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The Guide to Climate Change and Related Disputes - First Edition

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Arbitration as a mechanism for mass claims in climate change disputes

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Summary

INTRODUCTION

According to the United Nations Environment Programme, arbitration is becoming an important means of resolving climate change disputes.[2] That is rightly so, as arbitration is clearly well placed to handle many forms of dispute arising in the context of climate change and the energy transition, not least given its flexible character and ability to evolve to meet the changing needs of parties and nature of disputes. However, arbitration and the arbitral community will need to continue to do so to avoid being left behind by other modes of dispute resolution, such as litigation.

Mass claims are an increasingly prominent feature of the disputes landscape and an area where arbitration must adapt if it is to flourish and become a dispute mechanism of choice for climate change disputes. Originally a largely US phenomenon, mass claims have spread to the courts of many jurisdictions, including the United Kingdom and European countries. Increased scrutiny of climate change and environmental, social and governance issues in recent years are only likely to increase the prominence of such actions. In addition, climate change-related disputes could give rise to further mass claims, given the wide-ranging impacts of climate change on large groups of people and actors.

There is the potential for such disputes to be resolved by arbitration and this article seeks to explore how and why that might be the case.[3] The article begins by exploring mass climate change disputes more generally (in the sphere of litigation), before examining existing examples of mass arbitration, primarily in the United States and in the context of international investment treaty arbitration. The article then goes on to consider some of the challenges facing mass arbitration and suggests possible ways to overcome or mitigate these challenges.

MASS CLIMATE CHANGE DISPUTES

Mass claims are likely to be at the forefront of climate-related disputes and are already gaining momentum in civil litigation, where claimants are increasingly seeking collective redress for alleged harms related to climate change. This trend is understandable, as it reflects the breadth of potentially impacted individuals and that individual quantum may be hard to demonstrate or justify bringing claims individually. Climate change-related disputes by their nature will often affect very large groups of people.

The legal bases for these claims vary, and include alleged breaches of tort law, human rights, constitutional protections and indigenous rights. Many claims are brought against governments to effect practical policy change. In 2019, the Dutch Supreme Court upheld the decisions of the Court of Appeal and the Hague District Court that the Dutch government must reduce greenhouse gas emissions by at least 25 per cent (compared to 1990) by 2020 to fulfil its duty of care to protect Dutch citizens from danger caused by climate change.[4] This is one of many examples of climate change-related disputes being brought by non-profit associations over the rights of a group of people. Other examples include an ongoing representative action on behalf of islanders against the Australian government concerning the impact of climate change on the Torres Strait Islands,[5] and the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*,[6] in which the Grand Chamber of the European Court of Human Rights held that Switzerland had breached its obligations under Article 8 (right to respect for private and family life) and Article 6(1) (right to a fair and

public hearing) of the European Convention on Human Rights by taking insufficient action to mitigate the effects of climate change.

Respondents to such actions are not limited to governments. Earlier this year, the Supreme Court of New Zealand allowed a novel climate change claim against several of New Zealand's largest companies to proceed to trial.[7] The claim has been brought by an individual who claims to represent indigenous Māori communities. The courts of England and Wales have also emerged as a prime location for group environmental litigation against multinational companies. High-profile cases include *Vedanta Resources PLC & Anr v. Lungowe & Ors*,[8] which concerned claims by some 1,800 Zambian villagers relating to alleged toxic emissions from a copper mine, and *Município de Mariana v. BHP*,[9] which concerns claims brought by around 620,000 Brazilian claimants arising out of the collapse of the Fundãodam in Brazil.

As well as being brought on a range of legal bases, mass claims can take different procedural forms. These include group actions (an aggregate of individual claims), collective interest (or representative) action (in which one party represents the 'collective interest' of the others) and class actions (in which the claims are merged into one class, with all members of that class being parties to the proceedings). Group actions tend to 'opt-in', where each individual elects to join the proceedings, while class actions (which are most common in the United States (as discussed below), but recently have gained traction in the United Kingdom in the sphere of competition law[10]) tend to be 'opt-out' claims, meaning that they are brought on behalf of all those who fall within a defined class of claimants, unless they take positive steps to opt out. As this article will later explore, some of these structures are potentially more suitable for mass arbitration than others.

THE FUTURE OF MASS ARBITRATION

The question is then whether we can expect similar trends in arbitration, and what form mass arbitrations could take. The increase in mass litigation could lead to growing calls for mass arbitration, as it has in the United States. To see where arbitration might go, it is first necessary to summarise where mass arbitration currently is, namely in the context of commercial arbitration in the United States and mass international investment treaty arbitration.

US MASS COMMERCIAL ARBITRATION

Mass claims are an important feature of the United States arbitration and litigation landscape. The United States is the prime example of a jurisdiction that adopts the opt-out class action model (for both litigation and arbitration). Mass claims arbitrations have been present in the United States for about 30 years and are generally brought on an opt-out basis. To date, these claims have tended to focus on contractual disputes relating to employment or consumer relationships. However, despite the seemingly established nature of mass claims in the United States, this form of legal action has been the subject of much controversy, debate and judicial consideration over the years, and remains a polarised and politicised topic. Previously, it was common in the United States to see mass claims waivers in consumer contracts, as a means of excluding civil litigation and directing disputes towards arbitration, which tended to be more advantageous to the business party. However, in recent years certain claimant law firms adopted a new strategy: filing large numbers of individual arbitrations, which, in aggregate, required respondent companies to pay huge filing fees or settlement amounts.[11]

In response, some companies decided to return to civil litigation, while others considered amending the selected arbitral rules in their arbitration agreements to avoid the respondent filing fee requirement under the rules of the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc (JAMS). To address this, the AAA published its Supplementary Rules in January 2024 (further updated in April 2024), which, among other things, replaced filing fees with a flat initiation fee followed by a tiered fee structure, imposed an affirmation requirement to make it easier to verify claims and for respondent businesses to challenge claims by requesting a 'process arbitrator'. JAMS also made similar updates in its Mass Arbitration Procedures and Guidelines in May 2024.

It remains to be seen what the effect of these updated rules will be, and whether the trends we see in the United States will apply to arbitrations seated elsewhere and under different institutional rules. On the one hand, some of the drivers behind the high volume of mass arbitrations may be specific to the United States, at least for now. These drivers include the existence of dedicated mass arbitration rules, the widespread practice of consumer and employment contracts including mass claims waivers to direct disputes to arbitration, and (prior to the updated rules) the requirement for respondents to pay a filing fee. On the other hand, however, other institutions or jurisdictions could adopt dedicated mass arbitration rules in the future. The ICC, for example, has already considered mass arbitration at its conference in 2016 and in its subsequent report.[12] The fact that the rules of most leading arbitral institutions now provide for joinder of parties and consolidation of claims (which they previously did not) is a testament to the flexibility of arbitration to adapt to changing circumstances and trends. This, combined with the increasing momentum of mass claims more generally, could pave the way for the emergence of similar trends in other jurisdictions.

MASS INTERNATIONAL INVESTMENT TREATY ARBITRATION

There is also the potential for mass arbitration in international investment treaty arbitration, as this is not prohibited by the ICSID rules. The key example of a true 'mass claim'[13] in international investment treaty arbitration to date is *Abaclat v. Argentina*, in which 180,000 claimants (60,000 by the end of the case) brought a claim under the Argentina–Italy Bilateral Investment Treaty (BIT) against Argentina for its default on the payment of its sovereign debt. The BIT expressly provided for the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) and arbitration under its rules. The majority of the tribunal did not consider this high number of claimants to be an obstacle, and said that it was 'difficult to conceive why and how the Tribunal could [lose] such jurisdiction where the number of Claimants outgrows a certain threshold'.[14] It also found that 'the collective nature of the present proceedings derives primarily from the nature of the investment made,' which in this case was bonds 'which are susceptible of involving in the context of the same investment a high number of investors'.[15] In addition, the majority of the tribunal felt that it was able to take jurisdiction over the mass claim because it considered that it could strike the balance between properly resolving the investors' individual claims and safeguarding the rights of both the claimants and respondent (for instance, through the creation of an electronic database with identification documents and written consent from each claimant).[16] In fact, it considered that 'collective proceedings were seen as necessary'[17] and that denying jurisdiction would deprive the claimants of their rights:

> [N]ot only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations. Thus, the rejection of the admissibility of the present claims may equal a denial of justice.[18]

The case of ***Abaclat*** demonstrates the flexibility of arbitration and the potential for mass international investment treaty arbitration to grow, particularly for certain types of investments. The tribunal's concern for due process is also noteworthy, and could align with the 'access to justice' concerns of claimant lawyers in cases where it is difficult for claimants to seek recourse individually. However, the scope of mass international investment treaty arbitration is still unclear, given that ***Abaclat*** concerned a very specific kind of investment issued by the host state to a large number of investors and that was expressly covered by the applicable BIT's definition of investment.[19] Although the subsequent case of ***Ambiente Ufficio v. Argentina*** implicitly affirmed the possibility of 'mass claims' (while preferring to use the term of 'multi-party proceeding' in that dispute),[20] the dispute had arisen out of the same facts as Abaclat.

In the subsequent ICSID case of ***Adamakopoulos v. Cyprus,*** the tribunal took a narrower approach than in ***Abaclat*** to the question of admissibility of a mass claim. This case concerned claims brought by 956 deposit holders or bondholders for alleged expropriation as a result of bail-in measures during the financial crisis, which they argued was a breach of Cyprus's obligations towards their investments. The tribunal found that 'whether such a mass claim is admissible depends precisely on whether such a claim is compatible with the terms of the BIT and manageable under the selected dispute resolution process, that is to say ICSID'[21] and that the tribunal had no mandate to devise a new procedural framework (outside the existing ICSID framework) to deal with the case, as it considered ***Abaclat*** had done.[22] However, even with this narrower approach, the tribunal in ***Adamakopoulos*** found that it had jurisdiction over the mass claim and that the claim was admissible.[23] It asked the question of whether each stage of the process of the claim could be conducted in a manner that preserved the rights of both parties, and concluded that it could (though it rejected the claimant-friendly finding of the ***Abaclat*** majority that the alternative of each individual claimant bringing an individual claim would constitute a denial of justice[24]).

The application of ***Adamakopoulos*** remains to be seen. Indeed, it is conceivable that the rules within the ICSID framework may be supplemented in the future to make it more suitable for mass claims.[25]

How could this extend to mass international investment treaty arbitration of disputes relating to climate change? It is conceivable that we could in the future see a similar case to ***Abaclat*** and ***Adamakopoulos*** concerning, for example, green bonds or similar instruments. More broadly, the energy transition is already having a significant impact on the world of investments, leading to regulatory change and disputes both over whether states have failed to implement such changes, or whether their implementation has caused loss to investors.-[26] As investment treaties start to incorporate language relating to climate change,[27] the scope for such disputes is only set to increase. Mass investment arbitration may prove to be a useful tool for holding states to account over failure to adapt in line with globally recognised transition goals and evolving standards.

CHALLENGES FACING MASS ARBITRATION

There is clearly potential for mass arbitration to develop, including in the sphere of climate change disputes. A 2019 ICC report on Resolving Climate Change Related Disputes through Arbitration and ADR (the 2019 ICC Report), for example, acknowledges the potential role of mass arbitration of climate change disputes.[28]

However, there are some fundamental issues that the arbitration community needs to grapple with if arbitration is to assist in resolving these disputes and not be left behind. These include some of what we might call the fundamental tenets of arbitration. The challenges raised by mass arbitration are similar to those that arise under multi-party or multi-contract arbitration, but are amplified by the potential scale of the claims. Indeed, some go as far as to say that class actions and arbitration are not compatible, as 'class-action arbitration changes the nature of arbitration'.[29] We set out some of the challenges below.

CONSENT / CONTRACTUAL MECHANISM

COMMERCIAL ARBITRATION

In general, consent (usually in the form of a written agreement) is the prerequisite to arbitration. This means that opportunities for the participation of third parties and stakeholders is limited. Although there are ways of consolidating claims and joining third parties,[30] as well as voicing the opinion of third parties through ***amicus curiae*** submissions, the arbitration rules in this area are not always clear, and could arguably benefit from further rules and guidance.[31] For example, impacted communities would not be able to bring a tort claim against a polluting entity using arbitration in the way they may be able to in the courts.

The 2019 ICC report proposes some solutions to this. Firstly, it recommends incorporating provisions relating to third-party participation into contracts and arbitration agreements.[32] Indeed, given the primacy of the contractual mechanism in arbitration, there is in principle no reason why the contract cannot be drafted to permit a certain class of people to have recourse to arbitration (subject to local laws relating to consumer protection, for example, which may forbid the use of arbitration in such contexts). In some cases (as seen in the United States), the contract may be very broad in scope, extending the remit of arbitration to all issues relating to, or customers of, certain specified entities. The spike in mass arbitration in the United States demonstrates the possible consequences of broadly drafted arbitration clauses.

In the absence of such clauses, the second solution proposed by the 2019 ICC report is the idea of entering into a submission agreement after the dispute has arisen. The report applied this to a hypothetical example of 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, who 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. In the absence of a contract between them and the investors, a submission agreement can extend the existing contract to these third parties.

Although this kind of arrangement appears to be primarily advantageous for the third parties, it could also be attractive to respondents, preventing drawn-out multiple proceedings in different jurisdictions and potentially conflicting outcomes. In theory, submission agreements could impart cost and reputational benefits for respondents and give them some level of control over the dispute. However, such agreements are rare at present and there are no records of any resulting in climate change commercial arbitration.In addition, it is possible that we will see restrictions on arbitrability of certain climate change-related disputes in the future as a matter of public policy, which would result in submission agreements being an attractive solution only in a small number of cases.[33]

INTERNATIONAL INVESTMENT TREATY ARBITRATION

While the ICSID rules neither mention nor prohibit collective proceedings, the fundamental principle in international investment treaty arbitration, as in commercial arbitration, is that consent is required.[34] This means that opt-out class arbitration is difficult to envisage, but there is nothing in principle that precludes 'opt-in' multi-party – or even mass – international investment treaty arbitration, as the claimants would be identified and would consent to the proceedings.[35] International investment treaty arbitration tribunals have on several occasions affirmed jurisdiction over multiple and unaffiliated parties,[36] even where the number of claimants has been significant.[37]

Although the question of what is required for multiple claims to be heard as a single proceeding has been treated differently in different cases,[38] the general picture seems to be that such consolidation is possible where the claims are 'sufficiently homogenous',[39] namely where the claims can be regarded as a single dispute.[40] This means that the more elements of the claims that are the same (particularly the source of the consent, the measure affecting the investors and the type of investment), the more likely it is that a tribunal will treat them in a single proceeding. However, these elements are not decisive, and it may be that a tribunal is willing to find homogeneity where, for example, there are two BITs (with provisions that are essentially the same).[41]

CONFIDENTIALITY AND PRIVACY

Certain climate change disputes touch on broader issues of public policy or corporate accountability, and are brought with the aim of driving change, or otherwise raising broader issues of public interest.[42] A key motivating factor for claimants is that disputes are well publicised, and as such, may not be well suited to commercial arbitration, where confidentiality and privacy are key. That said, the arbitration community is considering the use of certain (mainly optional) measures that could strike a balance between confidentiality and privacy, on the one hand, and transparency, on the other. For example, there are proposals to publish awards with redactions, or to delay the publication of the award for a period after it is handed down.[43] Given the flexibility that arbitration has shown to date, some – including the ICC[44] – remain hopeful that arbitration can adapt further to become more transparent and therefore more suitable to public-focused claims.

If arbitration is to play a role in the resolution of mass claims and particularly of climate change disputes, the arbitration community will likely need to overcome this tension and find a way of striking the right balance.

ENFORCEMENT

There is also a need to ensure that jurisdictional challenges do not subvert the application of mass arbitration. There is a risk, particularly with the 'opt-out' class action model, of objections being made to counter the recognition and enforcement of an award. For example, a non-present class member could argue that they were not given adequate notice of the arbitration, or that there was a lack of agreement or consent. In addition, recognition could be denied for reasons of public policy.[45] If this challenge is overcome, however, there is significant potential for transnational arbitration to be a powerful tool in resolving global mass disputes and plugging jurisdictional gaps.

IS THE OPT-IN MODEL THE KEY TO OVERCOMING THESE CHALLENGES?

Arbitration is more likely to overcome these hurdles if it uses an opt-in model. Some have even argued that such 'opt-in' models 'might hold the key to truly unlock collective

arbitration in Europe'.[46] This is because it would be easier to obtain consent from identified persons who voluntarily opt in to proceedings, and easier to avoid the ***res judicata*** effect where the claimants are not aware of a judgment being entered against them. Additionally, confidentiality and privacy are easier to preserve when communications are only made to those persons who are likely to opt in (rather than the public at large, as would be the case when giving adequate notice to the public of opt-out proceedings).

CONCLUSION

Mass claims relating to climate change are gaining momentum. Given the rise in mass claims generally and the wide-ranging impact of climate change and the energy transition on a variety of stakeholders and communities, it is likely that we will see examples of mass arbitration of climate change disputes in the future. It is a key topic to keep under review.

Many of the challenges faced in mass arbitration amplify existing challenges in multi-party arbitration. If arbitration is to play a role in the resolution of mass climate change disputes, it will need to adapt to overcome these challenges. The ability of arbitration to evolve has already been evidenced by the introduction of certain procedural changes to arbitral rules in the past decade, such as consolidation and joinder, which could pave the way for mass claims. It remains to be seen whether the flexibility of arbitration will extend further into the realm of mass resolution of climate change disputes.

ENDNOTES

[1] Peter Wickham is a partner, Nick Ames is senior counsel, Samantha Holland is a senior professional support lawyer and Maria Shepard is an associate at Slaughter and May.

[2] United Nations Environment Programme, 'Global Climate Litigation Report 2023 Status Review' (2023), p. 14, accessible at https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3.

[3] This chapter does not address the existence of mass claims processes via the Permanent Court of Arbitration.

[4] Dutch Supreme Court (Hoge Raad), Urgenda Foundation v. The Netherlands, (20 December 2019), No. 19/00135, ECLI:NL:HR:2019:2006.

[5] Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia (2021), accessible at https://climatecasechart.com/non-us-case/pabai-pabai-and-guy-paul-kabai-v-commonwealth-of-australia/.

[6] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (9 April 2024), accessible at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-233206%22]}. See also Slaughter and May's analysis of the case at https://sustainability.slaughterandmay.com/post/102j5ga/european-court-of-human-rights-confirms-right-to-effective-protection-from-seriou.

[7] Smith v. Fonterra & Ors (2024), accessible at https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZSC-5.pdf. See also Slaughter and May's analysis of the case athttps://-sustainability.slaughterandmay.com/post/102j031/lessons-from-new-zealand-landmark-judgment-opens-door-for-climate-change-litiga.

[8] Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents) (2019) UKSC 20, accessible at https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf.

[9] Slaughter and May acts for BHP in these proceedings.

[10] See, for example, Mastercard Incorporated and others v. Walter Hugh Merricks CBE [2020] UKSC 51, Justin Le Patourel v. BT Group plc (case No. 1381/7/7/21).

[11] Some commentators have described this as an abuse of arbitration as a mechanism for resolving mass claims (e.g., see https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf.

[12] Class and Group Actions in Arbitration – Dossier XIV of the ICC Institute of World Business Law, (2016) (ICC Dossier 2016).

[13] In terms of terminology, it may be difficult to ascertain where the threshold is between a 'multi-party' and 'mass' arbitration, as there is no official numerical claimant threshold to make this distinction. In some (but not in all) cases, it can be said that multi-party often involves related parties and the same dispute, while mass arbitration often involves unrelated claimants with distinct investments. However, tribunals have refrained from delving into the details of terminology and have instead focused on the issue of the level of consent required and whether there is a sufficient link between the claimants and claims for consolidation into a single proceeding to be possible (Eloïse M. Obadia, 'Mass Arbitrations in International Investment Cases – Introductory Remarks', ICC Dossier 2016, pp. 105–111).

[14] Abaclat and others v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), paragraph 490.

[15] Abaclat, paragraph 490.

[16] ICC Dossier 2016, Chapter 9, p. 120.

[17] Abaclat, paragraph 484.

[18] Abaclat, paragraph 537.

[19] ICC Dossier 2016, Chapter 9, p. 122.

[20] Ambiente Ufficio v. Argentina, ICSID Case No ARB/08/9, (8 February 2013), paragraphs 121–122.

[21] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49, (7 February 2020), paragraph 225.

[22] Adamakopoulos, paragraphs 245–246.

[23] The tribunal found in favour of the respondents at the liability stage in 2024, but this does not affect the analysis of jurisdiction and admissibility of the mass claim in this chapter.

[24] Adamakopoulos, paragraph 242.

[25] Ridhi Kabra, 'Has Abaclat v Argentina left the ICSID with a "mass"ive problem?', Arbitration International, Volume 31, Issue 3, (September 2015), pp. 425–453.

[26] Lucia Bizikova, 'On Route to Climate Justice: The Greta Effect on International Commercial Arbitration', p. 88 and Lucy Greenwood, 'The Canary Is Dead: Arbitration and Climate Change', Journal of International Arbitration, Volume 38, Issue 3, (2021) pp. 318–319.

[27] For example, the 2018 Dutch Model Bilateral Investment Treaty highlights the importance of the Paris Agreement, and the Morocco–Nigeria BIT, Art 18(4) says that tribunals should take into account an investor's failure to 'manage or operate their investments in compliance with international obligations regarding human and labour rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives' when awarding compensation. More examples can be found in Annex B of the IBA's Report on use of ESG contractual obligations and related disputes (October 2023).

[28] ICC, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (2019), accessible at https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.

[29] Stolt-Nielsen S.A. v. AnimalFeeds International Corp. 130 S. Ct. 1758 (2010).

[30] Many arbitral rules provide for consolidation and joinder (Rule 22.7-8 and 22.1(x) of the LCIA Rules, (https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx), Rules 27–28 of the HKIAC Rules (-https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018), Rules 6–8 of the SIAC Rules (https://siac.org.sg/siac-rules-2016)).

[31] Laurent Gouiffès & Melissa Ordonez (2022), 'Climate change in international arbitration, the next big thing', Journal of Energy & Natural Resources Law, 40(2), p. 215, accessible at https://www.tandfonline.com/doi/full/10.1080/02646811.2021.1959158.

[32] ICC, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (2019), pp. 45–48.

[33] Lucia Bizikova, 'On Route to Climate Justice: The Greta Effect on International Commercial Arbitration', Journal of International Arbitration, Volume 39, Issue 1 (2022), p. 104.

[34] Article 25(1) of the ICSID Convention, Regulations and Rules.

[35] The withdrawal of a claimant from proceedings would also require the respondent's consent (see paragraphs 260–261 of Adamakopoulos).

[36] See Goetz v. Burundi (10 February 1999), Funnekotter et al. v. Zimbabwe (22 April 2009).

[37] See Anderson et al. v. Costa Rica (19 May 2010) (137 claimants), Bayview Irrigation District et al. v. Mexico (19 June 2007) (46 claimants), Canadian Cattlemen for Fair Trade v. United States (28 January 2008) (109 claimants), although these cases were dismissed on other grounds (Carolyn B. Lamm, Eckhard R. Hellbeck and Onur Saka, 'Mass Claims in Investment Arbitration – Jurisdiction and Admissibility', ICC Dossier 2016, p. 118).

[38] See Giovanni Alemanni et al. v. Argentina (14 December 2015), which suggested that an analysis was required of whether the factual and legal peculiarities of each claim were

sufficiently similar to permit the conclusion that all were part of the same dispute. However, a decision was never reached on this (Luca G. Radicati di Brozolo and Flavio Ponzano, 'Representative Aspects of "Mass Claim" Proceedings in Investor-State Arbitration', ICC Dossier 2016, p. 133).

[39] Abaclat, paragraph 540.

[40] Adamakopoulos, paragraph 209.

[41] Adamakopoulos, paragraphs 213 and 217 – 218.

[42] In the context of litigation, see the cases of Urgenda Foundation v. State of the Netherlands (2015) (which led to waves of litigation), and ClientEarth v. Shell (2023) (which was unsuccessful).

[43] Lucia Bizikova, 'On Route to Climate Justice: The Greta Effect on International Commercial Arbitration', p. 113.

[44] ICC, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (2019), paragraph 5.70.

[45] Article V paragraphs 1(b), 1(d) and 2(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[46] José Miguel Júdice, 'Chapter 4 | Collective Arbitration in Europe', ICC Dossier 2016, p. 48.

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