



DECISIONS, DECISIONS

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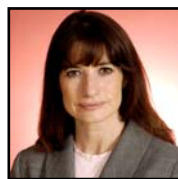
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HOTTING UP? – LITIGATING CLIMATE CHANGE

by Melanie Willems



These days you can't open a newspaper or switch on a television without hearing a reference to carbon emissions, melting ice caps or increasingly erratic weather patterns. The effects of climate change may not seem immediately tangible, but many are concerned at the serious short and long term implications of the effects of global warming. These include an increase in the incidence of major weather events and the loss of densely populated regions of land to rising sea levels.

Climate change is closely linked to increased levels of greenhouse gases, such as carbon dioxide, in the atmosphere. Furthermore, scientific evidence points to the rapid expansion of key industrial and manufacturing activities and the burning of fossil fuels as major contributing factors.

Against this background, there is potential for legal activity relating to climate change. This impacts governments, manufacturers and campaign groups. However, establishing a legal claim based on damage caused by the effects of climate change presents significant challenges from the outset, causation being one of the obvious ones.

The Approach to Climate Change in the US

The US Government displays caution in committing to a protocol for the reduction of emissions produced by its vast manufacturing and industrial activities. Its failure to ratify the Kyoto Protocol¹ citing the

¹ The Kyoto Protocol is an agreement ratified by many of the world's industrialised countries committing signatory States to mandatory obligations relating to their emission of Greenhouse gases.

negative impact that agreeing to its requirements might have on the US economy, was controversial.

Notwithstanding the position of the Federal Government, there has been a greater appetite for regulation of emission levels at a localised level in the US. For example, in August this year, the State of California introduced a Bill which will impose broad and far reaching controls on carbon dioxide emissions, with the aim of reducing emissions by 25% by 2020. This step has been seen by many as setting a serious litmus test on regulating emission levels in the US not only at State level, but also to the Federal Government.

The United States has also seen litigation relating to climate change issues. Jurisprudence is in its infancy, but indications are that claims against those contributing to climate change may at least be arguable by a party holding sufficient interest in the issues.

One example is the case of *Connecticut v American Electric Power Company Inc.*, Nos. 04 Civ. 5669 and 5670 (S.D.N.Y.). The claimants in this case, which included State authorities and environmental groups, brought proceedings against several large power companies in the US District Court in Manhattan on the premise that the emission of greenhouse gases represents a public nuisance.

A motion to dismiss the defendants' petition was granted by the Court on the basis that the Court's jurisdiction did not extend to a "non-justiciable political question" such as the regulation of greenhouse gas emissions and that policy on such issues should be determined by political authorities, and not by the courts. The decision has however gone to Appeal.

Another instance is *Friends of the Earth v Watson*, No. C 02-4106, filed in the US District Court for the Northern District of California. In this case the claimants sought a statement from the Court that two government bodies, the Overseas Private Investment Corporation ("OPIC") and the Export-Import Bank of the United States ("Ex-Im"), had failed in their obligations to

carry out an Environmental Impact Assessment prior to giving overseas funding to ventures engaged in the burning of fossil fuels.

The Court found that the claimants had sufficient standing to pursue the claim. It also indicated that, where the ventures being supported by OPIC and Ex-Im were alleged to make up a projected total of no more than 8% of global emissions in 2003, this level of contribution to emission levels was potentially enough to establish a traceable source of pollution.

Private and public corporations are not however, the only entities which need to be wary of potential legal action in this area. One widely reported example is that of the Inuit Circumpolar Conference ("ICC" – not based in Paris), an organisation representing the interests of the indigenous population of the Arctic Circle. In December 2005, the ICC filed a petition with the Inter-American Commission on Human Rights ("IACHR") claiming that the United States of America, as the world's largest emitter of carbon dioxide, was threatening the continued inhabitation of their native land. Its progress should be watched with interest.

Most recently in September 2006 California sued the six biggest car makers in the United States seeking compensation for environmental damage caused by increased greenhouse gas levels. The premise is that the carbon dioxide emitted by the vehicles contributes to global warming and costs the State billions of dollars to fight pollution and erosion.

The Position in the United Kingdom

In contrast to the United States Government, the UK has acknowledged the threat posed by climate change, and is a signatory State to the Kyoto Protocol. The Prime Minister stated in the lead up to the 2005 G8 Summit that "Climate change is ... long term, the single biggest issue that we face".

In the UK, attempts to promote environmental awareness in the corporate sphere have come to the fore recently through the proposed Company Law

Reform Bill, due to come into force in 2007. The Bill looks to shift the focus of the key objectives of company activity, setting out a broad range of directors' duties over and above the direct duties traditionally owed to shareholders. It states that, in exercising their powers, directors must have regard to a number of considerations, including "the impact of the company's operations on the community and the environment"².

Quite what effect the Bill will have on the approach of companies towards environmental issues is unclear. Notwithstanding this, a proposed legislative provision of this nature hints at the government's broad intent to encourage companies into taking a proactive approach to environmental responsibility.

In terms of litigation, there has not been the same appetite in England for pursuing claims based on the effects of climate change as there has in the United States. The potential remains: one need only consider the long term projections of flood damage to significant areas of the UK, caused by rising sea levels, to see that there may be scope in the future for claims in tort.

In *Fairchild v Glenhaven*³ the House of Lords took a purposive approach to the issue of causation, moving away from the "but for" test. This concerned a claimant who developed mesothelioma after having been exposed to asbestos dust during his employment with a number of employers. The claimant could not prove which period of exposure had "caused" the resulting disease. The House of Lords found that it was sufficient for the claimant to show that the defendant employer's negligence had materially increased the risk of injury. It was not necessary for the claimant to show that "but for" a particular period of exposure, the illness would not have arisen.

Given the number of potential contributors to climate change, the issue of causation is unavoidable. However, were reliable evidence available to this end, showing the emission levels of a particular party to have materially increased the risk of climate change, then the reasoning in *Fairchild* provides some food for thought.

Meanwhile, I'm off to see the Al Gore movie.

ICSID – A WEATHER EYE ON AN INSTITUTION'S PROGRESS

by Jay Sahota



The popularity of ICSID arbitration has increased exponentially in recent years. 150% more ICSID cases have been instituted in the last five years than in the first 35 years after its inception. So is all rosy, or is it time for a critical review?

ICSID (the International Centre for the Settlement of Investment Disputes) was established pursuant to an international convention in 1966.¹

It administers neutral international arbitration to resolve investor-State disputes, and thereby aids the flow of investment into developing countries. Such disputes arise, for example, where a State seizes or damages an investment, or does not fulfil obligations on which the investment depends.

The popularity of ICSID - BITs and pieces

To encourage investment, States try to offer effective, enforceable assurances to foreign investors as to how they will treat investments.

One mechanism for achieving this is to enter a 'Bilateral Investment Treaty' ('BIT') with another State, whereby each

² Company Law reform Bill s. 156(3)

¹ On the coming into force of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('the Convention').

³ Judith Fairchild v Glenhaven Funeral Services Ltd

undertakes obligations with respect to investments made by the other's nationals.

A typical BIT requires the host State to treat foreign investment no less favourably than that of its own, or any third country's, nationals, requires investments to be treated 'fairly and equitably', to enjoy 'full protection and security' and not to be treated to a lesser standard than required by international law. Of the 2,200+ BITs in force worldwide, over 900 give consent for ICSID arbitration.

ICSID's 'boom' is attributed to the following factors:

- there has been huge growth in the number of BITs entered into by developed and developing States in recent years;
- changes in the global economy – catalysed by economic liberalisation and technological change – have led to increased international investment;
- the fall of trade barriers and the globalisation of corporate activities has increased the propensity for joint ventures and similar cross-border partnerships; and
- now, more than ever, parties are put off by the uncertainties inherent in national court processes.

As a forum, ICSID offers investors various benefits:

- awards are not challenged in national courts; any request for annulment is determined by another ICSID tribunal set up for that purpose;
- ICSID awards are perhaps more readily enforceable than standard arbitration awards. In States which are signatories to the Convention they can be enforced as equivalent to final decisions of national courts. They can also be enforced under the 1958 New York Convention;
- ICSID is part of the World Bank Group. Host States may comply with awards or settle cases, rather than risk their relationship with the Bank;

- ICSID charges a minimal administration fee and does not charge venue costs. Compensation for arbitrators is fixed at a flat rate (presently US\$2,400/day, plus expenses), which compares well to other institutions which calculate fees based on the amount in issue.

Tribunals have been generous when considering whether acts complained of qualify as acts attributable to the 'host State'. This has allowed investors to seek redress under BITs before ICSID tribunals for acts of local or regional government and quasi-governmental organisations.

Relationship with the World Bank

ICSID is not an independent organisation. It is a part of the World Bank Group. It is financially and structurally dependent on the Bank. The President of the World Bank chairs its Administrative Council. The Legal Vice President of the Bank is also Secretary-General of ICSID. In addition, the Bank routinely expresses specific positions regarding the values of investment agreements, the interpretations of specific provisions, obligations and goals, and the role of the investor-State process. It is also possible that other parts of the World Bank Group may have a financial stake in a project brought to arbitration. All of this means that the independence of ICSID, from a strict conflict of interest perspective, may be compromised.

Several commentators have recently suggested that it may be timely, in the light of Robert Danino's resignation as general counsel at the World Bank, and with it, from the position of Secretary-General of ICSID, to look at the Centre's governance structure and specifically whether it is appropriate to continue combining the roles of Bank General Counsel and ICSID Secretary-General.

It is at least arguable that ICSID needs a full time Secretary-General, not someone who is also General Counsel of the World Bank. This would enable the appointment as Secretary-General of someone specifically suited to ICSID, and would allow the Secretary to devote his energies to time-consuming ICSID functions.

There follows a few comments on aspects of ICSID that may be the subject of debate.

Does ICSID favour the investor over the State?

BITs are an effective way to protect investors. They typically provide foreign investors with greater substantive rights against the host State than its own nationals enjoy. However, critically, there is very little scope for any kind of public interest defence. Although they are 'bilateral', in the sense of granting each contracting country's nationals equivalent rights against the other, BITs tend to work in favour of capital exporting countries.

ICSID tribunals will hear claims against States which are not always well placed to handle high volume, high value, complex litigation. Awards may have serious implications for the host State and its citizens. In recent years it has often been argued that, because of the 'public interest' in such hearings of this kind they should be held in public, amicus briefs should be accepted and awards published.

There is a 'public interest' in ICSID arbitration, in the sense that public funds are at stake, but that is true of any claim against a public body. It is difficult to see how this differs in principle from a private arbitration under a high value government procurement contract, which may have a serious effect on public finances. ICSID has, nonetheless, been singled out for scrutiny. Broadly, it is seen as undesirable that disputes under such a one-sided regime should be decided by an obscure, private body. Calls for reform of ICSID procedure in this context have generally favoured a 'judicial' rather than an arbitral approach.

This is however impractical on some levels. Having arbitrators appointed as required, and paid by the parties, works well. As against that, the fact remains that the result is a system where disputes about rights and obligations arising in public international law are determined in a private arbitration by a panel who are not public servants, with no requirement that awards should be published and, even where they are, with no

obligation on one tribunal to follow the precedent set by another.

The risk of inconsistent decisions

There is as might be expected, scope for separate tribunals to reach inconsistent decisions. The best known examples are to be found in claims against the Czech Republic where two different investors initiated arbitrations under different BITs against the Czech Government for alleged improper interference with their investments in a television business. One investor lost its case, but the other won an award of over \$300 million from the Czech Republic.

Multiple proceedings clearly impose a burden on the host State. These problems might be avoided by providing for the consolidation of such proceedings in BITs, other than with the consent of all parties (NAFTA includes such a provision).

Appeals

At present, decisions of ICSID tribunals are final, and can be challenged only before another ICSID tribunal on procedural or 'natural justice' grounds (tribunal not properly constituted, corruption, excess of power, failure to follow rule of procedure, failure to give reasons). There is no facility for an appeal on the substance of the decision, for example in respect of an error of law.

The possibility of introducing an appeal mechanism is mentioned in a consultation document produced in 2004 in advance of the rule change. In that document, ICSID notes that a number of countries are committing themselves to appeal mechanisms within individual BITs, and that it would therefore seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. According to a follow-up paper later issued by ICSID, this suggestion did not win much support. It seems that the speed and cost advantages of a final award are thought to be worth the price of an occasional bad decision.

Recent changes to ICSID Rules

The most recent changes to the ICSID rules were made in May 2006, and include:

- Rule 6 - Arbitrators were previously only required to disclose past or present relationships with parties. Rule 6 now extends arbitrators' disclosure requirements to match those of UNCITRAL and cover any circumstances likely to give rise to justifiable doubts as to impartiality or independence.
- Rule 32 - In *Suez/Vivendi v Argentina* (2005) an ICSID tribunal received a petition from various NGO's requesting that claims by foreign shareholders in Argentine companies which held statutory licences to operate water concessions be held in public. The tribunal found it had no power to allow public hearings without the parties' consent. The new Rule 32 makes express provision for the possibility that third parties may attend hearings, but still requires the parties' consent.
- Rule 37 - The tribunal in *Suez* found that it could accept amicus briefs and set out a test as to when it would do so. The new Rule 37 makes express provision for amicus briefs. The tribunal is required to consult both parties, but can accept amicus briefs even if they object. The rule lists certain factors to be taken into account by the tribunal. There is also an express duty imposed on the tribunal to ensure that the third party's submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party.
- Rule 48 - Previously, the rules prohibited publication of awards without the parties' consent. This was subject to an exception, in that ICSID retained a discretion to publish excerpts of awards showing the tribunal's legal reasoning. This has now been superseded by a positive duty on the part of ICSID in rule 48 to 'promptly include in its publications excerpts of the legal reasoning', apparently a response to criticism regarding the slow publication of reasoning.

Other considerations

Developed countries enthusiastically supported open markets and privatisation during the 90s in the belief that private investment would benefit their nations. In implementing the legal framework necessary to attract foreign investments, they entered into BITs and agreed to submit any controversy to arbitration. When confronting a crisis such as that in Argentina in 2001, private parties in many cases brought their claims against the Argentine Federal and Provincial Governments before ICSID. In *CMS Gas Transmission Company and The Argentine Republic* (ICSID Case No. ARB/01/8 – Award of May 12, 2005), for example, the tribunal held that the Argentine Government had breached its obligations to accord the Michigan-based energy company fair and equitable treatment, and to observe certain obligations entered into with regard to the investment, as guaranteed in the Argentina-US BIT.

The case was a landmark in that for the first time emergency economic measures taken by a national government were pitted directly against that State's obligations to foreign investors.

When the requirement for a functioning dispute resolution system to deal with such circumstances is examined, it seems obvious that ICSID is a much needed and essential arbitral institution. However, nothing should be praised without measure, and there is interesting commentary afoot - such as the fact that political risk insurance may turn out to be a commercial solution, and an alternative to investment treaty arbitration. How ICSID moves to deal with the demands and challenges it is facing is one of the more interesting questions about the institution today.

MEDIATION TACTICS AND PRACTICE – AN UPDATE

by Markus Esly



Howrey LLP round table participation

A senior in house Counsel recently asked Howrey LLP to participate in a round table he has set up concerning mediation and its use. The debate that ensued at the Chelsea Harbour Hilton turned out to be an animated discussion on how to raise awareness of alternative dispute resolution amongst project teams at the coal face. “Mediation” is still perceived in many quarters as a fluffy option, more reminiscent of a group hug than a working method of dispute resolution. However, it was also widely accepted that anyone who has experience of litigation will understand that that is not the only way of resolving commercial disputes between parties. In terms of making the concept stick, it seems that the starting point should be that negotiation is the first and foremost technique for resolving disputes. Mediation is after all a structured negotiation.

Negotiation techniques

Negotiation techniques involve assessing the best alternative to a negotiated agreement. This means working out the best outcome in the case if you do not settle it. The best alternative to a negotiated settlement is the benefit of winning minus the cost of winning at trial. That should then be looked at in the context of the cost of losing.

In negotiation, you need to be prepared. You need to know what your client’s walk-away price is. In addition to that, there will be a zone of possible agreement which is the overlap between the parties’ respective walk-away prices.

There are two kinds of negotiation. The first is horse trading - effectively a tug of war. This means that every pound of value gained by one party is a pound lost by the other. Typically you will want to disclose less in this kind of negotiation.

The second kind of negotiation is sometimes called integrative negotiation. This is where there might be some additional value that can be created for sharing between the parties. So you are looking at matters such as structuring settlement so that payment can be tax free, or agreement for deferred payment.

In an integrative negotiation, many matters which you would usually keep to yourself might be shared at an appropriate point. This can be quite difficult in one-on-one negotiation, but it is easy in mediation, where the mediator will receive information from both sides in confidence. The point is that you cannot create the value without knowing what the parties’ interests are. The process of mediation allows these interests to emerge and allows you to identify areas for creating value in this way.

Overview of mediation principles

Briefly, clients have little choice but to mediate if it is offered in good faith. If they refuse they may find themselves penalised on costs. This is illustrated by the decisions in *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] 2 All ER. 1041, *Burchell v Bullard* [2005] EWCA Civ 358; and *Dunnett v Railtrack* [2002] 1 WLR 2434 (C of A). The point has been refined in the case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 – in this matter, the Courts decided that, rather than apply a costs burden on a respondent automatically in the event that they had failed to accept an offer to mediate, the way of determining the matter was to place the burden of proof upon the respondent to show that they were right in turning down any such offer. It is a high standard of proof to meet – the test is whether there was no reasonable prospect of the matter settling in a mediation.

Factors to take into account in assessing this include: the nature of the dispute, merits of the case, failure of other settlement methods (a weak factor), disproportionately high costs of mediation (considered to be a serious point), delay caused by mediation, and to some extent the prospect of success (this was rejected

by the Court of Appeal but it is still an arguable factor).

Interestingly, the tone of correspondence is weighed in the balance too, which might cause some ruffled feathers amongst those solicitors who enjoy using the stronger expressions of outrage in their letters.

Conclusion

Deciding how best to communicate information on the management of disputes internally is a challenge for any

organisation. We enjoyed the candid discussion about “lawyers” in house (the group called theirs “Bob” – “Bob” being the man that team members tend to go to with problems, who “knows a good deal when he sees one” – but who is not actually a member of the legal team.) Howrey LLP offers training programmes in house for raising awareness of dispute resolution techniques at all levels, in all teams. It seems clear enough from the anecdotes we gathered that the need for these is not yet exhausted.

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MEET THE TEAM

Each quarter we will introduce one of the members of Howrey LLP's International Arbitration Group.



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PETER FITZPATRICK is a partner in the Global Dispute Resolution group in London specialising in International Arbitration and Litigation. He handles all types of commercial dispute resolution, but particularly in the areas of aviation, banking, and oil and gas. Peter's arbitration experience covers proceedings before most arbitral institutions, including ICC, London Court of International Arbitration (LCIA), London Metal Exchange, as well as ad hoc arbitrations.

Amongst other topical matters, Peter handles all of Ryanair's substantial litigation.

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