

The role of ICC arbitration in resolving climate change disputes

January 2020

Authors: [Kirsten Odynski](#), [Michael Polkinghorne](#), [Mark Clarke](#), [Elizabeth Oger-Gross](#), [Salma Selim](#)

The ICC has identified six procedural features for parties to consider when arbitrating climate change related disputes.

Introduction

The ICC Task Force on the Arbitration of Climate Change Related Disputes released its Report in Paris in November 2019 and in New York in January 2020. The Task Force had more than 100 members from a variety of sectors and institutions, including Kirsten Odynski of White & Case LLP. In its Report, the Task Force defines climate change related disputes and then explores the role for arbitration in the resolution of those disputes. Below is a brief overview.

What are Climate Change Related Disputes?

The Report identifies three broad categories of contracts that could give rise to climate change related disputes:

- (i) general commercial contracts in a range of sectors (e.g. energy, infrastructure, transport, agricultural, manufacturing & processing);
- (ii) contracts concluded with a view to implementing the transition, adaptation or mitigation commitments in the Paris Agreement; and
- (iii) submission agreements entered into after a dispute has arisen to allow an impacted group to resolve climate change related disputes in a specified forum.¹

Parties to these types of contracts, in particular those falling within the first category, tend to be existing users of ICC Arbitration. The Report provides, for example, that over 40% of new ICC cases registered in 2018 concerned the construction (26.6%) and energy sectors (14.6%).²

The risk of climate change related disputes for companies operating in these sectors is on the rise. New climate-change related causes of action have been accepted by courts,³ and climate-change related events have the potential to impact existing operations. The Report illustrates this with the hypothetical case of a contractor for a new deep-water harbour that has incurred delays and additional costs due to the increased salinity of fresh water sources. Whether the contractor is entitled to an extension of time and its additional costs will depend, at least in part, on whether the increased salinity is attributable to rising sea levels owing to climate change and the allocation of such risks in the contract.⁴

¹ ICC Commission Report, "Resolving Climate Change Related Disputes through Arbitration and ADR", November 2019 ("**Report**"), Section II, pp. 8-12.

² Report, p. 16, para. 3.8.

³ See Mark Clarke and Tallat Hussain, Climate change litigation: A new class of action, 13 November 2018.

⁴ Report, pp. 9-10, para. 2.5.

Can Climate Change Related Disputes be Effectively Resolved Using Arbitration?

The Report finds that ICC arbitration can be effective for the resolution of climate change related disputes and identifies six procedural features for users to consider when arbitrating climate change disputes:

- (i) selection of tribunal members and experts with appropriate scientific expertise;
- (ii) adopting measures to expedite early resolution to provide for urgent interim relief;
- (iii) ensuring the application of climate change commitments or laws;
- (iv) promoting transparency;
- (v) allowing for third party participation; and
- (vi) allocating costs.⁵

The Report provides suggestions for how each procedural feature can be implemented, including case management techniques, modifications to the Terms of Reference, etc.

For example, the Report recognizes that there is a variety of uses for dispute boards in the resolution of climate-change related disputes.⁶ In addition to ensuring early and efficient resolution of disputes, dispute boards can provide a direct line of communication between the owner of a Green Climate Fund funded project and affected individuals and groups.⁷

The Report also recognizes that the joinder of additional parties under the ICC Rules⁸ can allow the participation of impacted individuals or groups. The involvement of third parties in arbitration can provide a means to address opposition to a project and thereby improve the reputation of the corporation.⁹ In the same vein, nothing in the ICC Rules precludes an arbitral tribunal from allowing *amicus curiae* from third parties.¹⁰

Finally, the Report encourages parties to allow for greater transparency in the resolution of climate change related disputes because such disputes often raise issues of interest to the public generally. In addition to the information that the ICC publishes about any case,¹¹ the parties may jointly request that the ICC publish additional information including mutually agreed updates of material developments and the final award.¹²

White & Case LLP
19, Place Vendôme
75001 Paris
France

T +33 1 55 04 15 15

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice

© 2020 White & Case LLP

⁵ Report, Section V, pp. 17-49.

⁶ Report, pp. 32-35, Section V.B(1)(iii).

⁷ Report, pp. 34-35, para. 5.53(a).

⁸ See Articles 7, 8 and 9 of the ICC Rules.

⁹ Report, pp. 44-48, Section V.E, esp. para. 5.82.

¹⁰ Report, pp. 46-48, Section V.E(2).

¹¹ As of 2019, the ICC has published on its website information about the arbitrators, the industry, and the counsel involved in the proceedings.

¹² Report, pp. 42-43, paras. 5.72–5.77.