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Lessons for international arbitration from recent U.S. climate change litigation

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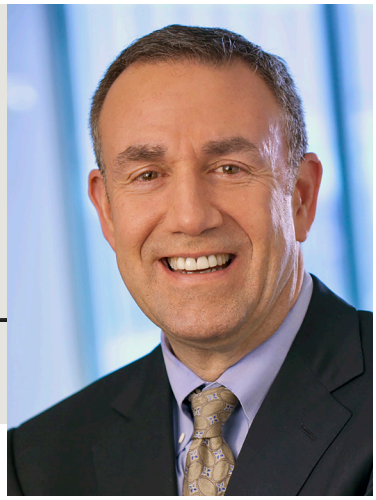

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The international arbitration community has publicly embraced the expectation that climate-change-related disputes submitted to arbitration will increase exponentially over the coming decade. Arbitral institutions and individual arbitrators, law firm practitioners and academics have all forecasted that cases related to or impacted by energy production and distribution (both fossil fuel and alternative), supply chain issues and catastrophic climactic events will multiply. So will investor-State disputes, particularly as nations around the world increase their regulation of the energy industry and the environment to meet international treaty obligations, blunt the effects of climate change, and address the issue of equity among impacted communities.

The anticipated growth in climate change arbitration also goes beyond traditional commercial and investor contract claims. Broad arbitration clauses in consumer and fuel supply contracts among others, and the possibility of post-contractual submission of climate-related disputes to take advantage of arbitration's expert, efficient and speedier resolution of conflicts, as well as increasing acceptance of arbitration by governments and other stakeholders all are predicted to land an ever-wider array of claims before international arbitration panels.

Players on both sides of the climate change divide have had varying reactions to these trends. In investor disputes, some states are concerned that their efforts to take regulatory action to combat climate change have received short shrift in arbitration against investors who claim their contractual rights have been infringed. This is the main impetus behind the decision by individual European nations and later the EU itself to withdraw from the Energy Charter Treaty of 1991.

On the other hand, those in the energy sector worry that the focus on climate issues by arbitral institutions could become one-sided and override other considerations, especially as societies develop increasingly proactive responses to the threats they face. For example, the ICC's 2019 Report on Resolving Climate Change Related Disputes through Arbitration and ADR states that "[c]limate change is one of the biggest imperatives of our time, as the IPCC Special Report on Global Warming of 1.5[degree sign] published in 2018 states it will 'require rapid and far-reaching transitions of energy, land, urban and infrastructure (including transport and buildings) and industrial systems' to avoid the worst effects of climate change," Sec. 2.3.

To maintain credibility, garner trust, and ensure that arbitral tribunals are perceived as a just forum for all stakeholders, the arbitration community will need to take a broad view of the policy considerations at stake when climate change is invoked as a factor by one side or the other. To understand those perspectives, one important place to look may be the jurisdictional arguments in dispute in the ongoing climate change litigation in the United States, primarily common law nuisance and fraud claims brought by state and local governments against fossil fuel companies.

In these cases, local governmental plaintiffs across the country argue that the fossil fuel defendants have caused them injuries from climate change both by manufacturing and distributing products that cause global warming and by misrepresenting the causal connection between fossil fuel and climate change over the course of many decades - in government submissions, public statements, advertising and privately funded research.

The substantive issues in these cases are novel and complex. But, as the fossil fuel companies' recent petition for certiorari to the *Supreme Court in Shell v. Honolulu* makes clear, it is the jurisdictional question that may shed the most light on differing viewpoints arbitration of climate change disputes will need to accommodate. That legal question turns on whether the litigation claims should be heard in the state courts where they were brought based on state tort law -- or instead in federal court based on the overarching national policy questions they implicate. As set forth in the petition, these include:

National energy policy and its interrelationship with domestic economic issues: virtually all nations depend on fossil fuels for both industrial and agricultural uses, and penalizing energy production and/or incentivizing reductions can have dramatic economic impacts;

National security: most nations' national defense is dependent on fossil fuels;

International relations: "Plaintiffs' claims hinge on global emissions and necessarily implicate issues involving 'our relationships with other members of the international community [that] must be treated exclusively as an aspect of federal law" (Petition at 21); and

Cross-border environmental impacts: the ubiquitous nature of climate change is not susceptible to state (i.e., localized) standards and duties but instead must be addressed at a more global level.

The petition cites the Second Circuit's acknowledgement of "the careful balance that has been struck between the prevention of global warming, a project that requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." (Petition at 12, citing *City of New York v. Chevron Corp.*, 993 F.2d 81, 93-94 (2d Cir. 2021).

Obviously, these considerations must all be weighed against the strong public policies arising from the devastating impacts of climate change; the scientific consensus surrounding increased atmospheric temperatures, unprecedented climate events, dangerously rising sea levels and the social and economic consequences of changing climate patterns. But the countervailing policy implications invoked by the fossil fuel industry and the court decisions they rely upon figure importantly in the calculus.

That is the principal lesson for the arbitration community as it looks toward increased arbitration of climate-related disputes. When raised by the parties, international arbitrators need to be prepared to address all sides of climate policy arguments, with an eye toward the consequences of their decisions beyond the limits of the dispute before them. As with court judgments, arbitral awards in the climate arena will have implications not only for the parties but for society beyond. In fact, those competing viewpoints may need to be considered by arbitrators as much as - and perhaps to a greater degree than - by judges.

First, parties in arbitration may be expected to invoke policy arguments more freely than they do in litigation. With its focus on reaching an equitable result, and sometimes looser adherence to legal technicalities, not to mention the absence of appellate avenues, arbitration may take account of policy considerations that may inform or go beyond strict contractual or statutory interpretation.

Second, courts reviewing arbitral awards for purposes of confirming, vacating, or enforcing them, properly take account of public policy, one of the rare exceptions to the strict requirement of judicial deference to arbitration. The New York Convention, for example, incorporated into U.S. law by the Federal Arbitration Act, 9 U.S.C. Section 207, includes as a ground for vacatur a finding that the award would be contrary to public policy.

Third, these policy considerations may be more complex in a dispute between parties of different nationalities than in purely domestic litigation. While arbitrators look to the governing law as specified in the contract, they may also consider the policies of the parties' jurisdictions, the site of the arbitration, or international imperatives and approaches.

Finally, it will be important for arbitrators to consider policy issues from different perspectives if arbitration is to retain the legitimacy among individual, corporate, and state players that it has so carefully developed over many decades.

None of these policy issues are determinative. They all must be weighed against competing concerns. But arbitrators making decisions in climate change-related disputes will need to carefully account for both sides of the equation -- and the climate change jurisdictional arguments, as well as any Supreme Court resolution of that question, will provide a helpful blueprint.