening that is implemented in one of Omni Bridgeway’s funds (Fund 6), which precludes investments into certain industries such as thermal coal and oil sands, by virtue of the requirements of its funding partners. Generally, however, the claimant’s identity is not determinative to Omni Bridgeway’s decision to fund a particular claim; rather, it is the merits of the case that matters. Understandably, commercial litigation funders would approach claims arising in areas where precedent is non-existent or limited with caution.

The reverse is also true: litigation funders can influence climate litigation. In recent years, Omni Bridgeway has financed several climate change claims across the world. One notable example is the Australian class action concerning the government's failure to address PFAS contamination: *Smith v. Commonwealth of Australia (No. 2)*, wherein Omni Bridgeway assisted the plaintiffs in obtaining \$57 million in compensation. When approving the settlement, Justice Lee recognized the significance of litigation funding in that and disputes of similar nature (para. 82):

Without litigation funding, the claims of these group members would not have been litigated in an adversarial way but, rather, they would likely have been placed in the position of being supplicants requesting compensation, in circumstances where **they would have been the subject of a significant inequality of arms.**

Though Justice Lee's comment was made in the context of a domestic class action, it applies with equal force in international arbitration. The anticipated increasing significance of third-party funding in energy-related disputes, including climate change disputes, is confirmed by the 2022 QMUL Survey (see p. 38) and a timely reminder to arbitration counsel to recommend funding as an option to their clients.

Is arbitration the best dispute resolution procedure for climate change disputes?

When evaluating which dispute resolution procedure(s) to select, the panelists suggested to approach this task by considering the following issues:

- availability of procedural features that can assist the resolution of climate change disputes;
- whether the dispute resolution procedure hinders or assists the alignment of the private sector with the goals of international documents (such as the Paris Agreement);
- appropriate allocation of risk and cost of energy transition (a question that often naturally arises in investor-State dispute settlement (ISDS) cases; and
- the possibility of participation by non-party stakeholders (for example, through amicus curiae submissions and/or access to the ongoing hearings where appropriate).

Additionally, the complex climate science, the rapidly evolving regulatory environment, the permeating public interest and the need for urgent resolution are all factors to consider.

Arbitration, which is characterized by neutrality, fairly foreseeable enforcement of awards, choice of arbitrators and experts, and flexibility, is particularly well-suited to resolving these types of disputes. Indeed, the 2022 QMUL Survey confirmed that arbitration is the preferred means of resolving international energy disputes (see p. 34).

The feature of arbitration that has prompted more discussion in the following days is precisely the ability to choose an arbitrator. More specifically, whether arbitrators require expertise and specific knowledge for the resolution of energy and climate change disputes was explored during the joint Young ICCA and YCAP event but also at the VanIAC / ICCA Conference at the panel "Predicting the Future of International Energy Arbitration". Some expressed views that, while useful, specific technical and industry knowledge among arbitrators is not the top priority since arbitrators are bound to benefit from expert evidence. A similar view was expressed by participants during the

LCIA event on June 3 (LCIA “Tylney on Tour” Vancouver: Energy Disputes). One participant disagreed with the proposition that an arbitrator is “not an empty vessel”, explaining that an arbitrator is not subject to cross-examination by counsel and therefore must decide the case based on submissions made and evidence adduced in the case before them. Yet, one must nuance this position from a situation where the lack of certain knowledge prevents an arbitrator from being effective (to use an analogy from a construction matter, not knowing the difference between concrete and cement makes an arbitrator ill-equipped for that dispute).

Though arbitration is the preferred means of resolving energy disputes, there are still ways to improve the process in this field, as noted in the 2022 QMUL Survey (see p. 33) and recently on this [blog](#). One suggestion would be for arbitral tribunals to take a more proactive approach by arbitrators i.e. resolving “easier” elements of disputes in a summary fashion.

** The views expressed herein are those of the authors and do not necessarily reflect the views of Woods LLP or its partners.*


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