

Five International Arbitration Trends And Topics For 2023

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The year 2023 will likely herald a number of interesting developments in international arbitration. While 2022 provided many milestones – from the U.S. Supreme Court’s long-awaited decision on the application of a U.S. discovery statute to different types of international arbitrations and an exodus of member states from the oft-invoked Energy Charter Treaty – many of these matters will continue to make waves in the field, alongside new issues that are already gaining traction in the international arbitration community.

This Alert Memorandum summarizes what are likely to be key trends and topics in international arbitration in 2023, including: (1) U.S. courts’ ongoing efforts to establish a test for determining whether Section 1782 discovery can be used in public international law arbitrations; (2) climate change-related arbitrations, especially in light of the increasing concern towards compliance with the ESG agenda; (3) an influx of cryptocurrency arbitrations; (4) post-pandemic disputes arising from COVID-19-related measures; and (5) the continuing impacts of Russia-related sanctions on arbitration proceedings and the enforcement of awards.

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1. The Applicability of Section 1782 to ICSID Tribunals in U.S. Courts

Last year provided many significant developments for the application of 28 U.S.C. § 1782 (“Section 1782”), a U.S. discovery statute that allows federal courts to compel witness testimony and document production from any person or entity who “resides” or is “found” in the judicial district where the federal court sits for “use in a proceeding in a foreign or international tribunal,”¹ to international arbitration.

The U.S. Supreme Court’s decision on June 13, 2022 in *ZF Automotive US, Inc. v. Luxshare, Ltd.* foreclosed the use of Section 1782 in private commercial arbitration but left open the possibility that such discovery could remain available in public international law arbitration if the tribunal was “imbued with governmental authority.”² Following that decision, U.S. courts have begun to grapple with the question of whether ICSID arbitration tribunals qualify as a “foreign or international tribunal” for purposes of the statute.

Two decisions from late 2022 found that Section 1782 discovery was not available in ICSID arbitrations, based largely on a comparison between the ICSID tribunals at issue in these cases and the *ad hoc* tribunal convened under the UNCITRAL Rules that the Supreme Court found did not have “governmental authority” in the companion case to *ZF Automotive*.³ In *In re Alpeine*, a magistrate judge in the U.S. District Court for the Eastern District of New York concluded that an ICSID tribunal convened pursuant to a China-Malta bilateral investment treaty (“BIT”) was not a “foreign or international tribunal” after reviewing the

“number of similarities” and “significant differences” between the ICSID tribunal and the *ad hoc* UNCITRAL tribunal.⁴ In *In re Webuild S.P.A.*, the U.S. District Court for the Southern District of New York similarly held that an ICSID tribunal convened pursuant to a Panama-Italy BIT was “materially indistinguishable” from the *ad hoc* UNCITRAL tribunal, and therefore was not a “foreign or international tribunal” under Section 1782.⁵

While the district courts in both cases acknowledged that the Supreme Court “did not provide a test for lower courts to apply” in determining whether a public international law arbitration tribunal is imbued with governmental authority,⁶ these recent decisions demonstrate that U.S. courts are beginning to forge a multi-factor test based on certain tribunal characteristics that other courts may use in future cases to determine whether Section 1782 applies. Such characteristics include whether:

1. The legal framework of the arbitration institution is comprised of states;⁷
2. The legal framework of the arbitration institution “creates a permanent institution;”⁸
3. The tribunal “functions independently of and is not affiliated with either” of the nations who executed the BIT or Free Trade Agreement;⁹
4. The tribunal is part of a “standing or pre-existing arbitration panel[];”¹⁰
5. The tribunal “derives its authority from the parties’ consent to arbitrate;”¹¹
6. The tribunal receives “government funding” or is “funded by the parties;”¹²

¹ 28 U.S.C. § 1782.

² *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S.Ct. 2078, 2087 (2022). See also Cleary Gottlieb Alert Memorandum, *With Respect to Private Commercial and Treaty Arbitrations*, Cleary Gottlieb (June 14, 2022), <https://www.clearygottlieb.com/news-and-insights/publication-listing/us-supreme-court-denies-applicability-of-section-1782-discovery-statute-with-respect-to-private-commercial-and-treaty-arbitrations>.

³ That case, *AlixPartners, LLP v. The Fund for Protection of Investors’ Rights in Foreign States*, which involved an *ad hoc* tribunal under the UNCITRAL Rules convened pursuant to a Lithuania-Russia BIT, was consolidated with the *ZF Automotive* case (which involved a private commercial DIS arbitration tribunal).

⁴ *In re Alpeine, Ltd.*, No. 21 MC 2547 (MKB)(RML), 2022 WL 15497008, at *3-4 (E.D.N.Y. Oct. 27, 2022).

⁵ *In re Webuild S.P.A.*, No. 22-mc-140 (LAK), 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

⁶ *Id.*; see also *In re Alpeine*, 2022 WL 15497008, at *2 (noting “[t]he Supreme Court did not set out any test or provide any guidelines for lower courts to follow in making this determination”).

⁷ *In re Alpeine, Ltd.*, 2022 WL 15497008, at *3.

⁸ *Id.*

⁹ *In re Webuild*, 2022 WL 17807321, at *1 (quotations omitted).

¹⁰ *Id.*

¹¹ *Id.* at *2.

¹² *Id.*

7. The award may be published or is kept confidential.¹³

Parties' ability to continue to seek Section 1782 discovery in public international law arbitrations is likely to continue to be a question in 2023. As Webuild SpA has expressed its intention to challenge the district court's decision,¹⁴ the Second Circuit will become the first federal appellate court to review this issue and may potentially clarify the standard that courts interpreting the Supreme Court's decision in *ZF Automotive* should apply to Section 1782 requests in public international law arbitrations, including, specifically, ICSID arbitrations.

2. Green Transition in the Spotlight: Arbitration as a Forum for Climate Change-Related Disputes

The continued concern over global climate change and the recently-adopted environmental laws and standards – including Environmental, Social, and Governance (“ESG”) policies – impacted both investor-state arbitration and international commercial arbitration in 2022,¹⁵ and will likely continue in 2023, as environmental issues become increasingly prevalent. Indeed, in early 2023, Azerbaijan announced that it initiated an arbitration against Armenia under the Bern Convention on the Conservation of European Wildlife and Natural Habitats – the first known inter-state arbitration under

this treaty – arising from deforestation, pollution, and other harms to biodiversity in the Caucasus Mountains allegedly caused during Armenia's “illegal occupation.”¹⁶

One example of the impacts of environmental issues on arbitration is the recent headlines relating to the Energy Charter Treaty (“ECT”). Although new text was proposed in 2022 to modernize the ECT (with a vote on these changes postponed until April 2023 amid rumors of a failure to gain consensus among EU Member States),¹⁷ the mass exodus of European countries such as Spain, France, the Netherlands, Germany, and Poland in 2022 has brought concerns with the future of the ECT and its impact on climate change to the forefront of the conversation.¹⁸

Among the currently-pending ECT arbitrations are a number of arbitrations in the renewable sector, including a 2021-initiated ICSID arbitration brought by German investor RWE against the Netherlands under the ECT. In *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, RWE's claims arose out of a recent Dutch law providing specific deadlines for the phasing out of all coal plants in order to reduce emissions by 2030 as required by the Paris Agreement,¹⁹ and claimed that such actions amounted to an unlawful expropriation of RWE's investment and a violation of the fair and equitable treatment (“FET”) standard. The Netherlands, on the other hand, has invoked its right to make

¹³ *Id.*

¹⁴ Caroline Simson, *2nd Circ. Will Consider Recently Narrowed Discovery Statute*, Law 360 (Jan. 18, 2023), https://www.law360.com/internationalarbitration/articles/1566716?nl_pk=142f1175-39b7-4227-b2dc-20fa6c79f717&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&utm_content=2023-01-19&nlsidx=0&nlsidx=1.

¹⁵ Ari D. MacKinnon *et al.*, *ESG-Related Disputes in Latin America: The Evolution of the Litigation and Arbitration Landscape*, Latin Lawyer (Dec. 16, 2022), <https://latinlawyer.com/guide/the-guide-environmental-social-and-corporate-governance/first-edition/article/esg-related-disputes-in-latin-america-the-evolution-of-the-litigation-and-arbitration-landscape>.

¹⁶ Alison Ross, *Azerbaijan launches landmark biodiversity case against Armenia*, GAR (Jan. 19, 2023), <https://globalarbitrationreview.com/article/azerbaijan-launches-landmark-biodiversity-case-against-armenia>.

¹⁷ Toby Fisher, *The Modernised Energy Charter Treaty: The New Text*, Arbitration Blog (Oct. 15, 2022),

<http://arbitrationblog.kluwerarbitration.com/2022/10/15/the-modernised-energy-charter-treaty-the-new-text/>.

¹⁸ The ECT has been called “outdated,” *Energy Charter Treaty exodus shows a global power shift*, Climate Change News (Nov. 24, 2022), <https://www.climatechangenews.com/2022/11/24/energy-charter-treaty-exodus-shows-a-global-power-shift/>, primarily because it “has not achieved a successful alignment with the Paris Agreement objectives and the European Green Deal.” *Energy Charter Treaty Withdrawal Announcements Reflect Reform Outcome is Insufficient for Climate Ambition*, International Institute for Sustainable Development (Nov. 7, 2022), <https://www.iisd.org/articles/statement/energy-charter-treaty-withdrawal-announcements>; Toby Fisher, *EU parliament calls for ECT withdrawal*, GAR (Nov. 24, 2022), <https://globalarbitrationreview.com/article/eu-parliament-calls-ect-withdrawal>.

¹⁹ See generally *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

environmental regulations and argued that coal plant owners could not have expected the government to avoid imposing measures to significantly reduce carbon emissions given its environmental obligations under international law.²⁰ Against this backdrop, the arbitral tribunal may consider the interplay between the ECT Members States' international obligations and these states' right to regulate environmental matters.

Additional climate-related arbitrations may be initiated under the ECT in 2023. Moreover, enforcement actions in key jurisdictions – like the United States and the United Kingdom – are likely to continue through 2023 as such ECT-related arbitrations are subject to annulment challenges before ICSID (or before domestic courts for non-ICSID arbitrations), and efforts to stay or dismiss enforcement actions – on the bases of the *Achmea* and *Komstroy* decisions finding that investor-state arbitration clauses in intra-EU treaties are incompatible with EU law – continue.²¹

Beyond Europe, recent political developments in Latin America may also provide fertile ground for climate-related arbitrations in 2023. In particular, Chile and Colombia have announced plans to phase out certain forms of fossil fuel extraction and electricity generation activities.²² In contrast, Mexico is seeking to reverse its renewable energies reform, canceling permits and incentives.²³ Such state action may indicate that a new wave of investor-state arbitrations is on its way. While claims arising from a host state's decision to regulate its energy sector are not new, a 2019-initiated ICSID arbitration, *Latam Hydro LLC and CH Mamacocha SRL v. Peru* – in which two U.S. investors alleged that Peru made promises designed to induce foreign investment in its renewable energy sector, but instead caused the

financial destruction of the renewable-energy projects involved – may be interesting to watch as a future precursor of how investment arbitral tribunals could approach cases regarding renewable energy projects in Latin America.²⁴

Moreover, to the extent that there is an increase in state regulation and investor-state arbitrations, this would likely have ripple effects and may lead to additional commercial disputes, given the interconnected nature of many of the commercial relationships and projects in the energy sector.

3. After a “Crypto Winter” in 2022, Cryptocurrency-Related Disputes Will Likely Heat Up in 2023

One industry that is likely to be a source of arbitration disputes in 2023 is cryptocurrency. As a consequence of the so-called “Crypto Winter” that began in early 2022 following adverse developments in the crypto market which led to a sharp drop in cryptocurrency prices and market capitalization, the number of crypto-related disputes has sharply increased, including several high-profile cases, such as an HKIAC arbitration involving Binance, a large Chinese-founded crypto exchange, and the U.S. Supreme Court's upcoming decision in *Bielski v. Coinbase*, as further described below.

Nearly a year ago, the crypto industry was booming, with the prices of multiple cryptocurrencies, such as Bitcoin and Ethereum, skyrocketing. However, that favorable climate quickly deteriorated in early 2022 with the “Crypto Winter” in which crypto-assets lost an estimated US \$2 trillion in value.

These developments have had a major impact on the crypto disputes landscape, with the number and complexity of disputes increasing across numerous

²⁰ See *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

²¹ See, e.g., Victoria McKenzie, *Spain Says Energy Investor Award Violates EU Law*, Law 360 (Feb. 25, 2022), <https://www.law360.com/articles/1468384/spain-says-energy-investor-award-violates-eu-law>.

²² See Noémie Leprince-Ringuet, *Chile's enhanced climate plan sets an example for other countries*, World Resources Institute (July 7, 2020),

<https://www.wri.org/insights/chiles-enhanced-climate-plan-sets-example-other-countries>; Joseph Winters, *Colombia's new president wants to phase out fossil fuels*,

The Beacon (June 23, 2022), <https://grist.org/beacon/colombias-new-president-wants-to-phase-out-fossil-fuels/>.

²³ See Elizabeth Meager, *Renewables at risk from Mexico reforms but lawsuits planned*, Capital Monitor (Apr. 20, 2022), <https://capitalmonitor.ai/institution/government/mexico-energy-reforms-hit-renewables/>.

²⁴ See *Latam Hydro LLC and CH Mamacocha SRL v. Peru*, ICSID Case No. ARB/19/28. Following a hearing in March 2022, a decision is likely in 2023.

jurisdictions, including many arbitrations, since arbitration clauses are often included in the terms and conditions of major crypto platforms.

As cryptocurrency is a novel sector, arbitrations initiated in 2023 and beyond are likely to raise new and interesting legal issues mainly arising from the delocalized nature of crypto, including as to:

- Determining the arbitrability of disputes when the proceedings present links to jurisdictions where cryptocurrency are restricted on public policy grounds, such as India, Russia, and China.²⁵
- Identifying the parties to the dispute and their role, due to the opaque manner in which crypto businesses are sometimes organized and the often vague terms of the user's agreements.
- Determining the law applicable to crypto transactions, given the delocalized nature of blockchain.
- Enforcing awards and securing interim measures against crypto-assets, given their virtual nature and the pseudonymity that surround them.²⁶

One notable crypto dispute that has received much attention and is likely to continue to captivate the arbitration community in 2023 is the Binance case, in which hundreds of users have initiated arbitration against the world's largest cryptocurrency exchange pursuant the HKIAC arbitration clause in Binance's

terms of use, alleging losses stemming from a widespread service outage in May 2019 that left users unable to exit their positions as cryptocurrency prices plummeted in real time.²⁷ A major challenge in this case is apparently that Binance claims to be a decentralized entity that has no official headquarters and there is no clear indication as to which of the several Binance entities control and are responsible for the platform's operations, which has presented issues for determining which jurisdiction and regulation applies to Binance's activities.²⁸

Another notable crypto dispute is *Bielski v. Coinbase*, which the U.S. Supreme Court granted *certiorari* to review in its 2023 term. The parties' dispute in this case arose after two now-former Coinbase users filed class action lawsuits against Coinbase, a large cryptocurrency exchange platform, and Coinbase moved to compel arbitration based on the arbitration clause in its User Agreement.²⁹ The District Court for the Northern District of California denied Coinbase's motion,³⁰ and the Ninth Circuit affirmed, underscoring a Circuit split as to whether litigation is automatically stayed pending a party's appeal of an order denying a motion to compel arbitration.³¹

The Supreme Court will resolve this Circuit split when it considers the question of whether, under Section 16(a) of the Federal Arbitration Act, a party seeking arbitration may file an immediate interlocutory appeal that results in a stay of litigation

²⁵ For example, in 2018, the Intermediate People's Court of Shenzhen in China set aside an arbitration award rendered in a crypto dispute concerning Bitcoin because the redemption, trading, and circulation was found to be prohibited in China, and the award was thus against public interest. *Gao Zheyu v. Shenzhen Yunsilu Innovation Dev. Fund Enter. (L.P.) and Li Bin*, Yue 03 Min Te No. 719 (Shenzhen Interim People's Ct. 2018).

²⁶ For example, in 2022, the English High Court granted an interim freezing injunction to prevent defendants from disposing of the crypto assets that they had subtracted from the plaintiff by means of fraudulent misrepresentation. *D'Aloia v. Person Unknown & Others* [2022] EWHC (Ch) 1723 (Eng.).

²⁷ See Sean McCarthy and Sophie Nappert, *The Impending Binance Arbitration: a Primer on the World of Cryptocurrencies, Derivatives Trading and Decentralised Finance on the Blockchain*, Kluwer Arbitration Blog (Oct. 13, 2021), [http://arbitrationblog.kluwerarbitration.com/2021/10/13/the-impending-binance-arbitration-a-primer-on-the-world-](http://arbitrationblog.kluwerarbitration.com/2021/10/13/the-impending-binance-arbitration-a-primer-on-the-world-of-cryptocurrencies-derivatives-trading-and-decentralised-finance-on-the-blockchain/)

[of-cryptocurrencies-derivatives-trading-and-decentralised-finance-on-the-blockchain/](http://arbitrationblog.kluwerarbitration.com/2021/10/13/the-impending-binance-arbitration-a-primer-on-the-world-of-cryptocurrencies-derivatives-trading-and-decentralised-finance-on-the-blockchain/).

²⁸ *Id.*

²⁹ Petition for Writ of Certiorari, *Coinbase, Inc. v. Bielski* (No. 22-0105), 2022 WL 3107708 (U.S.).

³⁰ *Bielski v. Coinbase, Inc.*, No. C 21-07478 WHA, 2022 WL 1062049, at *8 (N.D. Cal. Apr. 8, 2022); *Suski v. Marden-Kane, Inc.*, No. 21-CV-04539-SK, 2022 WL 103541, at *9 (N.D. Cal. Jan. 11, 2022), *aff'd sub nom. Suski v. Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022).

³¹ *Bielski v. Coinbase, Inc.*, No. 22-15566, 2022 WL 3095991, at *1 (9th Cir. July 11, 2022); *Suski v. Coinbase, Inc.*, No. 22-15209, 2022 WL 3099846, at *1 (9th Cir. May 27, 2022). While six Circuits – the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits – have held that a non-frivolous appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction, thereby automatically staying proceedings, three Circuits – the Second, Fifth, and Ninth Circuits – have held the opposite.

before the district court.³² *Coinbase* also presents the first time that the Supreme Court has addressed a crypto-related case, and will likely have implications for companies that seek to compel enforcement of the arbitration provisions in federal district courts.

In addition to these cases, the boom and bust of cryptocurrency has also prompted calls for increased regulation and faster intervention by administrative bodies, which will likely impact disputes and enforcement in the future. For example, the European Union is expected to approve in early 2023 the Markets in Crypto-Assets Regulation (“MiCA”),³³ a comprehensive regulatory regime that features, *inter alia*, certain provisions aimed at protecting private clients investing in cryptocurrency, which might give rise to disputes with service providers. This harmonized framework will affect both legal and natural persons that are engaged in the issuance, offering, and admission to trading of crypto-assets and the provision of crypto-asset services.³⁴

4. Arbitration in Industries Based on or Affected by the COVID-19 Pandemic

While many industries appeared to return to some sense of normalcy in 2022, the impact of the COVID-19 pandemic will likely continue to drive disputes work in 2023. Indeed, COVID-19-related disruption affected normal operations of economic sectors including commercial aviation and health, often prompting state regulation and response, and also created new industries and commercial opportunities that may have lost significant value in recent months as the world attempts to move past the pandemic. Coupled with supply chain disruptions in 2021 and 2022, there may be an increase in commercial and investor-state arbitrations relating to the so-called “COVID-19-based economy” and policy changes

implemented by states in response to the pandemic. Whereas 2021 and 2022 did not see as many new disputes initiated as expected – possibly in part due to parties’ unwillingness to challenge such actions in a time of crisis – in what is rapidly becoming a post-pandemic world, parties may be more willing to make claims and initiate arbitration proceedings in 2023.

Two examples of such types of disputes arising from a state’s pandemic policies come from Chile, where state measures have prompted an ICSID arbitration and also pre-arbitration consultation processes. In *ADP and Vinci Airports v. Chile*,³⁵ investors that held an interest in Santiago’s main airport concession making them responsible for operation, renovation, and construction of terminals to increase the total capacity of passengers brought a US \$455 million dispute against Chile, alleging that the state’s re-negotiation of the concession precipitated by a drastic decrease in air passenger traffic in 2020 after the onset of the COVID-19 pandemic breached provisions on FET, national treatment, and protection against expropriation under the applicable BIT.³⁶ The case is still pending and it remains to be seen whether the tribunal will grant ADP and Vinci’s claims.

Also during the pandemic, Chile adopted a law granting Chileans access to more than 10% of funds they had previously paid to insurance companies for pension annuities in an effort to ease the economic hardship brought upon its citizens by COVID-19.³⁷ Several insurance companies, including ON Global Holdings (a subsidiary of Ohio Financial Services Company), Chilean Consolidated Life Insurance Company (a subsidiary of Zurich Insurance), Principal Financial Group, and Metlife Inc., began formal consultations with Chile alleging that the newly adopted regulation violates their right to FET and constitutes unlawful expropriation.³⁸ According

³² *Id.* at *1-2.

³³ Part of the Regulation is expected to come into force in the first half of 2023, following the final approval of the EU Parliament and the EU Council, while the entry into force of other provisions will be pushed to 2024.

³⁴ See *Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive*, COM(2020) 593 final (Sept. 24, 2020).

³⁵ *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile*, ICSID Case No. ARB/21/40.

³⁶ Jack Ballantyne, *Chile threatened over airport pandemic disruption*, GAR (Jan. 20, 2021), <https://globalarbitrationreview.com/chile-threatened-over-airport-pandemic-disruption>.

³⁷ Lisa Bohmer, *US-Based Insurer puts Chile on Notice of a Treaty-Based Dispute*, Investment Arbitration Reporter (May 14, 2021), <https://www.iareporter.com/articles/us-based-insurer-puts-chile-on-notice-of-a-treaty-based-dispute/>.

³⁸ See Tom Jones, *US insurer puts Chile on notice*, GAR (May 18, 2021),

to publicly available information, no arbitration has commenced yet.

How different arbitral tribunals will assess states' policy measures related to the pandemic remains an open question. While contractual counterparties and states may seek to invoke the defense of *force majeure*,³⁹ this defense has not always persuaded domestic courts analyzing similar cases.⁴⁰ Nevertheless, some courts acknowledge the consequences of the pandemic. For instance, in one case, the Southern District of New York found that COVID-19 qualifies as a "natural disaster" excusing the non-performance of a contract under *force majeure*.⁴¹ In this case, although the parties had not included "pandemics" as a *force majeure* event in their contract, the court reasoned that COVID-19 was the type of circumstances beyond the parties' control envisioned by the *force majeure* clause.⁴² The court found that COVID-19 was covered by the catch-all language of the clause, and was also covered by the inclusion of "natural disaster" as a *force majeure* event.⁴³

Another potential legal defense in arbitrations against COVID-19-related breaches or state measures is necessity.⁴⁴ States invoking the defense of necessity

may need to show, *inter alia*, that any measures taken responded to the need to protect an "essential interest."⁴⁵ Since most BITs are silent on the doctrine of necessity, states will have to invoke international custom as the source for their defense.

Perhaps unsurprisingly in the wake of the pandemic, recently negotiated BITs allow states more leeway to implement emergency measures, including by providing enhanced protection of the state's power to dictate policy in comparison to what pre-COVID BITs permitted.⁴⁶ To the extent that COVID-19-related cases are initiated in 2023 or in the future, states may be able to rely upon this language in order to help buttress their defenses, although the interpretation and practical application of this new language will present a novel challenge for arbitrators.

5. The Growing Impact of Sanctions on Russian Parties

While the impact of sanctions on international arbitration is not a new issue – the arbitration community has long contended with international sanctions on countries like Iran and Venezuela⁴⁷ – the unprecedented scale and scope of the sanctions on Russian parties imposed by the United States, the

<https://globalarbitrationreview.com/article/us-insurer-puts-chile-notice>; Cosmo Sanderson, *Second insurer threatens Chile over pension reforms*, GAR (June 16, 2021), <https://globalarbitrationreview.com/second-insurer-threatens-chile-over-pension-reforms>; Eduardo Thomson, *Insurers Threaten to Sue Chile Over Law That Forces Them to Return Annuity Funds*, Bloomberg (Oct. 14, 2021), <https://www.bloomberg.com/news/articles/2021-10-14/insurers-threaten-to-sue-chile-over-early-annuity-payments>; *MetLife Joins Insurers Warning Chile Over Early Annuity Payments*, Bloomberg Law (Oct. 21, 2021), <https://news.bloomberglaw.com/insurance/metlife-joins-insurers-warning-chile-over-early-annuity-payments>.

³⁹ Article 23(1) of the ILC Draft Articles relates to "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation." See Int'l Law Comm'n, on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

⁴⁰ For example, French courts have held that the pandemic does not make payment obligations impossible. See Cour de Cassation (Cass.), com., March 22, 2012, Bull. civ. IV, n°13-20.306.

⁴¹ *JN Contemporary Art LLC v. Phillips Auctioneers, LLC*, 507 F. Supp. 3d 490, 491 (S.D.N.Y. 2020).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pursuant to Article 25 of the ILC Draft Articles, "necessity" cannot be invoked "unless the act is the only way for the State to safeguard an essential interest against a grave and imminent peril." See Int'l Law Comm'n, on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

⁴⁵ See *National Grid P.L.C. v. Argentine Republic*, Ad Hoc Tribunal (UNCITRAL), Case No. 1:09-cv-00248-RBW, Arbitral Award, ¶245 (Nov. 3, 2008) (accepting the protection of social stability and the maintenance of essential services vital to the health and welfare of the population as an "essential interest").

⁴⁶ Ronald Labonte, *Pandemic Responses and the Threat of Investor-State Disputes*, 2021 Prince Mahidol Awards Conference, Thailand, Nov. 4, 2020.

⁴⁷ See Cosmo Sanderson, *US sanctions authority clears Korea to pay Iranian award*, GAR (Jan. 12, 2022),

<https://globalarbitrationreview.com/us-sanctions-authority-clears-korea-pay-iranian-award>; Sebastian Perry, *Venezuelan state entity dodges ICSID enforcement in Singapore*, GAR (July 20, 2022), <https://globalarbitrationreview.com/article/venezuelan-state-entity-dodges-icsid-enforcement-in-singapore>.

United Kingdom, and the European Union, among other jurisdictions, in response to the military conflict in Ukraine in March 2022⁴⁸ deserves renewed attention as it is certain to leave a footprint on 2023.

In international arbitration, sanctions most commonly affect (1) the initiation of arbitration; (2) the ability of arbitrators, arbitral institutions, and parties to participate in arbitral proceedings; and (3) the enforcement of arbitral awards.

First, sanctions may create an impetus for parties to initiate arbitration, such as when companies stop performing their contracts to comply with an international sanctions regime. For example, RusChemAlliance (a Gazprom venture) recently announced that it intends to pursue a billion-euro HKIAC arbitration against Linde (a German multinational corporation), after the latter had suspended operations to construct a gas processing plant in the Baltic Sea to comply with international sanctions against Russia.⁴⁹

If history is any indication, 2023 may experience an influx of arbitrations initiated by non-Russian investors against Russia for claims of expropriation.⁵⁰ More recently, ExxonMobil has reportedly reserved its right to pursue arbitration against Russia for an alleged expropriation of its multibillion-dollar oil and gas Sakharin-1 project, following the issuance of decrees by Russia to seize shares in the project and transfer them to a state-controlled company after

ExxonMobil halted production in May 2022 to comply with international sanctions.⁵¹

Second, sanctions may raise practical difficulties with respect to the ability of arbitrators, arbitral institutions, or parties themselves to participate in an arbitration proceeding. For instance, a Canada-seated tribunal acting in a PCA arbitration brought by Nord Stream 2 AG (a Swiss subsidiary of Gazprom) against the EU under the ECT vacated a hearing set for June 2022 after the U.S. government levied financial sanctions against Nord Stream 2 AG, because the entity was “unable to make any payments or access finance.”⁵²

In addition, not all arbitral institutions may administer arbitrations involving sanctioned entities or, if they do, generally need to obtain licenses or take other administrative steps.⁵³ Therefore, while sanctions and parties’ inability to operate under pre-existing commercial contracts may lead to disputes, the practical difficulties of doing so when certain entities are subject to sanctions is likely to continue into 2023 as these issues, and sanctions, persist. Some arbitral institutions are already taking administrative steps to address these difficulties. For example, the LCIA – one of the only institutions with rules that address sanctions⁵⁴ – obtained a license in October 2022 from the UK’s Office of Financial Sanctions Implementation to process payments from parties subject to certain sanctions against Russia and Belarus.⁵⁵

⁴⁸ Cleary Gottlieb Alert Memorandum, *Sanctions Developments Resulting From the Conflict in Ukraine* (Oct. 13, 2022), <https://www.clearygottlieb.com/news-and-insights/publication-listing/sanctions-developments-resulting-from-the-geopolitical-conflict-in-ukraine>; Cleary Gottlieb Alert Memorandum, *Russia and Beyond: Sanctions Developments and Lessons for Boards from 2022* (Jan. 17, 2023), <https://www.clearygottlieb.com/news-and-insights/publication-listing/russia-and-beyond-sanctions-developments-and-lessons-for-boards-from-2022>.

⁴⁹ *Ruskhimalliance v. Linde GmbH*, Case No. A56-129797/2022, Arbitration Court of St. Petersburg and the Leningrad Region (Dec. 30, 2022), https://media.licdn.com/dms/document/C4E1FAOEDUJyZvnlnPw/feedshare-document-pdf-analyzed/0/1672925900564?e=1674691200&v=beta&t=91gJh20Pxzo2sn_mF-cC2woseGKT20pOgNzvs1PNT0; Susannah Moody, *Russian Court Freezes German Assets Ahead of Billion-Euro Gas Arbitration*, GAR (Jan. 4,

2023), <https://globalarbitrationreview.com/article/russian-court-freezes-assets-ahead-of-billion-euro-gas-arbitration>. On December 30, 2022, a Russian court froze nearly US \$500 million of Linde’s assets after RusChemAlliance argued that EU sanctions would make recovery of a subsequent arbitral award “virtually impossible.” *Id.*

⁵⁰ See, e.g., *Naftogaz and others v. The Russian Federation*, PCA Case No. 2017-16.

⁵¹ Jack Ballantyne, *Will Exxon bring a claim against Russia?*, GAR (Nov. 2, 2022), <https://globalarbitrationreview.com/article/will-exxon-bring-claim-against-russia>.

⁵² *Nord Stream 2 AG (Switzerland) v. The European Union*, PCA Case No. 2020-07 at 2.

⁵³ Katie McDougall and James Rogers, *Impact of International Arbitration Report at 18* (Norton Rose Fulbright, issue 18, 2022).

⁵⁴ See LCIA Rules, Art. 24A.10.

⁵⁵ OFSI, *LCIA Arbitration Costs*, INT/2022/1552576 (Oct. 17, 2022). On July 21, 2022, the Council of the

Finally, sanctions may create obstacles for the enforcement of an arbitration award. One of the grounds under which a national court may refuse enforcement of an arbitral award under the New York Convention is that it “would be contrary to the public policy of that country.”⁵⁶ While courts in sanctioning countries have in the past held that the public policy to enforce an arbitral award outweighed the public policy opposing enforcement with respect to a sanctioned entity,⁵⁷ the fact that recent sanctions are based on the use of military force may tip that balance the other way.⁵⁸ Making matters more complicated, since June 2020, an amendment to the Russian Arbitrazh Procedure Code enables Russian commercial courts to claim exclusive jurisdiction over disputes involving entities subject to Russia-related sanctions.⁵⁹

Moreover, asset freezes, often an integral part of sanctions regimes, make seizing assets in satisfaction of an arbitration award a complicated affair. For example, following a November 2021 Court of Justice of the European Union finding that a creditor of a sanctioned entity was precluded from seeking enforcement without prior authorization from the competent national authority,⁶⁰ in September 2022 the French Court of Cassation issued rulings in line with that decision.⁶¹ On the other hand, sanctions can help parties identify assets by flagging assets in sanctioning states, but a party’s ability to obtain those assets remains difficult when they are blocked.

European Union issued a decision exempting arbitral institutions “from the prohibition to enter into any transactions with Russian public entities necessary to ensure access to . . . arbitral proceedings.” Council of the EU No. 2022/1271 of 21 July 2022, 2022 O.J. (L 193) 200. However, legal and practical difficulties in arbitrating with parties subject to Russian sanctions remain. See, e.g., Mercédeh Azeredo da Silveira and Stephan den Hartog, *The EU’s Clarification on Access to Arbitration in its Seventh Package of Sanctions Against Russia: Trivial or Consequential?* Kluwer Arbitration Blog (Aug. 16, 2022), <https://arbitrationblog.kluwerarbitration.com/2022/08/16/the-eu-clarification-on-access-to-arbitration-in-its-seventh-package-of-sanctions-against-russia-trivial-or-consequential/>.

⁵⁶ New York Convention, Art. V(2)(b).

⁵⁷ See Tom Cummins *et al.*, *Economic Sanctions: Implications for International Arbitration*, GAR (Apr. 19, 2017), <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration->

Seizing sanctioned property will likely require extensive authorization processes and waiting in a queue of creditors.⁶²

Sanctions are likely to affect arbitration proceedings well into 2023 by influencing substantive matters of disputes as well as by creating procedural hurdles to arbitral proceedings and the enforcement of awards.

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[review/2017/article/economic-sanctions-implications-international-arbitration](https://www.clearlygottlieb.com/news-and-insights/publication-listing/sanctions-developments-resulting-from-the-geopolitical-conflict-in-ukraine-russia).

⁵⁸ See *supra* note McDougall & Rogers at 18.

⁵⁹ *Id.*; Cleary Gottlieb Alert Memorandum, *Sanctions Developments Resulting From the Conflict in Ukraine – Russia* (Aug. 22, 2022),

<https://www.clearlygottlieb.com/news-and-insights/publication-listing/sanctions-developments-resulting-from-the-geopolitical-conflict-in-ukraine-russia>.

⁶⁰ *Bank Sepah v. Overseas Financial Limited & Oaktree Finance Limited*, Court of Justice of the European Union, Case No. C-340/20 (Nov. 11, 2021).

⁶¹ Cour de cassation (Cass.), 1^e civ., September 7, 2022, Bull. civ. I, No. 19-21.964; Cour de cassation (Cass.), 1^e civ., September 7, 2022, Bull. civ. I, No. 19-25.108.

⁶² See, e.g., Caroline Simson, *PDVSA Creditor Owed \$166M Sets Sights On Citgo*, Law 360 (Nov. 1, 2022), <https://www.law360.com/articles/1545532/pdvs-a-creditor-owed-166m-sets-sights-on-citgo>.