

Global launch of the report entitled “Resolving Climate Change Related Dispute Through Arbitration and ADR” held in Paris on 28 November 2019.

Meeting Minutes

1. Presentation of the Report and its Task Force

Patrick Thieffry (Independent Arbitrator, Associate Professor University Paris I Sorbonne)

- ICC has decided to not print the report because of the environmental impact
- We do believe climate change and its related associated environmental impact mirrors any type contractual relationship in any industrial sector.
- The report identified 3 categories for possible disputes that have to do with climate change.
- Sales of transfer (Wheat farms) cases – category 1
- Every industry sector can be impacted by climate change. – category 2
- Report has boxes – include hypothetical case studies that show the vast diversity of situations.
- Category 3- all types of potential impacted people – business enterprises
- Section 5 of the report 6 areas of specific procedural features that have been checked. Only focus on 4
 1. Use appropriate expertise in dispute resolution processes.
 2. Emergency procedures – internal measures
 3. Transparency – essential to strength the social acceptability, how much involvement does the party want the public to be in the arbitration.
- Table of contents – panel will discuss section 5

2. Users’ Perspectives

Kirsten Odynski: Partner, White & Case

Ralf Lindback: Managing Counsel, Wartsila Corporation

Patrick Baeten: General Counsel, Engie

Moderated by Wendy Miles, QC – Partner, White & Case

(Moderator) What do you think is the lawyer’s role in relation to transition to zero carbon?

- Educate and create awareness
- The industry is changing we are in the midst of a transformation
- Users are different
- Zero carbon transition – ambition
- Putting in place contractual terms to achieve that– presumable when there is a dispute to be resolved to remain consistent with that goal
- What in the report do you think strikes you to particularly important to...
- Awards are not made public.
- To understand industry standards transparency is important.
- How does transparency in dispute resolution help zero carbon?
 - It is a give that one of the major upsides is confidentiality.
 - ICC rules do not provide for confidentiality

- Most of the contracts provide for confidentiality clause
- Concession agreements
- If parties in the long term resistance more transparency, we will have more difficulties
- Publication of awards – is.....
- ICC rules should be aware that there is a public system

(Moderator): What sort of expertise might be called for climate change dispute in a business that hasn't been called for before?

(Ralf):

- Data is collected
- Continuous monitoring
- We need expertise in data
- we need more comparable scenarios at the early stage
- supply chain is full of start-ups
- Aim is to be market leaders and world leaders to be zero carbon economies
- 1/3 of taskforce is client representative, mostly lawyers

(Moderator): What do you think is the lawyer's role in relation to a transition to a low carbon future?

(Ralf): Short and simple: my role inhouse is right now in regard to climate change, four key words:

1) Monetary and Regulatory framework

- Practical challenges for business and colleagues (risk is there)
- Educate, lead, create awareness
- Set up the steps necessary for contingency

(Patrick): What we try to do as inhouse counsel manage as well as we can are the risks of long term – probably will come to this because of choices made in initial proceedings – inspired by short term or long-term vision. What we do is a complying business – when they invest and operate; when they litigate – but the upstream and the investment and etc is important as well – which is part of investment fund just to illustrate it is one of matrixes for investment criteria and it's called sustainable investment development.

Sustainable investment development has 12 criteria:

1. Climate change mitigation
2. Cc adaptation
3. Enviro management
4. Water stress
5. Protection biodiversity

So, it lies at the very core of everything we do!

(Kirsten): Covering private practice - Three important points:

1. We share the monitoring role – when I think even back to the amount and XXX the significance of the changes we've seen in the legal and regulatory framework applicable to climate change even since we began work on taskforce in March 2018 – this is fast paced and moving. We will see further changes in this regard, and this is

one of reasons to accelerate this process and ensure the report to come out in a timely fashion. Important role for us in monitoring.

2. Risk – As disputes lawyers we have obligations to clients especially in areas like this where things move very quickly to be on top of identifying and managing those risks long before disputes start.
3. Large firms also have responsibility in everyday operations to reduce own carbon and ecological footprints. Think of everyday resources and client interactions. Should be at forefront of minds and everything we do.

(Moderator): Risk and compliance and investment decisions are all very important. But this report is on dispute resolution. How do you use this report (on dispute resolution) with your teams, clients? How do you sell it internally?

(Patrick): I confirm that I do use this. Participating on the taskforce, the things that struck me the most, is how difficult it is to articulate these issues. They're complex. Climate change is far reaching and to apply that to a procedure you know every well i.e. ICC Arbitration, it is difficult to conceptualise both the nature of issues and disputes and how that impacts the process. The report is useful in identifying the nature of issues that need to be considered, both when it is a dispute that is touched up on by climate change and how to frame those risks and arbitration procedure.

(Moderator): Ralf and Patrick, you both are client user counsel to co-chair of taskforce. You tried very hard to make this report useful to users, more than anyone else. How for you internally, how do you take this and talk to your own business stakeholders about the report?

(Ralf): The first merit of this report is to be there and be there in a timely fashion. UN published report recently – it is a disaster and EU have declared a state of climate emergency. The merit of the report is that it shows something that which might intuitively not be the best sector to do arbitration in – climate change disputes. Actually, it opens a lot of possibilities. The report confirms the adequacy of the rules because they're flexible and adaptable to any situation. Now that it comes with a lot of complexity. Most lawyers including dispute lawyers and myself, do not give it enough thinking when the draft closes – this is useful because it gives a checklist because it says this is the environment we will be working – so why not look at transparency or participation. The report is a very practical tool and make people think.

(Patrick):

Two aspects here:

- 1) Report comes from ICC. There are some good suggestions here. It's very user friendly. I used to call it roadmap – there is a fast track, traditional lane and expert lane. Everything is in a nutshell. Backed up by the fact it is from ICC. Top notch professionals in the field. Going with this report, presented to the Board and top management internally, it gives help to justify why we need it.
- 2) The industry is also changing. We are in the midst of transformation. The users are different compared with the users to 10 years ago. We need this type of re-thinking also in dispute resolution.

(Moderator): (to Ralf) Wartsila's mandate or energy businesses leading transition to 100% renewable energy future – that is this your statement = "Our ambition led zero carbon transmission". As lead lawyers in companies who have stated these ambitions to markets and shareholders, you're putting in place contractual terms to achieve that. Presumably you

want those contractual terms, when there's a dispute, to be resolved in a manner that remains consistent with that goal.

(Moderator to Kirsten): In terms of the report, and that objective for our clients, what in the report do you think of the features, strikes you as particularly useful/unique in order to achieve those transition objectives of our company's policies?

(Kirsten): Thank you, I think that there is probably two features that are unique:

- 1) Use of expertise – need relevant expertise in room to understand contractually what the parties intended, sophistication with which the agreement was made and how that fits into the larger legal framework. Useful items in report how you can bring expertise to Arbitration proceeding.
- 2) Transparency – common in commercial arbitration – awards are not public. ICC is making a move to increase transparency so people can understand industry standards and practices and the decisions being made.

(Moderator to Patrick): how does transparency in dispute resolution help led zero carbon transmission? Do courts like to keep dirty laundry private?

(Patrick): short-term and long-term. Short = given (upside for commercial users in arbitration is confidentiality. ICC rules do not provide for confidentiality. All contracts we enter into cover for stringent confidentiality clause – particularly with dispute. Most users including, when you look at one particular case, would be rather resistant to have dispute out there in the open. Whatever way you can promote this transparency.

Long-term: the words I have is that at one point in time commercial arbitration, especially in a field linked to climate change, might become under siege as we see with investment arbitration. Investment treaty and commercial arbitration – difference is not clear, technical deal difference. Distinction is not very clear and I fear if people keep on resisting transparency, we will have more and more difficulties convincing stakeholders, including our counterparties, to accept arbitration clauses. Need to find ways to be more transparent not just procedural aspects like who is the arbitrator but is interesting for the public interest. Publication of awards is far more useful. I wonder suggestions where we could not come to a system, if you choose ICC rules, you should be aware that obviously there will be systematic publication in short period of time so then you create a system whereby parties will get used to it and accept it more readily.

(Moderator): Might be able to within the ICC publication policy - climate change policy. Arguably the publication of decisions helps accelerate climate ambition i.e. we saw in the Spanish cases – (solar cases) not only did it teach other states what not to do when transitioning policy framework it also led to a decision in Spain last week to offer new concessions to claimants in exchange for full and final settlement of their claim. This innovative solution driven by climate ambition and transition is what we ought to be driving towards are arguably more feasible.

(Moderator to RALF): Another point Kirsten raised, was about the expertise, and just interested from a marine and energy side what sort of expertise is required for climate change related disputes in your business that hasn't been called for before:

(Ralf): Take a powerplant project (as an example) which is project financed. Lenders most likely in the near future will most likely have requirements as to climate change before they can get money into their projects. They are interested to follow up during the course of implementing and constructing this powerplant and building an offshore drill or whatever, the

continuous monitoring and connectivity to different stakeholders is a completely different level today than before. The point, we see that we need expertise in data and analytics. We see we need expertise in building scenarios and more comparable scenarios to compare at the very early stages of a project. Different nowadays, we have much more collaborative business models. We have clear supply chain and full of start-ups. It is a different world and different interconnectivity which produces data and people analyse data and draw conclusions out of this data. We need this kind of expertise – these are resources we need. Just to set the scene where we are coming from today in energy, which should be offshore or gas.

(Moderator): As funders start decarbonising their portfolios they're looking at projects that they're funding and they're wanting you to be able to account for that with a standardised system?

(Ralf): Correct. Ten years ago, technical specification for powerplant XCXX. (52 min) Now, we have normative mindset. This report is mirroring climate change laws. Essential going forward.

(Moderator): Transition stands a chance with people like Ralf and Patrick? Normative approach to climate change? We have a lot of people in the room part of taskforce. Started in February 2019.

Question to Kirsten: TCFD - Taskforce on Climate Related Financial Disclosure, that has now been signed up to by 1000s of companies, the principles on responsible investment have been signed up to by funds representing 120 trillion dollars in investment, although voluntary now, can become signed and ratified into constitution. What is this going to do to areas of expertise and disputes (our work)?

(Kirsten): It is the nature of disputes in the pipeline is going to change. We need to be prepared to change with it and understand the developments to advise clients in that connection. Re; the report, an interesting thing = existing clients will face issues (they are users of ICC arbitration who see the benefits) – we need to advise how that procedure, can be adapted to account for these new disputes.

(Moderator to Ralf and Patrick): Third party disputes gave us some pain in the birth of this report. There was a spectrum of views. Progressive view = all in process because climate change is everyone's business. Other view = keep non-parties out of it, don't open floodgates. When, if ever, would you want, welcome or tolerate a third party being involved in a climate change related dispute. How would you go about permitting them to become involved in an international arbitration procedure – which is usually confidential, consensual and contractual?

(Patrick): More difficult than transparency. Because it starts with transparency, no one knows arbitration has started or what it is about – there is no chance someone will try to intervene. If you don't have a minimum of transparency, which can be organised or non-organised, the question is void.

There is a fundamental difference between parties to a dispute accepting that a third party would become a full party and that I think that might be paradoxically easier, because I can't (sing Engie as example) imagine that if we have for instance on a hybrid power plant that we have a dispute regulator with the conceding authority with the constructor, that we would be prepared to have population in the surroundings participating in some way or another because they are impacted by a powerplant being there. If an arbitral class action can be structured in an efficient way, Engie should not resist to that.

Investment treaty arbitrations – we have seen European Commission trying to intervene – most of the time those intervening parties are not genuinely motivated by a willingness to educate the arbitrators – they are just willing to make their point or another agenda. But then again, if it is public interest and that third party has genuine expertise or interest in promoting public interest – why not?

We would be undercutting the essence of arbitration if parties keep resisting this.

(Moderator): Latin America and the example of hydropower infrastructure project, at which point in time would you think it is most useful to get the buy in of a potentially effective population in a project like that? When problem arises? At the end? At the start? (if you knew a population could potentially be impacted by a major energy renewable project)

(Patrick): The sooner the better but I am not naïve, not because you prevent problems when you start construction, but problems will not pop up at the end or even when you operate the plant. Because whatever reasons, for instance – hydropower plants are long term investments for good reason (up to 60 years). With the hydrology, what we see in Brazil, which has changed dramatically in last ten years. What solution we had 10 years ago is ineffective today. So it will happen at any point in time. This report gives rise to practical difficulties. You won't have local fishermen in an international arbitration (if they need to contribute to costs) but on the other hand if the one of the other parties says whatever "I will bear the cost of the arbitration" – that is kind of a blank cheque – then anyone can sue for any good or bad reason (which is something we want to avoid).

(Moderator): one of the things we got to discuss in the dispute boards, as Patrick knows, in this report and recommendations was creating type of dispute judicatory bodies within the auspices of the ICC and centre for expertise – for claims by affected populations. So, we are creating that with the government during tender process at outset of government – frighten horses a little bit.

Kirsten, you do a bit of infrastructure work, is that something you would ever envisage?

(Kirsten): It is really a creative solution – but honestly, but how you would involve the public (in an arbitration) is the most challenging topic and issue to be addressed. There are a lot of practical concerns that can be raised and can be difficult to manage. Important to find balance. Need to continue to think about this. I like the dispute board's angle – in terms of finding a way to involve that participation – you need someone who is very involved in the project and understands what's going on to monitor the process (might be easier way in some respects than an arbitration). When you're thinking of multi-tier dispute resolution clauses and how to manage the public interest – earlier the better. Creative standing boards can be considered.

(Moderator): Renewables comes with more mining – in Brazil, with the two tailing storage dams (BHP), the Government asked the mines to establish the type of private dispute resolution body for mediation – so this ofcourse is ADR as well as arbitration (not limited to arbitration – it is the multi-tiered clauses).

Ralf, if we listen to the UN and UNFCCC right now, we have 10 years to close the deal on transition, to (or two) arbitrations back to back. What do we do about speed?

(Ralf): Speed is essential. Projects have a lifecycle.

(Kirsten): I think the one point we haven't touched on is expert determination (using expert determination) – before you go into a long project or dispute – there are specific issues which can be resolved in an efficient manner.

(Moderator): international dispute resolution lawyers should be part of conversation. We hope this is the beginning of continuing the project. Majda will tell us a little more about what the ICC is doing (new ideas). Michael will speak first.

Concluding remarks

Michael Polkinghorne: Partner, White & Case

Nice to see the number of grants.

Awareness in climate change: think of films you've seen in last ten years – it's all we are responsible for the end of the world. I have a house in Australia – beach house in a country which is run by climate change deniers. My brother calls and tells me we have a situation: the beach house burnt down and we had to rebuild it. In Australia, when we had to rebuild this that we had to put it up at least 75cm above sea level – official policy for Australia that level of water will be 50cm by 2050. Climate denial – when you say you risk losing everything – no one listens – but when you say you risk losing something, it might start getting across and people might buy into the initiatives.