

# Yearbook on International Arbitration and ADR

Volume VIII

edited

by

**Marianne Roth**  
**Michael Geistlinger**

with the assistance of

**Elmar Buchstätter**

DIKE 



Zurich · Vienna 2024

Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at <http://dnb.d-nb.de>.

All rights reserved.

Publication in Switzerland:

ISBN 978-3-03891-763-2

Dike Verlag AG

Weinbergstrasse 41

8006 Zurich

Switzerland

[www.dike.ch](http://www.dike.ch)

Publication in Austria:

ISBN 978-3-7083-4217-7 (Print)

ISBN 978-3-7083-4218-4 (eBook)

<https://doi.org/10.37942/9783708342184>

NWV im Verlag Österreich

Bäckerstraße 1

1010 Wien

Austria

[www.verlagoesterreich.at](http://www.verlagoesterreich.at)

© Verlag Österreich, Vienna 2024

Print: Hantsch PrePress Services OG, Vienna

*In honor of*

*Hubertus Schumacher*

## Preface

Volume VIII of the present yearbook series focuses on the growing impact of human rights in international arbitration and alternative dispute resolution, be it in the context of global business, corporate or sports law. Further topics include climate change, investment and antitrust disputes in addition to various individual questions of arbitration and mediation proceedings. Our sincere thanks go to the thirty-six esteemed authors who contributed their in-depth analyses of the current developments in international dispute resolution. Without their experienced work, Volume VIII of the Yearbook on International Arbitration and ADR could not have been realized. Further, we express our gratitude to *Antonia Berger* and *Christoph Berger*, who reliably handled the cumbersome task of proofreading.

Each volume of this yearbook series is dedicated to an outstanding personality in the field of arbitration and alternative dispute resolution. With Volume VIII we are delighted to honor Professor Dr. *Hubertus Schumacher*, President of the Liechtenstein Supreme Court, in appreciation of his exceptional achievements in academia and practice, particularly in the area of dispute resolution both on a national and international level.

*Hubertus Schumacher* laid the foundation of his exemplary career by graduating from Karl Franzens University Innsbruck, where he served as a research and later university assistant focusing on insolvency and enforcement proceedings. In 1995, *Hubertus Schumacher* completed his habilitation with a pioneering thesis on the seizure and realization of securities. This accomplishment paved the way for his further professional development as a full professor at the Department of Civil Procedure at Karl Franzens University. With his top-rated teachings and comprehensive writings he significantly contributed to the education of numerous professionals in the field of civil procedure and alternative dispute resolution. The most notable books “Beweiserhebung im Schiedsverfahren” (Manz, Vienna) and “Dispute Resolution in Austria” (Kluwer, New York) are just two examples of his numerous legal treatises.

In addition to his academic career, *Hubertus Schumacher* has been practicing as a sought-after attorney specializing in corporate, banking and insolvency law as well as in cross-border litigation and arbitration. He has held respected positions in the legal profession, such as vice president of the Tyrolean bar disciplinary board or examiner for the judges’ and bar examinations at the Innsbruck Higher Regional Court. Due to his extraordinary commitment *Hubertus Schumacher* also played an active role in the ministerial commissions on civil procedure reform in Austria as well as in the Principality of Liechtenstein.

After all, his outstanding abilities qualified *Hubertus Schumacher* for the judicial office at the Liechtenstein Supreme Court, where he was appointed as a judge and a few years later, in 2015, raised to the prestigious position of the president of this court. It is not exaggerated to state that President *Schumacher’s* excellent skills in law and leadership have significantly contributed to the high reputation of Liechtenstein’s Supreme Court.

*Hubertus Schumacher* has succeeded in combining an exemplary academic career with the demanding task of a high-ranking lawyer in an international environment. His work is widely recognized and honored, notably with the Gold Medal of Honor for services to the Republic of Austria. In appreciation of his excellent achievements it is with great pleasure that we dedicate Volume VIII of the Yearbook on International Arbitration and ADR to our esteemed colleague *Hubertus Schumacher!*

Salzburg, May 2024

*Marianne Roth, Michael Geistlinger*

## Table of contents

Preface.....	7
List of abbreviations.....	13
<b>I Dispute resolution in general .....</b>	<b>21</b>
Federico ANTICH	
<b>Are arbitrators from Mars and mediators from Venus? .....</b>	<b>23</b>
Vassiliki KOUMPLI	
<b>Climate change related disputes: making the case for arbitration and mediation .....</b>	<b>47</b>
Tamás FÉZER	
<b>Challenges and potential solutions in international commercial arbitration .....</b>	<b>67</b>
Manon SCHONEWILLE/Jeremy LACK	
<b>The next new things – latest and future developments in Appropriate Dispute Resolution (ADR) &amp; ADR catalysts .....</b>	<b>79</b>
Cristina LENZ	
<b>Quality in conflict management procedures and a particular focus on mediation – from a German point of view .....</b>	<b>101</b>
Georgi GANCHEV	
<b>Latest development of ADR within civil litigation in Bulgaria .....</b>	<b>119</b>
Anna PLEVRI	
<b>The new Greek Arbitration Act – Law No. 5016/2023 on international commercial arbitration .....</b>	<b>131</b>

Iryna IZAROVA/Yurii PRYTYKA  
**Evolution and legal framework of international commercial arbitration in Ukraine ..... 143**

**II Human rights aspects in dispute resolution ..... 167**

Elmar BUCHSTÄTTER/Manuel HEISE  
**Navigating the legal landscape of global framework agreements (GFAs): is arbitration the north star? ..... 169**

Simon BURGER  
**The settlement of corporate human-rights due-diligence (CHRDD) disputes in commercial arbitration ..... 185**

Renate DENDORFER-DITGES  
**Human rights and mediation – mere theory or necessary focus ..... 203**

Muhammad A. KHAN  
**Access to an effective remedy through online dispute resolution in context of business and human rights ..... 215**

Valentina P. PRECHTL  
**CAS and human rights – a state-of-the-art report ..... 227**

**III Arbitrators’ duties and arbitrability ..... 241**

Jennifer BRYANT/Iika BEIMEL  
**The arbitrator’s duty to disclose – grounds for a successful challenge? ..... 243**

Jacob C. JØRGENSEN  
**Tort liability of arbitrators vis-à-vis third-party arbitration funders in a Danish perspective ..... 253**

Lilly PLATH	
<b>Excess of mandate? A Swedish perspective .....</b>	<b>263</b>
Fabian HEUBERGER	
<b>Arbitrability of disputes regarding defects in corporate resolutions under Austrian and German law .....</b>	<b>273</b>
<b>IV Evidence and procedural public policy in arbitration .....</b>	<b>295</b>
Jaunius GUMBIS/Jurgis BARTKUS	
<b>The problem of establishing the truth in international arbitration proceedings .....</b>	<b>297</b>
Klaus MARKOWETZ	
<b>Taking of evidence in international arbitration according to the 2020 revised IBA Rules .....</b>	<b>309</b>
Henriette C. BOSCHEINEN-DUURSMA	
<b>Violation of procedural public policy as a ground for setting aside under Austrian arbitration law .....</b>	<b>337</b>
<b>V Investment and antitrust arbitration .....</b>	<b>357</b>
Katarína CHOVANCOVÁ	
<b>Legitimate expectations and their current status in international investment law .....</b>	<b>359</b>
Gabriel M. LENTNER	
<b>Striking the right balance: the protection of intellectual property rights through international investment arbitration .....</b>	<b>381</b>
Aurela BEQARI	
<b>Antitrust arbitration – applying <i>Sumal v Mercedes</i> in joining third parties in commercial arbitration proceedings .....</b>	<b>409</b>

**VI Sports arbitration ..... 417**

James MERRYWEATHER

**'Consent' in international sports arbitration: striking the right balance..... 419**

Jean-François BELLIS/Steve ROSS/Michael GEISTLINGER

**Application of EU competition law to an international sports federation and CAS arbitration ..... 441**

**VII Reports and Reviews ..... 451**

Marianne ROTH

**Dispute resolution, legal education and the quest for happiness – the Bhutanese style ..... 453**

Zebiniso KHALILOVA

**History and development of arbitration in Uzbekistan ..... 463**

Prakhar CHAUHAN/Abdul H. HANEEF

**Contours of separability under embargoes of fiscal legislations – news from India ..... 471**

Michael GEISTLINGER

**Book review: Czernich/Reinhold (eds.), Streitbeilegungsklauseln im internationalen Vertragsrecht ..... 489**

Bibliography..... 495

Authors..... 549

Editors..... 559

Vassiliki KOUMPLI

## Climate change related disputes: making the case for arbitration and mediation

Climate change has gradually become one of the most important issues globally, with multiple fields and stakeholders being involved. At international level, soft law guiding principles and recommendations have been accompanied by hard law legislative instruments to confront climate change impact. As a result, specific obligations to protect the environment and make adaptation or mitigation efforts to tackle climate change have been imposed on states, public entities and private entities. The subsequent increase of climate change related disputes has inevitably led to an increase in discussion regarding appropriate dispute resolution mechanisms and the role that ADR, and in particular arbitration and mediation, may play in their resolution. Due to their intrinsic characteristics, arbitration and mediation present significant benefits for the resolution of climate change related disputes. Nevertheless, certain of their characteristics – which in another context may be considered desirable – must be adapted for their optimal application to the particular type of disputes.

**Keywords:** Climate change, climate change disputes, arbitration, mediation, ADR

### Table of contents

I	Introduction.....	48
II	Typology of climate change related disputes.....	50
A	Definition of climate change related disputes .....	50
B	Categories of climate change related disputes .....	50
1	General categories .....	51
2	Special categories .....	51
C	Selected cases .....	53
1	Cases before courts.....	53
2	Cases before arbitral tribunals .....	55
III	Suitability of arbitration and mediation for climate change related dispute resolution .....	56
A	Scope of arbitrable and mediatable climate change related disputes.....	56
B	Advantages of arbitration and mediation in climate change related disputes.....	57
1	Arbitration.....	57

2	Mediation.....	59
C	Issues to be considered when arbitrating or mediating climate change related disputes .....	61
IV	Conclusion.....	62
V	Bibliography.....	63

## I Introduction

According to the IPCC Report 2023, human activities, principally through GHG emissions, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global GHG emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals.<sup>1</sup> The significant impacts of climate change have raised the discussion on its causes and effects as well as on the ways to encounter it.

At international level, soft law guiding principles and recommendations<sup>2</sup> have been accompanied by hard law legislative instruments to confront climate change impact. The Kyoto Protocol,<sup>3</sup> an international treaty extending the 1992 UNFCCC,<sup>4</sup> was adopted at COP3 on 11 December 1997 and entered into force on 16 February 2005. It operationalised the UNFCCC by committing industrialised countries and economies in transition to limit and reduce GHG emissions in line with agreed individual objectives. Subsequently, another international treaty on climate change, the Paris Agreement,<sup>5</sup> was adopted at COP24 on 12 December 2015 and entered into force on 4 November 2016. Its overarching goal is to hold

---

1 Hoesung Lee/José Romero (eds.), IPCC Climate Change 2023: Synthesis Report – Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva 2023, 4, available at <https://www.ipcc.ch/report/ar6/syr/> (22 December 2023).

2 E.g., OECD Guidelines for Multinational Enterprises 2011 Edition, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf> (22 December 2023); UN Human Rights Council Resolution (A/HRC/RES/17/4) of 16 June 2011 “Guiding Principles on Businesses and Human Rights”, available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (22 December 2023); UN General Assembly Resolution (A/RES/70/1) of 25 September 2015 “Transforming our world: the 2030 Agenda for Sustainable Development”, available at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf) (22 December 2023).

3 Kyoto Protocol to the United Nations Framework Convention on Climate Change, available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (22 December 2023).

4 United Nations Framework Convention on Climate Change (“UNFCCC”), available at [https://unfccc.int/sites/default/files/convention\\_text\\_with\\_annexes\\_english\\_for\\_posting.pdf](https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf) (22 December 2023).

5 Paris Agreement, available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) (22 December 2023).

“the increase in the global average temperature to well below 2°C above pre-industrial levels” and pursue efforts “to limit the temperature increase to 1.5°C above pre-industrial levels”, which requires global GHG emissions to halve during the decade to 2030 and CO<sub>2</sub> emissions to reach net zero by 2050 to restrain climate change. At EU level, climate change targets are currently pursued through the European Green Deal,<sup>6</sup> the European Climate Change Law<sup>7</sup> and the relevant Fit-for-55 Package.<sup>8</sup>

As a result of the above regulatory background, specific obligations to protect the environment and make adaptation or mitigation efforts to tackle climate change have been imposed on states, public entities and private entities.<sup>9</sup> In numerous jurisdictions, national climate laws and regulations have been promulgated<sup>10</sup> affecting a vast range of activities having an environmental impact, whereas sustainable investments have been significantly increased.<sup>11</sup> According to the ICC Report on Resolving Climate Change Related Disputes through Arbitration and ADR 2019<sup>12</sup> (hereafter: ICC Report 2019), commercial contracts in specific sectors, such as energy, infrastructure, transport, agriculture and other land use and food production, as well as industry, including manufacturing and processing, are also expected to be strongly impacted.

In this context, natural climate phenomena, climate impacting human activities, violations of international or national environmental and climate laws and regulations as well as breach of relevant contracts may give rise to numerous climate change related disputes. The increase of climate change related disputes

---

6 See [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en) (22 December 2023).

7 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law), OJ L 243, 9.7.2021, 1-17.

8 See [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en) (22 December 2023).

9 See in general Maximilian Lackner/Baharak Sajjadi/Wei-Yin Chen (eds.), *Handbook of Climate Change Mitigation and Adaptation*, Third Edition, Springer Nature Switzerland AG, Cham 2022, *passim*; Paul Welfens, *Global Climate Change Policy. Analysis, Economic Efficiency Issues and International Cooperation*, Sustainable Development Goals Series 13, Palgrave Macmillan & Springer Nature Switzerland AG, Cham 2022, *passim*.

10 E.g., the Greek National Climate Law no. 4936/2022 (Government Gazette A 105). See also LSE Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World*, available at <https://climate-laws.org/> (22 December 2023).

11 See GSIA, *Global Sustainable Investment Review 2020*, available at <https://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf> (22 December 2023).

12 ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 9, available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023).

during the last few years<sup>13</sup> has inevitably led to an increase in discussion regarding appropriate dispute resolution mechanisms and the role that ADR, and in particular arbitration and mediation, may play in their resolution. Notably, acknowledging the issue, Article 14 UNFCCC provides that parties shall first seek a settlement through negotiation or other peaceful means of their choice, while its sub article (2) states that parties may opt in and declare that they recognise that a dispute may be submitted either to the International Court of Justice or to arbitration in accordance with the procedures to be adopted by the COP in an annex on arbitration.

Bearing this in mind, this paper aims to highlight the role of arbitration and mediation in the resolution of disputes related to climate change. After this introduction (I.), it first provides a typology of climate change related disputes (II.) and then explores the suitability of arbitration and mediation for resolving such disputes (III.), ending with some conclusions of the author (IV.).

## **II Typology of climate change related disputes**

### **A Definition of climate change related disputes**

So far, there is no universal definition in legal texts or doctrine as to what may constitute a climate change related dispute. The following definitions can indicatively be considered as helping delineate the scope of such disputes:

- a) The UNFCCC defines climate change as “[t]he change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.
- b) Based on the UNEP Global Climate Litigation Report 2020,<sup>14</sup> climate change related cases can be considered those that relate specifically to climate change mitigation, adaptation, or the science of climate change.
- c) The ICC Report 2019<sup>15</sup> offers a broad description of climate change related disputes including “any dispute arising out of or in relation to the effect of climate change and climate change policy, the [...] UNFCCC and the Paris Agreement”.

### **B Categories of climate change related disputes**

Despite dealing with the same issue, i.e., climate change, climate change related disputes are not homogenous, but they significantly vary. They can be broadly divided into the following general and special categories:

---

13 See Sabin Center for Climate Change Law of Columbia Law School, Climate Change Litigation Databases, available at <https://climatecasechart.com> (22 December 2023).

14 United Nations Environment Programme, Global Climate Litigation Report: 2020 Status Report, 7, available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (22 December 2023).

15 ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR.

## 1 General categories

According to their aims, climate change related disputes can be divided into two main categories:

- a) 'strategic' climate change related disputes, where the parties bringing the case – usually NGOs and/or individuals – aim at a broad societal shift, such as creating awareness or affecting the behaviour of states, public entities or private entities, including 'Carbon Majors', i.e., large fossil fuel companies; and
- b) 'non-strategic' climate change related disputes, where the parties bringing the case aim at satisfying individual concerns.<sup>16</sup>
- c) 'Strategic' climate change related disputes can be further subdivided into:
- d) 'in favour of regulation' or 'pro-regulation', where the parties bringing the case aim to enhance climate change mitigation and adaptation measures; and
- e) 'against regulation' or 'anti-regulation', where the parties bringing the case oppose to climate change mitigation and adaptation measures.<sup>17</sup>

## 2 Special categories

According to their legal basis, climate change related disputes can be divided into the following categories:

- a) 'Climate rights' disputes, where the parties bringing the case assert that insufficient action to mitigate climate change violates their international and constitutional rights to life, health, food, water, liberty, family life etc.
- b) 'Domestic enforcement' disputes, where parties bring a case against states, public entities or private entities, including 'Carbon Majors', to force them to meet set climate change goals and commitments.
- c) 'Failure to adapt' and 'impacts of adaptation' disputes, where parties either bring a case against states, public entities or private entities, including 'Carbon Majors', to force them to take the steps necessary to adapt to climate change severe effects, such as extreme weather events, or to request compensation for adaptation efforts that caused harm to them or their property.
- d) 'Fossil fuels permitting' disputes, where the parties bringing the case challenge the environmental permitting and review processes that they allege that overlook a project's climate change implications.
- e) 'Corporate liability and responsibility' disputes, where the parties bringing the case request compensation for their harm caused by GHG emissions from companies in the atmosphere.
- f) 'Climate disclosures and greenwashing' disputes, where the parties bringing the case allege that certain corporate statements about climate change are misleading. These cases involve plaintiffs bringing suits claiming that they relied on those statements to make financial decisions, as well as cases

---

16 Jacqueline Peel/Hari Osofsky, *Climate Change Litigation*, Annual Review of Law and Social Science, 16 (2020), 21 et seq.

17 Annalisa Savaresi/Joana Setzer, *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, 2021, available at <https://ssrn.com/abstract=3787963> (22 December 2023).

- brought by governments enforcing securities disclosure and consumer protection laws, and NGOs challenging alleged ‘greenwashing’ campaigns.<sup>18</sup>
- g) ‘Investor-state’ disputes, i.e., disputes arising pursuant to bilateral or multilateral investor-state treaties pertaining claims brought by foreign investors for breach of investment protections, such as the fair and equitable treatment standard.<sup>19</sup> Investor claims that were filed against states such as Spain and Italy under the ECT following changes to those states’ RES regulatory framework can be considered as an example of this category of disputes.<sup>20</sup> In this field, two observations are to be made. First, it is to be noted that after the CJEU’s *Achmea*,<sup>21</sup> *Komstroy*<sup>22</sup> and *PL Holdings*<sup>23</sup> judgments excluding intra-EU investor-state arbitration, Member State courts either annul or refuse enforcement of intra-EU BIT arbitral awards.<sup>24</sup> However, investor-state tribunals<sup>25</sup> – with the sole exception of *Green Power v Spain*<sup>26</sup> – as well as US courts<sup>27</sup> continue to reject *Achmea*-based jurisdictional objections, Second, the unsuccessful attempt of the EU to renegotiate the modernisation of the ECT was followed by the massive withdrawal of Member States, such as France, Germany, Poland, Portugal and Luxembourg,<sup>28</sup> and the subsequent proposal for the coordinated withdrawal of the EU from the ECT due to its incompatibility with the EU’s enhanced climate ambition under the European Green Deal and the Paris Agreement.<sup>29</sup>
- h) ‘Contractual’ disputes, i.e., disputes arising from commercial contracts. These may be further subdivided into: i) disputes arising from adaptation, transition or mitigation contracts which directly relate to the UNFCCC and

---

18 Categories under a) to f) are described in the United Nations Environment Programme, Global Climate Litigation Report: 2020 Status Report, 13 et seq., available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (22 December 2023)

19 See Tomás Restrepo Rodríguez, Investment Treaty Law and Climate Change, Springer Nature Switzerland AG, Cham 2022, *passim*.

20 See ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 12.

21 CJEU, *Slovak Republic v. Achmea BV*, Judgment of 6 March 2018, Case C-284/16, ECLI:EU:C:2018:158.

22 CJEU, *Republic of Moldova v. Komstroy LLC*, Judgment of 2 September 2021, Case C-714/19, ECLI:EU:C:2021:655.

23 CJEU, *Republiken Polen v. PL Holdings Sàrl*, Judgment of 26 October 2021, ECLI:EU:C:2021:875, Case C-109/20.

24 See, e.g., Luxembourg Court of Cassation (Cour de cassation du Grand-Duché de Luxembourg), *Romania v. Micula et al.*, Judgment of 14 July 2022, 116/2022.

25 See SCC Arbitration Institute, November 2022, available at [https://sccarbitrationinstitute.se/sites/default/files/2022-12/report\\_green\\_technology\\_disputes.pdf](https://sccarbitrationinstitute.se/sites/default/files/2022-12/report_green_technology_disputes.pdf) (22 December 2023).

26 SCC, *Green Power K/S and Obton A/S v. Spain*, Judgment of 16 June 2022, 2016/135, *ibid*.

27 See, e.g., United States Court of Appeals for the District of Columbia Circuit, *Micula et al. v Romania*, Judgment of 21 February 2023, 23-7008.

28 See <https://www.energycharter.org/> (22 December 2023).

29 See [https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07\\_en](https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en) (22 December 2023).

pertain to transitions to new systems to adapt to or to mitigate the effects of climate change, and ii) disputes arising from contracts not related to adaptation, mitigation and transition (e.g., a contractor in charge of construction of a new deep-water harbour disagrees with the owner of the harbour over whether increased salinity of fresh water sources was induced by rising sea-levels, owing to climate change, albeit that other contributing factors may exist).<sup>30</sup> This category may include construction disputes relating to delays or breaches, contractual disputes between shareholders involved in the development of RES projects, disputes arising from contracts in the framework of Voluntary Carbon Markets etc.

- i) 'Inter-state' disputes, i.e., climate change related disputes between states, arising from international treaties (being the less frequent category of disputes in this field).

## C Selected cases

The following are some of the landmark cases<sup>31</sup> falling into one or more of the above categories and brought either to court proceedings or to arbitration proceedings.

### 1 Cases before courts

In the case *Urgenda Foundation et al. v. State of the Netherlands*, the Dutch environmental Urgenda Foundation and 900 Dutch citizens sued the Dutch Government to require it to do more to prevent global climate change. On 24 June 2015, the Hague District Court (*Rechtbank Den Haag*) accepted Urgenda's arguments, finding that the Government's existing pledge to reduce emissions by 17% by 2020 was insufficient to protect the lives of Dutch citizens. The court held that the Government had a duty to take climate change mitigation measures, in a judgment informed by the application of human rights norms and standards. As a result, it ordered the Government to reduce emissions by 25% by 2020. The judgment of the Hague District Court was appealed, but on 9 October 2018 the Hague Court of Appeal (*Gerechtshof Den Haag*) dismissed the appeal and upheld the judgment of the Hague District Court, confirming that the Government owed its citizens a duty of care to protect their rights to private and family life, in accordance with Articles 2 and 8 ECHR. The judgment of the Hague Court of Appeal was challenged before the Supreme Court of the Netherlands (*Hoge Raad*), which eventually, on 20 December 2019, upheld the judgment of the Hague Court of Appeal.

---

30 Category under h) is described in the ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 8 et seq, available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023).

31 All cited cases can be found on <https://climatecasechart.com>, <<https://icsid.worldbank.org/> (22 December 2023) and in the Bibliography of this book, unless indicated otherwise.

In the case of *Neubauer et al. v. Germany*, the German Federal Constitutional Court (*Bundesverfassungsgericht*) upheld by its judgment of 29 April 2021 a claim by young plaintiffs challenging the constitutionality of certain provisions of the German Climate Protection Law (*Bundes-Klimaschutzgesetz*) on constitutional and human rights grounds. The Court found that the provisions of the law placed an unreasonable burden on future generations to reduce emissions at a rate that would be unacceptable today. Shortly after the judgment was issued, the German Cabinet approved proposals to raise the climate mitigation targets to net-zero GHG emissions by 2045, with targets to reduce emissions by 65% by 2030.<sup>32</sup>

In the case of *Milieudefensie et al. v. Royal Dutch Shell plc.*, the Hague District Court (*Rechtbank Den Haag*) in its judgment of 26 May 2021 found that Shell owed a duty of care to the plaintiffs to reduce emissions from its operation of its entire energy portfolio by 45% by 2030 relative to 2019 emission levels. The case represents a global first, with the court taking the unprecedented step of holding a company legally responsible for its individual contribution to global GHG emissions. Despite filing an appeal against the Hague District Court judgment, Shell has nonetheless announced its intention to increase the speed of its planned transition in line with the judgment.<sup>33</sup>

In the case *Commune de Grande-Synthe v. France*, the French Council of State (*Conseil d'État*) in its judgment of 1 July 2021 annulled the Government's refusal to take adequate measures to meet the domestic target of achieving carbon neutrality by 2050, which was enshrined in legislation passed in 2019 and ordered the government to take all the measures necessary by the end of March 2022 to bend the curve of GHG emissions to meet climate goals, including a 40% reduction by 2030.

In the case *Notre Affaire à Tous et al. v. France*, the Paris Administrative Court (*Tribunal Administratif de Paris*) in its judgment of 14 October 2021 accepted the plaintiffs' arguments that climate change has already caused significant ecological damage in France and that the Government has "failed to carry out the actions that it had itself recognised as likely to reduce greenhouse gas emissions".

In the case *ClientEarth v. Belgian National Bank*, ClientEarth filed before the Brussels Court of First Instance a suit against the Belgian National Bank for failing to meet environmental, climate and human rights requirements when purchasing bonds from fossil fuel and other GHG intensive companies in the framework of its participation in the ECB's Corporate Sector Purchase Program (CSPP), in which six national central banks purchased bonds from eligible companies to improve financing conditions by lowering debt costs. In December 2021, the court rejected ClientEarth's suit on procedural grounds. ClientEarth appealed the judgment in early 2022. While the appeal procedure was pending, ClientEarth announced that it would withdraw its case after the ECB "accepted

---

32 S&P Global, Germany brings net-zero forward to 2045, power sector hit hardest by new 2030 target, 12 May 2021, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/coal/051221-germany-brings-net-zero-forward-to-2045-power-sector-hit-hardest-by-new-2030-target> (22 December 2023).

33 See <https://www.shell.com/media/speeches-and-articles/articles-by-date/the-spirit-of-shell-will-rise-to-the-challenge.html> (22 December 2023).

its legal obligations to consider the climate in quantitative easing reforms,” which remedies the violations ClientEarth had alleged on the part of the Belgian National Bank.

In the case *ClientEarth v. Shell Plc.*, the High Court of Justice of England and Wales, by two judgments issued in 2023, dismissed ClientEarth’s attempt to launch a derivative action against the directors of Shell in respect of their alleged failures to properly address the risks of climate change. These judgments indicate that claims of this nature, at least insofar as they are brought by minority shareholders who are not typical investors (e.g., NGOs and other non-profits, such as the claimant in these cases), will face significant challenges.

## 2 Cases before arbitral tribunals

In the ICSID case of *Eco Oro Minerals Corp v. the Republic of Colombia*,<sup>34</sup> the Canadian mining company Eco Oro filed a claim for compensation against Colombia after a series of regulatory measures undertaken by the government to protect the Santurbán Páramo ecosystem. The company alleged that the measures deprived Eco Oro of its mining rights under a 2007 concession contract for the exploration and exploitation of precious metals and associated minerals. The company argued that Colombia breached its obligations under the Free Trade Agreement (FTA) through unlawful and indirect expropriation of its investment and for failing to accord the company’s investment the minimum standard of treatment. Eco Oro sought compensation in the amount of USD 696 million. The filing alleged that Colombia breached Article 811 of the FTA relating to expropriation, as well as multiple aspects of Article 805 relating to the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. On 9 September 2021, the arbitral tribunal found Colombia to be in breach of the FTA and Eco Oro entitled to damages. The tribunal decided that there was no breach of Article 811 as the regulatory measures protected a legitimate public welfare objective and were adopted in good faith. However, the tribunal found Colombia to be in breach of Article 805 given the government’s delay in delimiting the Santurbán Páramo and its failure to comply with constitutional obligations to protect the ecosystem at the time of the company’s investment. The company had legitimate expectations to undertake the mining exploitation activities in its concession. The tribunal found Colombia’s conduct to be arbitrary and disproportionate, damaging Eco Oro without serving any apparent purpose.

In the ICSID case *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*,<sup>35</sup> on 2 February 2021 the German investor RWE initiated arbitration proceedings against the Netherlands under the ECT. RWE claimed that the Netherlands Government did not allow adequate resources and time to enable transition away from coal, contrary to the ECT provisions. The ECT Treaty allows foreign investors to collect compensation against a government

---

34 ICSID, *Eco Oro Minerals Corp v. the Republic of Colombia*, Award of 09 September 2021, ARB/16/41.

35 ICSID, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ARB/21/4 (discontinued).

through arbitration for unfair losses resulting from government regulation. The Netherlands laid out a plan to phase out all coal-fired power plants by 2030, which, as alleged by RWE, does not give room for adequate compensation to transition to biomass its coal-fired Eemshaven power plant in the Netherlands or to phase out the entire coal-fired power plants. The Netherlands in its defence has invoked its right to make environmental regulations. It has further argued that it has imposed these measures to reduce carbon emissions given its environmental obligations under international law. The case is pending.

In the ICSID arbitration case of *Latam Hydro LLC and CH Mamacocha SRL v Peru*,<sup>36</sup> two United States investors raised claims under the United States–Peru Trade Promotion Agreement (TPA) that Peru made promises designed to induce foreign investment in its RES sector, but instead caused the financial destruction of the RES projects involved. The case is pending.

On 18 January 2023, the Republic of Azerbaijan commenced the first known inter-state arbitration proceedings against Armenia under the Bern Convention on the Conservation of European Wildlife and Natural Habitats. The case concerns pollution, deforestation and other harms related to the biodiversity in the Caucasus Mountains allegedly caused by Armenia during its ‘illegal occupation’.<sup>37</sup>

### **III Suitability of arbitration and mediation for climate change related dispute resolution**

After the categorisation of climate change related disputes and an overview of some landmark cases, the scope of arbitrable and mediatable climate change related disputes and the suitability of arbitration and mediation in terms of their process and its outcome will be analysed.

#### **A Scope of arbitrable and mediatable climate change related disputes**

In the above-mentioned categories of climate change related disputes, one may note that the potential role for arbitration and mediation significantly varies depending on the particular nature of the dispute. Claims falling under special categories a) to d) often concern questions on the validity of national laws, governmental actions and environmental permitting as well as the imposition of penalties in case of non-compliance with climate legislation, and are regularly based on international treaties, such as the Paris Agreement and the ECHR, as well as on constitutional or administrative law, as the case may be. Such disputes tend to end up before national courts, which have exclusive jurisdiction over the declaration of the unconstitutionality of laws, the annulment of administrative acts and the imposition of penalties.

---

36 ICSID, *Latam Hydro LLC and CH Mamacocha SRL v. Peru*, Award of 20 December 2023, ARB/19/28.

37 No:015/23, Press Release on arbitration filed by Azerbaijan against Armenia for widespread environmental destruction, available at <https://perma.cc/54Z4-R5LD> (22 December 2023).

On the contrary, claims falling under special categories e) to i) may be brought to arbitration or mediation either based on an arbitration clause, a mediation clause or a med-arb clause on future disputes or based on respective submission agreements in case of existing disputes. Such would be, for example, the case where a local indigenous population of subsistence farmers, fishermen and associated small businesses located in and around a new REDD+ certified forest carbon project area and bordering coastal region sue the foreign investors in the project and the host State in the local courts, alleging breach of constitutional, indigenous and other human rights and in tort against the foreign investor. The parties may consent to resolve those disputes in a single, specialist forum pursuant to a submission agreement.<sup>38</sup>

Even though litigation still remains a mode of resolving climate change-related disputes under special categories e) to i), in many cases this may not be acceptable for many parties due to its association with a specific national framework, especially if one of the parties is a domestic corporation or the state itself. In addition to the issue of possible partiality, delays in litigation and the lack of expertise of national judges in climate change matters, particularly in emerging economies, may also be reasons why parties may want to shy away from litigation in this case. Indeed, arbitration together with ADR, which includes mediation as prevailing ADR method, are already firmly established as favoured dispute resolution mechanisms in international investment and disputes in climate related industry sectors most directly impacted by energy, urban and infrastructure, land use and industrial systems transitions.<sup>39</sup>

## **B Advantages of arbitration and mediation in climate change related disputes**

### **1 Arbitration**

Due to its intrinsic characteristics, arbitration presents significant benefits for the resolution of climate change related disputes, as analysed below:

Inherent flexibility and adaptability give arbitration a strategic advantage in resolving climate change related disputes, given the extremely varied forms and aspects of such disputes. It is also worth mentioning the speed with which arbitral tribunals can resolve disputes. Courts in many countries are infamous for taking years to issue a judgment, while additional delays are often caused by quasi-systematic appeals by the parties to the courts of appeal and cassation.<sup>40</sup>

---

38 See ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 11, available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023).

39 Ibid, 52; Queen Mary University of London and White & Case, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, available at [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf), 2, 5 (22 December 2023).

40 Lucia Bizikova/Sérèna Salem, L'arbitrage commercial comme mode de résolution des litiges en lien avec le changement climatique. *Acquis et requis*, *Revue de droit international d'Assas*, 3 (2020) 3, 143.

Climate change is a global issue, not limited geographically, often involving international and foreign elements and giving rise to cross-border disputes. Geographical neutrality can be ensured in arbitration, for example, by the choice of arbitrators of nationality other than that of the parties or of a seat of arbitration outside the countries concerned. This neutrality in turn allows a certain protection of arbitral tribunals against external pressures, particularly political ones.<sup>41</sup>

The choice left to the parties in the constitution of the arbitral tribunal and the arbitration institution allows them to benefit from substantive expertise and a framework adapted to the technicality of the disputes in question. This technicality will above all be that of the arbitral tribunal which the parties may constitute from personalities having the skills and expertise required in the matter specific to their dispute.<sup>42</sup>

The parties may also choose to submit their procedure to arbitral institutions that have adapted their procedural rules suitable for the type of disputes. The IBA Climate Change Justice and Human Rights Task Force Report 'Achieving Justice and Human Rights in an Era of Climate Disruption' recommends the Permanent Court of Arbitration (PCA) as preferred forum, while it also recognises the availability of multiple other arbitral fora which, depending on the nature of the case, may also be considered, including the London Court of International Arbitration (LCIA), the ICC, and the Stockholm Chamber of Commerce Arbitration Institute, among others.<sup>43</sup>

Specifically, the PCA took steps to tailor its processes by issuing Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, which were based on the 1976 UNCITRAL Rules. Even though such rules were intended to deal with environmental disputes in the traditional – and non-climate change related – context and they have not been updated to reflect many of the developments reflected in the 2010 UNCITRAL Rules or various institutional rules, including the ICC Arbitration Rules, they incorporate useful provisions that enhance the PCA's ability also to administer climate change related disputes, as compared with its other rules. They provide for: (i) PCA lists of potential expert arbitrators or expert witnesses; (ii) the possibility for the tribunal to request a summary of technical or scientific matters from the parties; (iii) bespoke confidentiality restrictions on information; and (iv) possible precautionary interim measures to protect the environment, including provisional orders, where it is deemed necessary to prevent serious harm to the environment falling within the subject-matter of the dispute. The PCA has administered a number of cases under these Rules, concerning both State and non-State actors dealing with environmental disputes.<sup>44</sup>

---

41 Ibid.

42 Ibid.

43 IBA Climate Change Justice and Human Rights Task Force Report, Achieving Justice and Human Rights in an Era of Climate Disruption, 2014, available at <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04,144> (22 December 2023).

44 See ICC Report 2019, ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 18, available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023).

The ICC Commission on Arbitration and ADR, with the support of the ICC Commission on Environment and Energy, has created a task force on Arbitration of Climate Change Related Disputes (the “Task Force”). In 2019, it issued the above-mentioned Report on Resolving Climate Change Related Disputes through Arbitration and ADR 2019,<sup>45</sup> which examines the role for arbitration and ADR in the resolution of international disputes related to climate change. The Report first defines climate change related disputes, providing case studies as appropriate, and then explores current, potential use and benefits of ICC Arbitration and ADR services to resolve such disputes and identifies six broad features that potentially enhance the existing procedures to further improve their effectiveness for resolving climate change related disputes. Remarkably, however, no specific consideration of climate change related disputes has been included in the revised 2021 ICC Arbitration Rules.

The regime for the enforcement of arbitral awards at the global level, significantly facilitated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (the ‘New York Convention’)<sup>46</sup> should also be mentioned. An arbitral award rendered in one of the 166 signatory countries of the New York Convention can be recognised and enforced in all other member states. This ease of recognition and enforcement should be put into perspective with the execution of foreign judgments which is, in general, less predictable, and, especially for countries outside the EU, depending on a bilateral enforcement treaty in place or even on national law.

## 2 Mediation

Mediation may also constitute an effective mechanism to deal with climate change related disputes.

Further to saving resources in terms of time and economic costs, mediation can ensure the maintenance and development of the relationship of the parties, which can hardly be achieved in the context of adversarial dispute resolution processes.

Moreover, while the traditional methods of litigation and arbitration are suitable for clarifying legal rights between specific parties, the need for lasting solutions to meet climate goals in a short time frame highlights the importance of compromise, which can be obtained through consensual dispute resolution mechanisms, such as mediation.<sup>47</sup> Numerous stakeholders often involved in climate related cases – also at community level – are able to participate in the mediation ensured that they will contribute to shaping the content of the mediated agreement considering their interests in a collaborative context.

---

45 Ibid.

46 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958, available at <https://www.newyorkconvention.org/english> (22 December 2023).

47 Wolf von Kumberg/Jessica Crow, The Development of Investor-State Mediation and Its Future in Supporting Energy Transition, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 88 (2022) 3, 429.

Mediation is considered an effective tool in resolving deadlocks, especially when there is a lack of understanding on specific issues, of both technical and non-technical nature,<sup>48</sup> as there may be the case with the climate change related disputes.

Given the nature of climate change related disputes and the fact that climate change is an objective issue affecting all and needing to be faced by all, tailor-made, interest-based solutions that mediation can offer are appropriate as the facts giving rise to a dispute in almost all cases cannot be attributed to any party's fault.

As a both commercial and investor-state dispute resolution mechanism, mediation is being promoted and expanding in the recent years. At EU level, mediation in civil and commercial disputes has been regulated by Directive 2008/52/EC,<sup>49</sup> while national laws worldwide have also been enacted. Several institutions have actively engaged in developing mediation rules<sup>50</sup> as well as embodying mediation in the arbitration process as part of a multi-tiered dispute resolution mechanism.<sup>51</sup>

Moreover, the United Nations Singapore Convention on Mediation<sup>52</sup> was signed in 2018, constituting a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation in commercial disputes. Its purpose is to facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders. It has been signed by 56 countries and ratified so far by 12 countries.<sup>53</sup>

---

48 Federico Antich, Environmental mediation in the international context, in: Marianne Roth/Michael Geistlinger (eds.), *Yearbook on International Arbitration and ADR – Volume VII*, Dike Verlag AG & NWV Verlag GmbH, Zurich/Vienna 2021, 208.

49 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3-8.

50 E.g., ICC Mediation Rules; LCIA Mediation Rules; CIArb Mediation Rules; SCC Mediation Rules; UNCITRAL Mediation Rules, ICSID Mediation Rules, etc.

51 ICC Task Force on ADR and Arbitration Guide on Effective Conflict Management, 2023, & ICC Task Force on ADR and Arbitration Report on Facilitating Settlements in International Arbitration, 2023, available at <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/> (22 December 2023).

52 United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (the "Singapore Convention on Mediation"), available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) (22 December 2023).

53 Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Kazakhstan, Qatar, Saudi Arabia, Singapore, Turkey, Uruguay.

### **C Issues to be considered when arbitrating or mediating climate change related disputes**

Despite the multiple advantages of arbitration and mediation for the resolution of climate change related disputes, certain of their characteristics – which in another context may be considered desirable – must be adapted for their optimal application to the particular type of disputes. The relevant issues may be addressed either by the introduction of a particular regulatory framework or by the applicable institutional arbitration and mediation rules and the specific arbitration and mediation clauses.<sup>54</sup> Indicatively:

First, the lack of technical and scientific expertise of ordinary state courts is often referred to as a major disadvantage in climate change litigation, particularly because it may lead to lengthy proceedings, inconsistent results and fragmentation of the law. One of the major advantages of arbitration and mediation is that they afford the possibility of seeing a dispute resolved by qualified and experienced professionals in the matter in question. To ensure this in practice, arbitration and mediation institutions must further develop the sector specific expertise of arbitration and mediation professionals included in their rosters. Offering a substantial supply of arbitrators and mediators experienced in matters of climate change will not only considerably increase the quality of the processes and their outcome. Apart from this, parties should provide for the expertise of the third neutral to be selected in their arbitration or mediation clauses.<sup>55</sup>

Second, the confidentiality of the arbitration and the mediation process is often considered by their users as a major advantage. For various reasons, private actors are often reluctant to see their disputes publicised in the press or elsewhere, particularly when they are the responding parties. However, this feature may be a disadvantage and entail implications from the point of view of the 'common good' or 'public interest', which is at stake in the case of climate change related disputes. Therefore, transparency-enhancing mechanisms should be introduced. For example, the presumption of transparency could be the default rule and be adapted by all arbitration and mediation institutions in climate change related disputes. Given that, at the same time, commercial interests and confidential information of the parties involved must be protected, tailored versions of the arbitral awards and mediated agreements should be published, omitting information which would allow identification of the parties or the revelation of commercial secrets, unless otherwise agreed by the parties. Alternatively, only those parts of the award dealing with climate change issues

---

54 Cf. Lucia Bizikova/Séréna Salem, *L'arbitrage commercial comme mode de résolution des litiges en lien avec le changement climatique*. *Acquis et requis*, *Revue de droit international d'Assas*, 3 (2020) 3, 150.

55 Cf. ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 19 et seq., available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023); Lucia Bizikova/Séréna Salem, *L'arbitrage commercial comme mode de résolution des litiges en lien avec le changement climatique*. *Acquis et requis*, *Revue de droit international d'Assas*, 3 (2020) 3, 153-155.

could be published.<sup>56</sup> The ICC has addressed the issue of transparency by providing for the publication of redacted versions of arbitral awards two years after notification of the award to the parties, unless the parties agree otherwise.<sup>57</sup>

Third, local communities and groups of citizens may be affected in terms of climate damage by a specific project or investment in their region. In the absence of a contractual relationship, these disputes may not always be arbitrable or mediatable, and even if they were, the absence of an arbitration or a mediation clause between the potential plaintiffs and defendants makes the recourse to such dispute resolution mechanisms difficult. In this case, a *compromis* or an agreement to mediate a dispute that has already arisen may be an option in order to submit such dispute to arbitration or mediation, respectively.<sup>58</sup> Third-party views may also be addressed in the arbitration process through either the joinder of additional parties or a written *amicus curiae* brief.<sup>59</sup> In the mediation process, third parties may join at any time upon agreement by the mediating parties.

Fourth, the limited applicability of the Singapore Convention on Mediation<sup>60</sup> and the absence of any other legislative framework on the recognition and enforcement of mediated agreements at international level or at EU level<sup>61</sup> may render mediation unattractive for the resolution of climate change disputes, especially since the international and foreign element of most of them entails cross-border implications concerning the enforcement of the related mediated agreements.

#### IV Conclusion

Resolution of climate change related disputes through arbitration has been significantly growing in the last years, while mediation is steadily promoted and expanding. Both out-of-court dispute resolution mechanisms have undeniable advantages, which make them particularly suitable for this type of disputes. At

---

56 Cf. ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 40 et seq., available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023); Lucia Bizikova/Séréna Salem, L'arbitrage commercial comme mode de résolution des litiges en lien avec le changement climatique. Acquis et requis, *Revue de droit international d'Assas*, 3 (2020) 3, 155-156.

57 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2019) Articles 41-43.

58 Cf. Lucia Bizikova/Séréna Salem, L'arbitrage commercial comme mode de résolution des litiges en lien avec le changement climatique. Acquis et requis, *Revue de droit international d'Assas*, 3 (2020) 3, 150 et seq.

59 ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 44 et seq., available at <https://iccwbo.org/climate-change-disputes-report> (22 December 2023).

60 United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (the "Singapore Convention on Mediation"), available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) (22 December 2023).

61 Vassiliki Koumpli, Cross-Border Mediation, in: Angelos Bolos (ed.), *Mediation – Theory & Practice*, P.N. Sakkoulas, Athens 2023, 527-538 [in Greek].

the same time, these methods should not be considered a panacea for all climate change related disputes. Their suitability should be evaluated on an ad hoc basis, while certain adjustments in their rules and best practices can enhance their adaptability to such disputes.

## V Bibliography

### Books

- Koumpli, Vassiliki, *Cross-Border Mediation*, in: Bolos, Angelos (ed.), *Mediation – Theory & Practice*, P.N. Sakkoulas, Athens 2023, 515-544 [in Greek]
- Lackner, Maximilian/Sajjadi, Baharak/Wei-Yin Chen (eds.), *Handbook of Climate Change Mitigation and Adaptation*, Third Edition, Springer Nature Switzerland AG, Cham 2022
- Lee, Hoesung/Romero, José (eds.), *IPCC Climate Change 2023: Synthesis Report – Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva 2023, available at <<https://www.ipcc.ch/report/ar6/syr/>> (27 November 2023)
- Restrepo Rodríguez, Tomás, *Investment Treaty Law and Climate Change*, Springer Nature Switzerland AG, Cham 2022
- Welfens, Paul, *Global Climate Change Policy. Analysis, Economic Efficiency Issues and International Cooperation*, Sustainable Development Goals Series 13, Palgrave Macmillan & Springer Nature Switzerland AG, Cham 2022

### Articles

- Antich, Federico, *Environmental mediation in the international context*, in: Roth, Marianne/Geistlinger, Michael (eds.), *Yearbook on International Arbitration and ADR – Volume VII*, Dike Verlag AG & NWV Verlag GmbH, Zurich/Vienna 2021, 203-208
- Bizikova, Lucia/Salem, Séréna, *L'arbitrage commercial comme mode de résolution des litiges en lien avec le changement climatique. Acquis et requis*, *Revue de droit international d'Assas*, 3 (2020) 3, 139-158
- Peel, Jacqueline/Osofsky, Hari, *Climate Change Litigation*, *Annual Review of Law and Social Science*, 16 (2020) 21-38
- Savaresi, Annalisa/Setzer, Joana, *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, 2021, available at <https://ssrn.com/abstract=3787963> (27 November 2023)
- von Kumberg, Wolf/Crow, Jessica, *The Development of Investor-State Mediation and Its Future in Supporting Energy Transition*, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 88 (2022) 3, 426-436
- Wen, Shuangchun/Keller, Joshua/Joseph, Damien, *Are Men Better Negotiators Everywhere? A Meta-Analysis of How Gender Differences in Negotiation Performance Vary Across Cultures*, *Journal of Organizational Behavior*, 40 (2019) 6, 651-675
- Wolfe, Caryn Litt, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, *Fordham Law Review*, 75 (2006) 1, 11
- Zion-Waldoks, Tanya/Irshai, Ronit/Shoughry, Bana, *The First Female Qadi in Israel's Shari'a (Muslim) Courts: Nomos and Narrative*, *Shofar*, 38 (2020) 2, 229-261

## Cases

### *Belgium*

Brussels Court of First Instance, *Client Earth v. Belgian National Bank*, Judgment of December 2021, 21/38/C

### *European Union*

CJEU, *Republic of Moldova v. Komstroy LLC*, Judgment of 02 September 2021, Case C-714/19, ECLI:EU:C:2021:655

CJEU, *Republiken Polen v. PL Holdings Sàrl*, Judgment of 26 October 2021, Case C-109/20, ECLI:EU:C:2021:875

CJEU, *Slovak Republic v. Achmea BV*, Judgment of 06 March 2018, Case C-284/16, ECLI:EU:C:2018:158

### *France*

French Council of State (*Conseil d'État*), *Commune de Grande-Synthe v. France*, Judgment of 01 July 2021, 427301

### *Germany*

German Federal Constitutional Court (*Bundesverfassungsgericht*), *Neubauer et al v. Germany*, Judgment of 29 April 2021, 1 BvR 2656/18

### *International Centre for Settlement of Investment Disputes*

ICSID, *Eco Oro Minerals Corp v. the Republic of Colombia*, Award of 09 September 2021, ARB/16/41

ICSID, *Latam Hydro LLC and CH Mamacochoa SRL v. Peru*, Award of 20 December 2023, ARB/19/28.

ICSID, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ARB/21/4 (discontinued).

### *Luxembourg*

Luxembourg Court of Cassation (Cour de cassation du Grand-Duché de Luxembourg), *Romania v. Micula et al.*, Judgment of 14 July 2022, 116/2022

### *Netherlands*

Supreme Court of the Netherlands (*Hoge Raad*), *State of the Netherlands v. Urgenda Foundation et al.*, Judgment of 20 December 2019, 19/00135

The Hague Court of Appeal (*Gerechtshof Den Haag*), *State of the Netherlands v. Urgenda Foundation et al.*, Judgment of 09 October 2018, 200.178.245/01

The Hague District Court (*Rechtbank Den Haag*), *Milieudefensie et al. v. Royal Dutch Shell plc.*, Judgment of 26 May 2021, C/09/571932

The Hague District Court (*Rechtbank Den Haag*), *Urgenda Foundation et al. v. State of the Netherlands*, Judgment of 24 June 2015, C/09/456689

### *Sweden*

SCC, *Green Power K/S and Obton A/S v. Spain*, Judgment of 16 June 2022, 2016/135, available at [https://sccarbitrationinstitute.se/sites/default/files/2022-12/report\\_green\\_technology\\_disputes.pdf](https://sccarbitrationinstitute.se/sites/default/files/2022-12/report_green_technology_disputes.pdf) (27 November 2023)

### *United Kingdom*

England and Wales High Court, *ClientEarth v. Shell Plc*, Judgment of 12 May 2023, [2023] 1137 (Ch)

England and Wales High Court, *ClientEarth v. Shell Plc*, Judgment of 24 July 2023, [2023] 1897 (Ch)

### *United States of America*

U.S. Court of Appeals for the District of Columbia Circuit, *Micula et al. v. Romania*, Judgment of 21 February 2023, 23-7008

### **Other sources**

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3-8

European Green Deal, available at <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en)> (27 November 2023)

Fit-for-55 Package, available at [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en) (27 November 2023)

Greek Law no. 4936/2022. National Climate Law – Transition to climate neutrality and adaptation to climate change, emergency provisions to address the energy crisis and protect the environment (Government Gazette A 105) [in Greek: Νόμος 4936/2022. Εθνικός Κλιματικός Νόμος – Μετάβαση στην κλιματική ουδετερότητα και προσαρμογή στην κλιματική αλλαγή, επείγουσες διατάξεις για την αντιμετώπιση της ενεργειακής κρίσης και την προστασία του περιβάλλοντος (ΦΕΚ Α 105)]

GSIA, Global Sustainable Investment Review 2020, available at <https://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf> (27 November 2023)

IBA Climate Change Justice and Human Rights Task Force Report, Achieving Justice and Human Rights in an Era of Climate Disruption, 2014, available at <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04> (27 November 2023)

ICC Commission on Arbitration and ADR Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, available at <https://iccwbo.org/climate-change-disputes-report> (27 November 2023)

ICC Task Force on ADR and Arbitration Guide on Effective Conflict Management, 2023, available at <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/?> (27 November 2023)

ICC Task Force on ADR and Arbitration Report on Facilitating Settlements in International Arbitration, 2023, available at <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/?> (27 November 2023)

LSE Grantham Research Institute on Climate Change and the Environment, Climate Change Laws of the World <https://climate-laws.org/> (27 November 2023)

OECD Guidelines for Multinational Enterprises 2011 Edition, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf> (27 November 2023)

Paris Agreement, available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) (27 November 2023)

- Queen Mary University of London and White & Case, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, available at [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) (27 November 2023)
- Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021
- S&P Global, Germany brings net-zero forward to 2045, power sector hit hardest by new 2030 target, 12 May 2021, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/coal/051221-germany-brings-net-zero-forward-to-2045-power-sector-hit-hardest-by-new-2030-target> (27 November 2023)
- SCC Arbitration Institute, Green Technology Disputes at the SCC Arbitration Institute, November 2022, available at [https://sccarbitrationinstitute.se/sites/default/files/2022-12/report\\_green\\_technology\\_disputes.pdf](https://sccarbitrationinstitute.se/sites/default/files/2022-12/report_green_technology_disputes.pdf) (27 November 2023)
- UN General Assembly Resolution (A/RES/70/1) of 25 September 2015 "Transforming our world: the 2030 Agenda for Sustainable Development", available at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf) (27 November 2023)
- UN Human Rights Council Resolution (A/HRC/RES/17/4) of 16 June 2011 "Guiding Principles on Businesses and Human Rights", available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (27 November 2023)
- United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (the "Singapore Convention on Mediation"), available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) (27 November 2023)
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at <https://www.newyorkconvention.org/english> (27 November 2023)
- United Nations Environment Programme, Global Climate Litigation Report: 2020 Status Report, 7, available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> (27 November 2023)
- United Nations Framework Convention on Climate Change ("UNFCCC"), available at [https://unfccc.int/sites/default/files/convention\\_text\\_with\\_annexes\\_english\\_for\\_posting.pdf](https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf) (27 November 2023)