



CLIMATE CHANGE AND ARBITRATION

*By Smriti Shashikant Naik
From V.M Salgaocar College of Law*

Climate change what is it?

Climate is usually explained as the typical, normal weather in a place or a particular location for over several years. Climate change is a basically the changes or so to say the shift or changes in those normal average conditions. The Earth is now going through a phase in which there is a rapid climate shift, with the global temperatures soaring because of the detrimental effect of the human activities, such as usage of fossil fuels, the burn up of oil, coal and gas.

The United Nations assessment has come to the conclusion that by the year 2030 the Earth's average temperature will soar to a staggering level which would be 1.5°C higher than the preindustrial levels. This would have a very detrimental effect on the climate and would in turn impact affect the humankind. An article was published by the deciding panel Climate Change of the International Body claiming that the steep rise in the Climate change would be seen almost a decade earlier than what was anticipated which was just couple of years back. It was also published that the maximum limit be surpassed by 2050 which cannot be tackled in any way no matter how much carbon emission is reduced in the coming years.

Over the past few decades, the global warming has taken an ugly turn which has caused damage to an extent that cannot be undone. Emission of carbon dioxide to a significant amount caused the atmosphere to trap the solar radiations in its atmosphere

causing the climate to warm up which is called the greenhouse effect. The Intergovernmental Panel on Climate Change (IPCC) has concluded that the amount of carbon dioxide emitted is more than what they have been in 2 million years. It doesn't just stop here the amount of methane and nitrous oxide concentration is highest right now what had been in at least 800,000 years

Arbitration and Climate change

Climate change is a comprehensive, intricate, and a global occurrence, fear, and catastrophe that is being faced by everyone around the globe. There is a constant attempt towards adoption of conducive and concrete policies which will help in reducing the ricochet effect that the global warming is having on the rising sea level and climate. These stringent policies are being adopted by the business sectors everywhere. The private and the public sectors have been burdened and coerced into participating in combating and tackling Climate change that has detrimentally affected the entire world.

There is huge participation by the Arbitration sectors and Institutes who have been actively involved in settling the dispute that have been at a rise. Arbitration clauses have been added and incorporated into contracts that bind the business parties and big corporations so that they also put in an effort and do their bit in helping tackle climate change which are implicated with usage of fossil fuels, involved in deforestation, and including the burning of coal, gas and energy. The industries that have been regulated, structured and controlled by means of stipulating arbitration Clauses so that the industry sectors too have an active engagement and participation towards addressing of the Climate change.



The initiative to bring a change with respect to climate changes shall not just be made by legislators and policy maker but also by the arbitrators who have a massive role to play in bringing about a change. Looking at the steady rise in the number of climate change disputes and the upward trajectory that it has caught on to, the numbers are more likely in to rise even further in future, the disputes that would surface or come into picture would more likely be the ones that pertains to the rightful way of Interpretation and usage or the application of laws, regulations and codes pertaining to Climate change. However, there is no shortage of Climate change related laws or regulation, there are roughly about 1,500 policies and law pertaining to the Climate change around the world. Having said that the rules, regulations, codes, policies, and law will increase to a staggering number once the government, or organisations in power work alongside the private sector so as to achieve the set targets stipulated by the Paris Agreement 2015. Once everything is tandem with one another we could witness many disputes being reported with respect to the rules, regulations, codes and policies as such clauses will be incorporated in the Contracts binding the parties together and hence need to comply with the same.

Arbitration as a tool to combat Climate change

For the longest time the Arbitrational Institutions fixated themselves purely to only commercial disputes that used to took place in any kind of International Organisation or Business sector. The arbitrational Institution or the body has always been inactive or so to say dormant when it comes to disputes pertaining to environmental issues or

disputes. However, over the past few years dome Arbitration sectors have shown immense adaptability and support with respect to environment issues and issues related to climate changes. There are several landmark examples which have paved way and welcomed arbitration with respect to environmental Issues. The American Arbitration Association has explicitly registered environmental issues and environmental disputes which covers within its ambit issues pertaining to Pollution Control, Clean-up of the environment, chemical regulation for chemical plants, landfills, and other types of industrial projects, which are just few to name from the variety od expertise that they hold.

The International Chamber of Commerce, has also stepped in with respect recognizing and contributing towards the environment related arbitration, it has actively participated in the questions and queries that have merged from environment-related arbitrations by developing a task force on “Arbitration of Climate Change Related Disputes” to dive deeper and to have a better reach to the public with respect to the process and the manner in which the International Chamber of Commerce would aide and help in ensuring that the climate related issues and disputes. The ICC has time and again ensure great amount of inclination and readiness towards adopting frameworks which would be addressing the environmental issues and disputes.

The mission of the Task Force had the below mentioned missions:

- To find out as to how, why and in what ways can the ICC arbitration and other alternate dispute resolutions



can aide in finding a concrete solution to the problem of climate change.

- To determine as to a specific character of the dispute resolution procedure is of essence to tackle the issues and disputes arising out of Climate change.
- To evaluate the ICC Arbitration Rules, Mediation Rules, Expert Rules and Dispute Board Rules in tandem with climate change associated disputes in order to deliberate if it would be conducive for ICC to present any additional guidance, advice and suggest for dispute resolution sections and procedure.
- To formulate a report that reviews the Task Force's findings, considering that such result in many summary would later unfold to containing many summaries of issues discussed and proposed solutions for consideration by parties, potential parties, counsel and tribunals alike.¹

The Task Force members include business representatives, lawyers, arbitrators, arbitral institutions, in-house counsel, NGO representatives, business and industry groups and academics.

Kinds of Climate changes that are emerging

There are numerous factors that are affecting the intense growth of disputed pertaining to the climate changes in the and around the world. They involve:

- the activities pertaining to the commercial entities that cause many groups to be affected including

individuals who hold the right of action;

- States failure-when there is a failure on part of states and big institutions to act up against any kind of activities which might have posed as detriment to the climate change or the climate shift. The states and the administrative system should have taken the rightful measure in response to the major climatic shift which opens doors to prospective dispute pertaining to inter-state and investor-state matters, and allegations by parties of concerned citizens.
- Also, there are many times when the states do their part in coming up with regulations, coses and policies to tackle climate change, However it's not exactly received well by the people around thus causing many potential inter-state and investor-state disputes;
- reduction, cancellation or withdrawal of responsive methods by states, causing increase to potential renewable energy treaty arbitrations.
- contract implementation – the private sector is in focus to climate shift modification, and there will be an abundance of commercial contracts pertaining to the climate change mitigation and incorporation as well as adoption.
- The inception of the Paris Agreement in 2015 came in as a harbinger of good hope which will open doorways for arbitration

Paris Agreement 2015

There are any advantages and positives of Arbitration has significant advantages over

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litigation in dealing with climate change disputes. While the dispute arises Arbitrators can be chosen who have the right experience can be chosen. Multiparty proceedings are convenient; and the New York Convention on Enforcement of Arbitral Awards offers certainty as to implementation of awards.

In November 2019, an International Chamber of Commerce (ICC) task force published a report on addressing climate change-related errors and disputes through the process of arbitration and ADR. The report deeply dived into the examination of the prospective role for arbitration in the resolution of international disputes arena mainly pertaining to climate change. It came up with various possibility for ICC arbitration to amicably resolve and address disputes relating to environment, and elements which could augment present methods to resolve them².

On 2015 the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement for the very first time , which ensured that nations where in it obligated all nations actively engaged and contributed and participated towards combating and tackling Climate change and climate shift and adjust to the effects that comes along with it³.

The main agenda and the mission of The Paris Agreement is to try very possible means to decrease the current global temperature by 2 degrees Celsius higher than the pre-

industrial levels i.e., mitigation and to improve with the capability and the ability of the countries to deal with the effects of change in climate so that they can better adapt to the climate shift. The Paris Agreement also focusses on helping the non-developed nations who are vulnerable to adopt to such changes. The task force who were engaged by ICC always had a much had a larger and a holistic view to foreseeing the dispute that are a product of climate change, hence they tried to incorporate under its ambit a wide range of disputes that arise out of the impact caused by policies pertaining to climate changes and the climate shift itself in general⁴.

The IPCC has explicitly mentioned in its various reports more particularly the IPCC special report that the problem of Global Warming is the biggest challenge that the entire world is facing with. Hence, to combat and tackle this massive challenge that the entire world is reeling in there is an urgent need of dynamic and extensive change in energy, urban infrastructure, land, industrial systems to avoid the worst effects of climate change⁵.

The latest swift adjustments to land, infrastructure, and industrial systems that are occurring out from the reception to climate change will offer a new scope of investment and contracts, consequently, there will be an immense rise in the contractual legal disputes. Which falls into either two of the ambits:

² **Arbitration and climate change**

<https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2021/arbitration-and-climate-change/>

³ Resolving climate change disputes through arbitration [https://www.pinsentmasons.com/out-](https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration)

[law/analysis/resolving-climate-change-disputes-through-arbitration](https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration)

⁴ Melissa Denchak, Paris Climate Agreement: Everything you need to know, NRDC, 10-2-2021

⁵ The IPCC Special Report, Global Warming of 1.5°C (October 2018), p. 15



1. *Disputes arising out of Contracts concerning specific transition, adaptation, or mitigation contracts*

The contracts under this category are basically executed or signed between the investor, industry body, funder, State, etc. in accordance with the Paris Agreement obligations. All of the contractual obligation can be strengthened by means of effective dispute resolution procedures. For things to move smoothly it's very important for all the contracts that are signed by parties shall explicitly mention the terms and conditions pertaining to UNFCCC such as Green Climate Fund (GFC), agreements related to low emission projects⁶.

2. *Disputes arising out of Contracts not concerning specific transition, adaptation, or mitigation contracts*

Because almost all of the business activity and contractual association is on the verge of being affected by energy and other system transition, mitigation, or adaptation measures and/or the environmental impediment due to global warming, all the contracts that do not really suffer from the climate change or have no exact climate-linked purpose may oppose the Paris Agreement.

The nexus that has been created for the longest time by the Paris Convention would aid the arbitration institutions to fulfil their mission too. The main agenda to attain "greener arbitration" is posing as a hurdle to the goal set by the Paris Convention. Hence by prioritising both these agendas would in turn be the most optimum outcome. This

⁶Green Climate Fund Proposal Toolkit (2017), p. 3. & <https://iccwbo.org/content/uploads/sites/3/2019/1/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>

would pose to not only facilitate and also encourage and support other major institutions and association to do the same.⁷

The Paris Agreement provides for Dispute resolution procedures explicitly mentioning for Arbitration clause clearly being stipulated in the United Nations Framework Convention on Climate Change (UNFCCC), which empowers parties to state mention that they consider arbitration in accordance with the measures to be implemented by the Conference of the Parties (COP) of the UNFCCC in an "annex on arbitration".⁸

Even though Arbitration is accepted by the states it hasn't been addressed by the Conference of the Parties (COP). The event held during COP23 in 2017, numerous arbitral institutions, along with the International Bar Association (IBA), grabbed the occasion to spread awareness of the ability of arbitration in the niche of climate change. The following COP, COP26, that is supposed to be held in November Glasgow poses to be one of the quintessential Climate Change summits ever since the Paris Agreement was signed in 2015.

There are many other Climate change protocols that have been adopted to settle dispute by means of Arbitration:

- the Montreal Protocol on Substances that Deplete the Ozone Layer, stipulates methods for dispute settlement in article 11 of the Vienna Convention for the Protection of the Ozone Layer (VCPOL). VCPOL itself

⁷ IDIB 2

⁸ Arbitration Clause <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>



contains an 'arbitration annex' which has been adopted.

- the UN Convention on the Law of the Sea, which contains arbitration as a means of settling disputes. The convention has a role to play in maritime-related climate change disputes.

CGA: Campaign for Greener Arbitrations

The CGA is a comprehensive and an effective initiative, set up by well-known international arbitrator Lucy Greenwood in 2019, to successfully tackle the environmental impact of international arbitrations by means social change. The CGA ensures to spread maximum awareness of the large amount of carbon footprint of the arbitration community and fosters finest procedure in handling arbitrations in a sustainable way⁹.

There are basically 8 guiding principles that lay its foundation on the CGA namely¹⁰:

- Establishing a workspace which reduces the environmental by seeking opportunities to minimise energy consumption and waste
- Correspondence taking place by means of electronic, unless if its that's necessary to have a hard copy correspondence in some circumstances, while also being wary that email has a carbon footprint
- Promoting the usage of videoconferencing facilities as an option to travel
- Preventing printing, calling for the usage of electronic rather than hard

copies of documents and advocating the use of electronic packets at trials

- Associating with suppliers and service providers who are dedicated to reduce their environmental footprint
- Considering and/or suggesting, that witnesses or experts provide evidence by means of videoconferencing facilities, as opposed to attending hearings in person
- Avoiding unnecessary travel and using videoconferencing facilities as an alternative
- Considering and questioning the need to fly at all times and offsetting carbon emissions for any arbitration-related travel.

Conclusion

When we deal with the topic of Climate change it turns out be very sensitive, however it is very essential to address the issue of Climate change and the initiative taken up by the arbitral Institution. All the initiative and the crucial points that were discussed definitely seems like time consuming and will take a lot of time to adapt but it's of paramount interest to environmental problems that is being faced and which will have its effects shown on the future generation. Having said that, resorting to Arbitration as means of dispute resolution would be seen in abundance in matter of few month and it relevance will also be felt.

⁹ IDIB 4

¹⁰ Hogan Lovells signs 'Green Pledge' committing to greener arbitration practices

<https://www.hoganlovells.com/en/news/hogan-lovells-signs-green-pledge-committing-to-greener-arbitration-practices>