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Foreword

We are delighted to present this collection of articles on "The Future of Swiss Arbitration," a project borne out of a joint initiative by Jus Mundi and the Swiss Very Young Arbitration Practitioners (Swiss VYAP) mentoring programme.

This publication has been possible thanks to the efforts of Jus Mundi, which has provided valuable editorial guidance and an exceptional platform for the articles, and to the talented authors, who have shared their experiences and perspectives in each article.

The Swiss VYAP mentoring programme is an initiative designed to foster the professional development of junior to mid-level arbitration practitioners. It aims to help younger arbitration lawyers develop their profiles and gain meaningful insights from more senior practitioners acting as group mentors. The first edition of the Swiss VYAP mentoring programme was launched in 2022 with this joint publication as a final project.

Under the guidance of experienced mentors, six groups of young arbitration lawyers have embarked on a comprehensive exploration of the evolving landscape of Swiss arbitration, delving into the latest developments and offering their perspectives on the future trajectory of this dynamic field. The articles within this collection address a diverse range of topics, reflecting the breadth and depth of current issues in Swiss arbitration. They examine recent jurisprudence from the Swiss Federal Supreme Court on setting aside and revision proceedings, explore the emerging complexities of third-party funding and its impact on arbitration costs, analyse the intricacies of arbitrating corporate disputes, assess the influence of sanctions on international arbitration proceedings, scrutinize the potential implications of price caps on gas pricing and impossibility of performance, and dissect the nuances of interim measures in arbitration.

We applaud the remarkable contributions of the authors, who have skilfully navigated the demanding workloads and commitments of their respective legal careers to produce this outstanding collection of articles.

We hope this collection sparks dialogue and inspires further exploration of these fascinating topics.

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Jurisprudence of the Swiss Federal Supreme Court in Setting Aside and Revision Proceedings Involving Investment Arbitration Awards (2020 to 2022): Strengthening Switzerland as a Pro-arbitration Jurisdiction

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As a pro-arbitration jurisdiction, Switzerland is one of the leading seats for non-ICISD investment arbitration. In the period from 2020 to 2022, the Swiss Federal Supreme Court ("SFSC") had the opportunity to examine several requests to set aside and/or revise such investment awards. The SFSC's decisions over the last two years confirm that the rate of setting aside and revision of investment arbitration awards in Switzerland is very low. This is in line with the trend observed in previous years: to date, the SFSC has heard fewer than 30 annulment and revision applications in connection with investment arbitration awards, of which only one resulted in a successful annulment.

This contribution provides an overview of the SFSC's decisions in setting aside and revision proceedings of non-ICSID investment awards from 2020 to 2022. These decisions have not only developed the SFSC's jurisprudence on investment law, but also reinforce Switzerland as a safe and preferable seat for investment arbitration.

I. Introduction

A Swiss seat is often selected for investment arbitration proceedings which fall outside of the institutional arbitration proceedings administered by the International Centre for Settlement of Investment Disputes ("ICSID"). Such investment awards are increasingly subject to setting aside and revision applications before Switzerland's highest court, the Swiss Federal Supreme Court ("SFSC"). However, the threshold in Switzerland for setting aside or revising international arbitral awards, including investment arbitration awards, is extremely high. The SFSC has heard fewer than 30 setting aside and revision applications in investment arbitration proceedings. Of these applications, only one has been successful.

This contribution begins by examining the limited grounds to set aside and revise international arbitral awards in Switzerland (**Section II**). The authors then analyse a selection of the SFSC's key decisions on setting aside and revision applications between 2020 and 2022 to explore the complex legal and procedural issues that arise in such proceedings (**Section III**). The authors conclude that these decisions reinforce the deference that the SFSC accords to arbitral tribunals in their arbitral awards, and further develops the SFSC's jurisprudence on investment law, all of which are likely to strengthen Switzerland as a preferred seat for non-ICSID investment arbitration (**Section IV**).

II. Contextualising Switzerland's Approach to Setting Aside and Revision Proceedings

The principle that arbitral awards are final is enshrined in Swiss law.[2] Unlike in other jurisdictions which provide for appellate review of the decision on the challenge of an award (such as Germany, France or England), Article 191 of the Swiss Private International Law Act ("PILA") ascribes to the SFSC the sole authority to set aside international arbitral awards. As a result, Switzerland is one of the few jurisdictions with only one level of judicial review of such awards.

1 The opinions expressed in this publication are the authors' own. They do not purport to reflect the opinions or views of their employers or affiliated institutions.

2 Swiss Private International Law Act ("PILA"), 1987, Art. 190(1).

Parties may agree, in an arbitration agreement or by subsequent agreement, to waive, in whole or in part, the right to challenge any international arbitral awards rendered thereunder if none of them has their domicile, habitual residence, or seat in Switzerland.[3] The SFSC has clarified that this waiver must be explicit,[4] and is not applicable in sports arbitration.[5]

A decision of the SFSC can only be challenged before the European Court of Human Rights in an action against Switzerland for a violation of the European Convention on Human Rights.[6]

Accordingly, Switzerland has become one of the leading seats for non-ICSID investment arbitration due to its arbitration-friendly legislation and the pro-arbitration approach adopted by the SFSC.[7]

In this section, the authors examine the limited scope of the SFSC's powers to set aside (**A**) and review (**B**) arbitral awards.

A. Limited Grounds to Set Aside International Arbitral Awards

A party with standing to set aside an international arbitral award must do so within 30 days of its issuance,[8] and may only do so on limited, exhaustive grounds set out in Article 190(2) of the PILA, namely, that:

the arbitral tribunal was irregularly constituted, or a sole arbitrator was improperly appointed;[9]

- the arbitral tribunal wrongly accepted or declined jurisdiction;[10]
- the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;[11]
- there is a violation of the right to be heard or the principle of equal treatment of the parties;[12] or
- the award is incompatible with public policy.[13]
- "Preliminary" (or interim) awards can only be challenged on the first two grounds.[14] An application to set aside an arbitral award based on grounds outside of Article 190(2) will be inadmissible.[15]

The SFSC typically issues between 30 and 50 setting aside decisions annually on challenges to international arbitration awards rendered in relation to international commercial, investment and sports disputes.[16] According to a statistical analysis carried out by Dasser and Wójtowicz between 1989 and 2021, only **7.65%** of appli-

3 PILA, Art. 192(1).

4 Whether parties have waived the right to challenge an arbitral award made under their arbitration agreement depends on whether the parties have expressed an unambiguous intention, in writing and read in good faith, to exclude any legal remedy or recourse to any State bodies against a future award, even if the particular legal concepts ("recourse", "appeal", "revision") are not used consistently with their technical legal meaning: see Decision of the Swiss Federal Supreme Court ("SFSC") 4A_382/2021, 24 September 2021 and Decision of the SFSC 4A_577/2013, 3 April 2014.

5 Decision of the SFSC 133 III 235 (4P.172/2006), 22 March 2007, paras. 4.3-4.4 (cited recently in Decision of the SFSC 4A_248/2019, 25 August 2020, paras. 4.2.2-4.2.4). See also G. Bovey, *Article 77*, in F. Girandin et al. (eds.), *Commentaire de la LTF* (3rd ed., 2022), p. 919; C. Müller and S. Pearson, *Swiss Case Law in International Arbitration (3rd ed., 2019), pp. 63-64.*

6 See *e.g.*, Decision of the SFSC 4A_618/2020, 2 June 2021, para. 4.1; Decision of the SFSC 4A_486/2019, 17 August 2020, para. 4.1.

7 See *e.g.*, D. Girsberger and N. Voser, *International Arbitration* (4th ed., 2021), p. 603; M. Scherer, V. Heiskanen and S. Moss, *Domestic Review of Investment Treaty Arbitrations: The Swiss Experience*, 2009(2) ASA Bull., p. 257.

8 A party must have standing to pursue setting aside proceedings as provided for in the Swiss Federal Supreme Court Act ("SSCA"), 2005, Art. 76(1). If so, a party must commence such proceedings within 30 days of the communication of the award: see PILA, Art. 190(4).

9 PILA, Art. 190(2)(a).

10 PILA, Art. 190(2)(b).

11 PILA, Art. 190(2)(c).

12 PILA, Art. 190(2)(c).

13 PILA, Art. 190(2)(e).

14 PILA, Arts. 190(2)(a), 190(2)(b), 190(3).

15 PILA, Art. 190(2) read with SSCA, Art. 77(1)(a).

16 F. Dasser and P. Wójtowicz, *Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2019*, 2021(1) ASA Bull., p. 11.

cations to set aside awards that the SFSC heard on the merits led to the successful annulment of the awards in question.[17]

The same trend can be observed in setting aside proceedings of investment arbitration awards: the SFSC has heard fewer than 30 setting aside and/or revision applications in investment-treaty arbitration proceedings since 2000,[18] of which only **one** application has been successful.[19] These statistics illustrate that the SFSC's approach to challenge applications is stringent and, consequently, inherently arbitration-friendly.

The SFSC has full power of review over legal issues; in particular, challenges to an arbitral tribunal's decision on jurisdiction (including questions of interpretation of the notions of investor and investment, umbrella clauses, illegality, *etc.*).[20] When interpreting investment protection treaties, the SFSC relies on customary international law rules on treaty interpretation as reflected in the Vienna Convention on the Law of Treaties (1969).[21]

However, the SFSC's power to review an arbitral tribunal's factual findings is limited. The SFSC considers itself bound by an arbitral tribunal's findings of fact, even if such findings are manifestly wrong or are raised in the context of a party's challenge of an award on grounds of jurisdiction. The SFSC will only review factual findings where (i) an applicant has raised grounds for a challenge under Article 190(2) of the PILA and that challenge refers to the way the arbitral tribunal established a specific fact, *e.g.*, through a violation of fundamental procedural guarantees (Article 190(2)(d)) or procedural public policy (Article 190(2)(e)); or (ii) there are new facts that the SFSC is exceptionally required to consider (*e.g.* in the case of revision proceedings analysed below).[22]

B. Limited Grounds to Revise International Arbitral Awards

In certain, exceptional circumstances, parties may request revision of an international arbitral award on three limited grounds set out in newly adopted Article 190a of the PILA, effective from 1 January 2021; namely, where:

- a party subsequently discovers material facts or conclusive evidence that existed before the award was issued and which, despite the exercise of due diligence, a party was unable to produce in the arbitration proceedings;[23]

17 *Ibid*, p. 15.

18 To date, the SFSC has rendered 26 decisions in proceedings to set aside and/or to revise investment arbitration awards: see *Poland v. Saar Papier Vertriebs GmbH* (Decision of the SFSC 1P.113/2000, 20 September 2000); *Saar Papier Vertriebs GmbH v. Poland* (Decision of the SFSC 4P.200/2001, 1 March 2002); *Lebanon v. France Télécom Mobiles International S.A. & FTLM S.A.L.* (Decs. of the SFSC 4P.98/2005 and 4P.154/2005, 10 November 2005); *Czech Republic v. Saluka Investments B.V.* (Decision of the SFSC 4P.114/2006, 7 September 2006); *Hungary v. EDF International S.A.* (Decision of the SFSC 141 III 495 (4A_34/2015), 6 October 2015); *Recofi S.A. v. Vietnam* (Decision of the SFSC 4A_616/2015, 20 September 2016); *Russian Federation v. Yukos Capital Limited* (Decision of the SFSC 143 III 495 (4A_98/2017), 20 July 2017); *Poland v. Hortel Systems B.V. et al.* (Decision of the SFSC 4A_157/2017, 14 December 2017); *Serbia v. Mytilineos Holdings S.A.* (Decision of the SFSC 4A_507/2017, 15 February 2018; the SFSC was not ultimately required to decide on the setting aside application as the parties settled); *Russian Federation v. PJSC Ukrnafta and Russian Federation v. Stabil LLC et al.* (Decs. of the SFSC 144 III 559 (4A_396/2017) and 4A_398/2017, 16 October 2018); *Croatia v. MOL Hungarian Oil and Gas Company Plc* (Decision of the SFSC 4A_53/2017, 17 October 2017); *India v. Deutsche Telekom A.G.* (Decision of the SFSC 4A_65/2018, 11 December 2018); *Russian Federation v. PJSC Ukrnafta* and *Russian Federation v. Stabil LLC et al.* (Decs. of the SFSC 4A_244/2019 and 4A_246/2019, 12 December 2019); *Natland Investment Group N.V. et al. v. Czech Republic* (Decision of the SFSC 4A_80/2018, 7 February 2020); *Clorox Spain S.L. v. Venezuela* (Decision of the SFSC 4A_306/2019, 25 March 2020); *Mr. Gokul Das Binani and Mrs. Madhu Binani v. Macedonia* (Decision of the SFSC 4A_156/2020, 1 October 2020); *Etrak İnşaat Taahut ve Ticaret Anonim Sirketi v. Libya* (Dec. 4A_461/2019, 2 November 2020); *Spain v. AES Solar Energy Cooperatief U.A. and others (PV Investors)* (Decision of the SFSC 4A_187/2020, 23 February 2021); *Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria* (Decision of the SFSC 4A_516/2020, 8 April 2021); *Venezuela v. Clorox Spain S.L.* (Decision of the SFSC 4A_398/2021, 20 May 2022); *Russian Federation v. Yukos Capital Limited* (Decision of the SFSC 4A_492/2021, 24 August 2022); *Croatia v. MOL Hungarian Oil and Gas Company Plc* (Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022); and *India v. Deutsche Telekom A.G.* (Decision of the SFSC 4A_184/2022, 8 March 2023). See also D. Girsberger and N. Voser, *International Arbitration* (4th extended ed., 2021), p. 605.

19 Decision of the SFSC 4A_306/2019, 25 March 2020.

20 See C. Kunz, *Review of the Recent Case Law of the Swiss Federal Supreme Court*, in C. Müller et al. (eds.), *New Developments in International Commercial Arbitration 2020*, 2020, p. 146 (referring to *e.g.*, Decision of the SFSC 144 III 559 (4A_396/2017), 16 October 2018, para. 4; Decision of the SFSC 4A_398/2017, 16 October 2018, para. 4).

21 *Ibid* (referring to *e.g.*, Decision of the SFSC 4A_65/2018, 11 December 2018, para. 2.4.1).

22 See *e.g.*, Decision of the SFSC 4A_461/2019, 2 November 2020, para. 2.4; Decision of the SFSC, 4A_174/2021, 19 July 2021, para. 5.1; Decision of the SFSC 4A_564/2020, 7 June 2021, para. 4.1; Decision of the SFSC 4A_80/2018, 7 February 2020, para. 2.3.

23 PILA, Art. 190a(1)(a).

- the outcome of an arbitral award has been influenced by criminal conduct;[24] and/or
- circumstances give rise to a legitimate doubt as to a member of the arbitral tribunal's independence or impartiality which came to light only after the conclusion of the arbitration proceedings, despite the exercise of due diligence.[25]

The above grounds apply to requests for revision filed after 1 January 2021, even if the challenged award was issued before that date.[26] The second ground above is not waivable under Swiss law.

A request for revision under Article 190a of the PILA must be filed within 90 days of discovering the ground for revision, and, in any case, no later than ten years from the date on which the award was communicated.[27] If the SFSC upholds a request for revision, it will set aside the award and remand the matter to the arbitral tribunal for it to render a new award.[28]

Between 2020 and early 2023 (*i.e.*, slightly beyond the reporting period), the SFSC considered requests for revision of investment arbitration awards based on Article 190a PILA in two cases: *Croatia v. MOL Hungarian Oil and Gas Company Plc*[29] and *India v. Deutsche Telekom*.[30] These cases, which are further considered in **Section III.A** below, illustrate the limited circumstances in which revision can be invoked. Therefore, it is unlikely that this remedy will have a negative impact on Switzerland as a preferred seat of international arbitration, including in relation to investment disputes.

III. Complex Procedural and Substantive Issues Arising out of Setting Aside and Revision Proceedings in Switzerland between 2020 and 2022

Between 2020 and 2022, the SFSC rendered several important decisions in setting aside and revision proceedings of investment arbitration awards. Among the most notable decisions is the SFSC's decision in *Russian Federation v. Yukos Capital Limited* (the longest decision published in the context of setting aside proceedings in Switzerland to date),[31] in which the SFSC clarified several issues of Swiss procedural law and public international law that will be relevant to future setting aside proceedings before the SFSC. Another landmark decision is the *SFSC's annulment of the Clorox Spain S.L. v. Venezuela award*,[32] which is the first – and only – annulment of an international investment arbitral award in Switzerland to date.

In this section, the authors analyse a number of procedural (**A**) and substantive (**B**) issues that have arisen in setting aside and revision proceedings between 2020 and early 2023 (*i.e.*, slightly beyond the reporting period).

A. Procedural Issues

The SFSC has recently considered a number of procedural issues arising in the context of setting aside and revision proceedings; namely, whether revision can be invoked in the presence of an express waiver of an "appeal" against arbitral awards (**1**), or on the basis of new material evidence or evidence that the final award had been influenced by criminal conduct (**2**). The SFSC has also considered whether a preliminary award on jurisdiction in the form of a procedural order can be set aside (**3**), and whether new evidence is admissible in

24 PILA, Art. 190a(1)(b).

25 PILA, Art. 190a(1)(c).

26 See *e.g.*, Decision of the SFSC 4A_184/2022, 8 March 2023, para. 2.2.

27 PILA, Art. 190a(2). One exception is where a criminal offence is the ground for revision, in which case the ten-year deadline does not apply: see PILA, Art. 190a(2) and Art. 190a(1)(b).

28 H.-P. Schroeder and W. Junge, *Supreme Court Jurisprudence on Arbitration in Switzerland 2020-2021*, 20(4) German Arbitration Journal (SchiedsVZ), 2022, p. 218 (referring to Decision of the SFSC 118 II 199, 11 March 1992, para. 3). See also Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022, para. 3.2.

29 Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022.

30 Decision of the SFSC 4A_184/2022, 8 March 2023.

31 Decision of the SFSC 4A_492/2021, 24 August 2022.

32 Decision of the SFSC 146 III 142 (4A_306/2019), 25 March 2020.

setting aside and revision proceedings (**4**).

1. Waiver of a Challenge or Revision of an Arbitral Award

As explained above,[33] parties with their domicile, place of habitual residence, or seat outside of Switzerland may explicitly waive the right to challenge, or request revision of, an arbitral award.

In *Croatia v. MOL Hungarian Oil and Gas Company Plc*,[34] considered in further detail below, the SFSC considered whether a waiver of appeal against a final international arbitral award also precluded revision of that award under Article 190a of the PILA, which is a question of interpretation.[35] The waiver clause in that case read as follows:

> *"Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder."*[36]

The SFSC declared the request for revision inadmissible,[37] ruling that the parties' broad and explicit waiver of appeal constituted a corresponding waiver of revision.[38] In so holding, the SFSC reaffirmed its earlier case law that the term "appeal", on a broad interpretation, is a generic term that encompasses most diverse legal grounds, and on a more prescriptive interpretation, is synonymous with the term "revision".[39]

Accordingly, the SFSC will interpret a broad waiver clause as excluding all forms of recourse against an arbitral award unless the parties specify, with reference to the relevant sub-paragraphs of the PILA, which recourse is intended to be excluded.[40]

2. Revision of an Award Based on New Material Evidence or Evidence that the Final Award Had Been Influenced by Criminal Conduct

The SFSC has issued two decisions in respect of applications to revise international investment awards in the reporting period. In both cases, the applications for revision were denied. However, the SFSC provided observations on the admissibility and merits of the applications.

In *Croatia v. MOL Hungarian Oil and Gas Company Plc* (discussed above in the context of the waiver), Croatia sought revision of a 2016 final award pursuant to Articles 190a(1)(a) and 190a(1)(b) of the PILA on the basis that new evidence – namely, a 2021 decision of the Croatian Supreme Court which found that the former Croatian Prime Minister had accepted a bribe from the respondent's CEO in connection with the conclusion of the investment agreements in dispute in the arbitration – had come to light, and that this new evidence evinced that the award had been influenced by criminal conduct.[41]

The SFSC held that revision under Article 190a(1)(a), *i.e.*, where a party subsequently discovers material facts or conclusive evidence that existed before the award was issued and which, despite the exercise of due diligence,[42] was inadmissible in light of the broad and explicit waiver of revision discussed above.[43] In any event, the SFSC held, the 2021 Croatian Supreme Court decision was based on evidence which had been heard by the

33 See Section II above.

34 Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022.

35 *Ibid*, para. 4.3.3.

36 *Ibid*, para. 4.3.1.

37 *Ibid*, para. 4.3.

38 *Ibid*, para. 4.3.3.

39 *Ibid*.

40 Such a partial waiver is allowed under Swiss law: see Art. 192(1) PILA. See also *Ibid*.

41 Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022, para. C.

42 See also Section II.B above.

43 Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022, para. 4.5. See also Section III.A.1 above.

lower instance court in Croatia, which proceedings had concluded in 2019.[44] Therefore, Croatia was aware of the "new" evidence long before the publication of the decision in 2021.[45] Accordingly, the request for revision had not been filed within 90 days of the alleged evidence coming to light, as required in Article 190a(2) of the PILA.[46] Thus, the SFSC observed, Croatia would not have succeeded in grounding a request for revision under Article 190a(1)(a) in any event, as the evidence came into existence after the award was issued.[47]

As regards the second ground for revision under Article 190a(1)(b), *i.e.*, where the outcome of an arbitral award has been influenced by a criminal offence,[48] the SFSC considered that arbitral tribunals are not bound by decisions of State criminal courts on the same set of facts, and that inconsistent findings between the former and the latter are not enough to trigger Article 190a(1)(b) unless the State criminal court's decision is material to the arbitral tribunal's findings in its final award.[49]

In *India v. Deutsche Telekom*,[50] India sought revision of a 2017 interim award (establishing the arbitral tribunal's jurisdiction and finding that the respondent breached the standard of the fair and equitable treatment under the BIT in question) and a 2020 final award on the basis that it had discovered new facts and evidence; namely, a 2022 decision of the Supreme Court of India that suggested that the investment in question was made unlawfully (India invoked Article 190a(1)(a) of the PILA).[51] The SFSC held that India's request for revision was inadmissible in respect of each award.[52]

As to India's request for revision of the interim award, the SFSC confirmed that applications for revision can be filed against final, partial or interim awards, provided that the challenged decision is binding on the arbitral tribunal (*i.e.*, the decision cannot be subsequently amended by the arbitral tribunal, unlike, for instance, procedural orders or decisions on provisional measures).[53] However, in this case, the SFSC had previously dismissed India's application to set aside the interim award.[54] In these circumstances, a request for revision lay not against the interim award, but rather, the SFSC's decision dismissing India's challenge of this award,[55] as only the latter decision is final and binding in the Swiss legal order.[56]

As regards India's request for revision of the final award, the SFSC did not consider the 2022 decision of the Supreme Court of India to constitute "new" facts or evidence going to the legality of the investment, as the facts and evidence had already been established by quasi-judicial tribunals of lower instances, of which India had knowledge.[57] For the SFSC, it was immaterial whether the decisions of quasi-judicial bodies on the facts and evidence were final or not, as the decisive factor was India's knowledge of subsequently discovered material facts and not the authoritative determination by a judicial authority.[58] In any case, the evidence came into existence after the award was issued.[59]

Therefore, India's request for revision under Article 190a(1)(a) of the PILA failed.

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44 Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022, para. 4.2.

45 *Ibid.*

46 *Ibid*, para. 4.2.

47 *Ibid*, para. 4.4.

48 See also Section II.B above.

49 Decision of the SFSC 148 III 436 (4A_69/2022), 23 September 2022, para. 5.4.

50 Decision of the SFSC 4A_184/2022, 8 March 2023.

51 *Ibid*, paras. B-C, 4, 4.2.

52 *Ibid*, para. 5.

53 *Ibid*, para. 3.2.

54 *Ibid* (referring to Decision of the SFSC 4A_65/2018, 11 December 2018).

55 *Ibid*, para. 3.3.

56 *Ibid.*

57 *Ibid*, para. 4.3.

58 *Ibid*. The SFSC's argumentation on this point has been questioned: see N. Cleis, *Awards in Deutsche Telekom v. India Upheld in Switzerland*, 9 June 2023 (available at https://www.walderwyss.com/user_assets/publications/230609_dRSK-Deutsche-Telekom_Nicole-Cleis.pdf), paras. 16-18.

59 *Ibid.*

To sum up, *Croatia v. MOL Hungarian Oil and Gas Company Plc* and *India v. Deutsche Telekom* are useful additions to the growing body of cases on the application of Article 190a of the PILA, as they confirm that: (i) where arbitral awards have been challenged in the past, any request for revision thereof should be brought against the SFSC's decision and not against the award itself; (ii) the 90-day deadline to request revision starts running once an applicant is aware of the new facts or evidence, which need not have been definitively adjudicated by a State court or other judicial body; and (iii) arbitral tribunals examining allegations of criminal conduct are not automatically bound by the decisions of State criminal courts concerning the same allegations.

It remains to be seen whether parties will be able to avail themselves of revision in the future, given the extremely narrow ambit of application of this extraordinary remedy.

3. Setting Aside a Preliminary Award on Jurisdiction in the Form of a "Procedural Order"

As explained above,[60] "final" awards may be set aside on the five grounds in Article 190(2) of the PILA, and "preliminary" (or interim) awards may only be set aside on two of the five grounds, namely Articles 190(2)(a) and 190(2)(b).[61] Article 190 of the PILA does not otherwise define what is meant by an "award".

Final awards, final partial awards which definitively end a part of the dispute, and preliminary awards which settle preliminary questions of substance (*e.g.*, jurisdiction) or procedure (*e.g.*, the appointment or constitution of an arbitral tribunal) are eligible for immediate challenge.[62]

In *Spain v. AES Solar and others (PV Investors)*,[63] the SFSC considered whether an arbitral tribunal's procedural order refusing to revisit its preliminary award on jurisdiction constituted a preliminary award for the purposes of Article 190(3) of the PILA.

In that case, the arbitral tribunal had issued a preliminary award on jurisdiction in 2014 in which it declared itself competent to hear the dispute under the Energy Charter Treaty ("ECT"). The preliminary award addressed all of Spain's jurisdictional objections, including its intra-EU objection. The preliminary award was not challenged.[64]

After *Achmea*,[65] Spain requested that the arbitral tribunal consider a new jurisdictional objection based on *Achmea*. The arbitral tribunal rejected Spain's request in the form of a procedural order, confirming that it would not revisit its preliminary award on jurisdiction, as the arbitral tribunal had already finally settled the issue of jurisdiction (and, in particular, Spain's intra-EU objection), irrespective of *Achmea*. This procedural order was neither challenged, nor did Spain raise any objections to it during the remainder of the arbitration.[66]

Following another exchange of submissions on publicly available documentation related to *Achmea,* Spain requested the arbitral tribunal to reconsider its jurisdiction *ex officio*.[67] After a further round of written submissions, the arbitral tribunal denied Spain's request and set out its reasons in its final award. The arbitral tribunal observed that its preliminary award on jurisdiction had not been challenged and thus had *res judicata* effect.[68] The arbitral tribunal also made reference to its procedural order.

Spain sought to set aside the final award on the basis that the arbitral tribunal, in its procedural order, had (i) violated its right to be heard by refusing to examine Spain's new jurisdictional objection (Article 190(2)(d) of the PILA); and (ii) misapplied the principle of *res judicata* by wrongly considering itself bound by the preliminary award on jurisdiction, in violation of procedural public policy (Article 190(2)(e) of the PILA).[69]

The SFSC upheld the arbitral tribunal's final award. In so doing, the SFSC characterised the arbitral tribunal's

60 See Section II above.

61 PILA, Art. 190(3).

62 See *e.g.*, Decision of the SFSC 4A_187/2020, 23 February 2021, paras. 4.1-4.2.

63 Decision of the SFSC 4A_187/2020, 23 February 2021.

64 *Ibid,* para. B.b.

65 Judgment of the Court of Justice of the European Union, *Slovak Republic v. Achmea B.V.,* Case C-284/16, 6 March 2018.

66 *Ibid,* para. B.c.

67 *Ibid,* para. B.d.

68 *Ibid,* para. B.e.

69 *Ibid*, para. 5.1.

procedural order as a preliminary decision on jurisdiction within the meaning of Article 186(3) of the PILA,[70] the purpose of which was to confirm the arbitral tribunal's preliminary award on jurisdiction.[71] Accordingly, as Spain had not challenged this procedural order within the 30-day time limit (Article 190(4) of the PILA), it was precluded from challenging it.[72]

The SFSC observed the awkwardness in Spain's complaint, which effectively criticised the reasons underlying the arbitral tribunal's decision not to reconsider its jurisdiction, but which did not complain of a lack of jurisdiction *per se* (*i.e.*, the ground for challenge in Article 190(2)(b) of the PILA).[73] On that basis, the SFSC saw no need to consider whether procedural public policy had been violated.[74] The SFSC also rejected Spain's complaint that its right to be heard was violated.[75]

The SFSC took the opportunity to reconfirm that preliminary awards do not enjoy the effects of *res judicata*, although such awards remain binding on the arbitral tribunals from which they emanate.[76]

Spain v. AES Solar and others (PV Investors) is a helpful reminder that the content of an arbitral award, as opposed to its title or form, must be examined in order to determine whether the award has definitively disposed of the substantive or procedural issues in dispute. Where an arbitral tribunal addresses jurisdictional issues in the form of a procedural order, that decision may qualify as a preliminary award on jurisdiction under Swiss law and could thus be open to challenge within 30 days of its notification.

It should also be borne in mind that an award (or procedural order) that decides some but not all jurisdictional issues cannot be challenged until the arbitral tribunal has decided, in a partial or final award, the question of its jurisdiction in its entirety.[77] For example, in *Russian Federation v. Yukos Capital Limited*, the SFSC considered that the Russian Federation's request to set aside an award which only decided three out of five jurisdictional objections was premature and therefore inadmissible.[78]

4. Admissibility of New Facts and Evidence in Setting Aside Proceedings in Limited Circumstances

In *Russian Federation v. Yukos Capital Limited*, the SFSC clarified the admissibility of new facts and evidence in setting aside proceedings.[79]

The SFSC recalled that the prohibition against presenting new facts and evidence in challenge proceedings before the SFSC (Article 99(1) of the SSCA) pertains to evidence concerning the state of *facts*, but not to evidence which supports *new legal arguments* advanced by a party to those proceedings, provided that it is produced within the time limit for lodging the challenge.[80]

As the SFSC's review is limited to an arbitral tribunal's legal findings based on the state of the law prevailing up to the date of issuance of the challenged award, new legal evidence (*e.g.*, legal opinions, legal commentaries, or case law) which reflects or describes the state of the law before the issuance of the award will be admissible, whereas new legal evidence which reflects or describes developments in the law post-award will not be admissible.[81]

70 PILA, Art. 186(3) provides that "The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision".

71 Decision of the SFSC 4A_187/2020, 23 February 2021, para. 5.2.2.

72 *Ibid*, para. 5.2.2.

73 *Ibid*, paras. 5-6.

74 *Ibid*, paras. 5-6 (in particular, paras. 6.1 and 6.3).

75 *Ibid*, para. 6.2.

76 *Ibid*, para. 6.3.2.

77 M. Scherer, *Mission impossible? – Challenging Investment Treaty Awards before the Swiss Federal Tribunal*, in C. Müller et al. (eds.), *New Developments in International Commercial Arbitration 2020*, 2020, p. 44.

78 *Ibid,* referring to Decision of the SFSC 143 III 462 (4A_98/2017), 20 July 2017, paras. 4.2 and 6.5.4. In that case, the Russian Federation incurred CHF 100'000 in court fees in 2017 associated with its first setting aside application. The Russian Federation subsequently filed a new setting aside application against the final award in 2022.

79 Decision of the SFSC 4A_492/2021, 24 August 2022, paras. 5.1-5.3.

80 *Ibid*, para. 5.1.

81 *Ibid*, para. 5.2.

The SFSC left open the question as to whether new legal evidence would qualify as a new legal or factual exhibit, depending upon the argument for which the evidence is supporting.[82]

Therefore, the SFSC's ruling is a useful reminder that while new factual evidence is generally inadmissible in challenge proceedings, new legal evidence can be accepted if it supports new legal arguments and reflects the state of the law up to the issuance of the challenged award. However, the admissibility of new legal evidence as a factual or legal exhibit depends on the specific argument it supports.

B. Substantive Issues

The SFSC's recent jurisprudence has considered a number of substantive issues, including whether arbitral tribunals wrongly accepted or declined jurisdiction on the basis of its interpretation of "investor" and "investment" (Article 190(2)(b) PILA) (**1**) or ruled beyond the claims submitted to it (*extra/ultra petita*) (Article 190(2)(c) PILA) (**2**). The SFSC also considered whether challenged awards were incompatible with public policy (Article 190(2)(e) PILA) (**3**).

1. Jurisdiction (Article 190(2)(b) of the PILA)

Under Article 190(2)(b) of the PILA, an award may be set aside "where the arbitral tribunal wrongly accepted or declined jurisdiction".[83] If the SFSC upholds a challenge to an arbitral tribunal's jurisdiction, the SFSC may itself declare the jurisdiction or lack of jurisdiction of the arbitral tribunal.[84]

In considering applications to set aside investment arbitration awards based on this ground during the reporting period, the SFSC has been faced with various jurisdictional issues, such as whether: the illegality of an investment is a jurisdictional issue (**a**); the term "protected investment" requires an investment to have been made actively (**b**) and with an economic contribution and risk on the part of the investor (**c**); the term "protected investor" prohibits abusive restructuring (**d**); and the ECT may be provisionally applied to establish jurisdiction (**e**).

This section considers two important decisions of the SFSC, *Russian Federation v. Yukos Capital Limited*[85] and *Clorox Spain S.L. v. Venezuela*,[86] which provide useful guidance on these jurisdictional issues.

a. Is the Illegality of an Investment a Jurisdictional Issue?

Whether illegality of an investment pertains to jurisdiction, admissibility, or to the merits of the dispute is not settled in international investment law.[87] Many investment tribunals have considered illegality of an investment as a jurisdictional question,[88] even where the applicable treaty did not contain an explicit legality requirement.[89]

This question has significant implications in setting aside proceedings before the SFSC, as the SFSC has unlimited powers to review jurisdictional questions, whereas its merits review is limited by law to the question of whether there has been a violation of public policy.[90] The SFSC recently considered this question in *Russian Federation v. Yukos Capital Limited*. This decision is one of the most recent developments in the wave of international arbitrations initiated by the Yukos group of companies, seeking compensation from the Russian Federation

82 *Ibid*, para. 5.3 (read with para. 5.2).

83 PILA, Art. 190(2)(b). See also Section II.A above.

84 See *e.g.*, Decision of the SFSC 146 III 142 (4A_306/2019), 25 March 2020, paras. 2, 4.

85 Decision of the SFSC 4A_492/2021, 24 August 2022.

86 Decision of the SFSC 146 III 142 (4A_306/2019), 25 March 2020.

87 See *e.g.* Z. Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29(1) ICSID Review, 2014, pp. 155–186; D. Khachvani, *Legality of Investment*, Jus Mundi Wiki Note, 13 January 2023, para. 14.

88 See *e.g.*, Decision of the SFSC 4A_65/2018, 11 December 2018, para. 4.3.2 and the awards cited therein.

89 See *e.g.*, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras. 359-360; *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 191, 197-203, 257; *SAUR International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Dec. on Jurisdiction and Liability, 6 June 2012, para. 308.

90 See *e.g.*, SFSC 4A_406/2021, 14 February 2022.

for the alleged expropriation of its assets.

In that case, the SFSC held that the arbitral tribunal had validly assumed jurisdiction on the basis of the provisional application of the Energy Charter Treaty,[91] and that Yukos Capital Limited's investment in the Russian Federation was not illegal. The investment in this case comprised loans granted by the investor (Yukos Capital Limited, incorporated in Luxembourg) to Yukos Oil (the investor's Russian-based parent company). These loans were never repaid to the investor, because a court of the Russian Federation subsequently declared Yukos Oil bankrupt, and Yukos Oil was liquidated before it repaid the loans to the investor.

Before the SFSC, the Russian Federation asserted that the arbitral tribunal had unduly restricted its examination of the legality of the investment to the question of whether a criminal intent of the investor could be established, which was not found in this case. In its view, the arbitral tribunal had failed to address certain of its arguments that the intra-group loans were part of a complex system of tax evasion in violation of Russian taxation laws and the double taxation treaty between the Russian Federation and Luxembourg.[92] The SFSC found this grievance inadmissible for two reasons.

First, in the absence of an express legality requirement in the ECT (or any other evidence that the parties intended to condition their consent to arbitration on the legality of investment, *e.g.*, in *travaux préparatoires*),[93] the legality of the investment is a question which pertains to the merits of the dispute, rather than to the arbitral tribunal's jurisdiction thereover.[94]

Second, the Russian Federation's complaint goes to an alleged violation of the right to be heard (Article 190(2)(d) of the PILA) and not to an erroneous decision on jurisdiction.[95]

Therefore, there was no basis for the SFSC to set aside the award pursuant to Article 190(2)(b) of the PILA. Accordingly, the SFSC upheld Yukos Capital's multi-billion-dollar award against the Russian Federation.

It remains to be seen whether the SFSC will have cause to revisit its opinions on this question in future setting aside proceedings. For now, the SFSC's position that illegality of an investment pertains to jurisdiction is consistent with its previous case law,[96] as well as the approach adopted by a number of prominent investment tribunals. However, the SFSC left the door open for a case-by-case interpretation of investment treaties in the absence of an express compliance clause. In order to ascertain whether a host State intended to restrict its consent to arbitration (in which case the issue pertains to jurisdiction) to investments complying with its own legislation, it is necessary to ascertain what the host State's intentions were taking into account all the circumstances of the specific case; in particular, the text of the said clause, its place in the treaty, and, where appropriate, the conditions under which the clause was adopted based on the *travaux préparatoires*.

b. "Protected Investment": Is There a Requirement for an "Active" Investment?

In the first and (so far) only SFSC decision setting aside an investment arbitral award, *Clorox Spain S.L. v. Venezuela*,[97] the SFSC found that the arbitral tribunal had wrongly declined jurisdiction over the dispute based on

91 See also Section III.B.1(e) below.

92 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 9.

93 The Energy Charter Treaty does not contain a compliance clause, included in many bilateral investment treaties, which provides that investments have to be made in accordance with the laws and regulations of the host State; it merely defines "investment" as "every kind of asset, owned or controlled directly or indirectly by an Investor...": see Art. 1(6).

94 Decision of the SFSC 4A_492/2021, 24 August 2022, paras. 9.1.1-9.1.2. In so holding, the SFSC recited its earlier case law in which it analysed the interaction between compliance clauses in investment treaties and the SFSC's scope of review under Art. 190(2)(b) of the PILA: see Decision of the SFSC 4A_65/2018, 11 December 2018, para. 4.3.2. In that case, the SFSC observed that express compliance clauses in investment treaties are usually considered as a restriction on the jurisdiction of the arbitral tribunal, while an implicit condition in this regard is rather related to the merits, or even the admissibility, of a claim. Ultimately, the SFSC held, in order to ascertain whether a host State intended to restrict its consent to arbitration to investments complying with its legislation, it is necessary to ascertain what its intentions were taking into account all the circumstances of the specific case, in particular the text of the said clause, its place in the treaty, and even, where appropriate, the conditions under which it was adopted based on the *travaux préparatoires*.

95 *Ibid*, para. 9.1.3. The SFSC noted that a complaint under Art. 190(2)(d) of the PILA was also inadmissible, as it was neither explicitly raised nor substantiated by the Russian Federation, and even if were admissible, it would not be sustained as the arbitral tribunal examined and determined the question of liability in full: see para. 9.2.

96 See *e.g.*, Decision of the SFSC 4A_65/2018, 11 December 2018.

97 Decision of the SFSC 146 III 142 (4A_306/2019), 25 March 2020.

an erroneous application of the Spain-Venezuela BIT.[98]

In its ruling on jurisdiction, the arbitral tribunal considered that the BIT in question, which protects "assets invested by investors", required an active act of investment by the investor. The arbitral tribunal concluded that the investment in question (shareholding in a Venezuelan company) – which was initially made by a company located in a third State (the USA) and then transferred to the investor (a newly created Spanish company) without consideration – was not an active act of investment carried out by the investor itself and, therefore, the investment did not qualify for protection under the BIT. Upon that basis, the arbitral tribunal held that it lacked jurisdiction *ratione materiae*,[99] and thus, considered that it was not compelled to determine Venezuela's other jurisdictional objections, including its objection of an alleged abuse of rights by the investor.[100]

Before the SFSC, the investor argued *inter alia* that the arbitral tribunal had wrongly introduced conditions for the existence of an investment which were not contained in the BIT and had applied those conditions in a manner contrary to the BIT's object and purpose of encouraging and protecting existing and future investments. According to the investor, the holding of assets in the host State, and not the act of investment itself, was decisive to obtain the BIT's protection.[101]

The SFSC agreed with the investor that there was no textual basis in the BIT for interpreting the phrase "invested by investors" as imposing a requirement that an investment must have been made by an investor itself and in exchange for consideration. The SFSC observed *inter alia* that the asset-based definition of "investment" in the BIT was very broad, and there were no limitation clauses in the BIT (*e.g.*, a denial of benefits clause or origin of capital clause) restricting the scope of investment protection. Thus, the SFSC concluded, the arbitral tribunal had imposed additional requirements for investment protection which were not provided for in the BIT, and in ruling that these requirements had not been fulfilled, had erroneously determined that it did not have jurisdiction.[102]

As the arbitral tribunal had not yet determined Venezuela's jurisdictional objection concerning an alleged abuse of rights, the SFSC declined to decide on the arbitral tribunal's jurisdiction and remanded the matter back to the arbitral tribunal for a new decision on jurisdiction, including on the question of an abuse of rights and Venezuela's other jurisdictional objections.[103]

Some investment tribunals have held, prior to the SFSC's decision in *Clorox Spain S.L. v. Venezuela,* that an investment must be made in an active way in order to trigger treaty protection and thus, an investment tribunal's jurisdiction.[104] Therefore, whether an investment must be made actively or can be passively held in order to qualify for treaty protection is a question which remains unsettled in international investment law.

However, and more importantly for the development of Switzerland's jurisprudence on setting aside proceedings, *Clorox Spain S.L. v. Venezuela* represents a more assertive approach on the part of the SFSC to reviewing the definition of "investment" in investment treaties, as historically, the SFSC has indicated a degree of defe-

98 *Ibid*, paras. 3.4.2.4-3.4.2.7.

99 *Ibid,* paras. 3.1, 3.4.2.1.

100 *Ibid*, para. 4.

101 *Ibid*, para. 3.2.

102 *Ibid*, paras. 3.4.2.2-3.4.2.7.

103 *Ibid*, para. 4. See also para. 3.4.2.8, in which the SFSC suggests that the foreseeability of a dispute giving rise to the arbitration at the time the investor acquired a relevant nationality is determinative of whether an abuse of rights has occurred. This temporal approach, which is consistent with the approach adopted by arbitral tribunals over the last decade, represents a shift in the SFSC's earlier approach to the applicable test in determining whether an abuse of rights has occurred: see Dec. in 4A_80/2018, 7 February 2020, para. 4.8 (in which the SFSC indicated that the foreseeability of a dispute may not necessarily be determinative for a finding of an abuse of rights); see also: X. Favre-Bulle, *Case Notes on International Arbitration*, 31(5) Swiss Review of International and European Law, 2021, p. 822. On remand, Venezuela's objection on the possible existence of an abuse of rights was the only jurisdictional objection which remained pending before and which was ultimately dismissed by the arbitral tribunal: see Decision of the SFSC 4A_398/2021, 20 May 2022, paras. B.c, 4.2. Abusive restructuring is further considered in Section III.B.1.d) below.

104 See *e.g.*, *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, paras. 206-225, 230-232, 270 (in particular, para. 225); *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, paras. 337-354 (in particular, para. 350).

rence to "specialist" arbitrators on this question.[105] The SFSC's willingness to interpret international investment treaties independently, and to correct erroneous decisions on interpretation by arbitral tribunals where necessary, is likely to further strengthen Switzerland as a preferred seat in non-ICSID investment treaty arbitrations.[106]

c. "Protected Investment": Must There be an Economic Contribution and Risk?

In *Russian Federation v. Yukos Capital Limited*,[107] the SFSC was required to consider, as part of the Russian Federation's assertion that the arbitral tribunal erred in its determination that there was a protected investment under the ECT, whether economic contribution and risk are criteria inherent in the concept of investment.[108]

The investment in this case comprised loans granted by Yukos Capital Limited to its Russian-based parent company, Yukos Oil, using funds which the investor had borrowed from subsidiaries of Yukos Oil. The latter had no right of recourse against the investor in the event of Yukos Oil's default under the loans. A court of the Russian Federation subsequently declared Yukos Oil bankrupt, and Yukos Oil was liquidated before it repaid the loans to the investor.[109]

The arbitral tribunal held that the loans constituted assets in the form "other debt of a company" associated with an economic activity in the energy sector and thus, a protected investment within the meaning of Article 1(6) of the ECT.[110]

Before the SFSC, the Russian Federation argued that the arbitral tribunal had *inter alia* "ignored the economic and legal reality" that the investor was not the true economic owner of the loans, but rather, a vehicle through which the loans transited for tax avoidance purposes. As such, there was no genuine economic contribution or risk on the part of the investor associated with the loans. According to the Russian Federation, these criteria are inherent in the concept of investment and thus, form part of the test as to whether there has been an investment within the meaning of Article 1(6) of the ECT. In the absence of these criteria, the loans did not constitute a protected investment under the ECT.[111]

The SFSC rejected the Russian Federation's arguments and noted that no there was no unanimously accepted definition of an investment.[112] The SFSC observed that investment tribunals are divided on whether contribution and risk are criteria inherent in the notion of investment within the meaning of Article 1(6) of the ECT, as well as in the definition of investment more generally.[113] The SFSC ultimately concluded that it is "questionable" whether these criteria have textual support in the definition of investment in Article 1(6), and on that basis, there was no need to examine the question further (although, in the SFSC's view, the arbitral tribunal was correct to hold that the investor would have satisfied these criteria in any event).[114]

It remains to be seen whether the SFSC will adopt the "subjective" approach, which focuses on how the term

105 Decision of the SFSC 4A_616/2015, 20 September 2016, para. 3.4.1 ("It follows from this that the Arbitral Tribunal was right to focus on the text of the BIT itself rather than attempting to discover the meaning of the term 'investment' used by the signatories of the treaty in awards made in respect of other international agreements. (...) On the other hand, as the definition of investment under Art. 1 (1) of the BIT was made by three arbitrators whose experience in this field (...) is recognized by both parties, the [SFSC], although it enjoys full cognition in this respect, will not unnecessarily depart from the unanimous opinion of experts on the subject of the indeterminate legal concept of investment.") (unofficial translation).

106 X. Favre-Bulle, *Case Notes on International Arbitration*, 31(5) Swiss Review of International and European Law, 2021, p. 822. Indeed, in *Venezuela v. Clorox Spain S.L.*, in which Venezuela sought, unsuccessfully, to set aside the arbitral tribunal's subsequent award on jurisdiction and declare that the arbitral tribunal lacked jurisdiction to decide the dispute between the parties, the SFSC recited that its mandate in that case was to *inter alia* independently determine whether the restructuring of an investment qualified was abusive, "[e]ven if it [the SFSC] is aware of the important place that arbitral awards rendered in the field of international investment protection occupy in the specialized literature": see Decision of the SFSC 4A_398/2021, 20 May 2022, para. 5.2.4 (unofficial translation).

107 Decision of the SFSC 4A_492/2021, 24 August 2022.

108 *Ibid*, para. 7.3.1.

109 *Ibid*, para. A.

110 *Ibid*, para. 7.2.3.

111 *Ibid*, para. 7.3.1.

112 *Ibid*, para. 7.4.6.

113 *Ibid*.

114 *Ibid*.

"investment" is defined in the applicable investment treaty and which has been adopted by a number of investment tribunals, or the broader "objective" approach, which seeks to define the general characteristics or inherent criteria that are used to determine whether a particular asset qualifies as an investment.[115] Given that many investment treaties contain broad asset-based definitions of an investment (*e.g.*, "any asset… including, but not limited to…"), the question has practical implications: the "objective" approach tends to lead more easily to a dismissal of the case than the "subjective" approach, which often is more favourable to claimants (depending on the terms of the investment treaty in question).[116] Although the SFSC has left the question open for now, its latest pronouncement on this issue suggests a preference for the "subjective" approach.

d. "Protected Investor": Prohibition of Abusive Restructuring

The prohibition against an abuse of rights, which is a remedy intended to limit manoeuvres that do not objectively deserve treaty protection, is a general principle recognised internationally and under Swiss public policy.[117]

In *Venezuela v. Clorox Spain S.L.*,[118] the SFSC clarified that the temporal factor is decisive in drawing the line between legitimate nationality planning, on the one hand, and an investor's abusive changes of nationality for the purposes of gaining treaty protection (*i.e.*, treaty abuse), on the other. Investment treaty protection should thus be denied where an investor restructures at a time when the dispute giving rise to the arbitration proceedings in question would have been reasonably foreseeable to an investor in same situation at the time of the restructuring in light of all the surrounding circumstances. The SFSC clarified that an abuse of rights must be interpreted in a restrictive manner.[119]

In *Russian Federation v. Yukos Capital Limited*, the Russian Federation asked the SFSC to set aside the award under Article 190(2)(b) of the PILA on the basis that the investor's conduct constituted an abuse of the protection under the ECT. According to the Russian Federation, the investor's conduct was abusive for two reasons.

- First, the investor's loans to Yukos Oil constituted circular flows of capital designed to avoid taxes which is incompatible with the ECT's purpose of promoting genuine investments in the energy sector.[120]
- Second, at time the investor granted the second of the two loans to Yukos Oil, it was foreseeable that the loan would not be repaid, given the tax and criminal investigations pending against Yukos Oil and its directors in the Russian Federation.[121]
- The SFSC held that there was no textual support in the ECT for the Russian Federation's first argument: there was no basis in the ECT to suggest that an investment motivated solely by tax reasons is incompatible with the purpose of the ECT, which seeks to promote all investments (broadly defined) associated with an economic activity in the energy sector.[122]

The SFSC dismissed the Russian Federation's second argument that granting a loan in circumstances where it is foreseeable that this loan would not be repaid amounted to an abuse of rights. It held that the arbitral tribunal had correctly considered that the question of whether the risk of default was foreseeable was one which goes not to jurisdiction or admissibility, but rather, to causation and the claimant's contribution to its own damage, which are legal findings beyond the SFSC's powers of review. In any event, the SFSC held, the risk of the investor not obtaining repayment of the amounts loaned to Yukos Oil was not objectively foreseeable at the time the second loan was concluded.[123]

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115 See *e.g.*, V. Heiskanen, *Of Capital Import: The Definition Of "Investment" In International Investment Law*, 2010(34) ASA Special Series, p. 59 *et seq*.

116 *Ibid.*, p. 62.

117 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 8.1. See also Decision of the SFSC 4A_398/2021, 20 May 2022, paras. B.b, 5.2.2.

118 Decision of the SFSC 4A_398/2021, 20 May 2022.

119 *Ibid,* para. 5.2.4. See also Decision of the SFSC 4A_492/2021, 24 August 2022, para. 8.1. As explained in footnote 103 above, the foreseeability test as espoused in *Venezuela v. Clorox Spain S.L.* – which aligns with the approach of numerous investment tribunals – represents a shift away from the SFSC's earlier approach to the question of foreseeability when determining whether an abuse of rights has occurred.

120 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 8.2.

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

These decisions reinforce that the SFSC will only determine an abuse of rights in very limited circumstances, and that an investment which is structured to avoid tax is not such a circumstance. The party claiming an abuse of rights (*i.e.*, the host State) must prove that the dispute was foreseeable at the time of the restructuring. If it succeeds in doing so, it is presumed that the restructuring was abusive. The investor may, however, rebut this presumption by proving that the restructuring has in fact been carried out predominantly for reasons other than claiming the protection of the BIT.

e. Provisional Application of the ECT to Establish Jurisdiction

In *Russian Federation v. Yukos Capital Limited*, the SFSC considered whether the provisional application of the ECT based on Article 45(1) of the ECT shielded the Russian Federation from investor-State arbitration under that treaty.

In that case, the arbitral tribunal assumed jurisdiction under Article 26 of the ECT on the basis of a provisional application of the ECT (Article 45(1)). Article 45(1) of the ECT is a "domestic exception" clause which provides that provisional application of the ECT must not be inconsistent with the signatory State's constitution, laws or regulations.[124] This wording appears to give priority to national law over the treaty during the period of provisional application.

Before the SFSC, the Russian Federation asserted that the arbitral tribunal had erroneously assumed jurisdiction as Russian domestic law is incompatible with, and thus precludes, the provisional application of the ECT based on Article 45(1) of the ECT.[125] Accordingly, the question before the SFSC was: does Article 45(1) preclude an investor from invoking the ECT's dispute resolution mechanism (Article 26 of the ECT) in order to commence an investor-State arbitration against the Russian Federation?

The SFSC answered this question in the negative and rejected the Russian Federation's arguments. According to SFSC, Russia bore the burden of demonstrating that the provisional application of the treaty generally and the arbitration agreement specifically are inconsistent with its legal order – which the Russian Federation failed to do.[126] In fact, Russian law expressly contemplates arbitration as a mechanism for the resolution of disputes with a foreign investor.[127]

The SFSC also noted *en passant* that Article 45(1) allowed for two possible interpretations:

- First, that the wording "such provisional application" refers to the provisional application of the ECT in its entirety, in which case, a State could refuse to provisionally apply the ECT only if the principle of the provisional application is incompatible with its domestic law (i.e., the "all or nothing" approach: either the entire treaty applies, or it does not apply at all).[128]
- Alternatively, that a State should provisionally apply certain provisions of the ECT except those which are incompatible with its domestic law (i.e., the "piecemeal" approach, based on the wording "to the extent", which implies that the scope of the provisional application may vary).[129]

The Russian Federation submitted that the clause requires a "piecemeal" approach, which involves analysing whether each provision of the ECT is consistent with the constitution, laws and regulations of the Russian Federation. In contrast, the former Yukos shareholders argued that the inquiry is an "all-or-nothing" exercise which requires an analysis and determination of whether the principle of provisional application *per se* is inconsistent with the constitution, laws or regulations of the Russian Federation.

As the SFSC found that Russian law did not prohibit the provisional application of the ECT,[130] the SFSC was not

124 S. Nappert, *Russia and the Energy Charter Treaty: The Unplumbed Depths of Provisional Application*, OGEL 3 (2008) (available at https://www.biicl.org/files/3773_2_-_sophie_nappert.pdf).

125 Decision of the SFSC 4A_492/2021, 24 August 2022, paras. 6.1-6.2, 6.3.1. ECT, Art. 45(1) provides: "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Art. 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. (...)".

126 Decision of the SFSC 4A_492/2021, 24 August 2022, paras. 6.4.9-6.4.12.

127 *Ibid*, para. 6.4.10.

128 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 6.4.7.

129 *Ibid*.

130 *Ibid*, paras. 6.4.4-6.4.12.

compelled to make (nor did it volunteer) a final pronouncement on the correct interpretation of Article 45(1).[131] Accordingly, it remains to be seen whether the SFSC will adopt an "all or nothing" or "piecemeal" approach to the interpretation of Article 45(1) in the future. There are important practical implications of endorsing either approach: if a host State's legislation does not contain a prohibition on the provisional application of treaties (as was the case of the Russian Federation), the "all or nothing" approach typically favours investors, as all treaty provisions would apply as if the entire treaty were already in force; by contrast, the "piecemeal" approach is more favourable to States, as it may allow host States to raise arguments on possible inconsistencies between its domestic law and procedural and substantive provisions of the treaty in question.

However, the SFSC made several important clarifications in respect of provisional application of the ECT *en passant*. First, provisional application is the rule under the ECT, whereas the domestic exception clause is, indeed, the exception: there is no requirement that national legislation specifically authorize the provisional application of treaties.[132] Second, the party alleging incompatibility between the provisional application of an ECT provision and its domestic law bears the onus of proving such incompatibility.[133] Third, the relevant date for assessing any such incompatibility is the date on which the arbitration was initiated.[134]

2. Ultra/extra petita (Article 190(2)(c) of the PILA)

Under Article 190(2)(c) of the PILA, a party may challenge an award "where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims".[135] This includes decisions awarding more (*ultra petita*) or something different (*extra petita*) than what was requested.[136]

In *Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria*,[137] the investors sought to set aside a 2020 award on the basis that the arbitral tribunal ruled *extra petita* when it awarded compensation in a different currency (US dollars, or "USD") than the currency requested by the investors (Syrian pounds, or "SYP").[138] The SFSC rejected the investors' argument based on unusual reasoning.

The SFSC began by conceding that, "technically speaking", the arbitral tribunal's award of compensation in SYP (instead of USD) is something different to what the claimants had requested (in the words of the SFSC, an "*aliud*").[139] The SFSC also recalled that, in Swiss domestic litigation, a decision that orders payment in Swiss francs as opposed to the parties' agreed currency (*e.g.*, the currency of the contract in dispute) is vulnerable to being annulled.[140]

Notwithstanding these observations, the SFSC did not analyse whether, *in casu*, the award violated Article 190(2)(c) of the PILA. Rather, the SFSC rejected the investors' arguments on the basis that the investors lacked a legitimate "interest worthy of protection" in the annulment of the award (Article 76(1)(b) of the SSCA). The decision to set aside must provide the claimants with some practical utility. However, in this case, both parties had already spent significant amounts of arbitration fees and costs, and the precarious situation of the host State, bogged down in armed conflicts for a decade, should be taken into account. The investors had not satisfied the SFSC that they would have obtained a more favourable decision if the award were to be set aside and the case remanded to the arbitral tribunal: in this scenario, the SFSC assumed that the arbitral tribunal would maintain its award of compensation in SYP, as doing so would not violate public policy (this was the finding of the SFSC

131 *Ibid*, paras. 6.4.4-6.4.12.

132 *Ibid*, para. 6.4.8.

133 *Ibid*.

134 *Ibid*, para. 6.4.9.

135 PILA, Art. 190(2)(c). See also Section II.A above.

136 C. Dos Santos, *Rewriting Investors' Claim Labelled in USD in Near Worthless Syrian Pounds not Extra Petita or Violation of Public Policy: Swiss Supreme Court Decision 4A_516/2020 of 8 April 2021*, 2022(1) ASA Bull., p. 95 (referring to Decision of the SFSC 116 II 639, 19 December 1990, para. 3a; Decision of the SFSC 4A_430/2020, 10 February 2021, para. 6.1; Decision of the SFSC 4P.260/2000, 2 March 2001, para. 5a).

137 Decision of the SFSC 4A_516/2020, 8 April 2021.

138 *Ibid*, para. 5-6.

139 *Ibid*, para. 5.5. See also C. Dos Santos, *Rewriting Investors' Claim Labelled in USD in Near Worthless Syrian Pounds not Extra Petita or Violation of Public Policy: Swiss Supreme Court Decision 4A_516/2020 of 8 April 2021*, 2022(1) ASA Bull., p. 95 (referring also to Decision of the SFSC 4A_251/2021, 16 July 2021).

140 Decision of the SFSC 4A_516/2020, 8 April 2021, para. 5.4.

on the investors' second ground for the challenge under Article 190(2)(e) of the PILA). Moreover, the SFSC held, even if the investors were to initiate another arbitration with new claims in a currency other than USD, there is no indication that the outcome would be more favourable to them, however unsatisfactory the outcome may be for the parties concerned.[141]

In so holding, the SFSC avoided determining – at least for now – whether an arbitral tribunal may deviate from issuing a monetary award in the currency requested by a claimant,[142] which is unfortunate.[143] Such a determination will be helpful in the future, particularly in light of the SFSC's observations *en passant* that the principle of disposal (*i.e.*, the parties' right to choose the currency) need not be applied with the same rigour in international commercial law as in a case governed by Swiss law; that precise rules on the currency of compensation are lacking when the applicable treaty is silent on the matter; and that arbitrators enjoy wide discretion in awarding "adequate" compensation.[144]

The SFSC's reasoning has been criticised as unconvincing, as it cannot be excluded that a new set of arbitration proceedings may well have led to a more favourable outcome for the investors.[145]

Accordingly, *Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria* has limited precedential value for future investment arbitration awards challenged under Article 190(2)(e) of the PILA.[146]

3. Public Policy (Article 190(2)(e) of the PILA)

Under Article 190(2)(e) of the PILA, an award may be set aside where it is "incompatible with public policy".[147] An award is considered incompatible with public policy if its result (as opposed to the arbitral tribunal's reasoning) disregards the essential and widely recognised values which, according to the prevailing view in Switzerland, should form the basis of any legal order.[148] This occurs if fundamental principles of substantive law are violated to such an extent that the violation can no longer be reconciled with the relevant legal order and system of values.[149] *Pacta sunt servanda*, the duty to act in good faith, the prohibition of abuse of rights, expropriation without compensation, and discrimination are illustrations of such values.[150] Reaching the threshold for setting aside an international arbitral award on this ground is a rare occurrence.[151]

In *Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria*,[152] the SFSC acknowledged that the awarded compensation was very low and that investors should normally not bear the risk of depreciation of a host State's currency, but nonetheless refused to set aside the award after taking into account the circumstances of the case.[153]

In *Russian Federation v. Yukos Capital Limited*, the Russian Federation asserted that the arbitral tribunal had wrongly awarded Yukos Capital Limited compensation corresponding to the loss of capital and interest due under a loan granted to Yukos Oil, whereas Yukos Oil's damage was much lower as it corresponded solely to the spread that the Yukos Capital Limited was supposed to derive from the transaction.[154] As such, Yukos Capital

141 *Ibid*, para. 5.5.

142 *Ibid*.

143 Dos Santos, *Rewriting Investors' Claim Labelled in USD in Near Worthless Syrian Pounds not Extra Petita or Violation of Public Policy: Swiss Supreme Court Decision 4A_516/2020 of 8 April 2021*, 2022(1) ASA Bull., p. 96.

144 Decision of the SFSC 4A_516/2020, 8 April 2021, para. 5.5.

145 X. Favre-Bulle, *Case Notes on International Arbitration*, 32(4) Swiss Review of International and European Law, 2022, pp. 700-701.

146 *Ibid*.

147 PILA, Art. 190(2)(e). See also Section II.A above.

148 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 10.1.

149 *Ibid*.

150 See *e.g.*, Decision of the SFSC 4A_516/2020, 8 April 2021, paras. 4.2.1, 4.2.3. See also M. Scherer and A. Casey, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited*, 2019(4) ASA Bull., pp. 812-813 (referring to Decision of the SFSC 4A_2017, 14 December 2017, para. 3.2.2).

151 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 10.1.

152 Decision of the SFSC 4A_516/2020, 8 April 2021.

153 X. Favre-Bulle, *Case Notes on International Arbitration*, 32(4) Swiss Review of International and European Law, 2022, p. 700.

154 Decision of the SFSC 4A_492/2021, 24 August 2022, paras. 10.2 and 10.4.

Limited was awarded compensation to which it was not entitled, which infringed the prohibition of unjust enrichment of the injured party.[155] On this basis, the final award was incompatible with public policy and due to be set aside pursuant to Article 190(2)(e) of the PILA.[156]

The SFSC rejected the Russian Federation's plea for two reasons. First, the Russian Federation's arguments in support of this ground for challenge were based on references to certain arguments from the arbitration, made by one of the arbitrators in partial dissent,[157] which did not demonstrate how the result of the award would be incompatible public policy. Second, the arbitral tribunal had correctly found that Yukos Capital Limited was the sole creditor and only entity entitled to claim repayment of the loan, such that it would have received the full amount of the capital loaned and interest thereon, and not only the spread, if Yukos Oil had repaid the loan. Therefore, the Russian Federation failed to show that the award was contrary to substantive public policy.[158]

Having dismissed the Russian Federation's challenge for the above reasons, the SFSC was able to refrain from taking a stance on whether the prohibition against unjust enrichment of the injured party is part of *international* public policy. The SFSC restated that the prohibition against unjust enrichment of an injured party is a fundamental principle of Swiss law and thus, part of *Swiss* public policy, but continued to leave open the question of whether this principle is also part of public policy within the meaning of Article 190(2)(e) of the PILA.[159]

These cases continue to reinforce the SFSC's pro-arbitration stance: even if certain principles of law form part of Swiss domestic public policy, they are do not automatically form part of the *international* public policy. This is in stark contrast to those jurisdictions in which domestic public policy is applied in recognition and enforcement cases (*e.g.*, India and Hong Kong).[160]

Finally, it would be remiss to not comment on the potential impact of the recent decision of the European Court of Human Rights ("ECtHR") in *Semenya v. Switzerland*.[161] In that case, which concerned a challenge against a sports arbitration award rendered under the auspices of the Court of Arbitration for Sport (the "CAS"), a majority of the ECtHR held *inter alia* that the CAS arbitral tribunal, and the SFSC as the setting aside court, failed to provide sufficient procedural safeguards to South African runner Caster Semenya as required by Article 14 of the European Convention on Human Rights. As to the SFSC's failures, the ECtHR held that the SFSC erred when it conducted a limited review of whether the CAS arbitral tribunal's reasoning was consistent with public policy, as it failed to address Ms. Semenya's "substantiated and credible claims of discrimination".[162] It also held that public policy under Swiss law should encompass, without exception, all obligations arising from the European Convention on Human Rights and jurisprudence. According to the ECtHR, the SFSC should exercise a higher degree of control over CAS awards, as sports arbitration, unlike commercial (and, by extension, investment) arbitration, is not habitually consensual.[163] It remains to be seen whether the concept of public policy under Article 190(2)(e) of the PILA will be extended in light of the ECtHR's decision. For now, the ECtHR's decision has immediate implications for sports arbitration, though the ruling may become relevant where human rights issues arise in Swiss-seated investment arbitrations.

IV. Conclusion

Between 2020 and 2022, the SFSC issued a number of significant decisions in proceedings to set aside and revise investment arbitration awards. These decisions have clarified the SFSC's narrow powers to set aside and

155 *Ibid*, para. 10.3.

156 *Ibid*, para. 10.

157 *Yukos Capital Limited v. Russian Federation*, PCA Case No. 2013-31, Dissenting Opinion of Prof. Brigitte Stern, 23 July 2021.

158 Decision of the SFSC 4A_492/2021, 24 August 2022, para. 10.4.

159 *Ibid*. para. 10.3.

160 P. Madden KC et al., *Arbitrability and Public Policy Challenges,* in Global Arbitration Review, *The Guide to Challenging and Enforcing Arbitration Awards - Second Edition*, 8 June 2021 (available at https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/arbitrability-and-public-policy-challenges#footnote-055).

161 Decision of the European Court of Human Rights, *Semenya v. Switzerland*, App no. 10934/21, 11 July 2023

162 *Ibid*, para. 239.

163 *Ibid*, para. 177.

revise international arbitral awards, and further developed the SFSC's jurisprudence on international investment law.

The fact that only one investment arbitration award – *Clorox Spain S.L. v. Venezuela* – has been set aside by the SFSC confirms that Switzerland is a jurisdiction which accords significant deference to the determinations of arbitral tribunals in international arbitral awards.

The SFSC's approach is markedly different to the emerging approach in France, where the Paris Court of Appeal has recently demonstrated an appetite for conducting a substantive review of international arbitral awards on the merits, including by ordering the production of new evidence, at least where questions of corruption arise.[164] Given the significant judicial restraint exercised by the SFSC, even in the face of manifestly wrong factual findings, it is unlikely that the SFSC will orientate towards the French approach in the future.

For now, the recently reported cases illustrate that the SFSC is increasingly willing to independently interpret legal questions arising in international investment treaties. The SFSC's readiness to correct erroneous legal determinations in exceptional circumstances, and at the same time shield arbitral tribunals' factual findings, reinforces the SFSC's pro-arbitration outlook, thereby preserving Switzerland's reputation as a preferred seat for non-ICSID investment treaty arbitration.

164 See *e.g.*, C.G. Martens, *Fighting International Corruption in Domestic Courts – Alstom, Sorelec and the Review of Arbitral Awards*, 21(2) German Arbitration Journal (SchiedsVZ), 2023, pp. 91-98; G. Laborde, *Awards Masking Corruption: How French Courts Lead the Way*, 41 Spain Arbitration Review (Revista del Club Español del Arbitraje), 2021, pp. 120-135; and A.-C. Hahn, *Judicial Scrutiny of Corruption-Tainted Arbitral Awards at the Setting Aside and Enforcement Stage*, 47 ASA Special Series, pp. 71-80.

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Arbitration of Corporate Disputes in Switzerland

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ABSTRACT

This article explores how new Article 697n of the Swiss Code of Obligations allows for corporate law disputes to be settled by arbitration. The analysis first sets out an overview of the legal landscape in Switzerland before Article 697n was promulgated and this new provision's clarifications and lacunes. It then delves into the intricacies of the Supplemental Swiss Arbitration Rules for Corporate Law Disputes and the Explanatory Note to the Supplemental Rules, before concluding that Article 697n clarifies – in part – how corporate law disputes may now be settled by arbitration, but that it is too early to assess any significant impact of the legislative change on the use of arbitration for resolving corporate law disputes in Switzerland.

I. Introduction

As part of the revision of Swiss corporate law, a new Article *697n* of the Swiss Code of Obligations entered into force on 1 January 2023. This provision expressly allows the inclusion of statutory arbitration clauses in the articles of association of Swiss corporations, limited partnerships and limited liability companies. While for a long time there were significant legal uncertainties with regard to the validity and binding effect of such arbitration clauses, the introduction of Article *697n* into Swiss law brought some clarity, as well as new questions. To address some of these questions, the Swiss Arbitration Centre issued new Supplemental Swiss Rules for Corporate Law Disputes, which include a model arbitration clause and procedural rules specifically tailored to the procedural requirements enshrined in and implied by Article *697n*.

This contribution provides an overview of the new legal framework for the arbitration of corporate disputes in Switzerland and comments on the new Supplemental Swiss Rules for Corporate Disputes. It considers whether the new statutory framework clarified the confusion existing before its adoption and whether, as a consequence, an increase in arbitration proceedings dealing with corporate disputes in Switzerland should be expected in the future.

II. The Legal Landscape Prior to the Adoption of Article *697n* CO

Although arbitration is a common method of resolving corporate disputes in Germany and Austria it has rarely been used to this end in Switzerland. This limited recourse to arbitration stems, at least in part, from the legal uncertainty that surrounded the validity and effect of arbitration clauses in the Articles of Associations ("**AoA**") of Swiss corporations[165] before the adoption of Article *697n* of the Swiss Code of Obligations (the "**CO**")

The entry into force of this provision on 1 January 2023 followed the recent update of the Swiss arbitration law, i.e. Chapter 12 of the Swiss Private International Law Act (the "**PILA**") for international arbitration and Part 3 of the Swiss Code of Civil Procedure (the "**CPC**") for domestic arbitration.[166]

The revision of Swiss corporate law has clarified a number of uncertainties as to the validity and binding effect of arbitration clauses contained in AoA. Prior to these revisions, it was unclear whether arbitration clauses in AoA were to be considered multiparty arbitration agreements enshrined in the AoA or normal AoA pro-

165 *Aktiengesellschaft* in German and *société anonyme* in French, sometimes translated in English as "company limited by shares".

166 See Message of the Federal Council regarding the modification of the Swiss Private International Law Act dated 24 October 2018 (FF 2018 7153).

visions.[167] Under the first assumption, statutory arbitration clauses would derive their binding effect from contract law and, in the second, from corporate law. The source of the binding effect of these clauses – contractual or corporate – was decisive to determine the extent to which such provisions were subject to the substance and form requirements of Swiss arbitration law, as well as the scope of persons bound by the clause.

Indeed, Swiss arbitration law provides that arbitration agreements are only valid if they meet certain substance and form requirements.[168] While statutory arbitration clauses are unilateral acts rather than agreements, it was accepted that the requirement for arbitration agreements also applied to them.[169] The extent of this application was, however, disputed. Specifically, contracts under Swiss law (including arbitration agreements) only bind their parties, i.e. the persons that agreed to them. AoA provisions, however, bind a wider range of persons than those who expressed consent since their adoption does not always require unanimity amongst the members of the company. A particular AoA provision might thus bind company members that voted against its adoption or members that joined the company after its adoption. This difference between the respective scopes of application of contracts (including arbitration agreements) and AoA made the extent of the binding effect of statutory arbitration clauses uncertain.

As to the form, Swiss arbitration law requires that arbitration agreements be "in writing".[170] The application of the requirement usually raises few issues since most arbitration agreements are contained in contracts signed by the parties. With regard to statutory clauses, however, it was unclear whether this requirement applied to the consent of each person bound by the clause – meaning that each member of the company would have to declare its agreement in writing – or only to the original author of the clause.[171]

Unfortunately, the decisions of the Swiss Supreme Court (the "**SSC**") on these issues were rare and remained inconclusive as to the salient points of uncertainty. The majority of case law pertained to arbitration clauses in the AoA of sports federations, whose validity was undisputed.[172] It was, however, doubtful whether this jurisprudence could generally apply to Swiss corporations because the SSC explicitly applies reduced form and consent requirements to sports arbitration.[173] Furthermore, the legal organisation usually adopted by sports federations vastly differs from the legal structure of Swiss corporations.[174]

The decisions of the SSC unrelated to sport were equally unhelpful. The SSC had upheld the binding effect of statutory clauses for cooperatives and associations in older decisions but the applicability of these decisions to corporations remained unclear, notably due to the different regulation of corporations under Swiss law.[175]

More recent decisions from the SSC on the topic mainly pertained to succession of legal obligations.[176] Namely, the SSC found in a 2009 decision that an arbitration clause contained in the AoA of a corporation undergoing bankruptcy proceedings did not apply to the claim raised by a shareholder and creditor of the company – ac-

167 M.A. Mauerhofer, *Gültigkeit statutarischer Schieds- und Gerichtsstandsklauseln*, GesKR 2011, p. 20.

168 Article 178 PILA for international arbitration and Articles 357-358 CPC for domestic arbitration.

169 See, e.g., P.-Y. Tschanz, *Article 178 PILA*, in *Commentaire romand Loi sur le droit international privé (LDIP) - Convention de Lugano (CL)* (1st ed., 2011), p. 1533 *et seq.*, para. 44; M.A. Mauerhofer, *Gültigkeit statutarischer Schieds- und Gerichtsstandsklauseln*, GesKR 2011, p. 24 et seq.

170 See Article 178(1) PILA for international arbitration and Article 358(1) CPC for domestic arbitration.

171 D. Girsberger and N. Voser, *International Arbitration: Comparative and Swiss Perspectives* (4th ed., 2021), p. 98, para. 346b.

172 See, e.g., Decision of the Swiss Supreme Court 4A_314/2017 dated 28 May 2017, para. 2.3.

173 Decision of the Swiss Supreme Court 133 III 235, 22 March 2007, para. 4.3.2.3; Decision of the Swiss Supreme Court 4A_314/2017, 28 May 2017, para. 2.3.1. Furthermore, the case law pertaining to statutory arbitration clauses mainly concerned the inclusion of these clauses be reference, e.g. in an employment agreement between a sports club and an athlete. Sport arbitration case law thus tends to focus on this incorporation by reference rather than on the statutory clauses themselves.

174 Broadly speaking, Swiss law differentiate between (i) membership-based companies (*personbezogene Gesellschaften*), which are centered around the personal characteristics of their members and their role within the association and (ii) capital-based companies (*Kapitalbezogene Gesellschaften*), which are centered around their member's capital. Swiss associations fall under the former category while corporations belong to the latter.

175 Decision of the Swiss Supreme Court 22 II 552 (pertaining to a cooperative) and Decision of the Swiss Supreme Court 69 I 81 (pertaining to an association). See also Message of the Swiss Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 494 (Section 2.1.23), p. 494.

176 See, e.g., Decision of the Swiss Supreme Court 136 III 107, 8 December 2009 (pertaining to assignment of a claim in bankruptcy proceedings) and Decision of the Swiss Supreme Court 142 III 120 (concerning the management regulations of a co-owned property).

ting as assignee of the creditors' rights – against certain members of the board for alleged mismanagement.[177] The reasons for the SSC's decisions were, however, based on Swiss bankruptcy procedure.[178] As such, they brought little clarity as to the validity and scope of statutory arbitration clauses.

The last leading judgment before the revisions of the law was a 2016 decision pertaining to a co-owned property, the management regulations of which contained an arbitration clause for disputes in relation to the administration of the property.[179] The SSC judged that a (new) co-owner that has entered into the co-ownership could validly bring the other (existing) co-owner to arbitration on the basis of the arbitration clause contained in the management regulations. To reach this finding, the SSC rejected the (existing) coowner's objection that it was not bound by the arbitration agreement because it had entered into the agreement with the legal predecessor of the (new) co-owner, but not with the (new) co-owner.[180] Unfortunately, the SSC left open the issue of whether the (new) co-owner would have been required to agree to the arbitration clause in writing, both because it reasoned in terms of legal succession and because other elements permitted to conclude to the objecting co-owner's consent to arbitrate the dispute.[181]

Against this background, the 2021 revision of Swiss arbitration law had already brought some clarity by providing in Articles 178(4) PILA and 258(2) CPC that the formal and substantive requirements for the validity of arbitration agreements apply to statutory arbitration clauses "by analogy" rather than directly.[182] This application by analogy suggested that arbitrations clauses in the AoA of corporations were binding by virtue of corporate rather than contract law, but some questions remained as to the extent to which this application by analogy modified these form and substance requirements.[183]

In particular, the Swiss Code of Obligations indeed provided that the AoA of Swiss corporations could not impose any further obligation on a shareholder beyond that of paying for the shares it acquired.[184] According to the view that prevailed amongst Swiss corporate law authors, arbitration clauses in the AoA would have created new obligations for the shareholders and were thus incompatible with Swiss corporate law.[185] It was also questioned by certain scholars whether arbitration clauses in AoA complied with Article 706*b* (1) CO, which provides that resolutions of the general assembly shall be void if "they restrict the right [...] to take legal action or other shareholder rights that are mandatory in law".[186] Due to these apparent incompatibilities with the law, some of the Swiss authorities in charge of the supervision of companies refused to validate AoA containing an arbitration clause.[187] The introduction of Article *697n* CO resolved these issues.

177 Decision of the Swiss Supreme Court 136 III 107, 8 December 2009, paras. 2.5.1-2.5.2.

178 Decision of the Swiss Supreme Court 136 III 107, 8 December 2009, paras. 2.5.1-2.5.2.

179 Decision of the Swiss Supreme Court 142 III 120. Although not a corporate dispute, this case was nevertheless relevant for the issue of the validity of arbitration clauses in AoA because the SSC considered the management regulations of co-owned properties to have corporate aspects (see Decision of the Swiss Supreme Court 142 III 120, para. 3.4.1).

180 Decision of the Swiss Supreme Court 142 III 120, para. 3.4.4.

181 The written consent of the (new) co-owner was not in dispute because, prior to the initiation of the arbitration proceedings, it had requested Swiss courts to nominate the tribunal in a written pleading. On this basis, the consent to arbitrate was thus "in writing" (Decision of the Swiss Supreme Court 142 III 120, para. 3.4.4).

182 See Article 178(4) PILA for international arbitration and Article 358(2) CPC for domestic arbitration.

183 P. Habegger, *Das revidierte Kapitel 12 IPRG über die Internationale Schiedsgerichtsbarkeit*, 2021(53) Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrech ZZZ, p. 375 *et seq.*

184 Article 680(1) CO; Message of the Swiss Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 494 (Section 2.1.23).

185 See, e.g., P. Boeckli, *Schweizer Aktienrecht* (4th ed., 2009), p. 2303, para. 150.

186 Article 706*b* (1) CO; Message of the Swiss Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 494 (Section 2.1.23).

187 Article 706*b* (1) CO; Message of the Swiss Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 494 (Section 2.1.23).

III. The Adoption of Article *697n* CO and the Questions Left Unanswered

As explained above, the validity of arbitration clauses in AoA of Swiss companies was debated for a long time in Switzerland. There were thus significant legal uncertainties with regard to the admissibility and binding effect of such arbitration clauses. While the above-mentioned new Article 178(4) PILA clarified the validity of statutory arbitration clauses from an arbitration perspective, the issue remained unresolved from a corporate law perspective. In particular, it was contested whether all shareholders of a company needed to approve the arbitration clause contained in the AoA and if minority shareholders were entitled to any special protection. Moreover, it was still unclear whether shareholders who acquired the shares after a statutory arbitration clause had been approved by the general assembly were bound by such arbitration clause.

Clarifying these issues was one of the goals of the revision of Swiss corporate law. This led to the adoption of the new Article *697n* CO, which entered into force on 1 January 2023 and applies both to corporations and LLCs. With the adoption of a clear legal basis for statutory arbitration clauses, the Swiss legislator hoped to create more legal certainty. This aims also to contribute to improving both the safeguards for minority shareholders and effective enforcement of Swiss corporate law.[188] According to the Federal Council, an arbitral tribunal can make an important contribution to these objectives, as it can be composed of experts with substantial industry knowledge.[189] Further advantages of arbitral proceedings mentioned by the Federal Council are the possibility to ensure confidentiality of the proceedings (to the extent this is legally permissible) and to adapt the proceedings to the needs of the parties.[190]

A. The Mandatory Requirements for Statutory Arbitration Clauses

The new Article *697n* CO, which is entitled "Arbitral tribunal", provides as follows:

> **1.** *The articles of association may provide that corporate law disputes be adjudicated by an arbitral tribunal that has its seat in Switzerland. Unless the articles of association provide otherwise, the arbitration clause is binding on the company, the corporate bodies of the company, the members the corporate bodies and the shareholders.*
>
> **2.** *The procedure before the arbitral tribunal is governed by the provisions of Part 3 of the Civil Procedure Code; Chapter 12 of Federal Act of 18 December 1987 on Private International Law does not apply.*
>
> **3.** *The articles of association may regulate the details, in particular by reference to arbitration rules. They shall in any event ensure that persons who may be directly affected by the legal consequences of the arbitral award are notified of the initiation and conclusion of the proceedings and may participate in appointing the arbitral tribunal and in the proceedings as an intervening party.*

As can be seen, the statutory arbitration clauses for corporate disputes in AoA are subject to **several mandatory requirements**.

First, Article 697*n* CO only allows companies to include arbitration clauses in the AoA providing for the resolution of disputes by arbitral tribunals with their seats in Switzerland. This ensures that any award can be challenged in front of the SSC.

Second, paragraph 2 of Article 697*n* CO clarifies that the procedure before the arbitral tribunal – as well as the appeal proceedings before the SSC – are subject to Part 3 of the CPC, and not Chapter 12 of the PILA. This ensures that any award can be reviewed under the arbitrariness test (see Article 393(e) CPC),[191] which is not

188 Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 493 (Section 2.1.23).

189 See Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 493 (Section 2.1.23).

190 See Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 493 (Section 2.1.23).

191 Art. 393(e) CPC provides that: *"An arbitral award may be contested on the following grounds:* […] *e. the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity;* […]*."*

possible for arbitral proceedings subject to Chapter 12 of the PILA (see Article 190(2) PILA).[192] Unlike in the case of contractual arbitration clauses,[193] an "opting-out" from the application of the CPC is not possible in a statutory arbitration clause. According to the Federal Council, this will strengthen procedural certainty, in particular since under Part 3 of the CPC, the parties to the arbitration agreement cannot waive their right to challenge the award before the SSC.[194]

Third, Article 697*n*(3) CO includes special safeguards for directly affected parties such as minority shareholders. Thus, the AoA of a Swiss corporation introducing a statutory arbitration clause will not only have to ensure that any person who may be directly affected by the legal consequences of the arbitral award is notified of the initiation and conclusion of the proceedings, but that any affected persons may also participate in appointing the arbitral tribunal and in the proceedings as such as an intervening party.[195] This provision was not included in the original draft published by the Federal Council,[196] but added during the parliamentary debates as such procedural guarantees were seen as necessary in order to ensure compliance with due process principles enshrined in Article 29 of the Swiss Constitution and Article 6 of the European Convention on Human Rights ("**ECHR**"), in particular the right to be heard.[197] It is expected that in practice, most companies will refrain from including detailed procedural clauses in the AoA, but instead refer to specific arbitral rules, such as the 2023 Supplemental Swiss Rules for Corporate Law Disputes ("**Supplemental Rules**").[198] The elaboration of *ad hoc* specific procedural rules from scratch (and possibly without providing for the intervention of an institution) would be a complex and risky exercise for any corporation.

The protections of the rights of persons who can be directly affected by the award only apply to corporate disputes in which a decision with direct legal consequences *erga omnes* can be adopted.[199] This is in particular not the case if the action aims at obtaining an award obliging one of the parties to payments or similar pecuniary considerations.[200] In practice, it will be up to the claimant to inform the board of the corporation, which will then have to identify the persons potentially affected and notify them about the commencement of arbitration proceedings.[201] While Article 697*n* CO does not specify the form of such notification, it is argued that Article 626(1)(7) CO regarding notifications of the corporation to its shareholders shall apply.[202] As a consequence, the corporation may decide on the form of such notification in its AoA. It should be noted that compliance with these notification obligations, in particular in case the AoA require a publication in the Swiss Official Gazette of Commerce, is a potential limitation the confidentiality of the arbitral proceedings.[203]

Fourth, the entry in the commercial register of a corporation that adopted a statutory arbitration clause must reflect such fact.[204] This is important to ensure that shareholders acquiring shares of the corporation after the adoption of the statutory arbitration clause are also bound by it *ipso iure*. There is no additional approval or form requirement to ensure the binding effect of the arbitration clause, since newly joining shareholders must know the current, publicly accessible AoA.[205]

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193 See Article 353(2) CPC.

194 See Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 495 (Section 2.1.23).

195 See in detail P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2221 paras. 359 et seq.

196 See Message of the Federal Council, (FF 2017 353), p. 495 (Section 2.1.23).

197 See in detail P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2221, para. 360.

198 See P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2223 paras. 363 et seq.; see Articles 2 to 5 of the Supplemental Rules as well as below para. 39.

199 See Article 697n(3) CO: *"person who may be directly affected by the legal consequences"*. This is the case notably for the actions pursuant to Articles 706, 706b, 714 and 736(4) CO. See in detail P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2223 et seq. para. 365.

200 P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2225 para. 366.

201 P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2225 para. 366.

202 P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2225 para. 366.

203 F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?* GesKR 2023, p. 34 et seqq., p. 44.

204 Article 45(1) let. u of the Swiss Ordinance on the Commercial Register.

205 See Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 495 (Section 2.1.23).

Fifth, pursuant to Article 704(1)(14) CO, introducing a statutory arbitration clause requires the approval of at least two-thirds of the votes represented and a majority of the nominal value of shares represented (so-called qualified majority).

B. The Questions Left Unanswered

Despite the adoption of Article 697*n* CO, certain questions remain unanswered and will have to be further clarified in jurisprudence and scholarship. [206] This concerns for instance the following issues.

1. What Applies if the Statutory Arbitration Clause Does Not Meet the Criteria Set by Article *697n* CO?

If the arbitration clause does not meet the criteria set by Article 697*n* CO, for instance because it provides for a seat of the arbitral tribunal abroad, Article 697*n* CO cannot be invoked. Instead, the validity of the arbitration clause will have to be assessed based on the criteria established for contractual arbitration clauses.[207]

2. Which Corporate Disputes are Arbitrable?

Article 697*n* CO applies to "corporate law disputes", but the question arises as to which corporate disputes can actually be submitted to the jurisdiction of an arbitral tribunal. The term "corporate law disputes" is also used in Article 151(1) PILA and, pursuant to the legislative message of the Federal Council, the same interpretation shall apply to Article 697*n* CO.[208] Pursuant to Article 354 CPC, any claim over which the parties may freely dispose may be the object of an arbitration agreement. Generally, the term "corporate law disputes" is understood in a very broad sense.[209]

Thus, unless it specifies otherwise, a statutory arbitration clause in principle applies to all disputes in which claims based on corporate law are asserted.[210] This includes in particular **(i)** challenges against resolutions of the general assembly of shareholders (Articles 706, 691(3) and 689*f*(2) read in conjunction with Article 691(3) CO; Article 106 Swiss Merger Act); **(ii)** declaratory actions regarding the nullity of resolutions of the general assembly and the board of directors (Articles 706*b* and 714 CO); **(iii)** liability actions against members of the governing bodies of the corporation (Articles 752 et seqq. CO; Article 108 Swiss Merger Act); **(iv)** actions for the return of benefits (Article 678 CO; these actions are covered at least insofar as they are directed against shareholders, members of the board of directors, persons involved in the management of the corporation and members of the advisory board; **(v)** actions for the dissolution of the corporation (Article 736(1) CO); **(vi)** actions for an appropriate compensation payment following a restructuring (Article 105 Swiss Merger Act); **(vii)** further actions, including actions of the corporation against a shareholder for the performance of the obligation to pay the share capital and actions in connection with transfer restrictions.[211]

It is, however, controversial whether actions for defects in the organisation of a corporation are arbitrable. Pursuant to Article 354 CPC, only claims over which the parties may freely dispose may be the object of an arbitration agreement. According to some scholars, this is not the case for proceedings regarding defects in the organization of a corporation.[212] Moreover, court orders in non-contentious matters[213] are deemed not to be

206 See e.g. P. Boeckli, *Schweizer Aktienrecht* (5th ed., 2022), p. 2228 para. 370.

207 See above paras. 5 et seqq.; see generally B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (4th ed., 2021), pp. 118 et seqq.

208 Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 494 et seq. (Section 2.1.23).

209 See also F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 36.

210 Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 494 et seq. (Section 2.1.23).

211 Swiss Arbitration Centre, Explanatory Note to the Supplemental Swiss Rules for Corporate Law Disputes ("**Explanatory Note**"), p. 2, available at www.swissarbitration.org.

212 See F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 39 with further references.

213 *Freiwillige Gerichtsbarkeit* in German and *juridiction gracieuse* in French.

arbitrable by certain scholars.[214] This extends for instance to the judicial designation of an expert to carry out a special investigation decided by the general assembly of shareholders (Article 697*c* para. 2 CO) or the invalidation of securities (Article 971 f. CO, Article 977 CO, Article 981 ff. CO).

There is sufficient remaining uncertainty as to the scope of "corporate law disputes" to anticipate that well-advised corporations which resort to arbitration will define the scope of application of their statutory arbitration clauses more narrowly in the AoA.

The selected arbitration rules may also restrict the scope of application of the statutory arbitration clause to selected corporate disputes. While the Supplemental Rules do not exclude any disputes, the model arbitration clause proposed by the Swiss Arbitration Centre excludes disputes which are subject to summary proceedings pursuant to Article 250(c) CPC.[215] This is motivated by the Swiss Arbitration Centre's position that, unlike state courts, arbitral tribunals do not have the power to order enforcement measures or adopt binding orders vis-à-vis third parties.[216] This position has, however, been criticized by some scholars since it is not uncommon that a court deciding on corporate disputes must order the commercial registry to record a specific fact in the commercial register also in the context of disputes which are not subject to summary proceedings. Scholars further argue that arbitral tribunals may issue orders vis-à-vis commercial registers like courts do.[217]

3. Who is Bound by the Statutory Arbitration Clause?

Pursuant to Article 697*n*(2) CO, the statutory arbitration clause is binding on the corporation, the corporate bodies of the corporation, the members of the corporate bodies and the shareholders. However, it is clear that disputes among shareholders, in particular in the context of shareholders agreements, are not subject to statutory arbitration clauses.[218] This scope of application may be reduced by the AoA.

The question arises to which extent third parties outside of the corporate structure of the corporation, such as creditors, are bound by or may rely on statutory arbitration clauses. Article 697*n* CO does not clarify this. Scholars argue that a distinction must be drawn based on whether the third party is a claimant or a respondent in the relevant proceedings.[219] If the third party is a respondent, an arbitral tribunal may only be competent to decide the dispute in question if it is subject to a contractual arbitration agreement or if the third party does not object to the jurisdiction of the arbitral tribunal (implied consent). An exception might apply for *de facto* corporate bodies.[220]

However, if the third party is the claimant, it is argued that it may choose if it wants to file its claim with the competent state court or with an arbitral tribunal. Based on the relevant case law of the SSC, it can be expected that, if the third party decides to file a claim in a state court, the respondent, for instance a member of the board of the corporation, will not be allowed to invoke the arbitration defense.[221] If the third party decides to file a claim with the arbitral tribunal, it remains to be seen if a specific statutory arbitration clause – or already Article 697*n* CO as such – can be interpreted as an offer to conclude an arbitration agreement, allowing a third party to choose whether it wants to accept such offer or not. This would entail that the parties agree on an arbitration clause for the benefit of a third party, which, pursuant to the relevant case law of the SSC, could be a possibility.[222] Such arbitration clause for the benefit of a third party, that could be included in AoA, however,

214 See F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 39 with further references.

215 Swiss Arbitration Centre, Supplemental Swiss Rules for Corporate Law Disputes, p. 5, model statutory arbitration clause, available at www.swissarbitration.org.

216 See Explanatory Note, p. 2.

217 See in detail F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 37 et seqq.

218 Message of the Federal Council regarding the modification of the Code of Obligations dated 23 November 2016 (FF 2017 353), p. 495 (Section 2.1.23); see regarding the coordination of claims based on shareholders agreements F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 41 et seqq.

219 See F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 39 et seqq. with further references.

220 See F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 40.

221 Decision of the Swiss Supreme Court 136 III 107, 8 December 2009, consid. 2.5; see also F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 40.

222 See Decision of the Swiss Supreme Court 87 I 53, consid. 3b; for further details see F. Weibel and R. Dallafior, *Statutarische Schiedsklauseln – Echte Game Changer?,* GesKR 2023, p. 34 et seqq., p. 40.

must explicitly provide for such possibility or otherwise clearly and unambiguously indicate this.[223]

IV. The Supplemental Swiss Arbitration Rules for Corporate Law Disputes

The Swiss Arbitration Centre published the Supplemental Rules, which entered into force on 1 January 2023 along with Article *697n* CO. This is the first time such rules have been issued for the arbitration of corporate law disputes of Swiss corporations.[224] These supplement the Swiss Rules of International Arbitration ("**Swiss Rules**")[225] with respect to the administering and conduct of arbitrations concerning corporate law disputes and governed by the CO.[226] The Swiss Arbitration Centre's main goal in elaborating the Supplemental Rules was to deviate as little as possible from the main Swiss Rules, and to ensure that the requirements of Article *697n* (3) are complied with.[227] In addition to issuing these Supplemental Rules, the Swiss Arbitration Centre also published an Explanatory Note to the same, to provide additional background and guidance on the application of the Supplemental Rules ("**Explanatory Note**").[228]

The Supplemental Rules themselves are succinct: they are divided into six articles and also provide a model statutory arbitration clause, which itself helpfully contains both "recommended" as well as "possible additional" elements to include in the statutory arbitration clause.[229] The articles themselves cover the following areas: **(i)** the scope of the Supplemental Rules, **(ii)** the commencement and termination of the arbitration proceedings, **(iii)** the appointment of the tribunal, **(iv)** the participation of third persons, **(v)** information regarding the course of the arbitration proceedings, and **(iv)** interim measures and emergency relief.[230]

V. The Explanatory Note to the Supplemental Rules

The Explanatory Note serves to provide additional background and guidance on each provision of the Supplemental Rules.[231] The highlights below describe how the Supplemental Rules implement aspects of the new Article 697*n*, and ensure in particular the effective involvement of "Affected Persons" willing to intervene in the arbitral proceedings.

With respect to Article 1 of the Supplemental Rules which sets out the scope of the Supplemental Rules, the Explanatory Note clarifies that the Supplemental Rules intentionally do not define the term "corporate law disputes" and instead "defer" to the term's meaning as it is understood in the new Article 697*n*.[232] However, as noted above, the meaning of "corporate law disputes" in Article 697*n* CO is one of the questions left unanswered by the text of the provision.

The Explanatory Note further clarifies that the Supplemental Rules only apply automatically to disputes based on statutory arbitration clauses pursuant to Article 697*n* CO, in which case an explicit reference to the Supplemental Rules in the arbitration clause is not needed.[233] The Supplemental Rules, however, do not apply to arbitration proceedings based on arbitration clauses of a contractual nature that would involve an aspect of

223 See Decision of the Swiss Supreme Court 87 I 53, consid. 3b.

224 S. Pfisterer et al., *New Supplemental Swiss Rules for Corporate Disputes*, 7 November 2022 (available at https://www.homburger.ch/en/insights/arbitration-clauses-in-articles-of-association-pursuant-to-the-revised-law-on-corporations-new-supplemental-swiss-rules-for-corporate-law-disputes).

225 Swiss Rules of International Arbitration.

226 Swiss Arbitration Centre, Supplemental Swiss Rules for Corporate Law Disputes, p. 4, Introduction ("**Supplemental Rules**").

227 Explanatory Note, p. 1; Supplemental Rules, p. 4.

228 Explanatory Note, p. 1.

229 Supplemental Rules, p. 5.

230 Supplemental Rules.

231 Explanatory Note, p. 1.

232 Explanatory Note, p. 6.

233 Explanatory Note, p. 6.

corporate law "unless such contractual arbitration clause provides otherwise)."[234] The note further indicates that where there is doubt as to whether the arbitration clause on which the arbitration is based on a corporate law or contractual nature, the parties, the Court of the Swiss Arbitration Centre and the arbitral tribunal should consider that "it may be prudent to assume that it is of a corporate law nature and that, therefore, the requirements of Article *697n*(3) CO and the Supplemental Swiss Rules apply."[235]

The Explanatory Note further outlines the role of, and information provided to, Affected Persons, addressed in Articles 2, 3, and 5 of the Supplemental Rules. Article 2(1) of the Supplemental Rules defines "Affected Persons" as "persons who may be directly affected by the legal effects of the arbitral award […]."[236] The Explanatory Note states that Article 2(1) of the Supplemental Rules directly implements the provision of Article *697n*(3) CO, which requires that directly Affected Persons of the arbitral award be informed of the arbitration proceedings within 5 days of the arbitration's commencement.[237] Similarly, the Explanatory Note explains that Articles 2(6) and 2(7) of the Supplemental Rules implement the requirement under Article *697n*(3) that Affected Persons be informed of the termination of the arbitration proceedings, which includes a "brief statement about the outcome of the case."[238]

With respect to Article 3(2) of the Supplemental Rules, the Explanatory Note links this provision to Article *697n*(3) CO which requires that Affected Persons be allowed to participate in the appointment of the arbitrators.[239] Specifically, this group can provide comments on the appointment of the tribunal to the Court of the Swiss Arbitration Centre, but the period within which comments can be provided is limited to 30 days "following the commencement of the arbitration proceedings."[240] Lastly, the Explanatory Note describes that Affected Persons "who are not (yet) a party to or otherwise participating in the arbitration proceedings"[241] can still receive information about the arbitration proceedings from the arbitral tribunal pursuant to Supplemental Rule Article 5(2).[242] They can further request the contact details of the presiding arbitrator, but these details would only be provided after the Secretariat consults with the arbitral tribunal, which itself may consult with the parties.[243]

Perhaps unsurprisingly, the Supplemental Rules also include an Article 6 on interim measures and emergency relief.[244] Specifically, this provision allows the tribunal, or the emergency arbitrator, to "refrain from deciding or defer its decision […] for a judicial authority before which a parallel request is pending."[245]

VI. Conclusion

In this article, the authors sought to answer two questions: **(i)** whether the introduction of Article *697n* clarified the pre-existing landscape concerning arbitration clauses as they relate to AoA of Swiss corporations, limited partnerships, and limited liability companies, and; **(ii)** whether there may be an increase in arbitrations in corporate disputes in Switzerland as a result of this new provision.

Regarding the first item, Article 697*n* does provide clarification – in part – regarding the binding effect of arbitration clauses for corporations seated in Switzerland. Article 697*n* explicitly allows for the inclusion of arbitration clauses in AoA, clarifies the procedure of these arbitrations before an arbitral tribunal, and sets out the

234 Explanatory Note, p. 6

235 Explanatory Note, p. 6.

236 Supplemental Rules, Article 2(1) p. 6.

237 Explanatory Note, p. 7; Supplemental Rules, Article 2(1) p. 6.

238 Explanatory Note, p.8; Supplemental Rules, Article 2(6)-(7) p. 6.

239 Explanatory Note, p. 9; Supplemental Rules, Article 3(2), p. 7.

240 Explanatory Note, p. 9; Supplemental Rules, Article 3(2), p. 7.

241 Explanatory Note, p. 12.

242 Explanatory Note, p. 12.

243 Supplemental Rules, Article 5(1), p. 7.

244 Supplemental Rules, Article 6, p. 7.

245 Supplemental Rules, Article 6(1)-(2), p. 7

fundamental requirements to safeguard the rights of directly affected parties. However, as explained above, some issues remain unanswered, such as whether an arbitration clause that fails to meet the established criteria in Article *697n* might still be considered binding on the parties. Given the time required for a dispute to reach the SSC and the general rarity of corporate law disputes that move to this stage, these remaining questions may well remain open for a while.

Turning to the second question, an insufficient amount of time has passed since the entry into force of Article 697*n* CO, and the issuance of the Supplemental Rules, to answer this question. With just over ten months since the implementation of Article 697*n* CO, there is not yet enough data to adequately determine whether Article 697*n* CO has led, or will lead, to an increase in arbitration proceedings dealing with corporate disputes in Switzerland.

Nevertheless, the well-known advantages of arbitration make this dispute resolution method well-suited for such disputes. In addition to their confidentiality, arbitration proceedings allow the parties to nominate a tribunal with a specific expertise, be it regarding the subjectmatter of the dispute (e.g. the valuation of a share) or the industry in which the company operates. The possibility to hold the proceedings in English also make arbitration fit for a corporate landscape in which large parts of the documentation and the parties use English, in particular in the case of international companies headquartered in Switzerland or in certain industries that use English as working language. In view of these advantages, a wider adoption of arbitration as a means of corporate dispute resolution is desirable.

Ultimately, the question of whether the Swiss legislator and the Swiss Arbitration Centre's efforts have addressed enough of the uncertainty that preceded the adoption of Art. 697*n* CO to convince companies to go ahead and more routinely resort to corporate arbitration in Switzerland can only be assessed after some time has passed. They can, however, satisfy themselves that they have done the maximum that was legally and reasonably possible to offer companies a solid legal landscape for such development.

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Cost-Related Issues of Third-Party Funding in International Arbitration in Switzerland

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ABSTRACT

This article covers certain cost-related issues arising from the involvement of a third-party funder in international arbitration proceedings seated in Switzerland and governed by the Swiss Rules of International Arbitration (Swiss Rules). In particular, it addresses whether (i) security for costs can be requested on the basis of the funded party's reliance on third-party funding; (ii) the funding costs are recoverable if a funded party prevails; and (iii) the funder can be held liable to pay the other party's costs, if the funded party does not succeed in the arbitration.

The article suggests concrete answers to these cost-related issues and questions of third-party funding arising in Swiss arbitration proceedings. Where relevant, the case law under the arbitration laws of other jurisdictions as well as the arbitration rules of other arbitral institutions are taken into account to explore the current international arbitration practice.

I. Introduction

Third-party funding plays an increasingly important role in dispute resolution, both in state court litigation and arbitration.[246] In 2018, the market for dispute resolution funding was estimated at more than USD 10 billion.[247] The rise in third-party funding in dispute resolution has led to debates about its admissibility and regulation, for example regarding confidentiality and disclosure obligations of the funded party.[248]

In Switzerland, the Federal Supreme Court has confirmed the admissibility of third-party funding in state court litigation proceedings.[249] This ruling also applies to third-party funding in arbitration.[250] However, while third-party funding has recently been under the scrutiny of the European lawmakers[251] and the UK Supreme Court,[252] this is not the case in Switzerland. Therefore, the practical issues arising from third-party funding in Swiss arbitrations must be resolved by reference to case law and general procedural principles. Due to the

246 L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 147 *et seq.*

247 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, ("ICCA-Queen Mary Report"), p. 17.

248 See, for example, H. Haeri et al., *Third-Party Funding in International Arbitration*, GAR, 30 December 2022.

249 I. Berger et al., *Bei der Prozessfinanzierung*, ZZZ 62/2023, p. 165; Decision of the Swiss Federal Supreme Court ATF 131 I 223 at 4.5 and 4.6; Decision of the Swiss Federal Supreme Court 2C_814/2014 at 4.3.1.

250 I. Berger et al., *Bei der Prozessfinanzierung*, ZZZ 62/2023, p. 165.

251 See, for example, the resolution of the EU Parliament dated 13 September 2022 proposing a directive on the regulation of third-party funding entitled 'Responsible private funding of litigation' (P9-TA(2022)0308). The International Legal Finance Association (ILFA) criticized the resolution in its report on the "Resourcing the Rule of Law in Europe" dated June 2023. Pursuant to recent reports, the EU Commission plans to conduct further studies on dispute resolution funding before initiating any regulation (see, for example, the blog article by Pinsent Masons of 7 July 2023, *EU third-party litigation funding regulation delayed until further studies*, available online under https://www.pinsentmasons.com/out-law/news/eu-third-party-litigation-funding-regulation-delayed-until-further-studies (last visited on 4 August 2023)).

252 *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28. In its judgment of 26 July 2023, the UK Supreme Court qualified litigation funding agreements as so-called "damages-based agreements" ("DBAs"), and held that litigation funding agreements are unenforceable if they do not comply with the regime of the DBAs. The consequences of the judgment may be significant, also regarding English-seated arbitrations (see, for example, the blog article by White & Case of 2 August 2023, *Upheaval in the Litigation Funding Industry: UK Supreme Court Rules that many Litigation Funding Agreements are Unenforceable*, available online under https://www.whitecase.com/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding (last visited on 4 August 2023)).

absence of statutory rules, certain practical issues remain unresolved and subject to controversial discussions.

One of the most controversial and broadly discussed topics of third-party funding in international arbitration is its impact on costs. The involvement of a third-party funder raises questions regarding security for costs requests against funded parties, direct costs awards against the third-party funder and the recoverability of the funding costs by the funded party against the unsuccessful opponent.

Before analysing these questions, the funding mechanisms of third-party funding agreements should be taken into consideration. Third-party funders typically agree to bear the entire costs of the arbitration, *i.e.*, both the arbitration costs and the legal costs of the funded party (*"full cost-covering"*).[253] In other words, the third-party funder assumes the entire cost risks of the arbitration. If the funded party does not succeed in the arbitration, the third-party funder has no recourse against the funded party.[254] If, on the other hand, the funded party is successful, the third-party funder receives an agreed share of the proceeds ("funding costs"), either as a multiple of the amount of the funds that were provided ("multiple approach") or as a percentage of the proceeds ("percentage approach").[255] These proceeds not only cover the fees paid by the third-party funder to the funded party's attorneys, but also constitutes the return on the funder's investment in the arbitration and the consideration for the assumption of the cost risks. In other words, the funded party bears, by way of a reduction of the proceeds it recovers from the counterparty, not only its own attorneys' legal fees, but also the costs of the funding provided by the third-party funder.

For the purposes of this article, third-party funding is understood in a relatively narrow sense as covering *"'non-recourse legal finance provided by a commercial funder under the terms of a funding agreement, typically to a claimant (or sometimes defendant) in return for a share of the amounts recovered in the proceedings".*[256] Other types of (financial) support to one of the parties in a dispute, such as litigation insurance, portfolio financing or contingency fee arrangements between a party and its external counsel, are outside the scope of this article.[257]

II. The Cost-Related Issues Arising from Third-Party Funding in International Arbitration

Third-party funding in international arbitration can give rise to several practical issues. It does not come as a surprise that the potential impact of the involvement of a third-party funder on the determination and allocation of the costs of the arbitration is a sensitive and much debated issue. The involvement of a third-party funder in an arbitration raises at least three issues which should be carefully analysed by the parties' counsel already at the outset of the proceedings.[258]

In an early phase of an arbitration, it is not unusual for a party (in general the respondent) to request security for costs to safeguard its right to be reimbursed for the costs of the arbitration and its own legal fees in case of success. The arbitral tribunal may order security for costs if the requesting party can show an actual risk that it will not be able to recover the costs awarded by the tribunal from the unsuccessful party.[259] If one of the parties (typically the claimant) is funded by a third-party, the question may arise as to whether the counterparty (typically the respondent) may successfully apply to the arbitral tribunal for a security for costs order. Indeed, from the respondent's perspective, the mere fact that the claimant has recourse to a third-party funder may indicate a lack of sufficient funds, which could jeopardize the respondent's reimbursement claim for the costs of the arbitration and its own legal fees at the end of the arbitration.

This is, however, not the only cost-related issue arising from the involvement of a third-party funder in an ar-

253 I. Berger et al., *Bei der Prozessfinanzierung*, ZZZ 62/2023, p. 166.

254 I. Berger et al., *Bei der Prozessfinanzierung*, ZZZ 62/2023, p. 166.

255 I. Berger et al., *Bei der Prozessfinanzierung*, ZZZ 62/2023, p. 168.

256 H. Haeri et al., *Third-Party Funding in International Arbitration*, GAR, 30 December 2022, section 2 (*Defining TPF*).

257 It is being understood that certain cost-related issues, and the solutions discussed herein, also apply to other types of providing (financial) support to a party in a dispute.

258 For a general overview and analysis of the cost-related issues of third-party funding on arbitration, see, for example, ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 145 - 183.

259 G. Kaufmann-Kohler and A. Rigozzi, *International arbitration – Law and practice in Switzerland* (2015), para. 6.117, with further references.

bitration. The fact that (at least) one of the parties benefitted from the financial support of a third-party funder may also impact the determination and allocation of the costs of the arbitration at the end of the proceedings.

If the funded party *prevails* in the arbitration, the arbitral tribunal must (likely)[260] decide if the funded party can recover its own legal costs, *i.e.*, its attorneys' fees which were paid by the third-party funder, and/or the costs it had to pay to the third-party funder for having obtained the funding (i.e. typically the agreed share of the proceeds which must be paid to the third-party funder), from the unsuccessful opponent.

If, however, the funded party *does not succeed* in the arbitration, the successful party may wish to recover the costs of the arbitration and its own legal costs directly from the third-party funder, in particular if the funded party is in financial distress and if no order for security for costs has been requested or granted.

In the next section, we will explore how an arbitral tribunal in an arbitration seated in Switzerland and administered under the Swiss Rules could address and resolve these three cost-related issues of third-party funding. The developments under the arbitration laws of other jurisdictions and the arbitration rules of other arbitral institutions are referred to and taken into account where relevant.[261]

III. How Could Arbitral Tribunals Seated in Switzerland Address the Cost-Related Issues Under the Swiss Rules?

Before analysing the three cost-related issues arising from the involvement of a third-party funder in an arbitration in detail (*section* III.B), we will briefly outline the general legal landscape governing an arbitral tribunal's assessment under the Swiss *lex arbitri* and the Swiss Rules of International Arbitration (*section* III.A).

A. The Swiss *lex arbitri* and the Swiss Rules

An arbitration before a tribunal with its seat in Switzerland is subject to the Swiss *lex arbitri*, namely chapter 12 of the Federal Act on Private International Law ("**PILA**"). If an arbitration clause or an agreement to arbitrate refers to the Swiss Rules of International Arbitration issued by the Swiss Arbitration Centre or its preceding institutions (the "**Swiss Rules**"), the Swiss Rules govern the course of the arbitration to the extent an issue is not conclusively and mandatorily regulated by the PILA.[262]

As we will examine below, neither the PILA nor the Swiss Rules contain any specific provision regarding the involvement of a third-party funder, let alone the cost-related issues arising from such third-party funder's involvement.

However, the Practice Note on the Swiss Rules of International Arbitration (the "**Practice Note**") published by the Swiss Arbitration Centre in March 2023 includes a section on third-party funding. The Practice Note seeks to provide guidance regarding the practice of the Swiss Arbitration Centre when administering arbitration proceedings under the Swiss Rules.[263]

Article 100 of the Practice Note, which is inserted within the chapter on the duty of disclosure of arbitrators, provides that *"[i]n case third-party funding is resorted to by any party, that party is expected to disclose the existence and identity of the third-party funder, so as to enable each arbitrator to run a conflict check [...]".* As we will discuss in more detail below (*section* III.B.1), the disclosure of the existence of a third-party funding agreement and of the third-party funder's identity can be an important element when evaluating a security for costs request.

Apart from this Article 100, the Practice Note does not contain any other reference to third-party funding. In particular, the Practice Note does not provide any guidance on how to deal with the cost-related issues arising from the involvement of a third-party funder in arbitrations under the Swiss Rules.

260 Provided that the funded party claimed the reimbursement of such costs (see, for example, Article 38(e) Swiss Rules).

261 See Annex 1 for an Overview of the Provisions on Cost-related Issues arising from Third-Party Funding in selected institutional Arbitration Rules.

262 Swiss Rules, Article 1.1 ("*These Rules shall govern arbitrations where an arbitration clause or agreement to arbitration (the 'Arbitration Agreement') refers to these Rules, administered by the Swiss Arbitration Centre or previously by SCAI, or to the arbitration rules of the Chambers of Commerce and Industry of Basel, Bern, Central Switzerland, Geneva, Neuchâtel, Ticino, Vaud, Zurich, or of any further Chamber of Commerce or other entity that may adhere to or refer its cases to these Rules*).

263 See Article 1 of the Practice Note.

Due to the absence of specific provisions on third-party funding in the Swiss PILA and the Swiss Rules, and lacking any guidance in the Practice Note, arbitral tribunals seated in Switzerland must assess the cost-related issues arising from the involvement of a third-party funder based on the general principles of Swiss law applicable to security for costs orders and the determination and allocation of the costs of the arbitration.

B. Analysis of Three Cost-Related Issues

1. Is the Funded Party Obliged to Provide for Security for Costs?

There is no provision addressing security for costs in the Swiss *lex arbitri*. A part of the doctrine considers that a security for costs order amounts to a provisional measure within the meaning of Article 183 PILA,[264] and it is generally accepted that an arbitral tribunal has the authority to order security for costs if requested by a party.

The standard requirements to order security for costs as a provisional measure in accordance with Article 183(1) PILA also apply in cases involving a third-party funder, *i.e.,* (1) *prima facie* jurisdiction of the arbitral tribunal, (2) *prima facie* proof that harm to the applicant is likely to result if the measure is not ordered (risk of imminent serious harm), (3) and that such a harm outweighs the harm likely to result to the party against whom the measure is directed if the measure is granted (balance of interests), and (4) a reasonable possibility that the requesting party will succeed on the merits of the claim.[265]

As it is the case for the PILA, the Swiss Rules do not contain a specific provision regarding security for costs orders. However, it is also accepted by the doctrine and Swiss arbitration practice that an arbitral tribunal has the authority to order security for costs under Article 29 of the Swiss Rules[266], which governs interim measures, provided that the conditions (similar to those under Article 183(1) PILA) are met.[267]

Based on these general principles applicable to provisional measures under Article 183(1) PILA and Article 29 of the Swiss Rules, the party requesting security for costs must show a meritorious claim and possible harm.[268] Therefore, if the requesting party can credibly show that it is exposed to a relatively imminent risk of being deprived of its future costs award, an order for security for costs is appropriate.[269]

However, in Switzerland, the threshold to assume harm is high.[270] In particular, the mere fact that a case is funded does not imply an imminent risk that the funded party will not be in a position to satisfy an adverse costs award.[271] Indeed, third-party funding is not only used by parties in financial difficulty, but is also extensively used by financially stable parties to safeguard their cash flow or to share the cost risks of the arbitral proceedings.[272] Third-party funding should thus not *per se* determine the arbitral tribunal's decision on security for costs, unless there are concrete (additional) factual elements demonstrating that the requesting party's ability

264 Art. 183 PILA provides that "*(1) Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order interim measures or conservatory measures. (2) If the party concerned does not comply voluntarily with the measure ordered, the arbitral tribunal or a party may request the assistance of the competent court. The court shall apply its own law. (3) The arbitral tribunal or the state court may make the interim or conservatory measures subject to the provision of appropriate security*". Ch. Boog, Commentary to *Article 183 PILA*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide* (2018), p. 159 para. 10.

265 Ch. Boog, *Commentary to Article 183 PILA*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide* (2018), p. 159 para. 12.

266 Art. 29(1) Swiss Rules indicates that "*At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate. Upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative, the arbitral tribunal may also modify, suspend or terminate any interim measures granted*".

267 M. Magliana, *Commentary to Article 26 Swiss Rules*, in M. Arroyo (ed.), *Arbitration in Switzerland – the Practitioner's Guide* (2018), p. 708 para. 13.

268 S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri*, in M. Scherer (ed.), 38(4) ASA Bull., 2020, pp. 842 – 867, p. 853.

269 S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri*, in M. Scherer (ed.), 38(4) ASA Bull., p. 861.

270 S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri*, in M. Scherer (ed.), 38(4) ASA Bull., p. 853.

271 S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri*, in M. Scherer (ed.), 38(4) ASA Bull., p. 861.

272 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 171.

to recover its costs is in jeopardy.[273] This can be the case where a party's financial situation has seriously deteriorated since the conclusion of the arbitration agreement, or where the party uses bad faith maneuvers specifically intended to frustrate the other party's potential future cost claim.[274] As suggested by S. Bachmann, it is appropriate to consider the involvement of a third-party funder and the funding agreement's provisions (notably if the funder has an obligation to cover an adverse costs award) as a factual circumstance.[275]

To our knowledge, there is no published case law regarding security for costs orders against a funded party in arbitrations subject to the Swiss *lex arbitri* and/or the Swiss Rules. Therefore, case law in other jurisdictions and under different arbitration rules may offer some guidance. That said, this case law does not directly apply to a Swiss-seated arbitral tribunal applying the Swiss Rules, but it may serve as basis for ascertaining current international arbitration practice. In fact, the published case law indicates that the principles outlined above comply with the international arbitration practice.

For instance, in the PCA-administered UNCITRAL arbitration case *South American Silver v. Bolivia*, the arbitral tribunal denied security for costs to the respondent where the respondent's sole argument was that the claimant had been funded by a third party. The tribunal ordered only that the funder's identity be disclosed but not the terms of the funding agreement.[276] This, in fact, corresponds to the guidance of the Swiss Arbitration Centre pursuant to Article 100 of the Practice Note (*supra, section* III.A).

Many arbitral tribunals (in particular in investor-state arbitrations) rejected security for costs requests in cases in which the requesting party was relying primarily on the existence of third party funding.[277] The reasoning is mainly that *"[t]he fact of having financing alone does not imply risk of non-payment and that ordering security every time that third-party funding is established would increase the risk of blocking potentially legitimate claims"*.[278] In recent cases, arbitral tribunals confirmed that the existence of a third-party funding itself does not justify a security for costs order. For instance, in the ICSID Case *Hope Services LLC v. Republic of Cameroon*, the arbitral tribunal held that the Claimant's financial difficulties and the intervention of a third-party funder, whether taken individually or collectively, do not necessarily constitute circumstances justifying the granting of security for costs.[279] Similarly, in the PCA-administered UNCITRAL arbitration case *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia*, the arbitral tribunal found that the existence of a third-party funder may play a role but is not dispositive for granting security for costs, particularly if other factors are not present.[280]

However, the high threshold for granting a security for costs award was met in the investor-State arbitration case *RSM v. Saint Lucia*. A combination of three factors led the arbitral tribunal to order security for costs: (1) the claimant failed to comply with cost orders in the past; (2) the claimant acknowledged having limited financial resources; and (3) the funding was provided by an unknown funder.[281]

This generally restrictive approach to security for costs against funded parties mirrors international arbitration practice. Guidance for establishing the international arbitration practice can by found in the remarkable work of the International Council for Commercial Arbitration and the Queen Mary College at the University of

273 W. Kirtley and K. Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?*, 30(1) Journal of International Arbitration, 2013, pp. 17 – 30, p. 30.

274 M. Magliana, *Commentary to Article 26 Swiss Rules*, in M. Arroyo (ed.), *Arbitration in Switzerland – the Practitioner's Guide* (2018), p. 708 para. 14; S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri*, in M. Scherer (ed.), 38(4) ASA Bull., p. 861.

275 S. Bachmann, *The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland. Why and how third-party funding should be considered under the Swiss lex arbitri*, in M. Scherer (ed.), 38(4) ASA Bull., p. 861.

276 *South American Silver Limited v. Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paras. 79, 80 (*South American Silver v. Bolivia*); H. Haeri et al., *Third-Party Funding in International Arbitration*, GAR, 30 December 2022.

277 H. Haeri et al., *Third-Party Funding in International Arbitration*, GAR, 30 December 2022; See, for example, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, 23 June 2015; South American Silver v. Bolivia.

278 H. Haeri et al., *Third-Party Funding in International Arbitration*, GAR, 30 December 2022 [emphasis added]; South American Silver v. Bolivia.

279 *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4, Decision on Respondent Application for Security for Cost, 12 May 2021, para. 64.

280 The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia, PCA Case No. 2018-39, Procedural Order No. 15, Decision on the Claimants' Application for a Partial Award and the Respondent's Second Request for Security for Cost, para. 73.

281 H. Haeri et al., *Third-Party Funding in International Arbitration*, GAR, 30 December 2022; *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, para. 86.

London, which set up a Task Force[282] to address the main issues of third-party funding in international arbitration[283] and who issued a report in April 2018 ("**ICCA-Queen Mary Report**"). The ICCA-Queen Mary Report is intended to be used primarily as a "*reference manual*" and articulates specific Principles for each of the topics it covers.[284] The Task Force "*hopes that parties, counsel, and arbitrators may reference or invoke the Principles and analysis in the Report to address issues that arise in the course of an arbitration [...].*[285]

Regarding security for costs, the ICCA-Queen Mary Report concluded that *"[a]n application for security for costs should, in the first instance, be determined [...] without regard to the existence of any funding arrangement",* and that *"[t]he terms of any funding arrangement [...] may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights)*".[286] The ICCA-Queen Mary Report held that the starting point for any tribunal facing an application for security for costs is that there is at least *prima facie* evidence that claimant is unlikely to pay an adverse costs award and found that "*if the financial circumstances of the claimant have not materially and unforeseeably changed since the conclusion of the arbitration agreement, the claimant's inability to satisfy an adverse costs award may be taken to have been accepted by the respondent as part of the business risk at the inception of the parties' relationship*".[287]

Similarly, as part of the reform of investor-State dispute settlement ("**ISDS**"), the Secretariat of the United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) suggested that *"*[t]*he Working Group may wish to consider whether a regulation would need to explicitly provide that third-party funding may be considered in the decision on security for costs as one factor among other relevant circumstances. Alternatively, the decision on the relevance of third-party funding could be left to the tribunal*".[288]

Recently, some arbitral institutions, such as the Singapore International Arbitration Centre (SIAC), provided guidance to arbitrators when issuing security for costs orders in arbitration with the involvement of a third-party funder.[289] In particular, the SIAC guidance states that *"[t]he involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal or other costs*".

In view of this developing international arbitration practice, the mere involvement of a third-party funder does not, as such, justify a security for costs order in arbitrations under the Swiss Rules. However, an arbitral tribunal may order security for costs if a funded party experiences severe financial difficulties and might not be able to honor an adverse costs award, and if the funding agreement does not cover such adverse costs award.[290]

In any event, the applicants should request the disclosure of the funding agreement – or at least of the section pertaining to costs – to assess whether and under which circumstances the funder may cover (or not) an adverse costs award.[291] Alternatively, the funded party, its counsel or the funder could provide the tribunal with a witness statement or an affidavit stating whether the funder can be held liable for adverse costs under the

282 Composed by arbitrators, attorneys from both in-house and law firms, representatives from arbitral institutions, states, academics, and a range of third-party funders and brokers.

283 Such as potential arbitrator conflicts of interest, confidentiality, privilege, and costs issues.

284 The Principles from each substantive chapters are collected in a list both as an Appendix to the Chapter in question, and again in Chapter 7 of the ICCA-Queen Mary Report; ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 10.

285 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 13.

286 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 145, Principle D.2 [emphasis added].

287 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 168.

288 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Note by the Secretariat, p. 10.

289 Singapore International Arbitration Centre, Practice Note PN-01/17 (31 March 2017) on arbitrator conduct in cases involving external funding ("SIAC Practice Note").

290 T.P. Augsburger and E. Aliotta, *The Dos and Don'ts of security for costs in international commercial arbitration*, Arbitration Newsletter BWB, November 2017, p. 4.

291 T.P. Augsburger and E. Aliotta, *The Dos and Don'ts of security for costs in international commercial arbitration*, Arbitration Newsletter BWB, November 2017, p. 4 and 8; ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 181.

funding agreement.[292] It is a different question, however, if a third-party funder's liability may be decided by the arbitral tribunal or if separate proceedings must be initiated, potentially before state courts due to the lack of an arbitration agreement between the counterparty and the third-party funder (see below, section III.B.3).

2. If the Funded Party Succeeds: Which Costs are Recoverable from the Unsuccessful Party?

The Swiss *lex arbitri* does not provide for a specific provision on the determination and allocation of the costs of the arbitration. The costs of the arbitration are, however, governed by Articles 38 and 40 of the Swiss Rules.

The arbitral tribunal must, in its final award, determine the costs of the arbitration. These costs comprise both (1) the administrative costs and the fees and expenses of the arbitral tribunal as well as the experts and witnesses (the "arbitration costs"),[293] and (2) the *"legal and other costs"* incurred by each party in connection with the arbitration, in particular the costs for its legal representation (the "legal costs").[294] As provided by Article 40 of the Swiss Rules, the costs typically follow the event, unless it is otherwise agreed between the parties.[295] The principle that the costs are borne by the unsuccessful party *"is founded on the concept that if and to the extent a claimant is entitled in law and justice to obtain a sum of money from another party [a claimant] should not have to suffer any expense (beyond the cost of addressing a simple demand) for being awarded it; conversely, if a respondent is exposed to a claim which at the end of the day is deemed not to be founded in law and justice, [a respondent] should not suffer any expense for defending the action".*[296]

Therefore, unless otherwise agreed between the parties, the successful party may, in principle, recover its *"legal and other costs"* from the unsuccessful counterparty.[297] Where the successful party was funded by a third-party funder, two questions must be addressed: Is the funded party entitled to a reimbursement of the costs of the arbitration, and if yes, which costs are recoverable?

With regard to the first question and bearing in mind the funding mechanisms of third-party funding agreements set out in the introduction, it is generally accepted that the funded party is entitled to recover its legal costs from the unsuccessful counterparty, despite the fact that it was supported by a third-party funder which paid (or reimbursed) the party's attorneys' legal fees. This comes as no surprise. The proceeds retained by the third-party funder, regardless of whether based on a multiple or a percentage approach, will always exceed the party's attorneys' fees. In other words, the funded party indirectly pays for its attorneys' fees by allowing the funder to retain a portion of the recovered costs.[298] International practice as set forth in the ICCA-Queen Mary Report supports this view, because *"the involvement of a third-party funder does not change the funded party's primary liability to the law firm to discharge the bill".*[299] Therefore, the funded party is entitled to a reimbursement of its legal costs from the unsuccessful party.

The answer to the second question is more complicated. Although it is generally accepted that the funded party's (reasonable) legal costs are recoverable, it is a highly complex question whether the funded party's *funding costs*, *i.e.*, the costs the funded party must pay to the third-party funder for having obtained the funding, are recoverable.[300] These funding costs are often expressed as a multiple or percentage of the proceeds which the

292 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 181.

293 Swiss Rules, Article 38(a)-(d) and (f)-(g).

294 Swiss Rules, Article 38(e).

295 Swiss Rules, Article 40 *("The costs of the arbitration shall in principle be borne by the unsuccessful party. (...).")*.

296 J.G. Wetter and Ch. Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 1991(3) American Review of International Arbitration, p. 330, as cited in T. Zuberbühler, *Commentary to Article 26 Swiss Rules*, in M. Arroyo (ed.), *Arbitration in Switzerland – the Practitioner's Guide* (2018), p. 820, para. 5.

297 M. Bühler and M. Stacher, *Costs in International Arbitration*, in M. Arroyo (ed.), *Arbitration in Switzerland – the Practitioner's Guide* (2018), p. 2589, para. 74.

298 See B. Schumacher, *Prozessfinanzierung – Erfolgshonorierte Fremdfinanzierung von Zivilverfahren*, ZStv Nr. 180/2015, p. 84.

299 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 155.

300 In the context of this article, the discussion is limited to the question if such funding costs are recoverable based on procedural grounds, *i.e.*, based on Article 38 and 40 of the Swiss Rules. It is another question, however, if substantive law could provide for a reimbursement claim (see ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 157, with further references in footnote 369).

funded party was awarded in the arbitration.

Given that the Swiss *lex arbitri* does not contain a specific provision on the costs of the arbitration (*supra*, section III.A), we must assess if Article 38 of the Swiss Rules provides a sufficient legal basis for awarding the funding costs against the unsuccessful party. In fact, an award allocating the funding costs is, in the absence of a specific agreement between the parties, permitted only if the applicable *lex arbitri* and/or the institutional arbitration rules provide for a sufficient legal basis.[301] Under Article 38(e) of the Swiss Rules, this is the case because the costs of the arbitration comprise *"the legal and other costs incurred in connection with the arbitration, if such costs were claimed during the arbitration proceedings and the arbitral tribunal determines the amount of such costs to be reasonable"*. The funding costs may be considered as *"other costs"* which the funded party *"incurred in connection with the arbitration"*.[302] Therefore, in principle, funding costs could potentially fall under Article 38(e) of the Swiss Rules.

The Practice Note of the Swiss Arbitration Centre does not give guidance as to whether funding costs qualify as "legal costs" pursuant to Article 38(e) of the Swiss Rules. Nevertheless, the Practice Note stipulates that the nature and scope of the legal costs must be determined by the arbitral tribunal,[303] and that the arbitral tribunal must decide in its discretion *"according to the applicable law and arbitration practice"* whether the costs claimed by a party qualify as legal costs.[304]

The reference in the Practice Note to the "applicable law" includes both the applicable *lex arbitri* and the law applicable to the merits of the case. In fact, not only the applicable *lex arbitri*, but also the law applicable to the merits of the case could potentially provide for a claim against the unsuccessful party for the recovery of the funding costs.[305] However, depending on the qualification and the prerequisites of that claim under substantive law, an arbitral tribunal should first assess whether such a damage claim is subject to the arbitration agreement between the parties and lies within the arbitral tribunal's jurisdiction.

As we have seen, the Swiss *lex arbitri* neither provides for nor explicitly prohibits an award for the funding costs (*supra*, section III.A). If Swiss substantive law were to apply on the merits, the funding costs could potentially be qualified as (or similar to) so-called out-of-court legal costs. Such costs are, under certain circumstances, recoverable as damage under Swiss contract law if they were justified, necessary and reasonable.[306] In addition, the funding costs could potentially be recoverable as damage under Swiss tort law if the successful (funded) party came up against unlawful procedural conduct by the other party, *i.e.*, if the opposing party adopted a reckless position he or she knew or ought to have known was indefensible.[307] The Swiss Federal Supreme Court's case law, according to which legal costs cannot be awarded as damages in Swiss state court proceedings, is not applicable in arbitral proceedings. This case law is based on the consideration that the Swiss Civil Procedure Code conclusively governs the compensation for legal costs in Swiss court proceedings,[308] but has no bearing on international arbitral proceedings that are not governed by the Swiss Civil Procedure Code.

For the assessment of the *"arbitration practice"* mentioned in the Practice Note, we should turn, first of all, to the practice in Swiss arbitration law. Here, it is the view that, as a general rule, only such costs are recoverable *"which were, from an objective viewpoint, necessarily and reasonably incurred for the conduct of the arbitration"*.[309] Swiss scholars, in general, also take a critical view on the recovery of the funding costs in arbitration. Some seem to

301 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 158.

302 See below regarding the decisions by arbitral tribunals under the ICC Rules and the SIAC Arbitration Rules using similar or the same terminology as Article 38(e) of the Swiss Rules.

303 Practice Note of the Swiss Arbitration Centre, Article 202.

304 Practice Note of the Swiss Arbitration Centre, Article 255.

305 See, for example, ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 157.

306 Decision of the Swiss Federal Supreme Court 4A_692/2015 at 6.1.2 (not published in ATF 143 III 206).

307 Decision of the Swiss Federal Supreme Court ATF 139 III 190 at. 4.2, with reference to ATF 117 II 394.

308 Decision of the Swiss Federal Supreme Court ATF 139 III 190 at. 4.4.

309 M. Bühler and M. Stacher, *Costs in International Arbitration*, in M. Arroyo (ed.), *Arbitration in Switzerland – the Practitioner's Guide* (2018), p. 2589, para. 74.

exclude it as a matter of principle,[310] while others wish to allow it only in exceptional circumstances.[311]

The Swiss scholars' restrictive view is in line with international practice as set forth in the ICCA-Queen Mary Report, according to which the question of whether a claimant can recover the funding costs should be treated under the *"test of reasonableness"*.[312] The arbitral tribunals should take into account if the respondent's conduct has caused the impecuniosity of the claimant, if the claimant had no other option but to revert to third-party funding, and if the respondent knew that the claimant benefited from third-party funding.[313]

Recent case-law in international arbitration seems to go into the same direction, though with some nuances:

The English Commercial Court's decision in the case *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited* in 2016 (the "Essar Oilfield Case") is an example of an ICC arbitration in which the arbitral tribunal seated in the United Kingdom awarded the funding costs. The decision may be considered as one of the few cases in which the exceptional circumstances were met.[314] As explained by the English Commercial Court, it "*was a case, perhaps unusual, where the arbitrator ruled in detailed and robust terms that [respondent] drove [claimant] into this expensive litigation because of its own reprehensible conduct going far beyond technical breaches of contract, in order to vindicate its rights", and that "[claimant] had no option, but to obtain his funding from this third party funder"*.[315]

In the case *Tenke Fungurume Mining v. Katanga Contracting Services*, an arbitral tribunal in an ICC arbitration in the United Kingdom, and subsequently the English Commercial Court, confirmed the Essar Oilfield Case.[316] The arbitral tribunal explained that funding costs are recoverable if they are *"reasonable in two respects: as to the principle of the Claimant having recourse to this type of funding and as to the amount"*.[317] However, going further than in the Essar Oilfield Case, the arbitral tribunal considered that it was not a determining factor whether the funded party's financial difficulties were caused "exclusively" by the other party or whether the other party merely contributed to the financial difficulties.[318] The issue was rather *"whether the Claimant's recourse to this kind of funding was reasonable in the circumstances"*.[319]

- In the case *Speers and Johnson v. MakeMyTrip and Hotel Travel*, an arbitration under the SIAC Arbitration Rules, the arbitral tribunal seated in Singapore confirmed that, in principle, it has the authority to award recovery of third-party funding costs as long as those costs are incurred in connection with the arbitration.[320] However, the arbitral tribunal declined to award the funding costs in the concrete circumstances of the case, because the claimants had not shown that they were impecunious and that they required third-party funding to be able to pursue their claims, but that it was a *"commercial decision to reallocate risk"*. The arbitral tribunal also considered that it would be *"unfair"* to award the funding costs because the respondents *"were not apprised at a meaningful state of these proceedings of the scope of the risk they face in the event of an adverse cost award"*.[321]

As one of the few arbitration institutions to address the impact of third-party funding on the costs of an arbitration, the SIAC noted that the arbitral tribunals may take into account the existence of a third-party funder

310 M. Bühler and M. Stacher, *Costs in International Arbitration, in M. Arroyo* (ed.), *Arbitration in Switzerland – the Practitione's Guide* (2018), p. 2590, para. 76 (*"However, insofar as the uplift – the third party funder's success fee – is concerned, the same considerations apply as above: the successful party cannot claim reimbursement of the uplift as this would allow it to externalize this cost risk to its counterparty."*).

311 L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 199.

312 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 158.

313 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 158.

314 *Essar Oilfield Services Ltd v. Norscot Rig Management Pvt Ltd*, Queen's Bench Division (Commercial Court), 15 September 2016, EWHC 2361.

315 *Idem*, para. 69.

316 *Tenke Fungurume Mining S.A. v. Katanga Contracting Services S.A.S.*, Queen's Bench Division (Commercial Court), 7 December 2021, EWHC 3301

317 *Idem*, para. 68 (referring to para. 411 of the arbitral award).

318 *Idem*, para. 68 (referring to para. 412 of the arbitral award).

319 *Idem*, para. 68 (referring to para. 412 of the arbitral award).

320 *Blair James Speers and Graham Paul Johnson v. MakeMyTrip Limited and Hotel Travel Limited*, SIAC Case No. ARB169/16/AB, Final Award (No. 085 of 2020), 9 June 2020, para. 159. The arbitral tribunal considered that the language in Rule 33 of the SIAC Arbitration Rules (*"legal or other costs"*) may comprise third-party funding costs.

321 *Idem*, para. 194.

"in apportioning the costs of the arbitration" and *"in ordering in its award that all or a part of the costs be paid by another party"*.[322] However, the SIAC does not clarify what criteria an arbitral tribunal should consider when it uses its discretion to determine and allocate the costs.

The decisions above and the practice note of the SIAC show that international arbitration practice tends to permit the recoverability of the funding costs only in exceptional circumstances and based on a reasonableness test. Although these cases were not subject to the Swiss *lex arbitri* and the Swiss Rules, they may be used to explore the "arbitration practice" as set forth in the Practice Note to the Swiss Rules. This is even more the case as Article 38(e) of the Swiss Rules uses the same terminology (*"legal and other costs"*) as the SIAC Arbitration Rules[323] and English arbitration Act.[324]

The constraints on levying the funding costs from the unsuccessful party is well-founded and must be welcomed. As a matter of principle, it is for each party to choose how it funds the arbitration, and this decision should not have a negative impact on the unsuccessful party. A party's entirely internal decision on how to fund the arbitration should not substantially increase the adverse cost risk of the counterparty (typically the respondent).[325] In particular, it is well-known that not only insolvent companies turn to third-party funding, but also financially stable parties may opt for it for a number of different tactical, risk allocation or accounting reasons.[326] Therefore, the funding costs should be levied from the unsuccessful party only in exceptional circumstances.

In order to satisfy these exceptional circumstances, the test under the Swiss Rules is similar to the test developed in international arbitration practice. Therefore, the following three conditions must be met:

First, the recourse to third-party funding must have been *reasonable* and, in our view, *necessary*. An assessment of this condition depends on the individual facts of the case but should comprise the financial situation of the funded party and the reason(s) for the third-party funding. An award of the funding costs is excluded if the funding served (exclusively) strategic, accounting or risk allocation purposes. The arbitral tribunal should consider whether the funded party would not have been able to pursue the dispute in court had it not received any outside funding or financial support. However, in the context of cost determination and allocation pursuant to Article 38 and 40 of the Swiss Rules, the question whether the opposing party caused the financial situation of the funded party is not decisive, but rather one of the factors to assess reasonableness. The reason for this is that Articles 38 and 40 of the Swiss Rules provide for a (procedural) cost coverage provision outside of contract or tort damage claims based on the substantive law. It is another question if, and to what extent, a claimant could raise such damage claims *in addition to* the cost coverage based on Article 38 and 40 of the Swiss Rules, in the same or in a separate arbitration.

Second, if third-party funding costs are awarded, the amount must be reasonable. This is in line with the general principle enshrined in Article 38(e) of the Swiss Rules, pursuant to which the legal and other costs are recoverable if *"the arbitral tribunal determines the amount of such costs to be reasonable"*. The reasonableness of the amount depends, amongst others, on the amount in dispute, the complexity of the case, the financial situations of the funded party and the unsuccessful party, and the amount of the third-party funding.

Third, the opposing party should be aware of the (increased) cost risks from the outset of the arbitration. If the funded party requests an award for the funding costs, it should be obliged to substantiate the amount of the requested funding costs and to disclose the respective provisions in the underlying funding agreement. If the parties to the dispute do not agree on how to treat the funding costs, the arbitral tribunal could decide the matter upfront and include its decision in the procedural rules of the arbitration.

322 SIAC Practice Note (footnote 34), Article 10 *et seq.*

323 SIAC Rules, Article 37.

324 Article 59 (1) (c) of the English Arbitration Act 1996.

325 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 157.

326 I. Berger et al., *Bei der Prozessfinanzierung*, ZZZ 62/2023, p. 165: From a tactical viewpoint, the support by a third-party funder may make the case appear stronger. From an accounting perspective, a company may prefer to use its liquidity for its operative business needs instead of paying for the arbitration.

3. If the Funded Party Does Not Succeed: Can the Successful Party Recover its Costs from the Third-Party Funder?

In certain jurisdictions such as England and the USA, state courts can impose costs on third parties, including on the third-party funder if they have a certain economic interest in the proceedings and exercise a degree of control over the claim.[327] It can be argued that the role played by a third-party funder in the proceedings is not fundamentally different to the role of the parties, because the funder influences the course of, and has a financial interest in, the proceedings.

By contrast, Swiss state courts cannot, in principle, impose litigation costs on third parties.[328] The same goes for arbitral tribunals seated in Switzerland. The Swiss *lex arbitri* does not provide for a legal basis for that, and for good reason, as this would go against the consensual nature of arbitration.[329] Arbitration is based on an agreement between the parties to waive their right to access a state court, and to have their dispute settled by a private method of dispute resolution instead.[330] Save for an express legal basis to the contrary, an arbitral tribunal can only exercise jurisdiction over parties having agreed to arbitrate. As a general rule, only the parties having signed (or agreed to) the arbitration agreement are bound by that agreement.[331] However, a third-party funder is not bound by the arbitration agreement between the parties and an arbitral tribunal has no jurisdiction to levy the costs of the arbitration from a third-party funder.[332]

In the absence of such express agreement by the third-party funder to be bound by the arbitration clause, the successful party may seek alternative arguments to obtain a costs order from the arbitral tribunal against the third-party funder.

Such alternative arguments may be found in the extension of an arbitration agreement to non-signatories.[333] These cases cover a wide array of diverse scenarios, each of which has its own legal prerequisites.[334] Under Swiss law, such scenarios include, amongst others, the extension of an arbitration agreement based on the implied consent by the third party due to its intervention in the performance of the contract,[335] based on the fact that one party concluded the arbitration clause as an agent acting for another company (*e.g.*, within the same group of companies),[336] or based on the piercing of the corporate veil.[337] Theoretically, such extension theories could be raised in relation to third-party funders as well. At first sight, however, none of the above-mentioned extension theories seems to correctly reflect the third-party funder scenario.[338] In particular, the third-party funder does not intervene in the performance of the underlying contract between the parties and does not

327 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 160 *et seq.*, with further references; L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 179, with further references.

328 L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 179 et seq.

329 ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 161.

330 Ch. Müller and O. Riske, *Commentary to Article 178 PILA*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2018, p. 71 para. 2.

331 Under the Swiss lex arbitri, arbitration agreements need not necessarily be signed. It is sufficient that the agreement was made in a form that allows it to be evidenced by text (Article 178(1) Swiss PILA).

332 L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 180; ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 161; E. Bertrand, *The Brave New World of Arbitration: Third-Party Funding*, 29(3) ASA Bulletin, 2011, p. 613.

333 A. Meier, *Multi-party Arbitrations*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2018, p. 1510, para. 16.

334 D. Girsberger and N. Voser, *International Arbitration: Comparative and Swiss Perspectives* (2021), para. 301.

335 Decision of the Swiss Federal Supreme Court ATF 129 III 727 at 5.3.1; A. Meier, *Multi-party Arbitrations*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2018, p. 1510, para. 17 *et seqq.*

336 A. Meier, *Multi-party Arbitrations*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2018, p. 1511, para. 22. However, the "group of companies" doctrine as such does not apply under Swiss law.

337 A. Meier, *Multi-party Arbitrations*, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2018, p. 1511, para. 23.

338 L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 180; ICCA and Queen Mary University of London, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4*, 2018, p. 161.

express in any way its (implied) consent to be bound by the arbitration agreement. Moreover, the funded party does not act as an agent for the third-party funder, let alone at the time when the funded party concluded the arbitration agreement. Typically, the funded party and the third-party funder are unrelated and are not part of the same group of companies.[339]

It could potentially be argued that the funding agreement between the funded party and the third-party funder qualifies as a simple partnership agreement.[340] If this were the case (which is rather unlikely), the third-party funder could be jointly and severally liable for the costs of the proceedings which it supported.[341] It is a different question, however, if the arbitral tribunal has jurisdiction to decide on such a claim. The mere existence of joint and several liability by the third-party funder based on company law does not imply an agreement to arbitrate from the third-party funder.

An argument with higher chances of success is available if the funded party assigned its original claim against the opposing party to the third-party funder. Depending on the law applicable to such assignment, it is possible that the arbitration clause in the underlying contract travels with the assigned contract, claim or right. This result would be based on the theory that the arbitration agreement is an accessory right to the claim, with the consequence that it should be treated in the same manner as other accessory rights.[342] Therefore, if Swiss substantive law were to apply to the assignment, the assignee acquiring the claim subject to arbitration would be bound by the arbitration clause.[343]

In the absence of an assignment of a claim to the third-party funder or an express agreement by the third-party funder to be bound by the arbitration clause between the parties, an arbitral tribunal seated in Switzerland has, in principle, no jurisdiction to impose the costs of the arbitration under the Swiss Rules directly on a third-party funder. This is not only in line with the very nature of arbitration, but also with international practice. The ICCA-Queen Mary Report of 2018 indeed set out the principle that in the absence of an express power (in applicable national legislation or procedural rules), an arbitral tribunal lacks jurisdiction to issue a costs order against a third-party funder.[344]

4. Summary and Outlook

In summary, neither the Swiss *lex arbitri* nor the Swiss Rules contain specific provisions and guidelines on how to address the cost-related issues arising from the involvement of a third-party funder in an arbitration. Arbitral tribunals in Switzerland must address and solve these questions on the basis of general procedural principles under the Swiss Rules applicable to provisional measures and the determination and allocation of costs.

In addition, arbitral tribunals may refer to arbitral case law, regulatory developments in other jurisdictions and institutional arbitration rules to define the international arbitration practice. Nevertheless, a high degree of legal uncertainty remains for the parties and their counsel regarding the cost-related issues arising from the involvement of a third-party funder in the arbitration. The decisions on these issues depend largely on the exercise of discretion by the arbitral tribunals.

Therefore, the parties and the arbitral tribunal should address the cost-related issues arising from the involvement of a third-party funder at an early stage in the proceedings, for example before or during the case management conference. The non-funded party should be able to assess the cost-related risks from the outset of the proceedings. This includes the question of whether it is entitled to an order for security for costs, whether it may recover its own costs directly from the third-party funder or whether it must cover the funding costs if it is unsuccessful in the arbitration. In order to do so, the opposing party should be aware of the (increased) cost risks from the outset of the arbitration, and if the funded party requests an award for the funding costs, it

339 The situation and the assessment may be different if the funding stems from a parent, sister or subsidiary company of the funded party.

340 L.A. Zweifel, *Prozesskosten im Schiedsverfahren – Unter besonderer Berücksichtigung der erfolgshonorierten Prozessfinanzierung* (2021), p. 181, with further references.

341 Under Swiss substantive law, partners of a simple partnership are jointly and severally liable for obligations of the simple partnership to third parties. However, in our view, it is unlikely that third-party funding agreements qualify as simple partnership agreements.

342 See, for example, Article 170 para. 1 of the Swiss Code of Obligations (*"The assignment of a claim includes all preferential and accessory rights except those that are inseparable from the person of the assignor"*). See also D. Girsberger and N. Voser, *International Arbitration: Comparative and Swiss Perspectives* (2021), para. 303.

343 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (2021), para. 544.

344 ICCA and Queen Mary University of London, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration – The ICCA Reports No. 4, 2018, p. 145, Principle C.4.

should submit its respective prayers for relief as early as possible. In the absence of an agreement between the parties, the arbitral tribunal should decide on the cost-related issues early in the proceedings to provide the parties with the required legal certainty.

In view of the rise of third-party funding in international arbitration, parties could also address the cost-related issues of third-party funding directly in the arbitration agreement. For example, parties could agree to exclude (or provide for) security for costs if one of the parties benefits from a third-party funder. They could also explicitly exclude (or include) certain funding costs as recoverable costs.

Annex 1 – Overview of the Provisions on Cost-related Issues arising from Third-Party Funding in selected Arbitration Rules

Rules and practice guidelines on cost-related issues arising from third-party funding ("TPF")	**Swiss Rules 2021 (incl. Practice Note dated March 2023)**	**ICC Rules 2021 (incl. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration dated 1 January 2021)**	**SIAC Arbitration Rules 2016 (incl. Practice Note PN 01/17 dated 31 March 2017 on arbitrator conduct in cases involving external funding)**	**HKIAC Arbitration Rules 2018**	**DIS Arbitration Rules 2018**	**VIAC Rules of Arbitration and Mediation Rules 2021**
General provisions on TPF	No provisions regarding TPF in the Swiss Rules Art. 100 Practice Note (disclosure of the existence and identity of the TPF)	Art. 11(7) of the ICC Rules (disclosure of the existence and identity of the TPF), including clarifications in section II/D of the Note to Parties and Arbitral Tribunals)	No provisions regarding TPF in the SIAC Rules Specific Note on arbitrator conduct in cases involving external funding	Art. 44 of the HKIAC Rules (disclosure of the existence and identity of the TPF) • Art. 4.3(i) of the HKIAC Rules (in the notice of arbitration) • Art. 5.1(g) of the HKIAC Rules (in the answer to the notice) • Art. 27.6(i), 27.7(f) of the HKIAC Rules (in the joinder of additional parties) • Schedule 4 (emergency arbitrator application)	No provisions regarding TPF in the DIS Rules	Art. 6(1)(1.9) of the VIAC Arbitration Rules (definition of TPF) Art. 13a of the VIAC Arbitration Rules (disclosure of the existence and identity of the TPF)
Security for costs orders against the funded party	General principles applicable to interim measures pursuant to Art. 29 Swiss Rules	General principles applicable to conservatory and interim measures pursuant to Art. 28 ICC Rules	General principles applicable to interim and emergency interim relief pursuant to Art. 30 SIAC Rules Art. 9 of the Practice Note (TPF *"alone"* no indication for financial status; other factors to be taken into account in an order for security for costs)	Art. 24 HKIAC Rules on security for costs	General principles applicable to interim relief pursuant to Art. 25 DIS Rules	Art. 33(6) VIAC Rules on security for costs
Funding costs awards against the unsuccessful party	Determination of the costs pursuant to Art. 38(e) Swiss Rules (*"legal and other costs"*) Allocation of the costs pursuant to Art. 40 Swiss Rules (costs follow the event)	Determination of the costs pursuant to Art. 38(1) ICC Rules (*"legal and other costs"*) Allocation of the costs pursuant to Art. 38(4) and (5) ICC Rules (*"the arbitral tribunal may take into account such circumstances as it considers relevant"*).	Determination and allocation of the costs pursuant to Art. 37 SIAC Rules (*"legal and other costs"*) Art. 10 and 11 of the Practice Note: existence of TPF may be taken into account in apportioning costs and in costs award	Determination and allocation of the costs pursuant to Art. 34.4 of the HKIAC Rules (*"may take into account any TPF arrangement"*)	Determination of the costs pursuant to Art. 32 of the DIS Rules (*"reasonable costs of the parties that were incurred in connection with the arbitration"*) Allocation of the costs pursuant to Art. 33 of the DIS Rules ("discretion" of the arbitral tribunal, *"it shall take into account all circumstances that it considers to be relevant"*)	Determination of the costs pursuant to Art. 44 of the VIAC Rules ("other expenses") Allocation of the costs pursuant to Art. 38(2) of the VIAC Rules (*"discretion"* of the arbitral tribunal, *"the conduct of any or all parties as well as their representatives […] may be taken into consideration"*)
Direct awards against the third-party funder	n/a	n/a	n/a	n/a	n/a	n/a

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Mastering the Maze of International Arbitration and International Sanctions: Selected Aspects of the Impact of Sanctions on the Conduct of International Arbitration Proceedings in Switzerland and the EU

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ABSTRACT

As a consequence of the war in Ukraine, various governments across the globe have introduced economic sanctions against Russia. While sanctions are seen as a means of promoting justice and holding governments and individuals accountable for their actions, they can have the opposite impact and restrict fundamental rights such as economic freedom, or the right to access justice.

In this article, the authors explore the impact of economic sanctions – in particular sanctions introduced by the EU and Switzerland – on international commercial arbitration.

Apart from addressing the ban on legal advisory services, the authors focus particularly on one type of sanction: the asset freeze. This measure prevents the use or provision of economic resources to designated individuals.

In particular, the authors will discuss the impact that the freezing of assets may have on the conduct of an arbitration - i.e., on the transfer of funds from designated individuals to the arbitral institution, arbitral tribunals and/or counsel, such as an advance on costs, registration and legal fees, -, the enforcement of arbitral awards and the right to be heard and to access to justice.

I. Introduction

Since the start of the war in Ukraine in February 2022, the international community has expanded its sanctions against Russia.

While sanctions are often seen as a means of promoting justice and holding governments and individuals accountable for their actions, they can have far-reaching consequences, including on the conduct of international arbitration proceedings. Sanctions can impact the ability of a party to start and proceed with the arbitration, the arbitral tribunal's or arbitral institution's ability to manage the arbitration, and/or the enforcement of arbitral awards and therefore the parties' right to be heard and access to justice.

The present article explores selected aspects of the impact of economic sanctions on international commercial arbitration, with a focus on the recent EU and Swiss sanctions against Russia.

After an overview of the applicable sanctions, with a particular focus on the asset freeze and the ban on legal advisory services (II.), the article will explore their impact on the conduct of the arbitration (III.).

II. International Sanctions: The Freeze of Assets and the Prohibition to Provide Legal Advisory Services

A. Overview of Sanctions

Since the end of the Cold War, sanctions have been used as a tool to hold governments and individuals accountable for their actions.[345]

Sanctions regimes differ widely depending on the mandating authority, their targets, objects or types of coercive measures.[346] They can apply within a single jurisdiction or extra-territorially.[347] That said, even when applied within a single jurisdiction, sanctions will routinely have effects in third countries.[348] Individual governments and multilateral or regional organizations can impose sanctions.[349] Sanctions can target states, entities, business groups or individuals. They may include trade, financial or other economic restrictions. They can be sectoral and/or involve restricting certain activities. It goes without saying that the violation of a sanctions regime generally entails criminal liability and may result, at the least, in reputational harm.

Throughout the years, numerous sanctions have been imposed on States, entities and individuals. Today, the most expansive example of international sanctions is undoubtedly the sanctions regime against Russia following the outbreak of the (continued) war in Ukraine.

Although Russia has been subject to EU and Swiss sanctions since its annexation of Crimea in 2014, those sanctions were narrower in scope. More specifically, the EU adopted two Regulations: Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine ("**EU Regulation No 833/2014**"); and Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ("**EU Regulation No 269/2014**") (together referred as to "**EU Regulations**"). Both EU Regulations were more restrictive than they are currently, as they targeted fewer sectors; and as even the sanctions in place at that time were more limited in scope (e.g., the asset freeze did not affect as many individuals and entities). Switzerland on its hand adopted the Swiss Ordinance of 2 April 2014 introducing measures to prevent circumvention of international sanctions in connection with the situation in Ukraine[350] solely focused on prohibiting financial intermediaries from entering into new business relationships with certain entities (Art. 1 Ordinance of 2 April 2014). As for existing relationships, there was previously an obligation to declare them to the Swiss State Secretariat of Economic Affairs ("**SECO**") (Art. 3 Ordinance of 2 April 2014).

345 B. Kondoch, *Sanctions in International Law* (available at https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0191.xml, last accessed on 16 April 2023).

346 R. Hryshyn-Hryshchuk/O. Shenk, *Implicațiile sancțiunilor internaționale asupra executării hotărârilor arbitrale. Experiențe recente din statele CIS* [Implications of International Sanctions for Enforcement of Arbitral Awards. Recent experience of CIS Region], 15(2) Revista Română de Arbitraj, p. 39-40.

347 Unlike the US, the EU and Swiss sanctions regimes do not take an extraterritorial approach.

348 For instance, the latest EU sanctions against Russia apply (a) within the territory of the Union; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union (Art. [13] of EU Regulation No 833/2014). By comparison, the scope of the Swiss sanctions are much more limited. In this sense, neither the Swiss Ordinance of 4 March 2022 nor the Swiss Embargo Act specify the territorial scope of the Swiss sanctions. It is therefore widely accepted that the scope of such measures is limited – in the absence of any provisions to the contrary – by the existing principle of territoriality enshrined in administrative and criminal law (see: P. Burckhardt/N. Lumengo Paka, Die Russland-Sanktionen der Schweiz, 2022 RIW, p. 266 ss, 267; R. Nebel, Wirtschaftssanktionen gegen Russland, 2022 REAS, p. 265 ss, 266; see also Code pénal suisse, 1937, Art. 3).

349 Reuters maintains a list of government sanctions and actions against Russia taken by large companies and organisations around the world in the lead up to and following its invasion of Ukraine, which is available at https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/, last accessed on 16 April 2023.

350 Ordonnance du 2 avril 2014 instituant des mesures visant à empêcher le contournement de sanctions internationales en lien avec la situation en Ukraine, 2014, RS 946.231.176.72.

Since the start of the war in Ukraine in February 2022, Russia has been subject to enhanced sanctions by, among others,[351] the European Union, which extended its existing Regulations,[352] and Switzerland, which adopted the Ordinance of 4 March 2022.[353] These sanctions have reportedly resulted in the freezing of half of Russia's foreign exchange reserve.[354]

While these sanctions have similarities with other sanctions regimes in terms of the measures adopted (e.g. freeze of assets of listed person ("**Listed Person(s)**")), they also contain unique features which are not found in older sanctions regimes (e.g. the restriction on the provision of legal advisory services). By way of example, the Swiss sanctions against Russia include standard measures such as the asset freeze (Art. 15 Ordinance of 4 March 2022), and more specific measures such as the ban on legal advisory services (Art. 28e Ordinance of 4 March 2022).[355] Both measures derive from the EU Regulations (Art. 2 EU Regulation No 269/2014; Art. 5n EU Regulation No 833/2014).[356]

B. Financial Sanctions: The Freeze of Assets

The freeze of asset is embodied in Art. 2 of the EU Regulation No 269/2014 and in Art. 15 of the Swiss Ordinance of 4 March 2022.

More specifically, Art. 2 of the EU Regulation No 269/2014 provides:

> **1.** "*All funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen.*
>
> **2.** *No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I.*"

Furthermore, EU Regulation No 269/2014 provides for an anti-circumvention measure according to which it shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Art. 2 (Art. 9 EU Regulation No 269/2014). Consequently, any strategy aimed at circumventing the asset freeze, for example by trying to run transactions through an entity that does not fall within the territorial scope of the EU sanctions, is prohibited.

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351 For instance, the U.S., Canada, the UK and Japan also adopted sanctions. In contrast, other countries such as China, India and Serbia refused to do so. In response to the sanctions imposed against it, Russia established countermeasures in relation to "unfriendly states", including all EU member states, Switzerland, and other countries that introduced or endorsed those sanctions (see: C. Ho Wang Mak/R. Lai, *Russian Foreign Investments at Risk: Why Bring Investment Disputes Relating to Russia to the Hong Kong International Arbitration Centre?*, 25(1) Asian Dispute Review, p. 27; Russian government, *The Government approves the list of unfriendly countries and territories*, available at http://government.ru/en/docs/44745/, last accessed on 16 April 2023). These countermeasures are in essence intended to protect the Russian economy by restricting currency transfer. In 2020 Russia adopted a new federal law that provides for the exclusive jurisdiction of the Russian courts over disputes involving sanctioned individuals and entities and/or disputes relating to sanctions (see: "О внесении изменений в Арбитражный процессуальный кодекс Российской Федерации в целях защиты прав физических и юридических лиц в связи с мерами ограничительного характера, введенными иностранным государством, государственным объединением и (или) союзом и (или) государственным (межгосударственным) учреждением иностранного государства или государственного объединения и (или) союза" от 08.06.2020 N 171-ФЗ (последняя редакция), [Federal law of 08.06.2020 no. 171-фз "on introducing changes to the arbitration procedure code of the russian federation (protected) for the protection of rights of individual and legal personalities state (interstate) institution of foreign state or state association and (or) union "], Art. 248).

352 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 2014; Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, 2014.

353 Ordonnance instituant des mesures en lien avec la situation en Ukraine, 2022, RS 946.231.176.72.

354 C. Ho Wang Mak and R. Lai, *Russian Foreign Investments at Risk: Why Bring Investment Disputes Relating to Russia to the Hong Kong International Arbitration Centre?*, 25(1) Asian Dispute Review, p. 27.

355 S. Giroud et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Revue de l'avocat, p. 63.

356 Conseil fédéral, Communiqué de presse, *Ukraine: la Suisse met en œuvre le 8e paquet de sanctions de l'UE*, 23.11.2022; Conseil fédéral, Communiqué de presse, *La Suisse reprend les sanctions de l'UE contre la Russie*, 28.02.2022. For that reason, any EU clarifications, and more specifically the EU FAQs, provides useful guidance for the Swiss measures, with the caveat that it remains for the Swiss courts to actually decide on any issue arising in relation to these provisions.

Like the EU sanctions, the Swiss sanctions also provide for a freeze of assets (although they do not provide for an anti-circumvention measure). Art. 15 of the Swiss Ordinance of 4 March 2022 states:

> **1.** "*Shall be frozen the assets and economic resources owned or controlled directly or indirectly by:*
>
> **a.** *the natural persons, enterprises and entities listed in Annex 8;*
>
> **b.** *natural persons, enterprises and entities acting on behalf of or at the direction of natural persons, enterprises or entities referred to in letter (a);*
>
> **c.** *enterprises and entities that are owned or controlled by natural persons, enterprises or entities referred to in letter (a) or (b).*
>
> **2.** *It is prohibited to provide assets to the natural persons, enterprises and entities referred to in paragraph (1) or to make assets or economic resources available to them, directly or indirectly.*"

The concepts and mechanism used in the two instruments are essentially the same; the idea is to prevent any kind of use, including the selling, hiring or mortgaging, of assets and/or funds or economic resources belonging to targeted individuals and entities by (i) freezing their assets and economic resources and (ii) prohibiting persons obliged to comply with the sanctions from making any assets or economic resources available to the sanctioned individuals and entities.[357]

As a general rule, if a party to an arbitration is a Listed Person, i.e. a person or entity identified on a specific sanctions list (or a party owned or controlled by such Listed Person)[358] whose assets are frozen, **none of the assets in the sanctioning state may be transferred** (the impact of the freeze of assets on international arbitration will be further discussed below in Section III).[359] A transfer is only possible if the competent authorities issue an authorization.[360] Depending on the sanctions regime, there may be exceptions on the basis of which a sanctioned person or entity involved in arbitration proceedings could obtain specific authorizations or licenses. Those are generally granted on a case-by-case basis.[361] Each sanction program that applies will have to be studied in order to determine whether such exception exists and what the conditions for its application are. For example, under Swiss law, the authority designated by the respective regulation (generally SECO), sometimes after consulting with other Federal authorities – such as the Federal Department of Foreign Affairs or the Federal Department of Finance – can, in limited cases (e.g. in order to protect Swiss interests or to prevent cases of hardship), authorize transfers from frozen accounts.[362]

While the terms employed in the EU and Swiss legislation may differ, the differences mainly relate to form rather than substance. For instance, the EU Regulation refers to funds while the Swiss Ordinance refers to assets; however, based on their definitions, both concepts have the same scope of application (see Art. 1(g) EU Regulation No 269/2014 and Art. 1(a) Swiss Ordinance of 4 March 2022).

Therefore, any clarification from the EU authorities – and more specifically the FAQ on asset freeze and prohibition to make funds and economic resources– provide useful guidance in the interpretation of Art. 15 of the

357 For a definition of freezing of economic resources and freezing of funds under the EU Regulation No 269/2014 see, 2014, Art. 1(e) and (f); see also Art. 1(d) and (b) for the definitions in the Swiss Ordinance of 4 March 2022.

358 For the sake of simplicity, this article will use the term "Listed Person" both for the Listed person and for a person or entity owned or controlled by, or acting on behalf of or upon instructions of a Listed Person.

359 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021, (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/.

360 S. den Hartog, *Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia*, Kluwer Arbitration Blog, 23 March 2022, (available at https://arbitrationblog.kluwerarbitration.com/2022/03/23/challenges-faced-by-arbitral-institutions-amidst-new-waves-of-sanctions-against-russia/.

361 S. den Hartog, *Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia*, Kluwer Arbitration Blog, 23 March 2022, (available at https://arbitrationblog.kluwerarbitration.com/2022/03/23/challenges-faced-by-arbitral-institutions-amidst-new-waves-of-sanctions-against-russia/.

362 O. Thormann et al., *Séquestre, blocage et sanctions*, in S. Giroud and H. Rordorf-Braun (eds.), Droit suisse des sanctions et de la confiscation internationales, 2020, pp. 35-96, para. 185.

Swiss Ordinance of 4 March 2022.

In theory, only the persons listed in the relevant annexes are targeted by the freeze of assets. However, the reality has proven to be more complex. If the listed person is deemed to own or control a non-listed entity, it can be presumed that the control also extends to the assets of that entity. Consequently, one can assume that any funds or resources given to that entity may ultimately reach the listed person. As a result, an owned or controlled company should also be subject to a freeze of assets and economic resources.[363] Based on the EU FAQ, this presumption may be rebutted on a case-by-case basis by the entity concerned, if it can be demonstrated that all or part of its assets are outside the control of the listed person and/or that the funds or economic resources made available to it would not in fact reach or benefit the listed person.[364]

The concept of "ownership" is relatively straightforward, as it can be assumed that a person holding more than fifty percent of the shares of a company actually owns it.

However, the concept of "control" can be difficult to define. Based on the clarifications from the EU Commission, "control" will depend on whether someone is able to and effectively asserts a decisive influence over the conduct of the other entity in question.[365]

Practice has shown that it can be challenging to define the exact scope of application of Art. 2 of the EU Regulation No 269/2014 and Art. 15 of the Swiss Ordinance of 4 March 2022, i.e. to define to what extent a non-listed person can be considered as controlled by a listed person.

Based on the authors' experience, certain entities in Switzerland, particularly financial institutions, tend to freeze the funds of individuals and companies which are not listed under the Swiss Ordinance of 4 March 2022 because they are concerned that these funds may be controlled by a person or entity that is subject to sanctions (see below, para. 44, for the impact of this cautious approach on the arbitration proceedings).

Most of the time, this forces companies whose funds are frozen to contact SECO in order to obtain clarification on their status in the light of the Ordinance of 4 March 2022. However, the task presents certain challenges.

First, with regard to foreign entities, it would appear that SECO avoids taking a position when the request is initially made by the company with frozen funds. More precisely, SECO expects to be contacted first by the Swiss entity holding the funds and not the affected company. As such, the foreign entity with frozen assets must first approach the entity holding the funds. That entity would then have to contact SECO to discuss the control (or its absence) and/or ownership (or its absence) of a listed person. It is only if the financial institutions refuse to contact SECO that the foreign entity will be able to approach SECO directly.

Second, even when a company manages to reach out to SECO, the authors note that it is difficult to obtain a decision. Although the authorities are generally efficient in their decision-making, the authors note that SECO can take time to issue decisions related to sanctioned entities. In this respect, the authors observe that it can take up to 10 months (or even longer) for SECO to issue a decision.

In summary, funds and economic resources may extensively be blocked based on the EU and Swiss instruments, which can lead to difficulties for parties when initiating or financing arbitral proceedings (as explained further below in Section III). The only way for the parties to mitigate the effects of the assets freeze is to ask the competent authority (SECO in Switzerland) to release funds.

C. Ban on Certain Legal Services

According to Art. 5n para. 2 of EU Regulation No 833/2014 in its consolidated version, it is prohibited to provide, directly or indirectly, legal *advisory* services to the Government of Russia or to legal persons, entities or bodies established in Russia.

Following the adoption of this particular new set of sanctions, the Swiss Federal Council introduced additional restrictions mirroring the sanctions imposed by the EU. Specifically, Art. 28e para. 2 of the Ordinance of 4 March 2022 expressly prohibits the provision, directly or indirectly, of legal consultancy services to the Government of the Russian Federation or to legal persons, enterprises or entities established in that country.

363 FAQ on asset freeze, q. 1.

364 FAQ on asset freeze, q. 1.

365 For further details on this concept, one may refer to the Commission opinion of 19 June 2020 and the Commission opinion of 8 June 2021 of the EU Regulation No 269/2014.

Both the EU and the Swiss instruments provide for the following three categories of exceptions to this rule:

- First, the ban on legal services does not apply to the provision of services intended for the exclusive use of legal persons, entities or bodies established in Russia that are owned by, or solely or jointly controlled by, a legal person, entity or body which is incorporated or constituted under the law of a EU Member State, a country member of the European Economic Area, Switzerland, or a partner country listed in Annex VIII of the EU Regulation No 833/2014.[366]
- Second, the restriction does not apply to the provision of legal services that are (strictly) necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy. Furthermore, the ban does not apply to the provision of legal services which are (strictly) necessary to ensure access to judicial, administrative or arbitral proceedings in an EU Member State, Switzerland, a country member of the European Economic Area, or in the UK, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in one of the above-mentioned countries.[367]
- Third, there is a wind-down provision allowing for the provision of the legal services necessary for the termination of non-compliant contracts.[368]

The EU and Swiss provisions largely correspond to one another and contain only minor differences, one of which is the use of the term "strictly necessary" in the EU Regulation No 833/2014 versus "necessary" in the Swiss Ordinance of 4 March 2022.[369] Such distinction may provide the Swiss authorities a certain degree of discretion when assessing what falls within the scope of exceptions to Art. 28e of the Ordinance of 4 March 2022. It also makes the provision more generous and omits the requirement that the transaction needs to be consistent with certain objectives, thus making the regulation clearer than the EU equivalent.[370]

However, the Swiss Ordinance of 4 March 2022 regrettably does not define the scope of "legal services".

In this sense, the Swiss Federal Council in its press release of 23 November 2022 merely confirmed that "*Switzerland ensures that access to Swiss law is preserved and that the rule of law is fully guaranteed. This was the Federal Council's condition for adopting these new bans*".[371]

Furthermore, despite calls for clarifications, neither SECO nor the Federal Council has shed any light on the issues raised by Art. 28e of the Ordinance of 4 March 2022, such as the nature of legal services actually covered by the restriction.[372]

Given the absence of any clarifications, and in view of the similarities between the Swiss and the EU norms, the EU's interpretation will likely also prevail in Switzerland.[373]

In this regard, the EU, in the Council Regulation (EU) 2022/1904 of 6 October 2022 amending the EU Regulation No 833/2014, stated:

> *"'Legal advisory services' covers: the provision of legal advice to customers in non-contentious matters, including commercial transactions, involving the application or interpretation of law; participation with or on behalf of clients in commercial transactions, negotiations and other dealings with third parties; and preparation, execution and verification of legal documents. 'Legal advisory services' does*

366 See EU Regulation No 833/2014, 2014, Art. 5n(7); Ordinance of 4 March 2022, Art. 28e(2)(a).

367 See EU Regulation No 833/2014, 2014, Art. 5n(5)(6); Ordinance of 4 March 2022, 2022, Art. 28e(2bis).

368 See EU Regulation No 833/2014, Art. 5n(4); Ordinance of 4 March 2022, Art. 35(27); that being said, those provisions are no longer applicable as the wind-down period ended on 8 January 2023 for the EU and 4 February 2023 for Switzerland.

369 See also F. Dasser, *Sanctions and the Rule of Law*, 40(3) ASA Bull., pp. 523-525, p. 524.

370 See also F. Dasser, *Sanctions and the Rule of Law*, 40(3) ASA Bull., pp. 523-525, p. 524.

371 Federal Council press release: U*kraine: Switzerland adopts EU's eighth package of sanctions dated 23 November 2022*, available at https://www.seco.admin.ch/seco/en/home/seco/nsb-news.msg-id-91875.html, last accessed on 24 April 2022.

372 See for instance the letter of the Bar Association addressed on 13 January 2023 to the President of the Confederation Alain Berset, Federal Councillor Guy PARMELIN and Ambassador Erwin Bollinger, available at https://odage.us10.list-manage.com/track/click?u=2fa0acad750ae69ccf2a5ba44&id=5897abac23&e=200e3321fd, last consulted on 24 April 2022; see also the Swiss FAQ giving an interpretation of rticles 12, 13, 14, 14a, 14c, 15, 16, 20, 21, 23, 25, 28b, 28d and 28e of the Ordinance imposing measures in relation to the situation in Ukraine.

373 S. Giroud et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023 Revue de l'avocat, p. 67; see also MA. Niggli, *Die Sanktionen gegen Russland und der Rechtsstaat*, 2023 Revue de l'avocat, p. 61.

> *not include any representation, advice, preparation of documents or verification of documents in the context of legal representation services, namely in matters or proceedings before administrative agencies, courts or other duly constituted official tribunals, or in arbitral or mediation proceedings."*

The EU Regulation creates a concerning dichotomy, separating, on the one hand, legal representation in the contentious sense and, on the other hand, legal advice in the non-contentious sense (the latter being prohibited). While the line may seem clear at first, there are certainly grey areas. For instance, it is unclear which services can be considered (strictly) necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy. Are legal services provided ahead of dispute-resolution proceedings (e.g. pre-dispute negotiations) covered? Are settlement talks during the arbitration covered? The answer remains unsettled; however, arguably such services should not fall within the scope of the prohibited transactions as it would be inconsistent to permit those only during the contentious phase of a dispute (the impact of the freeze of assets on international arbitration will be further discussed below in Section III). [374] This measure may represent a breach of the right to access to justice and the right to be heard.

III. Impact on the Conduct of International Arbitrations

International sanctions have a major impact on commercial relationships with targeted entities and individuals and, as a consequence, on the conduct of international arbitrations.

Counsel, arbitrators and arbitral institutions must comply with sanctions. They are bound by the reporting obligations and authorization requests which relate to the transfer of funds from an entity based in a country with which such transfers are prohibited.[375] The following section examines the impact of sanctions on the parties' ability to start and proceed with the arbitration (A.) and on the arbitral tribunal's (or the institution's) ability to manage the arbitration (B.). Furthermore, it briefly touches upon the impact of sanctions on the enforcement of arbitral awards (C.) and on its impact on the right to be heard and access to justice (D.).

If a bank holds assets belonging to a Listed Person, it is obliged to freeze these assets. In the same vein, if a party becomes a Listed Person in the course of an arbitration, the arbitral institution should: immediately freeze the advances on costs which have already been transferred to it; and report the frozen assets to the competent authorities. Indeed, the Listed Person usually continues to be the beneficial owner of the assets despite the depositing with the arbitral institution, hence the provisions on the freezing of assets apply.[376]

It is important to highlight that penalties for violating trade sanctions also apply in case of gross negligence. Therefore, counsel, arbitrators and arbitral institutions need to act diligently when performing their tasks in order not to accidentally facilitate illegal acts committed by one of the parties (e.g. by confirming a settlement in a consent award without verifying if the performance of the settlement would violate the applicable sanctions regime). [377]

The impact of sanctions is not limited to cases in which frozen assets are involved. Sanctions may also have an impact on the arbitration proceedings if the funds originate from an account which is not frozen due to the indirect effects of the measures imposed against a country.

Specifically, in the context of the sanctions against Russia, various practical issues may be encountered by the entities involved in an arbitration.

374 S. Giroud et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023 Revue de l'avocat, p. 67 ; MA. Niggli, *Die Sanktionen gegen Russland und der Rechtsstaat*, 2023 Revue de l'avocat, p. 61.

375 E. Geisinger et al., *The Impact of International Trade Sanctions on Contractual Obligations and on International Commercial Arbitration*, 2012(4) International Business Law Journal, pp. 405-438, p. 431.

376 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021, (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/; Elliott Geisinger et al., *The Impact of International Trade Sanctions on Contractual Obligations and on International Commercial Arbitration*, 2012(4) International Business Law Journal, pp. 405 et seq., pp. 431-432.

377 E. Geisinger et al., *The Impact of International Trade Sanctions on Contractual Obligations and on International Commercial Arbitration*, 2012(4) International Business Law Journal, pp. 405-438, p. 432.

For instance, Switzerland[378], the EU[379] and other countries have introduced measures which prohibit the supply of specialized financial messaging services to certain Russian banks.[380] As a consequence, these banks were in effect disconnected from SWIFT and thus from the international financial system. Therefore, parties to proceedings which are not Listed Persons will also encounter practical difficulties when making international payments.

Moreover, many Western banks have adopted a cautious approach and prefer to abstain from conducting or facilitating any transaction involving Russian entities or handle funds which are linked to Russia (see. above, para. 23). Banks may thus be hesitant to handle such funds regardless of whether a Designated Entity is involved or not and thus regardless of whether the bank would have an obligation to freeze such funds or to notify the competent authorities.[381] In this context, both Switzerland[382] and the EU[383] have a prohibition to accept deposits above CHF 100,000 or EUR 100,000 respectively, from Russian nationals, individuals residing in the Russian Federation or entities established in the Russian Federation, regardless of whether such individuals or entities are listed.[384] Furthermore, Switzerland prohibits the receipt of payments of non-sanctioned clients of a sanctioned bank.[385] As mentioned, where the parties will have to advance costs for proceedings with a large amount in dispute, this regulation may constitute another obstacle for arbitral institutions and their banks.[386]

These issues may significantly delay the transfer of funds to legal advisors and to arbitral institutions, and therefore delay the proceedings.

A. Ability to Start and Proceed with the Arbitration

1. Payment of Counsel Fees

When initiating an arbitration, the first question arising if the assets of a client are frozen is whether counsel can accept the mandate, and, if so, how it can be remunerated for its services. As explained above, lawyers may in principle represent Listed Persons in arbitration proceedings.

Again, the answers to these questions will depend on the applicable sanctions regime.

With regard to the sanctions against Russia, Art. 15(2) of the Ordinance of 4 March 2022 prohibits "to transfer funds or to make funds and economic resources available, directly or indirectly, to natural persons, undertakings and entities" to persons referred to in Art. 15(1). It is only possible to release these funds by requesting a derogation from SECO pursuant to Art. 15(5) of the Ordinance of 4 March 2022. The request must contain an explanation as to why an exception must be made in the case in question, by describing the legal activity which the lawyer will carry out (if the request is made because the client needs to pay a retainer prior to the provision

378 Art. 15(3) Ordinance of 4 March 2022.

379 Council Regulation (EU) 2022/345 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Art. 1(3).

380 S. den Hartog, *Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia*, Kluwer Arbitration Blog, 23 March 2022, (available at https://arbitrationblog.kluwerarbitration.com/2022/03/23/challenges-faced-by-arbitral-institutions-amidst-new-waves-of-sanctions-against-russia/.

381 S. den Hartog, *Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia*, Kluwer Arbitration Blog, 23 March 2022, (available at https://arbitrationblog.kluwerarbitration.com/2022/03/23/challenges-faced-by-arbitral-institutions-amidst-new-waves-of-sanctions-against-russia/.

382 Art. 15(3) Ordinance of 4 March 2022.

383 Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Art. 1(9).

384 S. den Hartog, *Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia*, Kluwer Arbitration Blog, 23 March 2022, (available at https://arbitrationblog.kluwerarbitration.com/2022/03/23/challenges-faced-by-arbitral-institutions-amidst-new-waves-of-sanctions-against-russia/.

385 Auslegung der Artikel 12, 13, 14, 14a, 14c, 15, 16, 20, 21, 23, 25, 28b und 28d der Verordnung über Massnahmen im Zusammenhang mit der Situation in der Ukraine (SR 946.231.176.72), p. 5.

386 S. den Hartog, *Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia*, Kluwer Arbitration Blog, 23 March 2022, (available at https://arbitrationblog.kluwerarbitration.com/2022/03/23/challenges-faced-by-arbitral-institutions-amidst-new-waves-of-sanctions-against-russia/.

of legal services) or carried out (if the request relates to an invoice for legal services already rendered).[387] In order to disclose such information to SECO, the lawyer will need a waiver from its client with regard to professional secrecy.[388]

In any event, the lawyer should have to provide as little information as possible. For example, it should be sufficient that the lawyer indicates the number of hours which he or she intends to spend on the case (or, in case of an invoice, which he or she spent on a case).[389] There is no need to disclose to SECO or to a bank the nature of the legal services carried out or details of the case handled.[390] In case of doubt, the authority should have to justify this doubt in order to request the lifting of the secrecy from the competent supervisory authority.[391]

However, in practice, SECO regularly requires that the name of the client is disclosed and that sufficient information is provided to SECO in order for it to ascertain whether the activities carried out justify an exemption.[392] Legal scholars argue that it should not be up to SECO to carry out this assessment, since it does not have the competence to lift the legal professional privilege. From the perspective of the bank, there is a risk that banks may not accept payments from Listed Persons to their lawyers because they do not want to risk to making themselves liable to prosecution for instigation of the violation of the professional secrecy when researching the motive for the payments.[393] Clear practices or measures aiming at fully preserving the legal professional secrecy should be adopted *de lege ferenda*.[394]

The frozen assets are generally not presumed to stem from illegal activities if they are blocked only because of the legal sanctions and their freeze is thus politically motivated.[395] Therefore, its receipt by the lawyer should not constitute an illegal activity.[396] The receipt by the lawyer of retainers (or the payment of his or her invoices) for a permissible purpose must therefore be admitted. This is also a consequence of the case law of the Swiss Federal Supreme Court, pursuant to which a lawyer must in principle request retainers for reasons of independence.[397]

By comparison, the EU Regulation allows the competent authorities of Member States to authorize the release of frozen funds if these funds are, according to their assessment, *"intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services."*[398]

2. Payment of the Registration Fee and Advance on Costs

When a case is filed with the arbitral institution and the institution realizes that the case potentially involves targeted parties, the institution should do a compliance check and check if the case is sensitive.[399] If so, the ins-

387 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68., p. 66.

388 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p. 66.

389 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p., 66 ; M. Niggli, *Prise de position sur les sanctions à l'encontre de la Russie en rapport avec la situation en Ukraine, notamment sur le règlement 2022/1904 du Conseil de l'UE du 6 octobre 2022 «modifiant le règlement (UE) n° 833/2014 concernant des mesures restrictives eu égard aux actions de la Russie déstabilisant la situation en Ukraine*, 20 October 2022, available here : https://www.sav-fsa.ch/documents/672183/2025869/Gutachte_Niggli_zu_8.Sanktionenpaket_der_EU_FR.pdf/b951966d-17b7-b761-fd7f-86e3606c7398?t=1669217058657, p. 2 (abbreviated : M. Niggli, avis de droit).

390 SAV/FSA, *Le Conseil fédéral limite les services de conseil juridique à l'égard de la Russie en adoptant le 8e paquet de sanctions de l'UE* , 10 February 2022, available here : https://www.sav-fsa.ch/fr/news/-/asset_publisher/LUxP0kas3ihE/content/id/2921890; G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p. 66 ; M. Niggli, avis de droit, p. 2.

391 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p. 66 ; M. Niggli, avis de droit, p. 2.

392 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p.., 66.

393 M. Niggli, avis de droit, p. 3.

394 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p. 66.

395 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p. 66 ; M. Niggli, avis de droit, p. 1.

396 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2) Anwaltsrevue, pp. 63-68, p. 66 ; M. Niggli, avis de droit, p. 1.

397 M. Niggli, avis de droit, p. 1 ; DFSC 142 II 307, consid. 4.3.3,

398 Art. 4(1)(b) EU Regulation No 269.

399 See e.g. The Note to Parties and Arbitral Tribunals on ICC Compliance, 29 September 2017, II.7.

titution will have to examine whether there is an impact on the conduct of the proceedings. By the same token, the institution may require a party having reasonable doubt that a sanctions regime is applicable in their case to inform the institution prior to submitting the request for arbitration or the answer thereto, respectively.[400]

Consequences for the conduct of the arbitration may include the payment of the registration fee and of the advance on costs.[401] When initiating arbitration proceedings, the parties will generally have to pay the registration fee (pursuant to the applicable rules of the institution) and advance the costs of the arbitration in an amount sufficient to cover *inter alia* the arbitrators' fees and expenses.[402] Generally, the parties advance an equal share of the costs.[403] The arbitral tribunal is not obliged to commence or to continue with the arbitration as long as it has not received the advance on costs.[404]

The precise steps to take and measures to adopt in order to comply with the measures adopted regarding the transfer of funds will depend on the applicable sanctions regime. Generally, payments which are affected by a sanctions regime will require a prior authorization or a license from the competent state authority.

As regards the sanctions against Russia, under Art. 15(3) of the Ordinance of 4 March 2022, SECO can exceptionally authorize payments from blocked accounts and transfers of frozen assets if this is necessary, inter alia, to avoid hardship cases (let. a) or to honour an existing contract (let. b). This provision may be understood as allowing the release of funds for the payment of registration fees, advance on costs, court costs or the like, in which a party's procedural rights could be irreparably harmed if the required funds are not released, thus constituting a situation of hardship.[405] In the same vein, it can be argued that the release of funds in order to pay a registration fee or advances on costs is a means for the Listed Party to honour an existing contract (i.e. an arbitration agreement).[406]

In another example, relating to the sanctions against Iran, the ICC was granted a specific license by the US Office of Foreign Assets Control (OFAC) in October 2021, which allows the receipt and processing of certain payments in ICC arbitration proceedings implicating Iran.[407] The ICC can therefore now process payments from Iranian sanctioned entities.

If payment is not possible by these means, other ways to ensure payment are suggested by institutions and authors.

One option entails the payment through an escrow account or through a bank guarantee (if a bank is willing to provide such guarantee, which may be difficult in light of the banks being very cautious when it comes to managing funds in relation with potentially Listed Persons). The latter might constitute an alternative since the bank guarantee is not a payment.

Another possibility might be to change the currency of the fees and costs in order to avoid that the money

400 See e.g. the ICC Note on economic sanctions, dated 1 July 2015, (available at https://iccwbo.org/news-publications/news/international-economic-sanctions/.

401 For a detailed analysis see also J. Häsler, *Economic Sanctions and the Payment of the Advance on Costs in International Arbitration Proceedings in Switzerland*, in D. Girsberger and C. Müller (eds.), Selected Papers on International Arbitration, 2023, pp. 95-134.

402 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (2021), para. 1564.

403 M. Bühler and M. Stacher, Chapter 18, *Part IV: Costs in International Arbitration*, in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2018, pp. 2567 – 2594, para. 21 et seq.

404 M. Bühler and M. Stacher, Chapter 18, *Part IV: Costs in International Arbitration*, in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2018, pp. 2567 – 2594, para. 19.

405 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/); O. Thormann et al., *Séquestre, blocage et sanctions*, in S. Giroud and H. Rordorf-Braun (eds.), *Droit suisse des sanctions et de la confiscation internationales*, 2020, pp. 35-96, footnote 371.

406 M. Audit, *L'effet des sanctions économiques internationales sur l'arbitrage international*, in E. Loquin and S. Manciaux (eds.), *L'ordre public et l'arbitrage : actes du colloque des 15 et 16 mars 2013*, Dijon, 2014, pp. 143-157, p. 147.

407 ICC Dispute Resolution in 2021: Our year in review, 20 December 2021 (available at https://iccwbo.org/news-publications/news/icc-dispute-resolution-in-2021-our-year-in-review/).

passes through a bank of a country in which some entities are sanctioned.[408] However, this option may not necessarily be available under every sanctions regime. In this sense, anti-circumvention provisions (e.g. Art. 9 of the EU Regulation No 269/2014) could prevent entities from engaging in such a process, as they are designed to prohibit participation in activities designed to circumvent the measures referred to in Art. 2 of the EU Regulation No 269/2014. In case of doubt, it is advisable to ask the competent authority whether this would be possible.

In any event, institutions should apply caution when a payment is made by a non-listed third party on behalf of a Listed Person. As a general rule, an authorization is also required for these payments, since these activities have the effect to circumvent an asset freeze.[409] For Switzerland, SECO has determined that assets of third parties acting on behalf of Listed Persons or upon their instructions must in any event be deemed to fall within the definition of assets controlled by a Listed Person.[410]

3. Payment of the Registration Fee and Advance on Costs

As mentioned above, the arbitral tribunal is not obliged to proceed with the arbitration as long as the advance on costs is not paid. In theory, however, the arbitral tribunal may be free to do so,[411] unless stated otherwise in the procedural rules of the arbitral institution. In particular, in some instances, e.g. if the arbitral tribunal envisages to bifurcate the proceedings in order to first decide on some preliminary questions, it may be possible that the arbitral tribunal only proceeds with the advance provided by the claimant if it deems the advance to be sufficient to decide on the preliminary issues.[412]

In this context, the question arises whether, if a party to the arbitration has its assets frozen and can therefore not pay its advance on costs, the other party to the arbitration should intervene on its behalf and make the payments. The majority of arbitration rules provide for this possibility, for example where the respondent does not pay its share of the advance on costs (e.g. because it argues that the arbitral tribunal lacks jurisdiction).[413] In theory, such substitute payment for a Listed Person could be regarded as making assets directly available to that Listed Person and therefore as a breach of the regulation of the freezing of assets.

This question is particularly relevant when the assets of the respondent are frozen, which is in principle convenient as it can block the arbitration from progressing. Therefore, the respondent will most likely not have an incentive to seek the release of the funds. As a consequence, it is in the respondent's power to paralyze the proceedings.[414]

The claimant therefore has an interest, under certain circumstances, to pay the other part of the advance on costs in order to be able to proceed with the arbitration proceedings.

Oftentimes, sanction programs allow the release of frozen assets for such purposes but do not, by contrast, allow a non-listed person to seek authorization to make assets which are not frozen available to a Listed Per-

408 For instance, it is ICC practice that no payments are made in USD when dealing with a sanctioned party, in order to ensure compliance with US laws. See e.g. The Note to Parties and Arbitral Tribunals on ICC Compliance dated 29 September 2017, II.10 (available at https://cdn.iccwbo.org/content/uploads/sites/3/2017/11/note-to-parties-and-arbitral-tribunals-on-icc-compliance-english.pdf).

409 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/).

410 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/ with references).

411 See also DFSC 4P.2/2003 para. 3.3.

412 M. Bühler and M. Stacher, Chapter 18, *Part IV: Costs in International Arbitration*, in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide, 2018, pp. 2567 – 2594; see e.g. LCIA Rules, Art. 24(5).

413 M. Bühler and M. Stacher, *Chapter 18, Part IV: Costs in International Arbitration*, in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2nd ed.), para. 36; see e.g. Art. 41(4) Swiss Rules, Art. 37(5) ICC Rules, Art. 24(6) LCIA Rules, Art. 41(1) CAM Arbitration Rules.

414 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/).

son.[415]

As a consequence, the only solution may be to request a confirmation from the competent authority that a substitute payment would comply with the relevant sanctions legislation.[416] The fact that the non-payment of the other part of the advance on costs may benefit the Listed Person is an argument which may be advanced in order to obtain such confirmation.[417]

After advancing the respondent's costs, it may be possible for the claimant to seek reimbursement by obtaining an award against the respondent to that effect. While some institutional rules provide for this possibility (e.g. Art. 24(7) LCIA Arbitration Rules), neither the Swiss Rules of International Arbitration nor Swiss law expressly provide for this possibility. However, the Swiss Federal Supreme Court held that a partial award (rendered prior to the final award) ordering the counterparty to reimburse the substitute payment is enforceable in Switzerland.[418] It recently dismissed an appeal against a partial award ordering such reimbursement.[419]

By contrast, if a claimant is not able to pay its share of advance in costs because it is subject to sanctions, the respondent will rarely have an interest in making a substitute payment.

4. Consequences in the case of non-payment of the registration fee and/or the advance on costs

If the registration fee and/or the advance on costs is not paid, the arbitral institution will generally proceed to an administrative stay.[420] At this point, since not even the registration fee has been paid, generally no tribunal will have been appointed yet. While this will prolong the proceedings, the claimant may nevertheless be able to interrupt the statute of limitation if the applicable substantive law provides that the statute of limitation is interrupted by the receipt of the request by the secretariat of the respective institution.[421] For example, under Swiss law, a notice of arbitration filed pursuant to the requirements of the respective arbitral rules (e.g. Art. 3 Swiss Rules) is sufficient to interrupt the statute of limitations provided that the submission identifies the claim and the amount in dispute (Art. 135(2) Swiss Code of Obligations).[422]

Where the registration fee and the advance on costs have been paid at least in part, the tribunal may decide to proceed in respect of certain claims (e.g. if counterclaims are raised but the counter-claimant does not make the payment) or parties (e.g. in multi-party proceedings).[423]

B. The Arbitral Tribunal's (or Arbitral Institution's) Ability to Manage the Arbitration

When conducting an arbitration, the arbitral tribunal will have to take into account the existence of various applicable laws and the sanction regimes pursuant to these laws, such as the substantive law applicable to the contract between the parties, the *lex arbitri*, the law in which the winning party would seek enforcement of the arbitral award and any other laws with which the dispute has a significant connection.[424] This may lead to a delay of the proceedings.

415 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/).

416 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/).

417 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/).

418 Decision of the Swiss Federal Supreme Court 4P.173/2003, 8 December 2003, consid. 4.

419 Decision of the Swiss Federal Supreme Court 4A_27/2021, 8 December 2003, consid. 4-6.

420 See e.g. Art. 41(4) Swiss Rules, Art. 37(6) ICC Rules.

421 A.M. Petti, in T. Zuberbühler et al. (eds.), *Swiss Rules of International Arbitration*, Commentary, Art. 3 para. 12; Art. 4(2) ICC Rules 2021, J. Fry/S. Greenberg/F. Mazza, *The Secretariat's Guide to ICC Arbitration* (2012), paras. 3-123 to 3-124.

422 Angelina M. Petti, in T. Zuberbühler et al. (eds.), *Swiss Rules of International Arbitration*, Commentary, Art. 3 para. 12.

423 See e.g. Art. 41(4) Swiss Rules in fine.

424 S. Ngo and S. Walker, *Impact and Effects of International Economic Sanctions on International Arbitration*, in S. Brekoulakis (ed.), 3(2022) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, pp. 388-403 p. 374.

Furthermore, while this problem may be of minor relevance nowadays in light of the possibility of remote participation, arbitral tribunals may be confronted with the fact that party representatives or key witnesses may not be able to attend hearings because of travel bans or asset freezes.[425]

1. Security for Costs

During the arbitration proceedings, the tribunal may be confronted with a request for security for costs to be provided by the Listed Person. The question then arises whether such provision is possible if the assets are frozen. This will depend on the specific applicable sanctions regulation.

Under Swiss law, the provision of security for costs may potentially fall under Art. 15(5) of the Ordinance of 4 March 2022. [426] It could be argued that it is necessary to prevent cases of hardship (let. a) for the other party. Furthermore, it may also be argued that it may constitute a case of the fulfillment of a contract (let. b). While the exceptions in relation to the freeze of assets must be interpreted restrictively, the provision of security for costs by a Listed Person should also be considered in line with Art. 15(2) of the Ordinance of 4 March 2022. Pursuant to this article, it is prohibited to make funds directly or indirectly available to a Listed Person. In the present case, the funds are not made available, but the Listed Person's assets are diminished. Not providing the security for costs would harm the counterparty of the Listed Person, which cannot be the purpose of the regulation (which is to put pressure on the Listed Persons and the sanctioned country). In conclusion, it should be possible to receive an authorization from SECO for the payment of security for costs.

In the English decision *PJSC National Bank Trust v Mints [2023] EWHC 118 (Comm)*, the court held that the wording of the regulation (in that case: "*3. To enable the payment of – (a) reasonable professional fees for the provision of legal services, or (b) reasonable expenses associated with the provision of legal services…*") suggested that it was not limited to the payment by the Listed Person of its own legal fees, but that it covered all the fees incurred by the Listed person, regardless of the recipient of the services.[427] The court also analyzed the wording of the EU regime ("*reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services*"), in particular the word "*reimbursement*", which seemed to suggest that it was meant to cover only payments to the Designated Person's own lawyers.[428] However, the court came to the conclusion that there was "*no determination in the authorities on this point and concentration on a single word in a document of this nature [was] probably unwise*".[429] The court also considered the overall intention of the UK Licensing Regulation, which was to "*achieve some kind of workable situation", i.e. to allow the litigation to progress*.[430] Moreover, the court stated that an adverse cost order did not benefit the Listed Person but, on the contrary, diminished its assets, thus not running against the purpose of the regulation.[431] The English High Court also referred to the Court of Justice of the European Union ("**CJEU**") case 314/13 Užsienio reikalų ministerija, Finansinių nusikaltimų tyrimo tarnyba v. Peftiev and the principles outlined therein. While that case did not concern the payment of the Listed Person's own lawyers, the CJEU stated that an interpretation consistent with effective access to justice must be made.[432] For all these reasons, the English High Court concluded that the payment of an adverse costs order was licensable under that specific UK regulation.[433] This line of reasoning applies *mutatis mutandis* in the case of security for costs in arbitration proceedings.

425 See also T. Cummins and J. MacDonald, *Economic Sanctions: Implications for International Arbitration*, GAR, 10 May 2018 (available at https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/economic-sanctions-implications-international-arbitration).

426 Pursuant to this article, *"SECO may exceptionally authorise payments from frozen accounts, transfers of frozen assets and the release of frozen economic resources to: a. avoid hardship cases; b. fulfil existing contracts; c. fulfil claims which are the subject of an existing decision of a court, administrative body or arbitral tribunal; d. fulfil official activities of diplomatic or consular missions or international organisations enjoying immunity under international law; e. …; f. carry out humanitarian activities or assisting the civilian population in connection with the situation in Ukraine; or g. avert or mitigate an event that is likely to have a serious and significant impact on human health and safety or on the environment."*

427 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 168.

428 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 168.

429 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 169.

430 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 173.

431 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 176.

432 CJEU, C-314/13 Užsienio reikalų ministerija, Finansinių nusikaltimų tyrimo tarnyba v. Peftiev, para. 25 et seq; referred to in PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 178.

433 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 179.

2. Will Certifying an Award in Favour of a Targeted Entity Infringe the Relevant Sanctions Regime Because the Award Permits a Targeted Entity to Raise Funds?

Another question relating to sanctions and the provision of funds to Listed Persons is whether certifying an award in favour of a targeted entity may infringe the relevant sanctions regime because the award permits a targeted entity to raise funds.

At the time of this publication, Swiss courts have not (yet) decided on this issue. Art. 15(2) of the Ordinance of 4 March 2022 prohibits the transfer of funds to Listed Persons. The interpretation of the ordinance provides little guidance on this issue. Pursuant to the interpretation of the ordinance, "*income from mandatory corporate actions without a choice – typically stock dividends or bond interest but also exchange offers in connection with depository receipts – may be credited to the affected account and held blocked without prior authorization from SECO*" "*in order to take into account the operational realities of the securities business*".[434] Therefore, in some cases, funds can be credited to a frozen account. However, this appears to be an exception.

In its decision *Möllendorf* rendered in the context of the Council Regulation (EC) No 881/2002 of 27 May 2002 (imposing specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban), the CJEU ruled that "*a transaction such as final registration of transfer of ownership of immovable property in the Land Register was prohibited under [that regulation] if, in consequence of that transaction, [...] an economic resource is made available to a [targeted person], which would enable the latter to obtain funds, goods or services*"[435]. This is also the case if there is an economic balance (i.e. equivalence of the performance and counter-performance), since the possibility remains that the asset obtained by the targeted person may offer better prospects for value enhancement.[436] Moreover, this also applies "*in a situation where both the contract for the sale of immovable property and the agreement on transfer of ownership of that property and the agreement on transfer of ownership of that property have been concluded before the date in which the buyer is included in the list [of targeted persons] and where the sale price has also been paid before that date*", i.e. the final registration of the transfer of ownership in the Land register in performance of the contract.[437] Consequently, based on this decision, if an institution certifies an award which can be used to provide an economic advantage to a targeted person, there is a risk that sanction provisions are violated.[438]

At the same time, the EU Regulation 269/2014 states in Art. 7(1) that the freezing of funds shall not prevent the crediting of the frozen accounts by financial or credit institutions that receive funds transferred by third parties onto the account of a listed person, provided that any additions to such accounts will also be frozen.

On 27 January 2023, in *PJSC National Bank Trust v Mints [2023] EWHC 118 (Comm)*, the court ruled that sanctioned claimants can sue for damages and a judgment can be rendered in their favour without requiring a license and thus without violating economic sanctions.[439] This line of reasoning, applied by a state court, may be applied, at least in England, *mutatis mutandis* to arbitral tribunals.

In light of these uncertainties, the arbitral tribunal may be hesitant to issue an award which may expose it to sanctions liability, and the proceedings may suffer delays while the arbitral tribunal puts in place procedures to mitigate or eliminate the risk of such liability.[440]

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434 See interpretation of Art. 15 of the Swiss Ordinance of 4 March 2022 (available at https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/Exportkontrollen/Sanktionen/Verordnungen/Russland,%20Ukraine/auslegung_artikel_12_14a_14c_15_20_21_23_28b_28d_der_verordnung_2022-11.29.pdf.download.pdf/Auslegung_Artikel_12_13_14_14a_14c_15_16_20_21_23_25_28b_28d_28e_Verordnung_Massnahmen_Zusammenhang_Situation_Ukraine.pdf).

435 CJEU, C-117/06, Möllendorf and Möllendorf – Niehuus, para. 60; referred to in PJSC National Bank Trust v Mints [2023] EWHC 118 (Comm), para. 60.

436 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 59.

437 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 80.

438 See also T. Cummins and J. MacDonald, *Economic Sanctions: Implications for International Arbitration,* GAR, *10 May 2018* (available at https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/economic-sanctions-implications-international-arbitration); PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), paras. 28, 30.

439 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), paras. 11, 123 et seqq., 162.

440 See also T. Cummins and J. MacDonald, *Economic Sanctions: Implications for International Arbitration*, GAR, 10 May 2018 (available at https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/economic-sanctions-implications-international-arbitration).

3. Return of an Unused Portion of an Advance on Costs

As previously noted, sanctions usually prohibit making available, directly or indirectly, any assets or economic resources to Listed Persons.

This raises the question as to how the tribunal or the arbitral institution should proceed when an advance on costs which has not been used needs to be transferred back to a Designated Person, since the notion of making available assets comprises their transfer.[441] The question arises even if such advance was originally released by means of an authorization or license in the context of the arbitration proceedings.[442]

If funds are transferred to a frozen account, the newly transferred funds will be frozen as well. Therefore, it is questionable whether the transfer of funds could be considered as "making available" funds. While the targeted person may have more funds on his or her account, the targeted person cannot access these funds.[443] Pursuant to the European Court of Justice, the making available of assets "*covers any act required under the applicable national law for a person to* effectively ***obtain full power of disposal*** *over the thing in question*."[444]

Under EU law, the regimes usually explicitly provide that the financial and credit institutions in the EU shall not be prevented from crediting frozen accounts where funds are transferred to the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the relevant competent authority about such transactions without delay.[445] Therefore, in principle, such transfers should be admissible as long as the authorities are informed.

By contrast, the Ordinance of 4 March 2022 makes it clear in Art. 15(2) that it is forbidden to ***"transfer or make available"***, directly or indirectly, funds or economic resources to natural persons, undertakings or entities whose assets are frozen. This begs the question whether the return of unused funds falls into the scope of this article or under an exception. One solution may be to first transfer the funds to an escrow account until the competent authority grants the authorization.

C. Enforcement of Arbitral Awards

Lastly, sanctions may pose an obstacle to the enforcement of arbitral decisions.

On the one hand, the party against which the award should be enforced may argue that the dispute is not arbitrable (Art. V(2)(a) or that there is a violation of public policy (Art. V(2)(b) New York Convention).[446] The question of the arbitrability arises because sanctions include significant elements of public interest and public law, and it may be argued that therefore, it should be the state courts deciding on these issues.[447] Under Swiss law, the Swiss Federal Supreme Court confirmed in DFSC 118 II 353, a case concerning trade measures against the Republic of Iraq, that disputes involving sanctions are arbitrable. It argued that even if the issue at stake concerned a matter of public policy, it was not in itself sufficient to exclude its arbitrability. The Swiss Federal Supreme Court found that there were no legal principles which would establish a monopoly of the state courts

441 T. Döbeli, *Bankvertragsrechtliche Auswirkungen von internationalen Finanzsanktionen, Unter besonderer Berücksichtigung der Sperrung von Geldern*, 2020, p. 73.

442 M. Azeredo da Silveira and S. den Hartog, *Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?*, Kluwer Arbitration Blog, 19 October 2021 (available at https://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/).

443 T. Döbeli, *Bankvertragsrechtliche Auswirkungen von internationalen Finanzsanktionen, Unter besonderer Berücksichtigung der Sperrung von Geldern*, 2020, pp. 73 et seqq.

444 ECJ, C-117/06 dated 11 October 2007, Gerda Möllendorf und Christiane Möllendorf-Niehuus, para. 51 (emphasis added); confirmed in C-550/09 dated 29 June 2010, E and F, para. 67.

445 See e.g. Art. 12 para. 2 of the Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) No 204/2011, Art. 7 Abs. 2 of the Council Regulation (EU) No 667/2010 of 26 July 2010 concerning certain restrictive measures in respect of Eritrea. See also the EU Sanction Guidelines dated 4 May 2018, para. 84.

446 V. Yakimova, *The Enforcement of Awards Against Sanctioned Parties: Mission (Im)possible?*, Kluwer Arbitration Blog, 14 February 2023 (available at: https://arbitrationblog.kluwerarbitration.com/2023/02/14/the-enforcement-of-awards-against-sanctioned-parties-mission-impossible/); C. Hunt et al., *The Challenge of Sanctions for Arbitral Participants*, Kluwer Arbitration Blog, 5 October 2015 (available at *https://arbitrationblog.kluwerarbitration.com/2015/10/05/the-challenge-of-sanctions-for-arbitral-participants/*).

447 For more details see T. Szabados, *EU Economic Sanctions in Arbitration*, in M. Scherer (ed.), 2018(4) Journal of International Arbitration, pp. 439-462, p. 444 et seq.

to settle disputes concerning claims of a civil nature influenced by rules of public international law. [448] The approach adopted by the Swiss Federal Supreme Court corresponds to the approach adopted by most jurisdictions. By contrast, courts in other jurisdiction argue that such disputes are not arbitrable.[449] As regards the violation of public policy, the question arises whether recognition and enforcement can be denied because an overriding mandatory provision (i.e. in the present case, provisions related to sanctions) was not applied by the arbitral tribunal.[450]

On the other hand, seizing assets in satisfaction of an arbitral award when the counterparty's assets are frozen will most likely require the creditor to go through an authorization process.[451] Moreover, when the party against which the award is enforced is a state (e.g. Russia) or another entity benefitting from immunity protection, the creditor will have to demonstrate that neither the state, nor its agencies nor their assets are entitled to immunity protections because they relate to economic activities when enforcing a judgement, i.e. that the activities could also be engaged by a private person and not only by a sovereign.[452]

D. Right to be Heard and Access to Justice

As mentioned above, sanctions may have an impact on the right to be heard and access to justice. Firstly, the freeze of assets can prevent access to justice in certain instances. Secondly, concerning the sanctions imposed on Russia, the EU and Switzerland have introduced a ban on the provision of legal advisory services to the Government of Russia, or to any legal persons, entities or bodies established in Russia (see Section II.C).[453] Specifically, when discussing the ban on legal advisory services, various questions emerge, highlighting the need to address the issues behind this restriction.[454]

Art. 47 of the EU Charter of Fundamental Rights states that "everyone is entitled to a fair and public hearing [...]. Everyone shall have the possibility of being advised, defended and represented". Some authors argue that the definition of "legal advisory services" and exceptions to the ban should be read in conjunction with Art. 47 of the EU Charter of Fundamental Rights. As a consequence, EU operators would not be prohibited from providing legal advice to Russian legal entities ahead of dispute resolution proceedings, including arbitration proceedings, if such advice concerns the viability of potential claims and defenses in contentious matters.[455]

As to the situation under Swiss law, the Swiss Federal Constitution provides that every person has the right to equal and fair treatment in judicial and administrative proceedings (Art. 29 of the Swiss Federal Constitution; see also Art. 6 ECHR).

However, in practice, in order to defend themselves in court and arbitration proceedings, parties generally consult lawyers. In this sense, it is in the ordinary course of business for someone to enquire with a law firm regarding the potential cost of a proceeding, the chances of success, etc.

Therefore, this restriction appears to deny fundamental rights, specifically the right to be heard and access to justice. In particular, the question arises whether pre-proceedings advisory services fall under the scope of the

448 Decision of the Swiss Federal Supreme Court 118 II 353, 23 June 1992, consid. 3c.

449 See e.g. Fincantieri-Cantieri Navali Italiani SpA v. Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq; see also more recently Government and Ministries of the Republic of Iraq v. Armamenti e Aerospazio S.p.A. et al., Italy No. 189, Supreme Court of Cassation of Italy, Case No. 23893, 24 Nov. 2015, cited in Yearbook of Commercial Arbitration 2016, 503.

450 E. Geisinger et al., *The Impact of International Trade Sanctions on Contractual Obligations and on International Commercial Arbitration*, 2012(4) International Business Law Journal, pp. 405-438, p. 422 et seqq.; T. Szabados, *EU Economic Sanctions in Arbitration*, in M. Scherer (ed.), 2018(35) Journal of International Arbitration, pp. 439-462, p. 458 et seq.

451 Art. 15(5)(c) of the Ordinance of 4 March 2022; Art. 5(1)(a) of the EU Regulation No 269/2014; Bank Sepah v. Overseas Financial Limited & Oaktree Finance Limited, Court of Justice of the European Union, Case No. C-340/20 (Nov. 11, 2021); Cour de cassation (Cass.), 1e civ., September 7, 2022, Bull civ. I, No. 19-21.964; Cour de cassation (Cass.), 1e civ., September 7, 2022, Bull civ. I, No. 19-25.108.

452 See Art. 21 UN Convention on Jurisdictional Immunities e contrario; V. Yakimova, *The Enforcement of Awards Against Sanctioned Parties: Mission (Im)possible?*, Kluwer Arbitration Blog, 14 February 2023 (available at https://arbitrationblog.kluwerarbitration.com/2023/02/14/the-enforcement-of-awards-against-sanctioned-parties-mission-impossible/).

453 Art. 5n(2) of EU Regulation No 833/2014 and Art. 28e(1bis) of the Ordinance of 4 March 2022.

454 For more details on some of the questions that emerge from the prohibition on legal advisory services, see Section II.C.

455 M. Azeredo da Silveira and S. den Hartog, *The EU's Eight Package of Sanctions Against Russia and the Potential Ramifications of a Blanket Ban on Legal Advisory Services*, Kluwer Arbitration Blog, 1 November 2022 (available at https://arbitrationblog.kluwerarbitration.com/2022/11/01/the-eus-eighth-package-of-sanctions-against-russia-and-the-potential-ramifications-of-a-blanket-ban-on-legal-advisory-services/).

sanction (i.e. under "legal advisory service"). These provisions thus create a delicate distinction between legal representation and legal advice.[456]

These broad measures and distinctions are problematic from two points of view: first, legal security, and second, the impact they have on the rule of law. Practitioners may refrain from advising and assisting clients not only because of fears of breaching sanctions, but also due to the challenges associated with payment of legal fees and reputational risks.[457]

A recent English judgment illustrates the threat posed to legal security. As mentioned above, in *PJSC National Bank Trust & another v. Boris Mints & others*,[458] the Commercial Court had to deal with the question of the effect of sanctions on the litigation proceedings, given that at least one of the claimants was a sanctioned person. In particular, the question arose as to whether the court could rightly render a judgment on the sanctioned claimant's claim.[459] The court concluded that "the requisite level of clarity in intent to derogate from the fundamental right of access to the court for determination of rights outside designation is not demonstrated"[460] and that "if the legislation been intended to interfere with core judicial functions in this way, the very clearest of words or implications would have been necessary".[461]

As regards the impact on the rule of law, the BVI case of *JSC VTB Bank v. Sergey Taruta and arrowcrest*[462] serves as a good illustration of this concern. In this case, the legal counsel for VTB Bank – a majority state-owned Russian bank sanctioned by the UK – applied to be removed from the record as acting for his client mainly because VTB was a sanctioned entity that "*any breach of those sanctions is a criminal offence*",[463] and that "*the representation of a sanctioned Russian Bank is plainly a reputational concern or issue*".[464] However, the BVI Court denied the application. The court held that "*there is nothing in the sanctions legislation to support an inference that the denial of a right to participate in litigation was intended*".[465] The court continued its reasoning by stating that "*VTB may be a pariah* [...]. *That does not afford a ground for its legal representatives to withdraw from representing them. Quite the contrary. It is precisely when VTB are stigmatized as a pariah that VTB need the best endeavours of their legal representatives to advise them and to advocate in court on their behalf.* [...] *this is a vital safeguard for ensuring the rule of law in this Territory. Even pariahs have rights*."[466]

These cases highlight the legal and ethical concerns arising from the sanctions regime when applied to actual proceedings. Indeed, these unprecedented sanctions challenge basic fundamental rights which are so carefully protected under the European and Swiss legislation in their respective ways.

IV. Conclusion

Sanctions inevitably impact all the participants in arbitration proceedings, such as the parties and their counsel, the arbitral tribunal and the arbitral institutions. Since sanctions are evolving instruments, the solutions adopted to deal with sanctions in arbitration are also evolving and need to be adapted to the specific circumstances and set of sanctions.

Sanctions can impact the parties' ability to conduct or even to initiate arbitration proceedings, and in some cases may affect the right of access to justice of one of the parties, for example when counsel are reluctant to

456 G. Sandrine et al., *L'état de droit et les avocats à l'épreuve des sanctions contre la Russie*, 2023(2), Anwaltsrevue, pp. 63-68., p. 67.

457 S. Pavlou et al., *The impact of economic sanctions on the rule of law and the effective administration of justice*, International Bar Association, 28 April 2023 (available at https://www.ibanet.org/impact-of-economic-sanctions-on-rule-of-law).

458 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm).

459 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 10.

460 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 134.

461 PJSC National Bank Trust v. Mints [2023] EWHC 118 (Comm), para. 135 *in fine*.

462 This landmark decision delineated, for the first time in the Commonwealth, the impact of international sanctions on receivership orders and related injunctive relief.

463 JSC VTB Bank v. Sergey Taruta and arrowcrest (17, 22 March 2022), para. 4.

464 JSC VTB Bank v. Sergey Taruta and arrowcrest (17, 22 March 2022), para. 4.

465 JSC VTB Bank v. Sergey Taruta and arrowcrest (17, 22 March 2022), para. 15.

466 JSC VTB Bank v. Sergey Taruta and arrowcrest (17, 22 March 2022), para. 16.

advise a client because it is a listed individual and it is not clear whether the advice provided falls in the scope of the sanctions or of the exception. In the same vein, the right to access to justice may be affected if the proceedings come to a (even temporary) stay because the sanctioned party cannot use its assets to finance the arbitration and the party thus needs to apply for an authorization or seek alternative means to finance its arbitration.

Going forward, it would be desirable to have clearer guidelines from the states on how to proceed in these cases without violating the sanctions program. In the meantime, the parties are well advised to communicate with the arbitral tribunal, arbitral institutions and the banks involved, but most importantly the competent authorities, in order to best navigate through the arbitration.

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The Use of Interim Measures in International Commercial Arbitration Under Swiss and French Law

Authors: Tania Iakovenko, Christian Iovene and Alexandre Mazuranic

ABSTRACT

*Provisional and conservatory measures are a much-needed tool in international arbitration. This chapter addresses the key features of interim measures from a Swiss law perspective, with a comparison with neighbouring French law. We first address the recent amendments to the Swiss Private International Law Act in relation to interim measures and in particular the newly introduced Articles and 185a(1) and 183(2) of the Swiss Private International Law Act ("***PILA***") on the assistance of Swiss courts to arbitral proceedings seated abroad with respect to interim or conservatory measure in Switzerland, and on the parties' right to apply directly to the Swiss courts for the enforcement of conservatory measures granted by an arbitral tribunal seated in Switzerland. We then describe the powers of arbitral tribunals to order interim and conservatory measures in international commercial arbitrations seated in Switzerland and in France (what types of measures, the form of the decision, the enforceability of interim measures, the powers (or lack thereof) of arbitral tribunals to order "judicial penalties" or "astreintes"). Further we review the concurrent powers of state courts to order interim measures, and the possibility to apply for the same measures before state courts and arbitral tribunals. Finally, we share some thoughts on key features to consider when selecting the best forum to apply for interim measures.*

I. Introduction

Interim measures are important instruments to protect the parties' interests not only in state court litigation, but also in international arbitration. Between the commencement and the end of an arbitral proceeding, the parties' rights and interest may be subject to significant risks: the subject-matter, the evidence or the assets may disappear; irreparable harm may occur.[467] Thus, applications for interim measures are common in international arbitrations.

In the practice of international arbitration, interim measures are variously referred to "*interim*", "*provisional*", "*preventive*", "*protective*" or "*conservatory*" measures.[468] These expressions are often used interchangeably or in combination.[469] However, the expressions "*interim*" or "*provisional*" refer to the nature of the decision made (an interim or provisional order does not bind the court or arbitrator hearing the merits of the dispute), whereas "*protective*" or "*conservatory*" measures refer to the purpose of the decision (a protective or conservatory ruling preserves a party's rights, the status quo or evidence).[470] We will refer to these measures as "interim measures".

Most arbitration laws (including Swiss and French laws) expressly provide for the use of interim measures in the context of arbitration proceedings.[471] Under Swiss law, Article 183 of the Swiss Law on Private Internatio-

467 J. Lew et al., *Comparative International Commercial Arbitration* (2003), para. 23-1.

468 G.B. Born, *International Commercial Arbitration* (3rd ed., 2021), pp. 2601-2758.

469 G.B. Born, *International Commercial Arbitration* (3rd ed., 2021), pp. 2601-2758.

470 *Part 4: Chapter III - Provisional and Conservatory Measures in the Course of the Arbitration Proceedings*, in E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), pp. 709 – 734.

471 A. Yesilimak, *Provisional Measures in International Commercial Arbitratio*n, International Arbitration Law, 2005(12), Kluwer Law Arbitration, p. 4. ("*Although "[t]he interim protection of rights is no doubt one of those general principles of law common to all legal system" there is no widely accepted definition of the concept of interim measures.*"); J.-F. Poudret and S. Besson, *Droit comparé de l'arbitrage international*, 2002, p. 549; N. Rachdi, *Les mesures provisoires et conservatoires en matière d'arbitrage*, under the direction of S. Bostanji et al., *Le juge et l'arbitrage*, 2014, p. 70.

nal Law ("**PILA**") regulates the power of Swiss-seated arbitral tribunals to grant interim measures in international arbitration proceedings . Under French law, those provisions can be found in the French Code of Civil Procedure ("**FCCP**").

This chapter first describes the practical implications of the newly introduced Articles 185a(1) and 183(2) of the PILA, allowing respectively: (i) non-Swiss-seated arbitral tribunals or parties to foreign arbitration proceedings to request the assistance of the competent Swiss court where the interim measure is to be executed (before the introduction of Article 185a(1) PILA, only Swiss-seated arbitral tribunals had the possibility to do so), and (ii) parties to apply directly to the Swiss courts for the enforcement of conservatory measures granted by an arbitral tribunal seated in Switzerland (only arbitral tribunals were allowed to do so before the introduction of the new Article183(2)). We then turn to the nature and availability of interim measures ordered by arbitral tribunals under Swiss and French laws (the requirements, their form, their enforcement and the power to impose financial penalties in case of non-compliance with an interim measure ("*astreinte*"). We further turn to the state court's (concurrent) power to order interim measures prior to and in parallel to ongoing arbitration proceedings. Finally, we share some useful considerations to bear in mind when selecting the forum before which to apply for interim measures.

II. The Recently Introduced Articles 185a(1) and 183 of the PILA

The Swiss Parliament has recently amended Chapter 12 of the PILA which governs international arbitration in order to integrate in its provisions the essential elements of the case law of the Swiss Federal Tribunal and to clarify certain issues in relation to its scope of application.[472] The modifications entered into force on 1 January 2021. Two modifications relate specifically to interim measures.

Article 185*a*(1) PILA gives the possibility to a non-Swiss-seated arbitral tribunal or to a party to foreign arbitration proceedings to request the assistance of the competent Swiss court where the interim measure is to be executed.

Further, the revised Article 183(2) PILA allows the parties to apply directly to the Swiss courts for the enforcement of conservatory measures granted by an arbitral tribunal seated in Switzerland.

A. Article 185*a*(1) PILA

Article 185*a*(1) PILA reads as follows:

> *"An arbitral tribunal with seat abroad or a party to foreign arbitration proceedings may request the assistance of the state court at the place where the interim or conservatory measure is to be executed. Article 183 paragraphs 2 and 3 apply by analogy."*

In accordance with the newly introduced Article 185*a*(1) PILA, non-Swiss-seated arbitral tribunals are assimilated to Swiss-seated arbitral tribunals. As a result, the foreign seated tribunal or parties to foreign arbitration proceedings can request the intervention of Swiss courts to enforce interim measures granted in foreign seated arbitration proceedings.

The introduction of Article 185*a*(1) PILA is an important novelty in the Swiss arbitration legislation as it considerably facilitates the enforcement in Switzerland of conservatory measures granted by non-Swiss-seated arbitral tribunals. Indeed, before the introduction of Article 185a(1) PILA, the only available channel to enforce interim measures granted by non- Swiss-seated arbitral tribunals was international mutual legal assistance.[473]

Even though Swiss international mutual legal assistance works quite efficiently, it would have taken generally several months to obtain an order to execute the conservatory measure in question. Because conservatory measures are ordered to preserve a given situation, it is often crucial that those measures can be executed as quickly as possible.

Foreign-seated arbitral tribunals or parties to such proceedings may now apply directly to the competent Swiss

472 Message of the Swiss Federal Council regarding the amendments of the PILA (Chapter 12: International Arbitration), dated 24 October 2018, p. 7154.

473 Message of the Swiss Federal Council regarding the amendments of the PILA (Chapter 12: International Arbitration), dated 24 October 2018, p. 7187.

court to enforce interim measures in Switzerland.

As mentioned below, Swiss courts will, however, only enforce interim measures which are known in the Swiss legal system. Where asked to enforce a measure that is unknown in Switzerland, the local court should nonetheless issue an order which will match as closely as possible the arbitral tribunal's interim measure.[474]

B. Article 183(2) PILA

Another novelty introduced by the new PILA is the possibility for the parties (and not only the arbitral tribunal) to request the assistance of the local Swiss courts for the enforcement of interim measures granted by a Swiss-seated arbitral tribunal (Article 183(2) PILA).

Before the introduction of the new Article 183 PILA, only the arbitral tribunal could make such a request, although the majority of scholars were of the opinion that parties had the same right even in the absence of a clear wording in the former version of Article 183 PILA.[475] However, as this opinion was not unanimous[476] and in the absence of a clear case law of the Swiss Federal Tribunal, this point justified a clarification in the law.

In practice, we can expect that parties, through their counsel, rather than arbitral tribunals, will request in most cases the enforcement of the granted conservatory measures to the competent Swiss court for essentially two reasons.

First, it would generally be more time-efficient for the parties to seize directly the competent Swiss court rather than requesting to the arbitral tribunal to do so, as the latter solution would add an additional step in the procedure.

Second, the arbitrators may not be familiar with Swiss procedural law or may not be fluent with the official language of the canton of the Swiss court where the conservatory measure should be enforced.[477] This would often mean that the tribunal would need to hire local counsel which not only would increase the costs but raise additional potential conflicts of interest.

III. Interim Measures Ordered by Arbitral Tribunals

Both Swiss and French laws empower the arbitral to grant interim measures but their scope, form and enforceability varies between the two jurisdictions.

A. The Power of Arbitral Tribunals to Order Interim Measures Under Swiss and French Law

Under Swiss law. Article 183 PILA governs interim measures in international arbitrations. It provides that, unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order "interim measures or conservatory measures" ("*des mesures provisionnelles ou des mesures conservatoires*"). It is worth noting that parties can exclude the application of interim measures.

The PILA does not provide any guidance as to the types of interim measures that can be ordered by an arbitral tribunal or the requirements to be met to pronounce such measures (unlike articles 261 *et seqq.* of the Swiss

474 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (4th ed., 2021), p. 463, para. 1271.

475 Message of the Swiss Federal Council regarding the amendments of the PILA (Chapter 12: International Arbitration), dated 24 October 2018, p. 7186.

476 Notably CR LDIP-Bucher, art. 183 LDIP, para 12.

477 Failing any specific indication in Article 185a(1) PILA and 183(2) PILA on the language of the request for assistance, the request to the competent Swiss court would need to be drafted in the official language of the Canton of the relevant Swiss court in accordance with Article 129 of the CPC, which could be German, French, or Italian.

Code of Procedure ("**CPC**") applicable to Swiss civil proceedings). Article 374 CPC[478], applicable to domestic arbitration if not excluded by the parties, does not provide further details either. The consensus is that arbitral tribunals seated in Switzerland generally benefit from broad powers to order interim measures.

The parties can agree on the type and on the requirements of interim measures that an arbitral tribunal can order; however, explicit provisions of this type are extremely rare in practice. Likewise, rules of major arbitral institutions do not give much guidance on the requirements and the type of interim measures that a tribunal can order.

For Swiss-seated arbitral proceedings, the Swiss Federal Tribunal considered that the measures that an arbitral tribunal can order based on article 183 PILA can be of the same categories as the ones ordered by Swiss judges, namely:

- precautionary measures, which are intended to maintain the subject matter of the proceedings in the state it is in for the duration of the proceedings;
- regulatory measures, which regulate a legal relationship between the parties for the duration of the proceedings;
- provisional measures of anticipatory enforcement – these may be either monetary payments or other obligations to perform or refrain from performing – which are intended to obtain provisional enforcement, in whole or in part, of the substantive claim at issue.[479]

It is also generally accepted that arbitral tribunal sitting in Switzerland can order *ex parte* interim measures,[480] i.e., without the counterparty having a right to respond before the interim measure is ordered. Where that is done, arbitrators should, as soon as possible after the measure has been enforced or communicated, grant the counterparty a right of response.

Where appropriate, the arbitral tribunal or the state court may make the interim or conservatory measures subject to the provision of appropriate security (Article 183(3) PILA). This can be done in various forms, including the provision of a bank guarantee.

Arbitral tribunals cannot issue binding orders to third parties, unlike state courts. For instance, an arbitral tribunal cannot order a commercial registry to modify the list of authorized signatories of a company in a shareholders' dispute. Likewise, it cannot freeze assets held in a bank account.

Moreover, because arbitral tribunals lack *imperium* (the right to employ the force of the state to enforce the laws), they cannot directly enforce their orders against a non-compliant party.

If a party does not comply voluntarily with an interim measure, the arbitral tribunal or the party which applied for the measure may request the assistance of the competent state court. Swiss courts shall apply their own law, when enforcing an interim measure ordered by an arbitral tribunal (Article 183(2) PILA).

Under French law. Before the reform of 2011, the FCCP was silent on the possibility for arbitral tribunals to grant interim measures[481] although it was acknowledged by French courts and commentators that arbitrators in French-seated international arbitrations were entrusted with such powers. This liberalist approach of French law was confirmed by the Paris Court of Appeal which explained that the power for the arbitral tribunal to grant interim measures is an "*inherent and necessary extension of the function of judging to ensure greater effective-*

478 The unofficial English version of Article 374 CPC reads as follows:

> "*1 The ordinary court or, unless the parties have otherwise agreed, the arbitral tribunal may at the request of a party order interim measures, including measures to protect the evidence.*
> *2 If the person concerned does not comply with the measure ordered by the arbitral tribunal, the tribunal or a party may apply to the ordinary court for it to issue the necessary orders; if the application is made by a party, it requires the consent of the arbitral tribunal.*
> *3 The arbitral tribunal or the ordinary court may make the interim measures conditional on the payment of security if it is anticipated that the measures may cause harm to the other party.*
> *4 The applicant is liable for the harm caused by unjustified interim measures. If he or she proves, however, that the application for the measures was made in good faith, the arbitral tribunal or the ordinary court may reduce the damages or relieve the applicant entirely from liability. The aggrieved party may assert his or her claim in the pending arbitration.*
> *5 The security must be released once it is established that no claim for damages will be filed; where there is uncertainty, the court shall set a deadline for filing the action."*

479 Decision of the Swiss Federal Supreme Court, 136 III 200, 13 April 2010, para. 2.3.2.

480 B. Kellerhals, *Domestic and International Arbitration in Switzerland* (4th ed., 2021), para. 1260.

481 J.-B. Racine, *Droit de l'arbitrage* (2016), P.U.F, pp. 465-466.

ness of the jurisdictional power".[482]

Article 1468 of the FCCP now provides that "[t]he arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order."[483] This provision also applies to international arbitration pursuant to Article 1506(3) FCCP. Not only do arbitrators have powers to grant interim measures they deem necessary, but they can also attach penalties ("*astreintes*") to guarantee the enforcement of the measure, which is not the case under Swiss law.

However, the power of arbitral tribunals remains more limited than the powers of a judicial court. Similarly to Swiss law, under French law: (i) the arbitrators cannot order measures directed towards third parties to the arbitration (for example, a tribunal cannot order attachment or preservation of property held by a third party)[484] and (ii) arbitrators lack *imperium* and therefore cannot force the execution of the ordered interim measures in the absence of voluntary compliance by the debtor.

B. Criteria to be Met to Obtain Interim Measures

Neither Swiss law nor French law provides for any specific criteria to be met to obtain interim measures.

Some arbitrators are inclined to grant interim measures where the requesting party demonstrates (a) a risk of serious or irreparable harm; (b) a case of urgency; and/or (c) where the measure raises no risk of prejudgment of the merits. Other arbitrators have also required that the requesting party establish (d) a *prima facie* case on the merits; (e) a *prima facie* case on jurisdiction; and/or (f) a balance of hardship (also known as "balance of convenience" *i.e.,* the harm suffered by the applicant if the interim measure was not granted should be balanced against an assessment of the harm suffered by the other party in the event the requested measure was granted).[485]

Due to the lack of precedent in arbitration and where the arbitration rules do not provide for any specific requirement, arbitrators remain free to apply the criteria they deem most relevant on a case-by-case basis.

C. The Form of the Interim Measures Ordered by Arbitral Tribunals

Under Swiss law. In principle, arbitral tribunals are free to grant interim measures in the form they deem the most appropriate. The PILA does not determine any specific form. Interim measures will often take the form of orders because they are provisional by nature (and thus not a final decision). But there may be cases where a party will request that the interim measure be issued as an award to increase the chances of enforcing it abroad.

It should be noted that in Switzerland, the content of the decision will prevail over the form and therefore will often lead to such decisions being characterized as procedural orders, as they do not finally settle all or part of the parties' dispute.

Under French law. If an arbitral tribunal decides that it is appropriate to grant provisional measures, questions arise as to what form such measures should take.[486] Article 1468 FCCP does not provide any indication on the issue. Traditionally, French judges considered interim measures as procedural orders which were the-

482 *See* Judgment of 7 October 2004, Otor Participations v. Carlyle Holdings, 2005 Rev. Arb., p. 737 (Paris Cour d'Appel) (arbitrators had authority to decide request for provisional measures); Judgment of 8 October 1998, Akzo Nobel Co. v SA Elf Atochem, 1999 Rev. Arb. 58 (Versailles Cour d'Appel) (arbitrators have authority to order provisional measures once tribunal is constituted); Judgment of 14 May 1986, Industrial Phosphoric Acid & Fertilizer Co. v Indus. Fertilizer Trade, 1986 Rev. Arb. 55 (Paris Cour d'Appel) (provisional measures issued by arbitrator are compatible with arbitral proceedings); Judgment of 7 May 1986, Saint-Wandrille Fertilizer Co. v Trans Agric. Inv. Co., 1986 Rev. Arb. 565 (Rouen Cour d'Appel).

483 Free translation from the original text (Article 1468(1) FCCP). ("Le tribunal arbitral peut ordonner aux parties, dans les conditions qu'il détermine et au besoin à peine d'astreinte, toute mesure conservatoire ou provisoire qu'il juge opportune. Toutefois, la juridiction de l'Etat est seule compétente pour ordonner des saisies conservatoires et sûretés judiciaires.

Le tribunal arbitral peut modifier ou compléter la mesure provisoire ou conservatoire qu'il a ordonnée.").

484 See, e.g., Final Award in ICC Case No. 7828, cited in *J. Lew, Commentary on Interim and Conservatory Measures in ICC Arbitration Cases,* 11(1) ICC Ct. Bull., 2000, pp. 23, 25.

485 G.B. Born, *International Commercial Arbitration* (3rd ed., 2021), pp. 2601 – 2758.

486 The form of the decision has important legal consequences as a decision that qualifies as an arbitral award can be challenged and enforced under the relevant international conventions. In contrast, a decision in the form of a procedural order cannot.

refore not granted exequatur or the subject of enforcement measures. However, the position under French law is less clear since a decision of the Court of Appeal of 2004 in which the Court held the view that, subject to any contrary agreement of the parties, those measures can be granted by way of an order or of an arbitral award.[487]

This decision was not confirmed by more recent decisions and the question remains uncertain. Indeed, in a decision of the French Supreme Court dated 12 October 2011, the Court, after recalling the definition of an arbitral award under French law,[488] decided that an interim measure ordered by the president of the arbitral tribunal did not constitute an award.[489] The measure at issue was a provisional measure for the transitional period between the issuance of the award and the conclusion of the sequestration agreement provided for by this award. The measure did not settle any part of the dispute.[490] More recently, in 2021, the Court of Appeal of Paris[491] retained the qualification of arbitral award for a decision ordering a provisional payment, accompanied by a judicial penalty, because the decision settled, even provisionally, part of the dispute.[492]

Regardless of the characterization, by the arbitral tribunal, of an interim measure as award or procedural order, it is for the judge to determine whether the decision qualifies as an award as defined by French courts.[493] The Paris Court of Appeal held in 1994 that an award is any decision rendered by an arbitral tribunal which finally settles all or part of the parties' dispute submitted to it, and which addresses either jurisdiction, the merits of the dispute, or a procedural issue that terminates the procedure.[494] Thus, interim measures will generally not meet those requirements. In practice, it is more likely that arbitral tribunals seated in France order interim measures by way of procedural orders.

D. Enforceability of Interim Measures Ordered by Arbitral Tribunals

Parties usually comply voluntarily with interim and conservatory measures ordered by arbitral tribunals. This is generally by fear of antagonising the arbitrators' authority or by fear of adverse inferences being drawn in decisions on the merits.[495] In one author's view: "*the fact that arbitral tribunals can draw adverse conclusions from failure to comply with their decisions concerning [provisional] measures encourages voluntary compliance with such orders*."[496] However, adverse inferences are rarely seen in practice, with tribunals often finding other ways to address the issues. For instance, arbitral tribunals may find a "*recalcitrant party liable for costs and damages arising from [or related to] its non-compliance*" with the measure it ordered.[497]

Arbitrators lack *imperium* and therefore cannot enforce their orders directly. In case of non-compliance with the interim decision, the applicant is generally left with no choice but to apply to the competent state courts to seek assistance to enforce the interim decision.

Under Swiss law. In accordance with Article 183(2) PILA, if a party does not comply voluntarily with the interim measures ordered by an arbitral tribunal, the arbitral tribunal or the other party may request the assistan-

487 CA Paris, 7 October 2004, Otor Participations v Carlyle: C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, LGDJ, 2nd edition, 2019, p. 857.

488 The definition of arbitral award is consistent under French case law since a decision of the Paris Court of Appeal of 1994: an award is any decision rendered by an arbitral tribunal which finally settles all or part of the parties' dispute submitted to it, and which addresses either jurisdiction, the merits of the dispute, or a procedural issue that terminates the procedure. See, Court of Appeal of Paris, 25 March 1994, *Sardisud*.

489 Civ. 1re, 12 oct. 2011, n° 09-72.439, Groupe Antoine Tabet v. République du Congo, Rev. arb. 2012. 86, note F.-X. Train; JCP G 2011, p. 2545, obs. J. Ortscheidt; J. Jourdan-Marques, "L'imbroglio dans la qualification de la décision relative aux mesures provisoires", 1 April 2012, Cahiers de l'arbitrage – n°2 – page 397.

490 Civ. 1re, 12 oct. 2011, n° 09-72.439, Groupe Antoine Tabet v. République du Congo, JCP G 2011, p. 2545, obs. J. Ortscheidt.

491 Paris, 11 May 2021, n° 18/06076.

492 Paris, 11 May 2021, n° 18/06076, para. 26.

493 Court of Appeal of Paris, 1 July 1999, *Brasoil*.

494 Court of Appeal of Paris, 25 March 1994, *Sardisud*.

495 E. Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesure provisionnelles*, SJ 2005 II p. 375 ff, p. 385; S. Pfisterer, A. K. Schnyder, *International Arbitration in Switzerland* (2nd ed., 2023), pp. 109-119, p. 116.

496 J. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull., 2000, pp. 23, 24.

497 *Chapter 6 – Weight and Enforceability of Arbitral Provisional Measures*, in A. Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 2005(12) International Arbitration Law Library, p. 243.

ce of the competent Swiss court. PILA specifies that the competent Swiss court will apply its own law in considering whether to enforce the interim measures ordered by the arbitral tribunal. Therefore, Swiss courts will enforce interim measures ordered by arbitral tribunal (including emergency arbitrators) if they correspond to the type of measures that would typically be granted by Swiss courts. Where the interim measure is unknown to the Swiss legal system, the Swiss enforcement court should nevertheless render an order which will match as closely as possible the arbitral tribunal's interim measure.[498]

However, in accordance with some legal writers, the Swiss courts should not re-examine whether the conditions to grant interim measures are met[499] (*prima facie* jurisdiction; *prima facie* evidence that the claim of the requesting party is justified on the merits; *prima facie* evidence that it is likely to suffer irreparable harm; urgency: the risk of irreparable harm should be imminent; the measure should be proportional).[500]

Under French law. France does not have a direct mechanism permitting the enforcement of interim decisions rendered by arbitral tribunals and only decisions that are qualified by a French judge as arbitral awards may be subject to enforcement proceedings. Thus, an order from an arbitral tribunal is not enforceable unless the measure qualifies as an award. As mentioned above, the solution under French law is therefore uncertain.

With regard to emergency arbitrators' decisions, the enforcement of the decisions will depend on whether those qualify as arbitral awards before French courts.[501] The issue is currently being debated amongst scholars. Some authors argue that emergency arbitrator decisions are not arbitral awards as they are not "final" decisions[502] because of their "provisional" nature and because they can be amended by the arbitral tribunal once constituted. In contrast, other authors suggest that these decisions could meet the finality requirement as the Paris Court of Appeal has shown flexibility encompassing the possibility to consider an arbitral tribunal interim measure as being final and thus to qualify as an arbitral award.[503]

E. Judicial Penalties (or "Astreinte") Under Swiss and French Law

A judicial penalty can be defined as "a decision taken by a judge or an arbitrator that a party will have to pay a certain amount of money in the case of failure to comply with a given obligation. Such an amount of money generally consists of a lump sum payable for each day, week, or month of delay after the date when the debtor's obligation became due and until it has been complied with or as long as the debtor is found to be in breach of that obligation."[504]

Judicial penalties are ordered by judges or arbitrators and aim at ensuring compliance with their orders. Where a party does not abide by the order, that party ends up having to pay a penalty (often linked to the duration of the non-compliance). These monetary penalties are payable to the party in whose favour the measure was issued, not to the authority issuing the order. The penalty, however, does not serve to compensate a loss caused by the non-compliance.[505]

498 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (4th ed., 2021), p. 463, para. 1271.

499 E. Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesure provisionnelles*, SJ 2005 II p. 375 ff, p. 385.

500 E. Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesure provisionnelles*, SJ 2005 II p. 375 ff, p. 379.

501 A. de Lotbinière McDougall et al., *Practical Insights on Emergency Arbitrator Proceedings – France*, *Practical Insights on Arbitral Procedure*, June 2019.

502 M. Chevalier, *Enforcement of Emergency Arbitrator Decisions: Dream or Reality? The French Perspective*, in Maxi Scherer (ed.), Journal of International Arbitration, 2021(38) Kluwer Law International, Issue 6, p. 837.

503 M. Chevalier, *Enforcement of Emergency Arbitrator Decisions: Dream or Reality? The French Perspective*, in M. Scherer (ed.), Journal of International Arbitration, 2021(38) Kluwer Law International, Issue 6, pp. 852-853 and p. 855.

504 A. Mourre, *Chapter 2. Judicial Penalties and Specific Performance in International Arbitration,* in F. J.M. De Ly and L. Lévy (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, Dossiers of the ICC Institute of World Business Law, 2008, p. 52; S. Guinchard, *Droit et pratique des voies d'exécution 2018/2019*, Dalloz Action (9th ed., May 2018), p. 445: The definition under French law is similar. A judicial penalty is a threat amounting to a certain sum of money, which becomes due in the event of non-compliance or late compliance with a court decision, and which is added to the main condemnation. ("*L'astreinte est une menace de condamnation pécuniaire, qui se concrétise en cas d'inexécution ou d'exécution tardive d'une décision de justice et qui s'ajoute à la condamnation principale.*").

505 A. Mourre, *Chapter 2. Judicial Penalties and Specific Performance in International Arbitration*, in F. J.M. De Ly and L. Lévy (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, Dossiers of the ICC Institute of World Business Law, 2008, p. 52.

Under Swiss law. Neither PILA nor the CPC contain any reference to judicial penalties. Those sanctions are not part of the Swiss legal system.

In the context of the creation of the CPC (which entered into force on 1st January 2011), the idea of introducing in the Swiss legal system the possibility for Swiss judges to order judicial penalties was discussed but was eventually rejected.[506]

Some scholars consider therefore that arbitral tribunals seated in Switzerland cannot order the payment of judicial penalties on the sole basis of their power to determine the conduct of the proceedings (article 182 PILA).[507]

Swiss-seated arbitral tribunals could, however, grant judicial penalties with the agreement of the parties.[508] It is disputed whether such an agreement should be in writing, as suggested by one scholar[509] (which the least that can be said is that it would be extremely rare in practice to encounter such a written agreement), or if a tacit consent would be sufficient.[510] Another scholar considers that the parties have tacitly accepted to entrust the arbitral tribunal with the power to order judicial penalties by having submitted the dispute to a set of rules in which the provisional measures can take also the form of an award.[511] This is notably the case in the Rules of the International Chamber of Commerce (ICC Rules) (article 28(1) of the ICC Rules) but not in the Swiss Rules (article 29(2) of the Swiss Rules).

However, in cases where the intervention of a Swiss court is required to enforce such a measure, the Swiss court will apply its own law, being Swiss law, to decide to grant or not its assistance.[512]

To the best of our knowledge, Swiss courts have not had the opportunity to rule on the enforceability of judicial penalties imposed on a party and the question therefore remains open whether courts would enforce the payment of penalties triggered by non-compliance with interim measure.

Under French law. French law leaves no doubt on this question. French courts unanimously consider that arbitral tribunals can order penalties as part of their mandate to ensure the enforcement of a measure.[513] This was codified in the FCCP with the 2011 reform. Article 1468 of the FCCP recognizes the power of arbitrators to attach a penalty to the ordered provisional or conservatory measure ("*astreinte*").

IV. Interim Measures Ordered by State Courts

Swiss and French law provide for a concurrent jurisdiction of the state courts to order interim measures during an arbitration, but the scope of measures that can be ordered by arbitral tribunals and state courts is not equal.

A. The (Concurrent) Power of State Courts to Order Interim Measures under Swiss and French Law

Under Swiss law. In accordance with the principle of parallel jurisdiction, parties may apply for interim measures either to the arbitral tribunals or to the Swiss state courts, including in international arbitration.[514] Swiss

506 Message of the Swiss Federal Council regarding the Swiss Code of Procedure, dated 28 June 2006, FF 2006 6841, p. 6992.

507 G. Couchepin, *La clause pénale - Etude générale de l'institution et de quelques applications pratiques en droit de la construction* (2008), Schulthess Juristische Medien AG, pp. 226-233, para. 1148; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (2007), para. 540.

508 G. Couchepin, *La clause pénale - Etude générale de l'institution et de quelques applications pratiques en droit de la construction* (2008), Schulthess Juristische Medien AG, pp. 226-233, para. 1148; L. Lévy, *Les astreintes et l'arbitrage international en Suisse,* 2001(19) ASA Bull., Issue 1, pp. 21 – 36, para. 13.

509 G. Couchepin, La clause pénale - Etude générale de l'institution et de quelques applications pratiques en droit de la construction (2008), Schulthess Juristische Medien AG, pp. 226-233, para. 1148.

510 L. Lévy, *Les astreintes et l'arbitrage international en Suisse*, 2001(19) ASA Bull., Issue 1, pp. 21 - 36, para. 13.

511 L. Lévy, *Les astreintes et l'arbitrage international en Suisse*, 2001(19) ASA Bull., Issue 1, pp. 21 - 36, para. 14.

512 Article 183(2) PILA.

513 Rennes, September 26, 1984, Rev. Arb. 1986, 441, note by J.-P. Ancel; Paris, May 24, 1991, Rev. Arb. 1992, 638, note by Pellerin; *Paris, October 7, 2004, Otor Participations et autres v Carlyle Holdings et autres*, JDI 2005, 341, note by A. Mourre and P. Pedone.

514 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (4th ed., 2021), para. 1273.

state courts can order interim measures before the constitution of the arbitral tribunals, but they remain empowered to order such measures once the arbitration has started and a tribunal is constituted.

The state courts' power to grant interim measures cannot be limited by agreement of the parties (contrary to that of arbitral tribunals, although rarely applied in practice).

Importantly, Swiss state courts have the possibility to directly enforce their orders (at least within the Swiss territory), unlike arbitral tribunals. Parties should bear this in mind when determining before which judicial body to apply for interim measure.

In accordance with Article 261 CPC which governs the power of state courts to order interim measures, the court may order the interim measures required provided that the applicant shows credibly that: (a) a right to which he or she is entitled has been violated or a violation is anticipated; and (b) the violation threatens to cause not easily reparable harm to the applicant.

Article 262 CPC provides a non-exhaustive catalogue of types of interim measures that can be ordered by state court. Swiss state courts can order (a) an injunction; (b) an order to remedy an unlawful situation; (c) an order to a register authority or to a third party; (d) performance in kind; and (e) the payment of a sum of money in the cases provided by the law. As a result, Swiss courts can issue orders with the purpose of freezing bank accounts or confiscating goods. They can issue orders to the register authorities (notably any commercial, civil or land registry in Switzerland). Swiss courts can order commercial registries to enter or strike-out company representatives,[515] or civil registries not to disclose personal data,[516] or land registry to record a prohibition to sell a real property.[517]

Furthermore, Swiss courts can also complete the interim measures with a threat of criminal penalty in accordance with article 292 of the Swiss Criminal Code ("**CP**"). Non-compliance with the measure would in this case constitute a criminal offence. It could be argued that such a threat is not particularly efficient as, in case of breach of Article 292 CP, the perpetrator shall only be liable to a fine. However, Swiss criminal law is primary applicable to natural persons (legal persons can exceptionally be convicted under the conditions of article 102 CP). Consequently, the natural person(s) behind the company (usually the members of the board of directors) can be found personally liable in case of breach of article 292 CP by the company. Apart from the fine, the offence can also be registered in the criminal record(s) of the perpetrator(s). The application of article 292 CP could therefore be very persuasive against a party who does not intend to comply with the interim measures granted by a Swiss court.

Under French law. The powers of French courts to grant interim measures in support of international and domestic arbitrations seated in France or abroad are set out in Articles 1449 and 1468 of the FCCP. French courts have recognised that the existence of an arbitration agreement is not, in and of itself, an obstacle for parties to apply for interim remedies before French courts.[518] However, Article 1449 of the FCCP[519] specifies that parties can only apply for interim measures before the French courts as long as the arbitral tribunal has not yet been constituted.[520] Once the arbitral tribunal has been constituted, French courts only retain exclusive jurisdiction (i) to order two types of interim measures, namely conservatory attachments ("*saisie conservatoire*") and judicial securities ("*sûreté judiciaire*") and (ii) to enforce such measures (Article 1468 FCCP).

Under Article 1468 FCCP, the court also has the power, subject to the arbitral tribunal's authorisation, to compel a third party to produce evidence.

Interim measures that are available before the constitution of the arbitral tribunal include:

(a) All investigative measures necessary "*to preserve or establish before any trial the evidence of facts on which the solution of a dispute may depend*" including pre-arbitration disclosure of documents (Article 145 of the FCCP). Parties requesting such measures do not have to demonstrate any kind of urgency but need to demonstrate that: (i) no

515 CR CPC-Bohnet, art. 262, para. 6.

516 CR CPC-Bohnet, art. 262, para. 6.

517 CR CPC-Bohnet, art. 262, para. 6.

518 Société Le Panorama v. Simt, Cass. 3rd Civ., 20 December 1982; Société Léon Grosse v. Société Schwind, Cass. 1st Civ., 6 December 2005.

519 Article 1449 (1) FCCP provides that: "the existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures". (Free translation from the original text : "*L'existence d'une convention d'arbitrage ne fait pas obstacle, tant que le tribunal arbitral n'est pas constitué, à ce qu'une partie saisisse une juridiction de l'Etat aux fins d'obtenir une mesure d'instruction ou une mesure provisoire ou conservatoire.*")

520 Applications may be made either before the President of the Tribunal Judiciaire or of the Tribunal de Commerce, at the claimant's option.

arbitral tribunal has been yet constituted; (ii) there is a legitimate reason to preserve or establish the evidence of facts upon which the resolution of the dispute depends and (iii) that the investigative measures requested are legally permissible.

(b) All interim measures to avoid a damage, the aggravation of a damage, or to put an end to a manifestly unlawful disorder, including protective seizures or sequestration (Articles 809 paragraph 1, 834, and 835 of the FCCP). This type of measure includes but is not limited to conservatory attachments and judicial securities for a claim.

(c) All interim measures "which are not seriously disputed, or which are justified by the existence of a dispute" (Article 808 of the FCCP).

(d) Any interim relief order ("*référé-provision*") allowing the creditor of an obligation which cannot be seriously disputed to obtain an advance covering all or part of its claim (Articles 835, paragraph 2 and 873, paragraph 2 of the FCPP). To obtain such payment, three requirements must be met: (i) the measure does not give rise to any serious dispute or are warranted because of the existence of a dispute; (ii) the measure is urgent; and (iii) the arbitral tribunal is not yet constituted.

Investigative measures under Article 145 FCPP do not require any demonstration of urgency,[521] while other interim and conservatory measures require that urgency be demonstrated.[522]

In contrast with interim and conservatory measures ordered by an arbitral tribunal, French state courts possess the *imperium* and thus can order immediately enforceable measures to which they can attach a fine ("*astreinte*") as provided in Article L. 131-1 of the Code of Civil Procedures for Enforcement ("**CCPE**").

B. Can Parties Apply for the Same Interim Measures Before an Arbitral Tribunal and a State Court?

There are cases where a party may wish to seek the same interim measures before both an arbitral tribunal and a state court. This can be justified because the party is seeking to maximise its chances of obtaining the measure sought, or because one instance has refused the measure and the party seeks a second bite at the apple before another authority, or because one instance has the power to order *ex parte* measures whereas the other cannot.

Under Swiss law. In accordance with scholars, based on Article 183 PILA, a party in an arbitration proceeding seated in Switzerland may wish to request provisional measures to both the arbitral tribunal and to State courts.[523] However, Swiss law does not address the situation where one party would seek the same measure before an arbitral tribunal and a state court, be it in parallel or sequentially.

Some scholars consider that interim measures do not have *res judicata* effect, and that it would be possible to apply to the state court for the same measure that has been previously rejected by the arbitral tribunal or *vice-versa.*[524] For other scholars, even though provisional measures do not have a *res judicata* effect, they should have a preclusive and binding effect for other proceedings with the same matter in dispute; therefore a losing party cannot later seize the other forum with the same request.[525] Other scholars suggest that the *res judicata* effect should be applied by analogy in those situations.[526]

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521 Article 1449 paragraph 2 of the FCCP provides that the president of the commercial court or the court of first instance "shall decide on the measures of inquiry under the conditions provided for in Article 145 [...]", which does not include urgency. (Free translation from the original text : "*Sous réserve des dispositions régissant les saisies conservatoires et les sûretés judiciaires, la demande est portée devant le président du tribunal judiciaire ou de commerce, qui statue sur les mesures d'instruction dans les conditions prévues à l'Article 145 et, en cas d'urgence, sur les mesures provisoires ou conservatoires sollicitées par les parties à la convention d'arbitrage.*")

522 For instance, see case law extending the requirement for urgency under Article 835 and 873 of the FCCP: Cass. 1st Civ., 6 March 1990, No. 88-16.369; Cass. 1st Civ., 21 October. 1997, No. 95-18.561; Cass. Com., 29 June 1999, No. 98-17.215. See also case law extending the requirement for urgency under Articles 809 of the FCCP: Cass. 2nd Civ., 13 June 2002, No. 00-20.077; Cass. Com., 29 June 1999, No. 98-17.215.

523 S. Thorens-Aladjem, *Le juge d'appui en matière d'arbitrage interne et internationa*l, 2017(35) ASA Bull., Issue 3, pp. 530 – 550, p. 535; E. Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesure provisionnelles*, SJ 2005 II p. 375 ff, p. 375.

524 E. Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesure provisionnelles*, SJ 2005 II p. 375 ff, p. 375.

525 S. Pfisterer and A. K. Schnyder, *International Arbitration in Switzerland* (2nd ed., 2021), pp. 109-119, p. 111-112.

526 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (4th ed., 2021), pp. 449-475, paras. 1278 and 1279.

In practice, a decision on provisional measures rendered by an arbitral tribunal that has been previously rejected by a Swiss state court would probably not be enforced by the Swiss courts, unless the underlying circumstances of the case have changed. Indeed, arbitral tribunals and state courts can revisit interim measures where new circumstances justify a variation, suspension or termination of the measures previously ordered.

Under French law. Similarly, to Swiss law, French law does not address the situation where one party would seek the same measure before an arbitral tribunal and a state court. However, the provisional nature of interim orders allows an arbitral tribunal to review measures taken by state courts. As an example, if a court has ordered continuation of works, but the arbitral tribunal considers that those should cease, it can order the suspension. In practice, the arbitral tribunal will only review the measures if new facts or circumstances are brought before it. The provisional decision of the arbitral tribunal which has jurisdiction to rule on the merits should prevail over the state court's decision in case of conflict.[527] Thus, national court's decision regarding provisional measures should not be considered as *res judicata* in subsequent arbitral proceedings and the arbitral tribunal enjoys the right to re-evaluate and examine the legal position of a party. The arbitral tribunal generally considers the judgement of the state court as one of the factors to be considered to make its decision.[528]

V. Which Forum to Select When Applying for Interim Measures

Under both Swiss and French laws, parties have a choice to resort to state courts or to the arbitral tribunal if they need to seek interim measures (before and after the constitution of the arbitral tribunal, although in more limited circumstances under French law). This choice may depend upon a variety of considerations.[529] Some of the most important considerations impacting this determination may include:

- *The likelihood of voluntary compliance by the opposing party*: If there is a concern that the opposing party may not comply with the decision rendered by the arbitral tribunal or the emergency arbitrator, then it would be advisable to resort to a state court to obtain a measure that would be immediately enforceable.
- *The enforceability of the interim measure*: French and Swiss legal systems offer different enforcement mechanisms. Under Swiss law, it is possible to enforce interim measures against non-compliant parties through Swiss courts, provided those orders comply with Swiss law. Under French law, there is no direct mechanism permitting the enforcement of interim decisions rendered by arbitral tribunals. Although the Paris Court of Appeal has determined in one case that a specific order for interim measures qualified as an award (and was thus directly enforceable),[530] parties who fear that the counterparty will likely not comply with the order should consider applying to French state courts, where that is still an option. Regarding emergency arbitrator decisions, the risk is even higher as, to our knowledge, the French courts have not ruled on the issue of whether such decisions could qualify as arbitral awards.
- *The degree of urgency:* The degree of urgency of the interim relief is another factor. If the relief is urgent and the arbitral tribunal has not been constituted, the applicant will have no choice but to resort to the state court or to an emergency arbitrator (provided the applicable rules offer such the latter solution). In situations where it is essential to act promptly, including on an *ex parte* basis, state courts, having the *imperium* and being in most of the cases more familiar with granting urgent measures would usually be the better forum to select. As provisional measures can be granted within a very short time limit by Swiss state courts (even in one or two days) and can be directly enforced, in cases of emergency in relation to the execution of the measures in Switzerland, Swiss state courts should be the preferred forum. With respect to provisional measures requested before constitution of the arbitral tribunals, emergency arbitration relief is an important tool that has been recently inserted in the rules of the major arbitral institutions.[531] However, emergency arbitrators will often take several days or a couple of weeks to render their decisions (once appointed and after having

527 *Part 4: Chapter III - Provisional and Conservatory Measures in the Course of the Arbitration Proceedings*, in E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), p. 723.

528 *"Part 4: Chapter III - Provisional and Conservatory Measures in the Course of the Arbitration Proceedings"*, in E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), p. 723.

529 Institutional arbitral rules may also be considered when deciding whether to use state courts or the arbitral tribunal for interim relief.

530 Judgment of 7 October 2004, *Otor Participations v. Carlyle Holdings*, 2005 Rev. Arb., p. 737 (Paris Cour d'Appel).

531 *E.g.,* Appendix V: Emergency Arbitrator Rules, 2021 ICC Arbitration Rules; Article 23 and Schedule 4 of the 2013 HKIAC Administered Arbitration Rules; Schedule 1 : Emergency Arbitrator, 2016 SIAC Rules; Article 43 of the 2012 Swiss Rules.

received the application),[532] which may be too long, depending on the circumstances.

- *The need for confidentiality*: Parties may need to consider whether they wish their proceedings to be confidential. Arbitration (including emergency arbitration) in comparison to state proceedings may permit the confidentiality of the procedure. Parties should nonetheless ensure such rules are in place unless their arbitration agreement provides for this protection.
- *The complexity of the case:* It may be advisable to apply to the arbitral tribunal if the arbitration is already ongoing and the file is complex (from a legal, factual, or technical point of view) as the arbitral tribunal will have a good knowledge of the case as opposed to a state court that has not been involved in the matter. Arbitrators may also have expertise in the subject matter of the case and are thus able to deliver a good decision.
- *The involvement of third parties:* Under Swiss and French law, the arbitral tribunal's power is limited to the parties of the arbitration. Thus, it is not able to issue any enforceable order against third parties. Resorting to state courts for interim relief may be necessary in those cases.
- *Scope of remedies:* Some interim measures may only be granted by state courts. For example, French courts retain exclusive *jurisdiction* to order conservatory attachments ("*saisie conservatoire*") and judicial securities ("*sûreté judiciaire*"). Swiss law retains a similar approach with respect to attachments ("*séquestre*") or orders of sealings ("*mise sous scellé*"). The applicant will have no choice but to resort to the state court if it wishes to apply for such measures.

VI. Conclusion

Interim measures are a useful tool in international arbitration provided the parties opt for the most appropriate forum (arbitral tribunal, emergency arbitrator or state court) in light of the specific circumstances of the case. Parties will often have the choice (subject to the timing when the measure is sought) to resort to the arbitral tribunal or the state court. The enforcement of such measures will greatly depend on the forum where the measure ought to apply. As explained above, Swiss law provides for recognition and enforcement of interim measures, upon the request of a party or an arbitral tribunal and will provide support to foreign arbitration proceeding seated abroad. The situation is less clear under French law where the law does not provide tools for the enforcement of similar mesures (unless they take the form of an award). Therefore, parties seeking protection by way of interim measures should always consider all steps up to the enforcement stage before filing their applications. As often, the devil (or in this case, the successful interim measure) is in the details.

532 *E.g.,* Article 43(7) of the Swiss Rules and Article 6(4) of Appendix V of the ICC Arbitration Rules.

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Gas Conflicts, Sanctions, and European Energy Contracts: Navigating Force Majeure and Hardship in Swiss Arbitration

Authors: Natalia Mouzoula, Sanjana Sharma,and Alexander Stonyer-Dubinovsky[533]

ABSTRACT

In 2022 and 2023, eight major European energy companies took on Russia's Gazprom in gas disputes. This paper investigates the legal intricacies surrounding gas conflicts, sanctions, and European energy contracts, with a specific emphasis on Force Majeure and Hardship clauses in the context of Swiss-seated arbitrations.

The Russia-Ukraine conflict has raised European energy security concerns, prompting an examination of the role of sanctions given their impact on energy contract disputes. Through a comparative analysis between Swiss and English-seated arbitration, the paper offers a nuanced assessment of how restrictive measures may be categorized and addressed in energy disputes, i.e., whether sanctions should be treated as hardship events under the "rebus sic stantibus" doctrine or as force majeure events under the Roman law doctrine of "impossibilium nulla est obligatio" for insights into the potential legal implications of future gas disputes.

I. Introduction

On 24 February 2022, Russia increased military aggression in Ukraine (the "**Russia-Ukraine Conflict**").[534] Consequently, out of the 193 member States of the United Nations, 45 States[535] including the European Union (the "**EU**"), the G7 States, and Switzerland collectively pledged and imposed a combination of sanctions on Russia's defence, financial, and energy sectors.[536]

Financial sanctions, imposed by the EU in coordination with the US, Australia and non-EU G7 countries of Canada, Japan and the UK,[537] prevented 10 Russian banks from making or receiving international payments using SWIFT. These banks can neither buy foreign currency nor transfer assets abroad.[538] These Russian banks were removed from SWIFT on 26 February 2022.[539]

More than a month later, on 31 March 2022, Russian president Vladimir Putin signed Decree 172 ("**March 2022**

533 This article has been prepared under the supervision of a partner at a law firm based in Geneva.

534 EuroNews, *Sanctions against Russia have not stopped Ukraine war but are impacting long term, says expert*, 21 February 2023 (available at https://www.euronews.com/my-europe/2023/02/21/sanctions-against-russia-have-not-stopped-ukraine-war-but-are-impacting-long-term-says-exp, accessed 02 August 2023).

535 Castellum.AI, *Which countries are taking action on Ukraine?* (available at https://www.castellum.ai/insights/which-countries-are-taking-action-on-ukraine, accessed 02 August 2023).

536 U.S. Department of the Treasury, *Targeting Key Sectors, Evasion Efforts, and Military Supplies, Treasury Expands and Intensifies Sanctions Against Russia,* 24 September 2020 (available at https://home.treasury.gov/news/press-releases/jy1296, accessed 02 August 2023).

537 *Ibid*.

538 European Council, *Sanctions against Russia Explained*, 8 March 2023 (available at https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/ accessed 02 August 2023).

539 C. Perez, *What Does Russia's Removal from SWIFT Mean For the Future of Global Commerce*, Foreign Policy, March 2022 (available at https://foreignpolicy.com/2022/03/08/swift-sanctions-ukraine-russia-nato-putin-war-global-finance/#:~:text=With%20the%20rapid%20escalation%20of,Telecommunications%20(SWIFT)%20international%20payment%20messaging).

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Rouble Decree") pertaining to "fulfilment by the foreign buyers of obligations to Russian suppliers of gas"[540] that prohibited State and municipal institutions from using foreign currency (including the Euro) for gas transactions and to hold deposits abroad.[541]

Facts suggest that Gazprom continued supplying gas and only commenced withholding supplies towards the end of April 2022 and thereafter, when European buyers refused payment in Roubles for the gas supplied.

In April 2022, Gazprom halted gas supplies to Polish PGNiG and Bulgaria's Bulgargaz, after their refusal to pay in Roubles.[542] In May 2022, the Finnish State-owned Gasum refused Russian demand for payment in Roubles under its long-term GSAs and filed for arbitration.[543] Eni, Italy, while making temporary Rouble payment, eventually followed suit.[544]

In June 2022, Gazprom retroactively invoked *force majeure* clauses in long-term GSAs and informed European buyers that it will not be responsible for past and current gas shortfalls because of the "extraordinary circumstances" of the Russian-Ukraine Conflict.[545]

In September 2022, France's Engie initiated arbitration against Gazprom for its non-performance of gas delivery obligations along with damages,[546] while Ukraine's Naftogaz claimed *force majeure* against Gazprom citing impossibility to transport gas through Russian-occupied territory and refused responsibility for Russian gas transmission.

In November 2022, Uniper initiated a €11.6 billion SCC arbitration against Gazprom for damages as replacement cost for Russian gas alternatives.[547] In December 2022, German RWE also filed an arbitration against Gazprom over halted gas supplies.[548]

In February 2023, CEZ, the majority State-owned Czech energy group launched a USD 45 million ICC arbitration against Gazprom, citing "significant under-deliveries" of natural gas in 2022.[549] In May 2023, Polish Europol Gaz filed an SCC arbitration against Gazprom seeking USD 1.47 billion over delayed gas deliveries and lost revenue for gas transmission through its ownership of 684kms Polish section of the Yamal pipeline.[550]

Meanwhile, Europe suffered an energy crisis[551] and certain States undertook mitigation measures, key amongst which were the price caps on Russian seaborne crude oil and natural gas (the "**Oil Price Cap**" and "**Gas Price Cap**").

The Oil Price Cap was imposed by the G7 countries and Australia and went into effect on 5 December 2022.[552] It limits the price of Russian crude oil at USD 60 per barrel with an adjustment mechanism that keeps the cap

540 Russian Presidential Decree No. 172, "On the imposition of certain special economic measures in connection with the unfriendly actions of foreign states and international organizations," 31 March 2022 (available at https://rg.ru/documents/2022/03/31/prezident-ukaz172-site-dok.html, accessed May 14, 2023); see also Reuters, *Putin's decree on Russian gas purchases in roubles,* 31 March 2022 (available at https://www.reuters.com/article/ukraine-crisis-russia-gas-putin-decree-idUSL5N2VY5U7, accessed 02 August 2023).

541 Vedomosti, *Путин запретил евро [Putin has banned the euro],* 31 March 2022 (available at https://www.vedomosti.ru/business/articles/2022/03/31/916141-putin-zapretil-evro, accessed 02 August 2023).

542 C. Sanderson, *Arbitrations likely after Gazprom halts supplies*, GAR, 27 April 2022.

543 J. Ballantyne, *Gazprom faces first arbitration over roubles demand*, GAR, May 2022.

544 S. Perry, *Uniper brings claim against Gazprom*, GAR, November 2022.

545 C. Parker, *Russia's Gazprom sends force majeure letter to European clients*, Washington Post, 19 June 2022.

546 J. Ballantyne, *French utility pursues Gazprom over supply shortage*, GAR, 21 February 2023.

547 S. Perry, *Uniper brings claim against Gazprom*, GAR, November 2022; see also J. Ballantyne, Gazprom faces second German supply claim, GAR, December 2022.

548 J. Ballantyne, *Gazprom faces second German supply claim*, GAR, December 2022.

549 J. Ballantyne, *Czech energy group brings ICC claim against Gazprom*, *GAR,* 10 February 2023.

550 J. Ballantyne, *More claims filed over halted Gazprom supplies*, *GAR,* 19 May 2023.

551 International Energy Agency, Europe's energy crises: Understanding the drivers of the fall in electricity demand, 09 May 2023 (available at Europe's energy crisis: Understanding the drivers of the fall in electricity demand – Analysis - IEA, accessed 07 July 2023).

552 Federal Foreign Office of Germany, *G7 and Australia agree on price cap for seaborne Russian origin crude oil*, 7 October 2022 (available at https://www.auswaertiges-amt.de/en/newsroom/news/g7-australia-price-cap-seaborne-russian-origin-crude-oil/2567026, accessed 02 August 2023).

at 5% below the market price, reviewed every two months.[553] Today, the EU cannot import crude oil (from December 2022) and refined petroleum products (from February 2023).[554]

Unlike crude, bans were not imposed on Russian natural gas.[555] Rather, European countries committed to reduce gas imports from Russia by two-thirds[556] to ensure continued security of supply. The Gas Price Cap by the EU member States provides a price ceiling for gas transactions as a market correction mechanism, effective from 15 February 2023.[557] The mechanism activates if the month-ahead price on the Dutch Title Transfer Facility (the "**TTF**")[558] exceeds 180€/MWh for three working days.[559] The market correction mechanism has been designed to combat extraordinarily high gas prices, only if they reach such levels compared to global markets.[560]

The paper focuses on gas contracts for two reasons. First, the market for oil is typically more fragmented than gas[561] and, gas supply agreements ("**GSA**") appear more predominantly in the European markets than oil contracts. Second, by seeking payment in Roubles for gas supplied, as a policy measure and also in response to sanctions, the underlying GSAs were altered, effectively triggering either *lex generalis* clauses like *force majeure* or *lex specialis* of GSAs such as price review mechanisms. Both of these are addressed in turn below.

A brief history of the European gas matrix is critical to understanding the dynamics of why Russia-Ukraine conflict consistently threatens European security of supply. A review suggests Russian efforts to circumvent the key geographical role played by Ukraine could be for naught, in light of the military aggression. Against this backdrop, **Section II** shall also explore Gas pricing indexes given the TTF's role and their arbitrations in Europe.

Sanctions, although not a legal term, have increasingly become a handy foreign policy tool formulated as mandatory rules of domestic law by States. They constitute an added dimension that will play a role in any potential energy arbitration in the foreseeable future. Arguably, if not for sanctions, the recent spate of arbitrations may not exist and even if they did, preference should have been for inbuilt price review of GSAs and not *force majeure*. **Section III** critiques sanctions, explores the Gas Price Cap and comparatively addresses sanctions in French and Swiss seated arbitrations, before focusing on the Russian amendment to its Commercial Procedure Code and recent developments thereunder.

Against this background, in **Section IV**, through a comparative assessment between Swiss and English seated arbitration, the paper will attempt to answer whether sanctions and counter-sanctions (such as the Gas Price Cap and March 2022 Rouble Decree) should be considered hardship events under the doctrine of "*rebus sic stantibus*", which calls for the adaptation/re-negotiation of a contract *ergo* activation of the price review mechanism of GSAs. It will also consider, in the alternate, whether they should be considered *force majeure* events under the Roman law doctrine of "*impossibilium nulla est obligatio*" *i.e.,* no obligation to perform impossible things and hence, are a case for contractual suspension/termination.

553 EEAS (European External Action Service), *Questions and answers: G7 agrees on oil price cap to reduce Russia's revenues while protecting consumers in Europe*, European Union External Action, 28 Mar. 2022 (available at https://www.eeas.europa.eu/delegations/ukraine/questions-and-answers-g7-agrees-oil-price-cap-reduce-russias-revenues-while_en, accessed 02 August 2023).

554 European Council, *Sanctions against Russia Explained*, 8 March 2023.

555 Wavell Room, *Russian Oil and Gas Industry: The impact of sanctions*, 01 July 2023 (available at https://wavellroom.com/2023/01/07/russian-oil-and-gas-industry-the-impact-of-sanctions/, accessed 02 August 2023).

556 *Ibid*.

557 Council of the European Union, 16241/22, 19 December 2022, Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices, pdf (europa.eu) accessed 02 July 2023. See also Council of the European Union, *Council formally adopts temporary mechanism to limit excessive gas prices*, 22 December 2022 Council formally adopts temporary mechanism to limit excessive gas prices - Consilium (europa.eu), accessed 02 August 2023.

558 The Title Transfer Facility (TTF) is a virtual trading point for natural gas in Europe. It is located in the Netherlands and serves as a benchmark for natural gas pricing in the European market. See European Natural Gas Hubs (bluegoldresearch.com), accessed 02 August 2023.

559 Council of the European Union, Energy prices and security of supply - Consilium (europa.eu) (accessed 02 August 2023).

560 Council of the European Union, 16241/22, 19 December 2022, Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices.

561 M.A. Toman, *The Economics of Energy Security: Theory, Evidence, Policy,* 1993(3) Handbook of Natural Resources and Energy, pp. 1167-1218.

II. The Gas Matrix and Gas Pricing Arbitrations

Global gas trade is divided into three main regional markets: Asia, Europe, and North America. Significant regional price differentials have existed for many years, and can be partially explained by the large gas exporters exercising market power.[562]

Around 70% of international gas trade is conducted through pipeline and 30% through LNG.[563] Pipelines are large infrastructure investments with a high degree of "asset specificity"; purpose-built for a specific market, with few or no alternative customers. LNG exports are more flexible, super-cooled and transported by tanker, and exporters have a choice of markets to sell to.[564] These two modes also impact gas prices.

As a result, the predominant practice in the international energy market are long-term contracts, providing exporters and importers the advantage of cash flow stability and increasing their debt capacity for large, long-lived capital investments.[565] The average duration of long-term energy contracts is usually 20-25 years.[566] Even for LNG supply, a 2009 study of 261 long-term contracts (i.*e.,* more than 3 years in duration) found that 80% averaged a time period of 16.7 to 20.3 years.[567]

Indeed, prevalent gas contracts are based on the "Groningen model" developed in 1961 when Dutch gas fields near Groningen were being commercialised. Groningen agreements typically last up to 30 years, have fixed supply volumes throughout the duration with little flexibility to deviate from agreed volumes. They also price gas according to oil-indexation. These agreements govern the majority of gas imports to the EU and global LNG trade.[568]

A. European Gas Network

Russia has the world's largest proven gas reserves, at 1,688 trillion cubic feet (tcf) and approximately 24.3% of global reserves.[569] It is the world's second-largest producer after the US, producing nearly 761 billion cubic meter (**"bcm"**) in 2021 or 18% of the world's output. According to the International Energy Agency (**"IEA"**), as of November 2022, Russia is the world's largest gas exporter, with exports of approximately 250bcm, 210bcm through pipelines and 40bcm through LNG.[570] The EU consumes around 360bcm of gas per year,[571] and Russia supplies approximately 32%-40% of this demand.[572]

Russia's State-owned energy corporation, Gazprom, has a long history of selling gas through pipeline transportation.[573] Gazprom controls around 75% of Russian gas production and holds a legal monopoly over exports of piped gas. Of Gazprom's pipeline exports, over 80% goes to fuel European demand.[574] The extent of this share

562 R.A. Ritz, *A Strategic Perspective on Competition between Pipeline Gas and LNG*, 40(5) The Energy Journal, 2019, p. 195.

563 R.A. Ritz, A Strategic Perspective on Competition between Pipeline Gas and LNG, 40(5) The Energy Journal, 2019, p. 195.

564 *Ibid*, p. 195.

565 P. Hartley, *The Geopolitics of Natural Gas: The future of long-term LNG Contracts,* October 2013, James A Baker III Institute for Public Policy, p. 7.

566 J. Stern, *Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?*, April 2007, International Journal of Energy Management, p. 1.

567 P. Hartley, *The Geopolitics of Natural Gas: The future of long-term LNG Contracts*, October 2013, James A Baker III Institute for Public Policy, p. 13.

568 P. Buhanist, *Path Dependency in the Energy Industry: The Case of Long-term Oil-indexed Gas Import Contracts in Continental Europe*, 5(4) International Journal of Energy Economics and Policy, 2015, pp. 934-948.

569 Worldometers, *Russia Natural Gas Reserves, Production and Consumption Statistics* (available at https://www.worldometers.info/gas/russia-natural-gas/, accessed 02 August 2023).

570 International Energy Agency, *FAQs on Energy Security* (available at https://www.iea.org/articles/frequently-asked-questions-on-energy-security, accessed 02 August 2023) (hereafter IEA, *FAQs on Energy Security*).

571 IEA, *How to avoid gas shortages in the EU in 2023* (available at https://www.iea.org/reports/how-to-avoid-gas-shortages-in-the-european-union-in-2023/baseline-european-union-gas-demand-and-supply-in-2023, accessed 02 August 2023).

572 IEA, *FAQs on Energy Security*; see also R.A. Ritz, *A Strategic Perspective on Competition between Pipeline Gas and LNG*, 40(5) The Energy Journal, 2019, p. 195.

573 R.A. Ritz, *A Strategic Perspective on Competition between Pipeline Gas and LNG*, 40(5) The Energy Journal, 2019, p. 195.

574 *Ibid*.

is such that Russian pipelines have enjoyed almost complete dominance over European gas imports.[575]

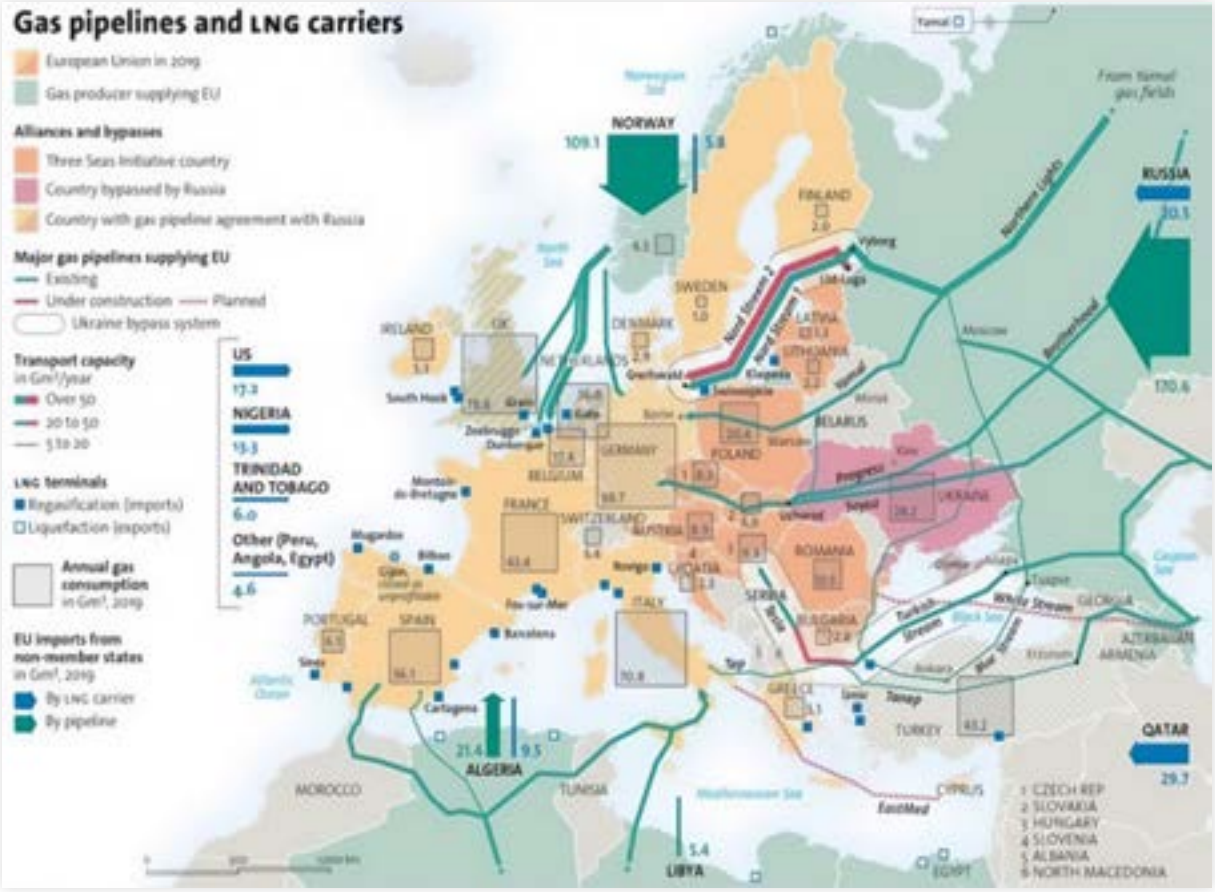

Figure 1: European Pipelines and LNG Supply Routes

The original Russian gas pipelines transiting through Ukraine or Belarus were much longer, albeit with lesser capacity than the newer ones. The Yamal I is a 4,196 kilometre pipeline with 17bcm export per year and Northern Lights, a 4,500 kilometre pipeline completed in 1983, has a supply capacity of 27.9bcm per annum.[587]

575 *Ibid.*

576 *Ibid.*

577 Switzerland Federal Council, *About Switzerland: Energy Facts and Figures* (available at https://www.eda.admin.ch/aboutswitzerland/en/home/wirtschaft/energie/energie---fakten-und-zahlen.html, accessed 02 August 2023).

578 Switzerland Federal Office for National Economic Supply FONES, *Natural Gas* (available at https://www.bwl.admin.ch/bwl/en/home/themen/energie/erdgas.html#:~:text=Switzerland%20has%20neither%20its%20own,its%20natural%20gas%20from%20Russia, accessed 02 August 2023.

579 *Ibid.*

580 *Ibid.*

581 *Ibid.*

582 Switzerland Federal Council, *About Switzerland: Non-Renewable Energy* (available at https://www.eda.admin.ch/aboutswitzerland/en/home/wirtschaft/energie/die-nicht-erneuerbaren-energien.html, accessed on 02 August 2023).

583 Swiss Federal Office of Energy Switzerland Gas Imports (available at dashboardenergie.admin.ch, dashboardenergie.admin.ch/gas/import, accessed 14 May 2023).

584 Swiss Federal Office of Energy, *Switzerland's Natural Gas Imports* (available at https://www.dashboardenergie.admin.ch/gas/import, accessed 02 August 2023).

585 O. Chang, What Ukraine War means for Switzerland's Energy Policy, 19 March 2022 (available at https://www.swissinfo.ch/eng/politics/what-the-ukraine-war-means-for-switzerland-s-energy-policy/47440086, accessed 02 August 2023).

586 A. Lee and J. Kim, *Analysis of Bargaining Power between the EU and Russia by Altering Gas Supply Network Structure*, Sustainability, 2023.

587 K. Borisocheva, *Analysis of the Oil- and Gas-Pipeline-Links between EU and Russia: An account of intrinsic interests*, Centre for Russia and Eurasia, Athens, Greece, November 2007 (available at https://www.files.ethz.ch/isn/47031/Analysis%20Oil%20and%20Gas.pdf, accessed on 02 August 2023).

At the outset, the USSR transported gas to Europe through member countries at favoured prices. However, post the collapse of the Soviet Union, despite easing of tensions, geopolitics served to play an important role due to the emergence of transit countries.[588] After the collapse of the USSR, Ukraine and Belarus, located between the largest gas exporter and its primary customer, claimed transit fees.[589] Through 2019, Ukraine earned approximately USD 1.2 billion/year in transit fees,[590] charging on average USD 2.66 per 1,000 cubic meters of gas.[591]

History suggests that Russia was considered as a "reliable supplier" in the 40 years that it served as "the largest exporter to the EU".[592] However, international trade in oil and gas is always intertwined with geopolitics and concerns over security of supply.[593]

These concerns surfaced in bilateral relations and first appeared in 2006 and 2009 when Russian gas supply to Bulgaria, Romania, Greece, Croatia and Serbia was disrupted as a result of Ukrainian proposals for renegotiation of its transit fees for imported gas.[594] It led Russia to explore and plan new diversionary routes for direct gas transit:

- Nord Stream I: The pipeline was completed in 2011 and in operation since. It is a 1,224 km pipeline with a capacity of 55bcm per year, direct from Russia to Germany.[595] The pipeline was sabotaged in September 2022 and is no longer operational.
- Nord Stream II: This pipeline runs parallel to Nord Stream I and has a capacity of 55bcm per year, direct from Russia to Germany. Although completed in 2021, it never entered service as Germany withheld opening permission.[596]
- Blue Stream: This pipeline has been operational since 2005 and runs from Russia to Turkey.[597] It is a 1,200 km pipeline with a capacity of 16bcm per year.
- Turk Stream: This pipeline began operations in 2020 and spans 930 kms from Russia to Turkey. It has a capacity of 31.5bcm per year and is intended to deliver gas to Turkey and Southern Europe. [598]
- The construction of the pipelines is significant to recent Russian-Ukrainian relations. In 2017, Ukraine stopped purchasing gas from Russia, providing only transit services with no "offtake gas" for its own use. In 2018 (against Western opposition) Nord-Stream II began construction,[599] to directly supply an additional 55bcm/year to Germany.[600] In 2019, Russian-Ukrainian negotiations on gas transit fees failed, threatening its EU energy security commitments.[601]

If not for the Russian-Ukraine Conflict, Russian plans for uninterrupted supply through either the Black Sea (Blue and Turk Stream) or the Baltic Sea (Nord Stream I and II) would have raised its energy export capacities

588 A. Lee and J. Kim, *Analysis of Bargaining Power between the EU and Russia by Altering Gas Supply Network Structure*, Sustainability, 2023, p. 5.

589 A. Lee and J. Kim, *Analysis of Bargaining Power between the EU and Russia by Altering Gas Supply Network Structure*, Sustainability, 2023, p. 5

590 *Ibid*, p. 9.

591 DW, *Can Ukraine do without Russian gas transit fees?* (available at https://www.dw.com/en/can-ukraine-do-without-russian-gas-transit-fees/a-60552279, accessed 14 May 2023).

592 A. Postolachi, Ensuring Security Supply of Natural Gas in the EU's Common Energy Policy, 9(4) AUDCE, 2013, p. 382.

593 R.A. Ritz, *A Strategic Perspective on Competition between Pipeline Gas and LNG*, 40(5) The Energy Journal, 2019, p. 195.

594 A. A. Postolachi, *Ensuring Security Supply of Natural Gas in the EU's Common Energy Policy*, 9(4) AUDCE, 2013, p. 382.

595 Spiegel Online, *Controversial project launched: Merkel and Medvedev open Baltic gas pipeline* (available at https://www.spiegel.de/international/europe/controversial-project-launched-merkel-and-medvedev-open-baltic-gas-pipeline-a-796611.html, accessed on 14 May 2023).

596 Reuters, *Germany's Scholz halts Nord Stream 2 certification* (available at

https://www.reuters.com/business/energy/germanys-scholz-halts-nord-stream-2-certification-2022-02-22/, accessed 14 May 2023).

597 Hydrocarbons Technology, *Blue Stream Pipeline Project, Russia to Turkey* (available at https://www.hydrocarbons-technology.com/projects/bluestream-pipeline/, accessed 14 May 2023).

598 TurkStream Project (available at https://turkstream.info/project/, accessed 15 May 2023).

599 A. Lee and J. Kim, Analysis of Bargaining Power between the EU and Russia by Altering Gas Supply Network Structure, Sustainability, 2023, p. 9.

600 *Ibid,* pp. 6-9.

601 *Ibid*, p. 6.

by up to more than 200 bcm/year without any Ukrainian intervention.[602]

Below we examine the gas pricing mechanisms of GSAs given TTF's applicability in the Gas Price Cap.

B. Gas Pricing

In the mid-1980s, the IEA established three principles for gas pricing to Western Europe:

- "Parity with crude oil export prices": gas prices were set to be at or near parity with crude oil export prices;[603]
- "Market value principle": gas prices were set to be competitive with final consumer's alternative non-gas fuels;
- Historic costs of gas production: gas prices were set to reflect historic costs of gas production.[604]

Gas is usually priced on the following two basis:

1. Oil-linked Gas Prices

Historically Asian and European importers first contracted for gas when there were no developed markets. Gas buyers created downstream demand by importing gas and selling it to consumers in competition, not with other importers, but with alternative competing fuel products (such as oil). Therefore, GSAs included clauses allowing price reviews for delivered gas in accordance with the price of oil products.[605]

The rationale behind oil-linked gas pricing was that gas and oil were substitutable in both the short and long-term.[606] Gas adoption has been principally driven by user incentivisation to switch from high-carbon coal and oil, to comparatively lower-carbon natural gas, following the 2015 Paris Agreement move toward renewables.[607]

In the last two decades no new oil-fired power plants have been constructed in Europe. Particularly in Southern Europe, oil-powered plants have been slowly phased out in favour of gas.[608]

2. Hub-pricing Method

Today, European countries use gas-indexed prices through trading at a single hub (or multiple) and quoted on a single (or multiple) exchange(s).[609] The development of spot markets led to the introduction of a new mechanism for the determination of gas prices. The market or "hub-pricing method" replaced oil indexation.[610] For example, Zeebrugge in Belgium is the largest Continental European hub in terms of traded gas volume. Closely followed by the Dutch TTF Exchange,[611] a virtual trading point in the Netherlands and the basis of which the EU has fixed the Gas Price Cap.[612]

However, it has been argued that there are three key issues with Continental European hubs:

602 A. Postolachi, *Ensuring Security Supply of Natural Gas in the EU's Common Energy Policy*, 9(4) AUDCE, 2013, p. 383.

603 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 3.

604 J.J. Stern, *Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?*, International Journal of Energy Management, April 2007, p. 1.

605 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 19.

606 J.J. Stern, *Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?*, International Journal of Energy Management, April 2007, p. 1.

607 R.A. Ritz, *A Strategic Perspective on Competition between Pipeline Gas and LNG*, 40(5) The Energy Journal, 2019, p. 195.

608 J.J. Stern, *Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?*, International Journal of Energy Management, April 2007, p. 6.

609 *Ibid*, p. 17.

610 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 20.

611 J.J. Stern, Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?, International Journal of Energy Management, April 2007, p. 19.

612 Gasuni Transport Services, *About GTS Services* (available at https://www.gasunietransportservices.nl/en/about-gts/gastransport/ttf accessed 02 August 2023).

i. The lack of trading volume (the simple measure of gas traded);

ii. Insufficient liquidity (i.e., the ratio between total volume of trade and physical volume of gas consumed in the area served by the hub), and;

iii. The risk of price manipulation by dominant national players.[613]

In practice it is unlikely that uniform indexation can be appropriate for all Continental Europe, or even all North-western European markets, given that national and regional solutions exist depending on the local conditions.[614]

For example, because different European countries and regions will have different gas delivery costs and power generation alternatives, price dynamics will vary. Spain's price dynamics will vary with North-western Europe due to Spain's much greater dependence on LNG, and the supply from the Algerian gas pipeline.[615] In North-western Europe the primary competition to gas is coal, nuclear, and renewable energy sources.[616]

C. Price Review Mechanisms in Gas Contracts

Price adjustment mechanisms are common features of long-term energy contracts. In GSAs the price is usually determined through a specific formula to calculate the contractual price by reference to specific indexes.[617] A basic formula with indexation would be:[618]

***Contract Price** = initial fixed price x (realisable value of gas in review period/realisable value of gas in base period).*

Since the price review clause containing the original contractually agreed formula may not represent the evolving gas market conditions, specific clauses providing for the adaptation and adjustment of the contract's terms and conditions are also included in most GSAs.[619] These clauses became standardized in the 1980s when Norwegian Troll gas contracts were signed.[620]

Price review mechanisms ensure that over time, the price for gas supplied under the contract reflects market fluctuations.[621] Historically they were included because sellers under long-term contracts often needed financing to bring the gas to commercial production.[622] Factors like labour cost, operational materials, maintenance, and eventual decommissioning of the field, were embedded in the 'initial price' in the formula.[623]

Another key reason why buyers and sellers would allow for price changes, would be to account for inflation.[624] Buyers needed assurance that the price paid would remain viable in the future,[625] and their understanding was

613 J.J. Stern, *Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?*, International Journal of Energy Management, April 2007, p. 17.

614 *Ibid*, p. 20.

615 J.J. Stern, *Is there a rationale for the continuing link to oil product prices in continental European long-term contracts?*, International Journal of Energy Management, April 2007, p. 31.

616 *Ibid*, p. 31.

617 S. Dolea, Determination of the price in Gas Price Review Arbitration, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 3.

618 M. Willems and R. Blackett, *Price Arbitrations: It's a Gas, Gas, Gas*, 8(2) Energy Law Advisor, 2014 (available at https://www.cailaw.org/media/files/IEL/Publications/2014/ela-pricing-arbitrations-vol8-no2.pdf, accessed on 23 May 2023).

619 S. Dolea, *Determination of the price in Gas Price Review Arbitration, Gas Price Arbitration Handbook*, Cartea Juridicia, 2020, p. 3.

620 *Ibid*, p. 19.

621 M. Cole, Price review clauses in long term energy contracts, Lexology, 13 September 2012 (available at https://www.lexology.com/library/detail.aspx?g=6f5f65fa-0e23-4917-b56e-0bfd0e22f322#:~:text=Structure%20of%20a%20price%20review%20clause&text=a%20procedure%20for%20arriving%20at,to%20apply%20under%20the%20contract, accessed on 13 August 2023.

622 M. Cole, *Price review clauses in long term energy contracts*, Lexology, 13 September 2012.

623 M. Willems and R. Blackett, *Price Arbitrations: It's a Gas, Gas, Gas*, 8(2) Energy Law Advisor, 2014.

624 M. Willems and R. Blackett, *Price Arbitrations: It's a Gas, Gas, Gas*, 8(2) Energy Law Advisor, 2014.

625 M. Cole, *Price review clauses in long term energy contracts*, Lexology, 13 September 2012.

predicated on the fact that, the more they paid for gas, the more they could charge their customers.[626]

1. Features of Price Review Clauses

Price review clauses vary widely in their drafting, from concise clauses to extremely detailed provisions. Price review clauses generally feature the following provisions:[627]

i. **Trigger Event:** This permits the review procedure to be invoked either automatically at a defined date, or upon satisfaction of a threshold test (like evidencing change in particular market).

ii. **Negotiation:** A procedure for negotiation is inbuilt, followed by binding dispute resolution clauses (usually arbitration).

iii. **Assessment Criteria:** A criteria against which the possible revisions to the price formula are assessed, which usually requires that the buyer is able to procure and market the gas economically.

iv. **Accounting adjustments:** Provisions are made for accounting adjustments, including balancing payments, typically to give retroactive effect to the adjusted price from the price review date.

v. In view of the above, some key elements are noteworthy for engaging a price review dispute. First, should the change required to trigger the review be assessed mechanically, or be more fluid? A mechanical assessment would entail that the price review clause triggers when the price generated by the formula changes by more than x%, or if the specified cap is exceeded for more than a specified period. Conversely, a fluid assessment would broadly require a "significant change" in the energy market of the buyer since the contract commencement date or last price review.[628]

vi. Other factors to consider include determining the relevant period for assessing price reviews, which may vary depending on whether it pertains to short/long-term price fluctuations. The relevant market referred to in the clause is equally important, as it determines whether the relevant market is the end-user market or the wholesale market.[629]

If a foreseeability requirement is included in the clause, it can address two issues. First, it can prevent reviews from being triggered for changes already accounted for in the existing price agreement for the reference period. Second, it can prevent changes brought about by the actions of one party to the GSA being relied upon by that same party.[630]

Under Swiss law, GSAs are usually qualified as contracts for delivery of goods by instalments (*contrats à livraisons successives*). They are not specifically regulated by Swiss contract law and belong to category of "innominate" contracts, different from outright sales contracts because they call for continuing performance over an extended period of time and are not outright one-time sales. Under Swiss law, natural gas is deemed moveable personal property. However, GSAs are governed by Articles 184 of the Swiss Code of Obligations ("**SCO**") designed for one-off sales contracts, but with some adjustments.[631]

2. Price Reopener Arbitrations

In the last two decades, the shift from oil-linked pricing to hub-based pricing brought these types of price review mechanisms to the forefront. Since GSAs are structured so sellers take the price risk, and buyers take the volume risk,[632] the price shift led buyers to trigger price review clauses and renegotiate the contract price to

626 M. Willems and R. Blackett, *Price Arbitrations: It's a Gas, Gas, Gas*, 8(2) Energy Law Advisor, 2014.

627 S. Sparling et al., *Taming Price Review Clauses: Lessons from the Transactional and Arbitration Battlefields*, April 2016 (available at https://marketingstorageragrs.blob.core.windows.net/webfiles/taming_price_review_clauses.pdf, accessed 02 August 2023).

628 *Ibid*.

629 S. Sparling et al., *Taming Price Review Clauses: Lessons from the Transactional and Arbitration Battlefields*, April 2016.

630 *Ibid*.

631 M. Iynedjian, *Gas Sale and Purchase Agreements under Swiss Law*, 30(4) ASA Bull., 2012, pp. 746-757.

632 S. Sparling et al., *Taming Price Review Clauses: Lessons from the Transactional and Arbitration Battlefields*, April 2016.

disconnect them from oil prices.[633]

Examples which involved the interpretation of the price review clauses based on this switch underline the value of these clauses:

i. The early 2000s saw the first-ever price review arbitration, where the buyer (claimant) claimed that the liberalization of the European gas market broke up the buyer's monopoly and, for the first time, created gas-to-gas competition when new competitors entered the market and began offering prices at a discount to the previously prevailing prices.[634] The claimant then sought the addition of a new factor in the pricing formula to reflect this development. The tribunal award significantly lowered the gas contract price in the formula, by introducing a factor to correct for a significant decrease in the market gas price, and changing the price level to reflect gas-to-gas competition price in the market.[635]

ii. In the 2011 case of *Edison v. Gazprom* the determination of the price formula sought by Edison was awarded in Edison's favour to use the hub-based index instead of the oil-price index. The hub-index formula was preferred by Edison because it was cheaper than the oil-price formula.[636]

iii. In 2013 the *RWE v. Gazprom* tribunal introduced an element of indexation to spot gas pricing when the contract originally provided for oil-indexation.[637]

iv. In 2015 the *Edison v. Eni* arbitration saw the tribunal changing the indexation from oil to spot-gas prices in the buyer's market.[638]

v. In 2018 the *Gazprom v. Naftogaz* tribunal decided that the gas price formula provided in the GSA between the parties would not be oil-indexed, and the nearest German Gaspool hub price would the new reference for deliveries at the Russian-Ukrainian border.[639]

Later arbitrations saw buyers with significant downward revisions to their supply prices. Among these were all the major German, Italian, Dutch and Austrian gas buyers along with the Polish PGNiG; Bulgarian Bulgargaz; Danish DONG; Spanish Gas Natural; and the French GDF Suez.[640]

Both major European suppliers, Gazprom and Equinor agreed for gas hub indexation and modified their supply contracts to show hub pricing. The biggest supply contracts were between Italian Eni and E.On and Gazprom and both are good examples of inclusions of gas indexation, where the Eni-Gazprom contract is 100% hub-indexed.[641]

III. Arbitrating Sanctions: The Russian Federation and Switzerland

"Sanctions" are not a legal term, and its use gives little clarity regarding its definition and ambit. ILC initially included the term in the draft articles, but later replaced it with the more neutral "countermeasures".[642] Similarly, although the UN Charter does not use the word "sanctions", UN Security Council resolutions refer to

633 S. Dolea, *Determination of the price in Gas Price Review Arbitration, Gas Price Arbitration Handbook*, Cartea Juridicia, 2020, p. 20.

634 S.P. Anway et al., *The Evolution of Natural Gas Price Review Arbitrations*, Global Arbitration Review, 5 August 2022.

635 RWE, WINGAS and WIEH (Germany), Edison, Eni and E-On (Italy), Shell Energy along with GasTerra (Netherlands), EconGas and Centrex (Austria), see S.P. Anway et al., *The Evolution of Natural Gas Price Review Arbitrations*, Global Arbitration Review, 5 August 2022.

636 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 20.

637 S. Sparling et al., *Taming Price Review Clauses: Lessons from the Transactional and Arbitration Battlefields*, April 2016.

638 *Ibid.*

639 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 20.

640 S.P. Anway et al., *The Evolution of Natural Gas Price Review Arbitrations*, Global Arbitration Review, 5 August 2022.

641 *Ibid.*

642 I. Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the impact of the principle of common concern of humankind,* 2022(9) World Trade Institute Advanced Studies, p. 66.

relevant measures as "sanctions."[643]

International law literature displays a lack of consistency in the usage of "economic sanctions," nor is there a settled approach to measuring the effectiveness of sanctions. Notwithstanding the inconsistency, all economic sanction definitions share a core, they usually pursue political objectives and involve economic restrictions.[644]

Whether unilateral economic sanctions are legal is a not settled international law question. Despite States relying on unilateral economic measures, its legal certainty remains ambiguous.[645] Indeed, while States rely on their domestic law and impose various economic restrictions as a response to the behaviour of other States, they rarely clarify their nature.[646] As a rule, these measures do not need any prior authorisation from regional or international organisations before invocation since their application is regulated domestic laws.[647]

Unilateral economic sanctions can possibly be defined as, "restrictive economic measures imposed by an individual State against another State and/ or its government officials and bodies, legal entities, and its nationals, in pursuance of political objectives and without any prior authorisation from an international or regional organisation". Differently put, economic restrictions enacted on the basis of domestic laws and regulations of the State that imposes them,[648] usually as a foreign policy tool.[649]

The Oil Price Cap and the Gas Price Cap being unilateral acts by States, introduced in line with their domestic laws and not authorised by any international institution like the United Nations are unilateral economic sanctions.[650]

Before addressing the Gas Price Cap, two criticisms are levelled against sanctions as a foreign policy tool: first they may not work as intended and second they usually harm the sender's economy.[651] These criticisms have been explored *inter se* the Gas Price Cap and Russia's response below.

A. Gas Price Cap

Historically neutral Switzerland refrained from sanctions against Russia in 2014, although it did condemn the Crimean annexation by Russia.[652] By 2015, Swiss measures became more aligned with those of the EU and had integrated key restrictions into its own sanction regime.[653]

Since the Russia-Ukraine Conflict began, Switzerland has adopted the EU sanctions packages consistently[654] signalling its departure from neutrality for the first time in history. In its energy sector Switzerland adopted the 6th EU sanctions package on 10 June 2022, embargoing Russian crude oil and certain refined petroleum

643 M. Asada, *Definition and legal justification of sanctions*, in M. Asada (ed.), *Economic Sanctions in International Law and Practice* (2020), pp. 4-5.

644 I. Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the impact of the principle of common concern of humankind*, 2022(9) World Trade Institute Advanced Studies, p. 45.

645 *Ibid*, p. 6.

646 *Ibid*, p. 68.

647 For a more nuanced understanding of the use of "sanctions" from an international perspective see A. Pellet and A. Miron, *Sanctions*, in I. Bogdanova, *Unilateral Sanctions in International Law and Human Rights*, 2022(9) World Trade Institute Advanced Studies, p. 67.

648 I. Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the impact of the principle of common concern of humankind*, 2022(9) World Trade Institute Advanced Studies, p. 5.

649 M. Onderco and R.A. van der Veer, *No more gouda in Moscow? Distributive Effects of the imposition of sanction*, 59(6) Journal of Common Market Studies, 2021, pp. 1345-1363.

650 I. Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the impact of the principle of common concern of humankind*, 2022(9) World Trade Institute Advanced Studies, p. 1.

651 M. Onderco and R.A. van der Veer, *No more gouda in Moscow? Distributive Effects of the imposition of sanction*, 59(6) Journal of Common Market Studies, 2021.

652 M. Hayashi, *The Crimea question and autonomous sanctions*, in M. Asada (ed.), Economic Sanctions in International Law and Practice (2020), p. 229.

653 *Ibid*, p. 230.

654 Swiss Federal Council, *Media release: Sanctions against Russia extended*, 20 July 2023 (available at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html, accessed 02 August 2023).

products.[655] Adoption of the 9th Sanctions Package on 25 January 2023 brought gas within Swiss sanctions.[656] The 10th EU Sanctions package dated 25 February 2023 banning provision of gas storage capacity to Russians,[657] was also adopted by Switzerland.[658]

The EU's 9th Sanctions Package obligated EU companies to inform the relevant authority of Member States of any imports or onward transportation to third countries, of natural gas condensates falling under CN code 2709 00 10 from liquified natural gas ("**LNG**") production plants, originating in or exported from Russia.[659] The report must include information on volumes.[660]

On 15 February 2023, the EU Member States implemented the Gas Price Cap citing that due to the Russian-Ukraine Conflict, "and the unprecedented reduction of gas supplies from [...] Russia to Member States threaten the security of supply in the Union and its Member States", and that this "supply shock" contributed to price volatility and price hikes.[661] An illustration of the gas prices shows the following:

	2019	2022	2023
Average Natural Gas Price in Europe (USD/mmbtu)	4,5[662]	14,35[663]	4,8[664]

The Gas Price Cap automatically activates if the month-ahead price on TTF surpasses 180€/MWh for three consecutive working days.[665] Once activated, gas suppliers and traders are unable to charge prices above the limit. The mechanism applies to month-ahead, three months-ahead, and year-ahead derivative contracts and transactions within the EU.[666] Instead of addressing abnormal market behaviour, the EU regulation provides that, "the mechanism is designed in a manner not to alter the fundamental contractual equilibrium of gas supply contracts".[667]

Lastly, if Switzerland is the destination, all exempted transactions for the purchase, import or transport to Switzerland of gas condensates listed under customs tariff number 2709 00 10 from Russia must be reported to the State Secretariat for Economic Affairs within two weeks indicating the quantities purchased, imported

655 Baker Mckenzie, *Switzerland decides to adopt the EUs Sixth Package of Sanctions against Russia and Belarus* (available at https://sanctionsnews.bakermckenzie.com/switzerland-decides-to-adopt-the-eus-sixth-package-of-sanctions-against-russia-and-belarus/#:~:text=I.,the%20sixth%20EU%20Sanctions%20Package&text=In%20the%20area%20of%20trade,a%20series%20of%20transitional%20periods, accessed 02 August 2023).

656 Baker Mckenzie, *Switzerland implements the 9th package of EU sanctions against Russia* (available at https://sanctionsnews.bakermckenzie.com/switzerland-implements-the-9th-package-of-eu-sanctions-against-russia/, accessed 02 August 2023).

657 European Council, *Restrictive measures against Russia over Ukraine* (available at https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/, accessed 13 August 2023).

658 Switzerland Federal Council, *Ukraine to implement tenth sanctions package* (available at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-94032.html, accessed 02 September 2023).

659 Gard, *EU adopts 9th package of Russia sanctions*, 15 March 2023 (available at

https://www.gard.no/web/news/article?p_document_id=34668674, accessed 02 August 2023).

660 Van Bael & Bellis, Guide to the EU Sanctions Against Russia, 16 January 2023 (available at https://www.vbb.com/media/Insights_Articles/10-1-2023_European_Union_Imposes_Sanctions_on_Russia_9th_package.pdf, accessed 02 August 2023).

661 Council of the European Union, 16241/22, 19 December 2022, Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices, para. 1; Council of the European Union, *Council formally adopts temporary mechanism to limit excessive gas prices*, 22 December 2022.

662 Eurostat, *Natural gas price statistics* (available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Natural_gas_price_statistics, accessed 02 August 2023).

663 YCharts, *Europe Natural Gas Price* (available at https://ycharts.com/indicators/europe_natural_gas_price, accessed 02 August 2023).

664 *The National News, European natural gas prices fall to 21-month low on record imports and rising stocks* (available at https://www.thenationalnews.com/business/energy/2023/05/07/european-natural-gas-prices-fall-to-21-month-low-on-record-imports-and-rising-stocks/, accessed 04 May 2023).

665 Council of the European Union, *Energy prices and security of supply - Consilium (europa.eu)*.

666 Council of the European Union, 16241/22, 19 December 2022, Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices (n 24).

667 *Ibid*.

or transported.[668]

We analyse the Russian response to energy sanctions in light of the two criticisms of using sanctions as a foreign policy tool.

B. Russian Response to the Sanctions

The March 2022 Rouble Decree, possibly aimed to strengthen the Rouble and reduce reliance on foreign currency also coincided with Russia's earlier demand for European countries to pay for gas in Roubles and was viewed by western powers as "blackmail"[669]. In March 2022, President Putin also provided a list of States (including Switzerland) that committed "unfriendly actions" against Russia and its interests.[670]

In April 2022, following Russia's exclusion from SWIFT, four European gas buyers - Italy's Snam, France's Engie, Germany's Uniper and Austria's OMV - made Rouble payments for gas purchases to Gazprom.[671] Eventually, they also initiated arbitration over the method of contract performance.

a. Criticism I

Whether the Gas Price Cap worked as intended merits consideration. For example, the measures aimed at applying economic pressure on Russia due to the Russian-Ukraine Conflict compelled it to explore alternative markets leading to diversification of its energy exports to countries such as China and India[672] — two of the world's largest economies and part of the BRICS coalition.

Russia and China also reached an agreement on the second phase[673] of the Power of Siberia gas pipeline, which will connect Russia's Far East and China's northeast.[674] The Power of Siberia 2 pipeline is expected to transport up to 50bcm of gas per year, and is part of a 30-year gas deal signed between the two countries in February 2022.[675] Meanwhile, India has become one of Russia's largest customers for oil and gas, with Russian oil exports surging to over one-third of its total imports in March 2023.[676]

In September 2022, Japanese energy company Toho Gas signed a deal with Gazprom to import LNG from the Sakhalin-2 project.[677] Japan's reliance on Russian energy is so crucial for its economy that in March 2023

668 Baker Mckenzie, *Switzerland decides to adopt the EUs Sixth Package of Sanctions against Russia and Belarus*.

669 Reuters, *Russia sets deadline for rouble gas payments from Europe, calls it blackmail*, 31 March 2022 (available at https://www.reuters.com/business/energy/russia-sets-deadline-rouble-gas-payments-europe-calls-it-blackmail-2022-03-31/, accessed 02 August 2023).

670 Tass, Russian government approves list of unfriendly countries and territories, 07 March 2022 (available at https://tass.com/politics/1418197?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com, accessed 02 August 2023).

671 Bloomberg, *Four European Gas Buyers Made Ruble Payments to Russia*, 27 April 2022 (available at https://www.bloomberg.com/news/articles/2022-04-27/four-european-gas-buyers-made-ruble-payments-to-russia, accessed 02 August 2023).

672 Tass, *Russia sets new natural gas export record amid gas crisis in Europe*, 24 November 2022 (available at https://tass.com/economy/1575561?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com, accessed on 02 August 2023).

673 This follows on the May 2014 agreement between the two countries which was touted to be one of the largest contracts in the history of the natural gas industry. The original "Power of Siberia" deal involved pipeline gas deliveries worth USD 400 billion over a 30-year period commencing in 2019, with China also extending USD25 billion of financing to support the development of Eastern Siberian gas-fields and pipeline construction. See further, R.A. Ritz, *A Strategic Perspective on Competition between Pipeline Gas and LNG*, 40(5) The Energy Journal, 2019, p. 214.

674 Enerdata, *Russia announces progress with China on the Power of Siberia 2 gas pipeline*, 13 May 2023 (available at https://www.enerdata.net/publications/daily-energy-news/russia-announces-progress-china-power-siberia-2-gas-pipeline.html).

675 Reuters, *Exclusive: Russia, China agree 30-year gas deal using new pipeline – sources*, 04 February 2022 (available at https://www.reuters.com/world/asia-pacific/exclusive-russia-china-agree-30-year-gas-deal-using-new-pipeline-source-2022-02-04/, accessed 02 August 2023).

676 Economic Times, *India's oil buy from Russia surge, now more than one-third of total imports*, 17 September 2021 (available at https://economictimes.indiatimes.com/industry/energy/oil-gas/indias-oil-buy-from-russia-surge-now-more-than-one-third-of-total-imports/articleshow/98425002.cms?from=mdr, accessed 02 August 2023).

677 Toho Gas, *Toho Gas renews deal to buy Russian LNG for stable energy supply*, 20 September 2022 (available at https://www.japantimes.co.jp/news/2022/09/20/business/toho-gas-russia-energy-sakhalin/, accessed on 13 May 2023).

Japan broke with its western allies and purchased Russian oil at prices above the Oil Price Cap.[678] Even while, Turkey increased Russian gas imports and in 2022, imported 40% of its gas consumption from Russia, up from 35% in 2021.[679]

b. Criticism II

The second criticism regarding the harm to the sender's economy is trickier to assess and time will be the determinative factor. For example, the impact of Russian countersanctions are disproportionate to EU-imposed sanctions. While the EU sanctions affect a smaller number of EU exporters, the Russian countersanctions impact entire sections of the wider EU economy,[680] *e.g.*, the rising energy prices which eventually led to the Price Cap on oil and gas.

Russia's pre-eminent role as EU's primary energy supplier means that sanctions may have had a far-reaching impact and exposed several businesses to risks, affecting their ability to fulfil commercial obligations,[681] for example, studies show that Germany's chemicals sector is the most exposed to rising power costs with expected production to fall by 8.5% in 2022 alone.[682]

Germany, the largest European economy appears to face immediate aftermath.[683] Per the IMF, it is the only G7 nation not achieving growth in 2023, with engineering industry facing maximum impact on account of factors like high energy prices.[684] Calculations suggest that by December 2022, Germany had set aside €440 billion to avoid running out of power and securing new sources of energy, which equates to €1.5 billion per day since February 2022 or around 12% of national economic output or roughly €5,400 per German.[685]

Germany also nationalised energy giant Uniper in a historical corporate bailout and assumed risks valued up to €216 billion associated with its built-up derivatives. For the first nine months of 2022 alone, Uniper reported €40 billion losses, with €10 billions of realised losses incurred due to replacement of Russian gas at much higher prices.[686] Uniper's volume of liabilities tied to derivatives was 2.5 times since 2021 and six times the equivalent exposure of BP or Shell by the end of September 2022.[687]

The aftermath of these breakdowns is, invariably, invocation of arbitration clauses,[688] as is evident in Uniper's €11.6 billion SCC arbitration or the RWE arbitration against Gazprom.

C. International Arbitration and Sanctions

Legally, modern sanctions are mandatory rules of law typically originating in domestic legal systems, although

678 The Wall Street Journal, *Japan breaks with U.S. allies, buys Russian oil at prices above cap*, 02 April 2023 (available at https://www.wsj.com/articles/japan-breaks-with-u-s-allies-buys-russian-oil-at-prices-above-cap-1395accb, accessed on 03 May 2023).

679 Energy Monitor, Russia's war in Ukraine inspires Turkish gas dreams, 08 March 2022 (available at https://www.energymonitor.ai/policy/russias-war-in-ukraine-inspires-turkish-gas-dreams/, accessed on 05 May 2023).

680 M. Onderco and R.A. van der Veer, *No more gouda in Moscow? Distributive Effects of the imposition of sanction*, 59(6) Journal of Common Market Studies, 2021.

681 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?*, Columbia Law School: American Review of International Arbitration, 28 April 2023 (available at https://aria.law.columbia.edu/arbitration-or-sanctions-who-survives-the-battlefield/, accessed 02 August 2023.

682 Reuters, *Germanys half a trillion dollar energy bazooka may not be enough*, 15 December 2022 (available at https://www.reuters.com/business/energy/germanys-half-a-trillion-dollar-energy-bazooka-may-not-be-enough-2022-12-15/, accessed 02 August 2023).

683 KPMG, Germany: Economic Key Facts (available at

https://kpmg.com/de/en/home/insights/overview/economic-key-facts-germany.html#:~:text=Germany%20is%20the%20fourth%20largest,part%20to%20the%20country's%20GDP, accessed 02 August 2023.

684 KPMG, Germany: Economic Key Facts.

685 Reuters, Germanys half a trillion dollar energy bazooka may not be enough, 15 December 2022 (available at https://www.reuters.com/business/energy/germanys-half-a-trillion-dollar-energy-bazooka-may-not-be-enough-2022-12-15/, accessed 02 August 2023).

686 Reuters, Germany set to assume 230 Billion Uniper Derivatives, 16 December 2022 (available at https://www.reuters.com/business/energy/germany-set-assume-230-billion-uniper-derivatives-2022-12-16/, accessed 02 August 2023).

687 *Ibid*.

688 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?*, Columbia Law School: American Review of International Arbitration, 28 April 2023.

some sanctions are imposed by intergovernmental organisations like the UN Security Council or regional organisations such as the EU.[689] The prevailing view is that disputes involving economic sanctions are arbitrable.[690]

Sanctions (and the arbitration of disputes involving them) can fall in four categories. Sanctions may:

i. form part of the applicable substantive law;

ii. be binding under the law of the judicial forum or arbitral seat;

iii. be imposed by the law of the country where the contractual performance should take place; and/or

iv. fall into neither of these three categories but still have some connection to the dispute at hand.[691]

v. Illustratively, if parties Geneva is chosen as a seat of arbitration, or the underlying contract is governed by Swiss law, then sanctions will form part of the dispute.

1. Sanctions as Mandatory Rules of Law in Switzerland

Under Swiss law, unilateral sanctions are usually considered to be mandatory rules since they typically purport to address a foreign policy objective and apply regardless of whatever law governs the particular transaction. Such mandatory rules have been variously termed as "peremptory norms, international mandatory rules, '*lois de police*,' rules of immediate application, '*lois d'application necessaire*,' overriding statutes, self-limiting rules, and spatially conditioned rules".[692]

Given the mandatory nature of sanctions, the requirements for consideration of foreign mandatory provisions by an arbitral tribunal are:

i. They must be considered mandatory in the State of origin;

ii. They have close connection with the subject matter of the contract and/or the dispute;

iii. They lead to an acceptable result in the light of the concept of truly international public policy; and

iv. They appear reasonable and appropriate under the overall circumstances.[693]

While, the Private International Law Act ("**PILA**") Chapter 12, does not contain express rules on mandatory norms or other limits to parties' choice of substantive law, Swiss authors are of the view that tribunals must apply mandatory provisions of the law governing the contract (*lex causae*), because they are necessarily included in the parties' choice of law.[694]

In this context, authors have argued that arbitral tribunals can directly apply the economic sanctions even if

689 Y. Kryvoi, *The effect of sanctions on investment arbitration*, British Institute of International and Comparative Law, 24 October 2022 (available at https://www.biicl.org/blog/46/the-effect-of-sanctions-on-investment-arbitration?cookiesset=1&ts=1690886899, accessed 02 August 2023).

690 C. Shah and K. Mahajan, *Implications of economic sanctions on international arbitration*, Thomson Reuters Practical Law Arbitration Blog, 05 July 2018 (available at http://arbitrationblog.practicallaw.com/implications-of-economic-sanctions-on-international-arbitration/, accessed 02 August 2023).

691 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), *The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space* (2021), pp. 294-326, 301.

692 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), *The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space* (2021), p. 302.

693 D. Girsberger and N. Voser, *Chapter 2: The Arbitration Agreement and the Jurisdiction of the Arbitral Tribunal*, International Arbitration Comparative and Swiss Perspectives (2016), p. 353.

694 *Ibid*, p. 352.

they do not form a part of the proper law of the contract under three conditions:

i. The sanctions have to be applicable to the case under the wording of the relevant legal instrument.

ii. There must be a sufficient jurisdictional link between the economic sanctions and the transaction; and

iii. arbitrators should only take sanctions into account if they deem it appropriate after consideration of all the elements of the case.[695]

iv. The Gas Price Cap will apply to GSAs subject to Swiss law or seated in Switzerland, necessitating consideration by the arbitral tribunal due to their mandatory nature.

2. Sanctions and Public Policy

The impact of sanctions continues even after an arbitration has concluded and an award issued. Where the sanctions were themselves an issue for consideration in the dispute, it is likely that these will be addressed in the award. However, that does not mean that these issues may not arise again in the context of enforcement. If the sanctions as they are applicable at the seat or covered under the governing law of the contract are not considered in the award, then there is a likelihood of it being set aside on grounds of public policy under, for example, Article 34(2)(b)(ii) of the UNCITRAL Model Law.[696]

Although it is difficult to gauge a uniform public policy that is customized to fit each State's needs, the most commonly upheld public policy violations are:[697]

i. National sovereignty violation;

ii. Awards tainted by fraud, corruption or duress;

iii. Disproportionate penalties or extremely high damages; and

iv. Impartial tribunal or the exclusion of one arbitrator's deliberations.

However, the "public policy" ground is often considered the "most lucrative and defendable objection" that can be argued by award-debtors because of its undefined nature, especially when it concerns "international sanctions".[698] For example, in the EU there is "little guidance currently available to clarify whether economic sanctions constitute part of the public policy of the enforcing EU Member State, and if so, whether they outweigh the enforcing State's policy in favour of the finality and enforceability of arbitral awards".[699]

Arguably, international sanctions are temporary and volatile in nature, and fluctuate depending on a State's political inclinations and, as such, they cannot form part of its public policy, which should remain static and preserve certain fundamental values.[700]

Examples of sanctions being raised as an argument during enforcement proceedings also include where the

695 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), *The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space* (2021), p. 312.

696 C. Shah and K. Mahajan, *Implications of economic sanctions on international arbitration*, Thomson Reuters Practical Law Arbitration Blog, 05 July 2018.

697 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?*, Columbia Law School: American Review of International Arbitration, 28 April 2023.

698 *Ibid.*

699 L.H. de la Colombe and D.F. von Enzeberg, *How can international sanctions and international arbitration be reconciled?*, Taylor Wessing, 16 February 2021 (available at https://www.taylorwessing.com/en/insights-and-events/insights/2021/02/how-can-international-sanctions-and-international-arbitration-be-reconciled).

700 P. Banerjee, Arbitration or Sanctions: *Who survives the Battlefield?*, Columbia Law School: American Review of International Arbitration, 28 April 2023.

award creditor is itself a target entity. The award debtor could raise objections on the ground that "making payment under the award would contravene the public policy of the State in which enforcement is being sought".[701]

In 2014, the Swiss Supreme Court rejected objections to enforcement, and concluded that the payment of an award would not breach Swiss public policy by providing financial assets to Iran against the international sanctions that were enacted following the 1979 Iranian revolution. In that case, the contested payment was related to oil shipments delivered prior to the imposition of sanctions. The Court also rejected the argument that the payment of the award would attract criminal liability for the award debtor's Israeli shareholders under Israeli laws.[702]

In another 2020 case before the French Court of Appeal, an application to set aside an award was rejected and the French company, the award debtor, was ordered to pay the award amount to the Iranian award creditor. In this case, the arbitration arose after the Iranian company terminated the contract based on a breach of the French company, who refused to extend the necessary bank guarantees under the contract due to international sanctions against Iran.[703]

This prompted the French company to initiate International Chamber of Commerce ("**ICC**") arbitration proceedings in Paris for wrongful contract termination. The tribunal dismissed the French claims and passed an award in favour of the Iranian company.[704] The challenge before the Court of Appeal was based on the fact that the tribunal allegedly failed to take into account the impact of international sanctions against Iran, which made performance of the contract impossible for the French company.[705]

The Court of Appeal's rejection differentiated between UN and EU sanctions imposed on Iran and noted that the international sanctions emanating from the UN and EU were materially and temporally not applicable to the contractual relationship at issue. Thus, any award which did not consider them could not be set aside on international public policy objections.[706] It held that:[707]

> i. The UN Security Council Resolutions imposing economic sanctions against Iran do form part of international public policy "in so far as they are intended to contribute to the maintenance or restoration of international peace and security" and "embody rules and values whose disregard must be considered to be incompatible with the French legal system" (despite these Resolutions having no direct effect on the domestic law of the Members States involved).
>
> ii. Whereas, "the EU Regulations imposing international economic sanctions and incorporated into national law ***can*** be assimilated into French law, as they contribute to international peace and security, and can be equally integrated with the French conception of international public policy".

Notwithstanding these differences, the objections to set aside the award were rejected.

In contrast to the sanctions on Iran (and North Korea) which are in large part, crafted as UN sanctions, the package of sanctions against Russia consists of autonomous sanctions by multiple States and the EU, which are carried outside the UN framework. As a result, the necessity, legitimacy, and design of these sanctions are determined without a common frame of reference or a formal point of coordination. There is also no Sanctions Committee or Panel of Experts to help monitor their implementation.[708] While it appears unlikely that the Gas Price Cap will constitute public policy, it does remain States' foreign policy.

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701 C. Shah and K. Mahajan, *Implications of economic sanctions on international arbitration*, Thomson Reuters Practical Law Arbitration Blog, 05 July 2018.

702 *Ibid*.

703 L.H. de la Colombe and D.F. von Enzeberg, *How can international sanctions and international arbitration be reconciled?*, Taylor Wessing, 16 February 2021.

704 *Ibid*.

705 *Ibid*.

706 L.H. de la Colombe and D.F. von Enzeberg, *How can international sanctions and international arbitration be reconciled?*, Taylor Wessing, 16 February 2021.

707 *Ibid*.

708 M. Hayashi, *The Crimea question and autonomous sanctions*, in M. Asada (ed.), Economic Sanctions in International Law and Practice (2020), p. 223.

3. Russian Arbitration Amendment

A contract in breach of a Presidential Decree should render that contract invalid under Russian law.[709] A review of the Russian First Instance Commercial Court's 2019 rulings show that EU sanctions feature regularly in contractual disputes resolved by Russian domestic courts. In most cases, the courts do not concern themselves with determining the applicability or non-applicability of EU sanctions in Russia as a matter of Russian law.[710]

They, however, consider EU economic sanctions against Russia as grounds that may, in principle, excuse the non-performance of contracts requiring the import of affected products into Russia from the EU. This supports the view that, at least in this category of cases, the Russian courts considered the EU sanctions against Russia as datum, *i.e.*, a factual circumstance that does not require any consideration of the applicability of the relevant EU rules in the territory of Russian Federation.[711]

In 2020, Russia passed an amendment its Commercial Procedure Code (the "**Amendment**"), which grants the Russian Courts exclusive jurisdiction with respect to any disputes arising out of contractual relationships between Russian and foreign entities subjected to the sanctions, unless there is a dispute resolution clause to the contrary. If such a clause exists, "the Amendment allows parties to plead that it is unenforceable since there are "obstacles" to access justice because of sanctions".[712]

If the arbitration was already underway, the sanctioned party could file an anti-arbitration injunction and effectively prevent the arbitration from proceeding. Except, since there is no indication of what can constitute "obstacles," there is room for interpretation. The open-endedness has been criticised as unilaterally depriving foreign entities from pursuing their claims through arbitration and impairing the doctrine of *kompetenz-kompetenz*.[713]

Examples of "obstacles," include the case of *JSC Tsargrad Media v Google*,[714] where the Petitioner submitted that commencing arbitration against Google would not be viable given the travel ban imposed on the beneficial owner of the Petitioner. The Petitioner argued that such restriction would effectively impair their ability to engage a lawyer or participate in the proceedings. The Moscow Arbitration Court ruled in the Petitioner's favour.[715]

In *JSC Uraltransmash v PESA*,[716] the petitioner requested an anti-arbitration injunction against an ongoing SCC arbitration claiming that it was precluded from making payments, hiring legal counsel, undertaking timely filings and attending hearings. However, the Arbitration Court for the Sverdlovsk Region noted that the Petitioners had failed to prove any direct link of the sanctions to their ability to continue with the arbitration. It returned a finding that sanctions alone are not sufficient reason enough for an anti-arbitration injunction and there has to be direct link to access to justice.[717]

Eventually, the Russian Supreme Court in the appeal judgment for *JSC Uraltransmash v PESA*,[718] held that the burden to prove that an arbitration clause was unenforceable does not fall on the sanctioned entities and the

709 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space (2021), pp. 294-326.

710 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space (2021), p. 306.

711 *Ibid*, p. 306.

712 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?,* Columbia Law School: American Review of International Arbitration, 28 April 2023.

713 *Ibid*.

714 *JSC Tsargrad Media v. Google* (Case No. A40-155367/2020).

715 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?*, Columbia Law School: American Review of International Arbitration, 28 April 2023.

716 *JSC Uraltransmash v. PESA* (Case No. A60-62910/2018).

717 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?*, Columbia Law School: American Review of International Arbitration, 28 April 2023.

718 *JSC Uraltransmash v. PESA* (Case No. A60-36897/2020).

mere fact that such sanctions were in place, would be enough for Russian courts to exercise jurisdiction.[719]

In the present context, the EU sanctions are applicable to EU corporations, but not to Russian corporations unless they carry out their business within the EU. Thus, an action carried out, or a decision made, by a Russian corporation (*e.g.,* Gazprom) cannot be prosecuted or fined by the EU's national authorities in the way a breach by an EU corporation would be.[720]

More recently, in February 2023, German industrial gas and engineering company, Linde's assets worth approximately USD 500 million were frozen by the St Petersburg and Leningrad Commercial Court at the behest of Gazprom's RusChemAlliance (**"RCA"**). RCA launched the Russian lawsuit for recovering approximately a €1billion advance payment for the construction of a gas processing plant it had paid Linde, as a contractor, after Linde suspended work due to EU sanctions. The guarantees from German banks were also allegedly refused when called upon, due to sanctions.[721]

In July 2023, the Russian court refused to suspend the court proceedings despite High Court of Hong Kong requiring RCA to suspend its suit under the threat of criminal prosecution because of sanctions. Linde had argued for suspension until the final award by the Stockholm seated Hong Kong International Arbitration Centre ("**HKIAC**") arbitration.[722] Grounds for refusal included HKIAC not being sanctions neutral, no guarantee of a "fair trial" due to British and European judges serving in the Hong Kong judiciary, costs and fees payment through UK's HSBC.[723]

In another February 2023 case, Siemens termination of its €1.1 billion supply and long-term maintenance contracts with Russian Railways for high-speed electric trains was rejected by Moscow Courts. It also refused Siemens request for suspension of proceedings in favour of arbitration before the Vienna International Arbitration Centre ("**VIAC**") stating that there was no reason to believe that parties' dispute would be heard objectively and fairly before the VIAC.[724]

In August 2023, the Russian Arbitrazh Court confirmed its preliminary measures of protection in favour of Yamal LNG to freeze Baker Hughes assets of worth approximately USD 50million so it may not dispose assets, while Yamal LNG prepared for an ICC arbitration over a terminated contract for parts and services on USD 27 billion LNG project.[725]

Presumably, given this trend, disputes against Gazprom by energy companies are likely to face Russian court litigation, an option that contracting parties might be constrained to consider, specifically with the reality of enforcing arbitral awards against Russia and its entities not achieving a high success rate till date.

IV. The Defences of *Force Majeure* and Hardship

Price review arbitrations are poised to surge as the gas market undergoes radical shifts due to government-imposed unilateral economic sanctions. In respect of the underlying merits of a dispute, authors suggest that a respondent (like Gazprom), "can potentially rely on sanctions forming part of the applicable law to the dispute as justification for its inability to comply with contractual obligations, by raising a defence of frustration or *force majeure*".[726]

This is evident in Gazprom's retroactive invocation of the *force majeure* clauses in long-term GSAs as early as June 2022, where it informed European buyers that it will not be responsible for past and current gas shortfalls

719 P. Banerjee, *Arbitration or Sanctions: Who survives the Battlefield?,* Columbia Law School: American Review of International Arbitration, 28 April 2023.

720 M. Hayashi, *The Crimea question and autonomous sanctions*, in M. Asada (ed.), Economic Sanctions in International Law and Practice (2020), p. 235.

721 T. Fisher, *Russian Court refuses to stay lawsuits for HKIAC arbitration*, GAR, 05 July 2023.

722 J. Ballantyne, *Russian Court rules against Siemens in rail dispute,* GAR, 01 March 2023.

723 T. Fisher, *Russian Court refuses to stay lawsuits for HKIAC arbitration*, GAR, 05 July 2023.

724 J. Ballantyne, *Russian Court rules against Siemens in rail dispute*, GAR, 01 March 2023.

725 T. Jones, Russian court freezes Baker Hughes assets ahead of ICC case, GAR, August 2023.

726 C. Shah and K. Mahajan, *Implications of economic sanctions on international arbitration*, Thomson Reuters Practical Law Arbitration Blog, 05 July 2018.

because "extraordinary circumstances" of the Russian-Ukraine Conflict.[727]

In a Swiss-seated arbitration, three concepts could excuse performance, two of which are case law driven: *force majeure*, subsequent objective impossibility, and change of circumstances.[728] Whether such defences will be accepted by a tribunal, will depend on the terms of the contract, the impact of the sanction on the contract, and their treatment under law.[729]

Rules of legal interpretation are that *lex specialis* takes precedence over *lex generalis*. Thus, while price review mechanisms of gas contracts are *lex specialis,* the *force majeure* and hardship defences are *lex generalis*. Whether disputing parties, if the Gas Price Cap or the Russian rouble decree is applied, will rely on *lex specialis* or *lex generalis* will be determined, not only on the wording of the specific clause of a contract and case strategy but also in the difference between their application.

However a nuanced determination that merits consideration is whether sanctions fall within the doctrine of "*rebus sic stantibus*", which calls for the adaptation or termination of a contract when unforeseeable or extraordinary circumstances renders a contractual obligation extremely burdensome.[730] Differently put, are sanctions hardship events which activate the price review mechanism of GSAs?

Or should sanctions be considered *force majeure* events under the Roman law doctrine of "*impossibilium nulla est obligatio*" i.e., no obligation to perform impossible things?[731] After all, while sanctions may not form part of State public policy, they are mandatory rules of law forming a State's foreign policy and are definite government interventions outside the control of commercial parties. For example, oil trade between Russia and Europe at previous volumes is unlikely given the European Commission President Ursula von der Leyen's statement that the EU plans to ban 90% of all Russian oil imports by the end of 2023.[732]

Below is an assessment of both doctrines specifically under Swiss law.

A. Force Majeure Versus Hardship

The term "*force majeure*" derives from the French for 'greater force' or "irresistible compulsion or coercion". The Oxford English Dictionary of Law defines it as:

> *"the phrase used in commercial contracts to describe events possibly affecting the contract which are completely outside the parties' control. Such events may include acts of God, fires, failure of suppliers or subcontractors to supply the supplier under the agreement, and strikes and other labour disputes that interfere with the supplier's performance of an agreement. An express clause would normally excuse both delay and a total failure to perform the agreement".*[733]

The objective of *force majeure* clauses is to allow both contracting parties to bring the contract to an end or excuse performance of the contract, either entirely or partially or suspend performance, on the occurrence of specified circumstances beyond their control. *Force majeure,* therefore, acts as a form of contractual safeguard against supervening and unexpected events.[734]

The term "hardship", on the other hand, typically refers to situations where a significant change in circumstances leads to a fundamental disruption of the contractual balance of interest between parties on account of

727 C. Parker, *Russia's Gazprom sends force majeure letter to European clients*, Washington Post, 19 June 2022.

728 White and Case, *In brief: energy contract performance and liability in Switzerland*, Lexology, 28 February 2023 (available at https://www.lexology.com/library/detail.aspx?g=4741bf43-2e71-4df1-b411-3e88afafbfae, accessed 12 August 2023).

729 C. Shah and K. Mahajan, *Implications of economic sanctions on international arbitration*, Thomson Reuters Practical Law Arbitration Blog, 05 July 2018.

730 I. Schwenzer, *Force Majeure and Hardship in International Sales Contract*, 2008, p. 709.

731 *Ibid*, p. 709.

732 BBC News, *EU to ban almost 90% of Russian oil imports by 2023 - Ursula von der Leyen*, e 31 May 202 (available at https://www.bbc.com/news/av/world-europe-61645756, accessed 10 May 2023).

733 Dictionary of Law, Oxford University Press, Market House Book ltd 1997 in H. Kunarski, *Force Majeure and Hardship Clauses in International Contractual Practice*, 2003(4) Int'l Bus. L.J., pp. 405-428.

734 D. Fairgrieve and N. Langlois, *Frustration and Hardship in Commercial Contracts: A Comparative Law Perspective*, The Jersey and Guernsey Law Review, 2020, pp. 142, 143.

a supervening event.[735] Hardship encompasses situations where performance is radically more onerous or less profitable for a party.[736] Whilst performance is possible in theory, its execution requires efforts or costs unrelated to a parties initial commitment, and in hardship situations the decisive question is whether changed circumstances have rendered the contractual performance excessively onerous.[737]

A *prima facie* review of *force majeure* and hardship clauses suggest that the two doctrines have a common link: the occurrence of unforeseeable and usually unavoidable events. They both aim to protect contracting parties from such events, and are usually recognised as legal grounds for exemption from contract performance, particularly in long-term contracts. They differ, however, in their scope and application. [738]

Normally hardship means that, although it becomes onerous and costly to one party to perform its obligation, it is still possible. *Force majeure* indicates an event or circumstance, irrespective of whether it was foreseeable or unforeseeable (depending on applicable law) during the contractual period, which the claiming party cannot overcome, resulting in the impossibility of compliance and hence allows for suspension of performance or termination of the contract.[739]

Force majeure and hardship in the context of GSAs are discussed below.

B. Force Majeure

GSAs usually contain detailed *force majeure* clauses which release parties from their obligations in certain specific circumstances. These clauses:

i. Precisely define the circumstances which are deemed *force majeure* events and release the parties from their obligations.[740] Typically, this is referred to as a triggering event, encompassing a wide range of circumstances such as: war, riot, natural disasters, acts of God, terrorist attacks, famines, strikes, ***embargo***, epidemic, plague, civic disturbance and ***government action.***[741]

ii. Provide for an impact of such event along with the causation,[742] covering aspect such as foreseeability and the event being beyond the control of the parties.[743]

iii. Impose certain obligations like notice and reporting duties by the affected party.[744]

iv. Give the other party termination rights if the *force majeure* extends over a determined period of time.[745]

However, there are differences between the common law and civil law legal systems. In common law there is no precise definition of *force majeure*, and parties' coverage under it is purely based on the contract terminology. In contrast, in civil law, *force majeure* is a mandatory legal rule which operates independently of contract, and even

735 C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, pp. 392-393.

736 *Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship*, in M. Azeredo da Silveira (ed.), Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation (2014), p 322.

737 C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, pp. 392 – 393.

738 T. Abdulla A.Q.Al-Emadi, *The hardship and force majeure clauses in international petroleum joint venture agreements*, Oxford Student Legal Research Paper Series Paper number 02/2011, July 2011, p. 4.

739 H. Wei, *Liabilities and remedies of the changed circumstances caused by the COVID-19 in construction projects around the world*, 2020(55) Revista Derecho & Sociedad, pp. 367-382.

740 M. Iynedjian, *Gas Sale and Purchase Agreements under Swiss Law*, 30(4) ASA Bull., 2012.

741 ICC, ICC Force Majeure and Hardship Clauses, 24 March 2020.

742 D. Fairgrieve and N. Langlois, *Frustration and Hardship in Commercial Contracts: A Comparative Law Perspective*, The Jersey and Guernsey Law Review, 2020, p. 142.

743 ICC, ICC Force Majeure and Hardship Clauses, 24 March 2020.

744 M. Iynedjian, *Gas Sale and Purchase Agreements under Swiss Law*, 30(4) ASA Bull., 2012.

745 *Ibid.*

in the absence of specific contractual provisions, parties remain statutorily protected.[746]

Interestingly, Swiss law recognises *force majeure* even though it is not expressly provided in the SCO.[747] Swiss case law considers *force majeure* as an extraordinary, unforeseeable and insurmountable external event which prevents the performance of the obligation,[748] interrupting the causal link between the breach of the contract and the damage caused by such violation.[749]

Although for a Swiss seated international arbitration, PILA would be applicable and opposed to domestic law, unless expressly chosen by the parties, it can be recalled that parties tacitly choose Swiss law when making Switzerland as the seat. It is also the third option to determine the validity of an arbitration agreement under Article 178, paragraph 2.[750]

Generally, the claiming party needs to establish causation wherein it must show that its non-performance is the result of the *force majeure* event instead of any unrelated circumstance.[751] Under Swiss law specifically, contractual liability is fault-based,[752] and if the debtor can prove the absence of fault because the non-performance has been caused by *force majeure*, then the debtor is free of liability.[753]

Such absence of fault is where the performance of debtor's contractual obligation becomes "objectively" impossible by subsequent circumstances not attributable to the debtor,[754] and beyond its control unless provided otherwise by the contract. In these cases payment is no longer required under SCO, Article 119.[755] However, SCO, Article 185 provides that the buyer (European gas companies) must pay the agreed price even if the seller's (Gazprom's) obligation is discharged.[756]

Under SCO, Article 185 (2) when a seller cannot perform due to *force majeure* the purchaser must still pay the agreed price only if the delivery of the sold object has become impossible after either the sold object has been segregated by the seller, or if the sold object was to be shipped after its remittance by the seller to the transporter.[757] In other words, if the gas is not already prepared or in the process of being shipped at the agreed-upon delivery time, it is deemed impossible for the seller to fulfil the timely-delivery as per the contract, and hence be discharged from its obligations, if such delivery failure is without the seller's fault.

Although, SCO Articles 119 and 185 are not "compulsory law", the commonly set forth *force majeure* clauses in GSAs are usually consistent with them and any detailed provisions in GSAs which deviate from this regime are in principle, valid and enforceable.[758]

An application of Article 119 is found in a 1985 Federal Tribunal decision where a Swiss company agreed to build and deliver the atomic installation 'Mini 8067' to Pakistan. Subsequently, the Federal Office of Energy

746 H. Wei, *Liabilities and remedies of the changed circumstances caused by the COVID-19 in construction projects around the world*, 2020(55) Revista Derecho & Sociedad.

747 White and Case, *In brief: energy contract performance and liability in Switzerland*, Lexology, 28 February 2023 (available at https://www.lexology.com/library/detail.aspx?g=4741bf43-2e71-4df1-b411-3e88afafbfae, accessed 12 August 2023).

748 FTD 102 Ib 257, c 5 in https://www.lexology.com/library/detail.aspx?g=4741bf43-2e71-4df1-b411-3e88afafbfae, accessed 12 August 2023.

749 C. Wilhelm, *Force Majeure in Swiss Contract Law: Caution*, Wilhelm Gilliéron Avocats, 10 June 2020 (available at https://www.wg-avocats.ch/actualites/droit-des-contrats/force-majeure-suisse/, accessed 12 August 2023).

750 Ch. Müller and O. Riske, *Article 178 PILS – Commentary*, in M. Arroyo (ed.), Arbitration in Switzerland – The Practitioner's Guide (2nd ed., 2018), p. 83.

751 D. Fairgrieve and N. Langlois, *Frustration and Hardship in Commercial Contracts: A Comparative Law Perspective*, The Jersey and Guernsey Law Review, 2020, p. 142.

752 Swiss Code of Obligation, Article 97.

753 C. Wilhelm, *Force Majeure in Swiss Contract Law: Caution*, Wilhelm Gilliéron Avocats, 10 June 2020.

754 L. Azaria and B. Rigaudeau, *Coronavirus: A Force Majeure Event Under Swiss Law?*, *LALIVE*, 05 March 2020 (available at https://www.lalive.law/coronavirus-a-force-majeure-event-under-swiss-law-2/, accessed 02 August 2023).

755 MME Legal Tax Compliance, *Force Majeure in Contract Law*, Lexology, 06 April 2020 (available at https://www.lexology.com/library/detail.aspx?g=13f67ad3-aeb4-44be-9ec5-a23e7b91aa5e, accessed 02 August 2023).

756 M. Iynedjian, *Gas Sale and Purchase Agreements under Swiss Law*, 30(4) ASA Bull., 2012.

757 *Ibid*.

758 *Ibid*.

(**"FOE"**) imposed a ban on the delivery of a similar installation '8062 Micro', and the seller did not perform its obligation on the ground that it has become impossible to do so under CO, Article 119.[759]

The Federal Tribunal rejected this argument and pointed out that the debtor is responsible for the legal impossibility of performance where they knew (or should have known), having investigated the matter with due diligence at the time of conclusion of the contract, that the circumstances preventing the proper performance could arise. In this case, the adoption of such a ban was foreseeable for the debtor because the provisions of the law gave the FOE the right to impose such a ban at any time, which a nuclear technology exporter must always expect.[760]

1. The Test of Foreseeability and Risk Assumption

A normal rise or decline in prices can be a result of normal market supply and demand fluctuations, and is the type of event which most reasonable businesses are usually cognisant of, even if they cannot anticipate exact price fluctuations. However, a marked increase or decrease in cost caused by an oil embargo, general strike, or government-imposed rationing and restrictions are contingencies which might be so remote as to indicate the parties' lack of awareness,[761] and hence unforeseeable.

Will the Gas Price Cap or the March 2022 Rouble Decree be interpreted as foreseeable?

Foreseeability in *force majeure*, is predicated on the assumption that a party has assumed the risk of the supervening event by failing to provide for it. However, it does not distinguish between risks of the supervening events that a party actually anticipates and risks it should have anticipated.[762] Whilst businesses may attempt to forecast future developments, their efforts can be rendered futile by an adjudicator's *ejusdem generis* construction of the clause.[763]

Specifically given the "catch-all" provisions of non-specific language inserted in the clauses which are of significant external events but remain subject to ordinary rules of construction, such as "*and similar events beyond the reasonable control of the parties*" or "*or any other such causes beyond the control of the parties*".[764] Arguably, contractual flexibility also establishes a lower bar so that clauses may merely require that the performance becomes "impracticable", "delayed", or "hindered"[765] for *force majeure* to be triggered.

Therefore foreseeability and risk assumption are closely interlinked, *i.e.,* whether the event was foreseeable in the sense that the contractual parties had envisaged or assumed that risk, and agreed which party would bear its burden.[766] An examination of this aspect requires an assessment of the nature of the risk, the terms of the contract, the surrounding circumstances and parties' intent, all of which is a fact-intensive exercise.[767]

The treatment of legal impediments by acts of public authority, such as trade restrictions, boycotts, sanctions, embargoes are of importance in international commerce and varies, transnationally. Under German and Swiss law, a temporary impossibility of performance is to be equated with a permanent impossibility if, at the time of the occurrence of the impediment, it is not foreseeable whether or when a particular impediment will cease to exist.[768]

759 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space (2021), p. 313.

760 A. Kotelnikov, *Chapter 17: Contracts affected by economic sanctions, Russian and international perspectives*, in A. Aseeva and J. Górski (eds.), The Law and Policy of New Eurasian regionalization: Economic intergration, trade and investment in the post-Soviet and Greater Eurasian Space (2021), p. 313.

761 C.G. Brown, *The Doctrine of Impossibility of Performance and the foreseeability test*, 1975(6) Loyola University of Chicago Law Journal.

762 C.G. Brown, *The Doctrine of Impossibility of Performance and the foreseeability test*, 1975(6) Loyola University of Chicago Law Journal, p. 580.

763 *Ibid*, p. 581.

764 D. Fairgrieve and N. Langlois, *Frustration and Hardship in Commercial Contracts: A Comparative Law Perspective*, The Jersey and Guernsey Law Review, 2020, p. 142.

765 *Ibid*, p. 142.

766 C.G. Brown, *The Doctrine of Impossibility of Performance and the foreseeability test*, 1975(6) Loyola University of Chicago Law Journal, p. 587.

767 *Ibid*, p. 585.

768 C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, p. 252.

Hence, if it is not foreseeable when an export embargo will be lifted, it is generally unreasonable to merely suspend seller's performance. Where temporary impediments amount to a permanent impossibility, the obligor's performance obligation will be extinguished by law and will not become effective again even if the impediment ceases to exist before the contract term ends. In particular, if performance becomes impossible due to war, then although it is a temporary impediment, it is treated as a permanent one because of the fundamental difference between the obliger having to effect performance now or only after an unforeseeable end of the war.[769] It appears that the Russian-Ukraine Conflict is likely to interpreted as a permanent impossibility discharging gas buyers and sellers from their GSA obligations.

a. Alternate Performance Method

Common law courts have held that rights affected by governmental interference should be equitably adjusted so that the benefits of compensation by the Government or the losses incidental to the activity of the Government may be equitably divided between the contractual parties.[770] For example, when the question of alternative manner of contract performance was before the English Court of Appeal, in *MUR Shipping BV v RTI Limited,* an award passed by the LMAA arbitrators under English Arbitration Act 1996, was restored.[771]

The issue before the court was whether the shipowner, MUR Shipping BV, as the party invoking the excuse of *force majeure* under a Contract of Affreightment ("**COA**") against the charterer, RTI Ltd, could resist an offer of alternative performance that departed from the contractually specified method.[772]

The 2016 COA was for the monthly carriage of bauxite from Guinea to Ukraine over a period of 2 years. In 2018, the majority owner of RTI was sanctioned, while RTI was not. Subsequently MUR sent a *force majeure* notice to RTI, which RTI rejected. RTI protested that the sanctions did not preclude performance of the COA and instead sought to make payments in Euros as opposed to the COA mandated USD. RTI also offered to bear any additional costs or exchange rate losses in converting Euros to USD, which MUR refused.

The mixed question of law and fact before the Court was whether COA's *force majeure* clause could include accepting payments in Euros instead of USD. Not concerning itself with general legal propositions, the court restricted itself to the COA clause on *force majeure* and "reasonable endeavours". They held that, given the COA's specific terminology, however reasonable a party's endeavours may be, they would be irrelevant if they did not result in overcoming the event or state of affairs in question. Where "event" was defined as something which happens at a particular time and place (like sanctions), while "state of affairs" was the situation which results from the happening of one or more events (i.e. the delay in making dollar payments).

The burning issue now remains, whether the mandated Roubles payment for gas supplies will be accepted based on contractual wording, or does it trigger force majeure and eventual suspension/termination. The November 2022 Gasum award provides insight. Although Gasum was found not obligated to pay in Roubles instead of euros, a finding was returned that Gazprom was owed more than €300million for unpaid gas and was entitled to cut-off gas supplies pursuant to the Russian decree.[773]

769 For German law see BGHZ 83, 197, 201 (1982) BGHZ83, 197, 200 (1982) ('Dabei ist die Frage, ob ein Leistungshindernis zu einer dauernden oder nur vorübergehenden Unmöglichkeit führt, nach dem Zeitpunkt des Eintritts dieses Hindernisses zu beurteilen.'); Löwisch, in Staudinger, § 275 BGB para. 47; Neumann, 309. Yet the development after the occurrence of the impediment may nevertheless be considered in the context of the assessment at the time of the occurrence of the impediment (Medicus, FS Heldrich, 356); Löwisch, in Staudinger, § 275 BGB para. 43-44 and references there; Neumann, 307 ff. (specifically regarding embargos); Medicus, FS Heldrich, 354; for Swiss law see Swiss Federal Tribunal, 24.04.2001, s. 4 (not published in BGE 127 III 300, discussed infra pp. 477, 478) ('Wegfall zumindest nicht abzusehen ist'); Swiss Federal Tribunal, 12.11.2003, 4C.344/2002, s. 4.2 ('unforeseeable duration [of an impediment] ... may be assimilated to a durable impossibility'); Sulzer, AJP 2003, 993; see also von Tuhr/Escher, 96-97; Aepli, in Zürcher Kommentar, Art. 119 CO para. 123; Wiegand, in Basler Kommentar, Art. 97 CO para. 16 in C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, p. 252.

770 W. Conlen, *Intervening impossibility of Performance as Affecting the obligations of contracts*, 1917(1) University of Pennsylvania Law Review, p. 29. This may not be the case when the State or a State-owned entity are parties to the contract.

771 *MUR Shipping BV* v *RTI Ltd* [2022] EWCA Civ 1406.

772 R. Dawson, *MUR Shipping BV v RTI Ltd*: Force majeure and reasonable endeavours, Lexology, 04 November 2022 (available at https://www.lexology.com/library/detail.aspx?g=d40186f7-2e47-4c74-8852-47e13c7c5f77, accessed 02 August 2023).

773 J. Ballantyne, *Czech energy group brings ICC claim against Gazprom*, GAR, 10 February 2023.

b. Force Majeure?

In the English case of *Thames Valley Power Limited v Total Gas and Power Limited*[774] the defendant sought discharge of its obligations under the GSA through *force majeure.* The GSA was a long-term contract for physical delivery of gas in accordance with certain conditions. The unforeseen supervening event being claimed was Total's exposure to increases in gas prices, specifically the difference between the price it had to pay in the market for the gas to be supplied to the plaintiff and the contract price. According to Total, the price was so high that Total could only perform the contract at a degree of loss that was beyond the parties' contemplation at the time of signing.

Interpreting the clause of the contract, the English High Court held that the price increase was not so high as to be considered an event of *force majeure*. According to the Court, if a company as familiar with effect of fluctuations as Total wished to secure discharge due to price fluctuations, it should have done so explicitly. The risks assumed by Total as the seller, particularly in light of the price escalation clause which provided for increases in the contract price in accordance with formulae based on indices, implied that Total would supply gas to TVPL against payment of the contract price throughout the 15 years and was not entitled to refuse because of exponential price increase.[775]

In *Tandrin Aviation Holdings Limited* v *Aero Toy Store LLC* the English High Court held that even an event as catastrophic as the 2008 global financial crises would not trigger a *force majeure* clause. The defaulting party said that the crises fell within "any other cause beyond the Seller's reasonable control" part of the clause. While dismissing the claim, the court held that *force majeure* will not just apply because a contract became more onerous to perform, even if the cause was an unexpected financial crises.[776]

Basic English position suggests that an unexpected or dramatic financial event like a steep decline in prices will not qualify as *force majeure* and hence parties are encouraged to include price mechanisms, hardship and exclusion clauses.[777]

Force majeure due to either the Gas Price Cap, or the Russian Decree for payments in Roubles, depending on the contract wording, and governing law will have different results. English law governed contracts, will not discharge parties, whereas those governed by Swiss law might just.

c. Hardship

The term hardship is not a fixed legal concept in each jurisdiction, but rather a collective term in English to describe the situation of fundamentally changed circumstances that render "performance of the contract obligation much more burdensome so that continued performance by the party impacted becomes an undue hardship".[778]

Arguably, the principle applies across jurisdictions because it is set forth in the UNIDROIT Principles of International Commercial Contracts and because similar principles exist in different legal orders, such as *wegfall der Geschaftsgrundlage* in Germany, *imprévision* in France, frustration of purpose in England.[779]

Hardship in Swiss law is not statutory but case law driven. The doctrine, equivalent to *clausula rebus sic stantibus,* is predicated on good faith principles found in Article 2 of the Swiss Civil Code.[780] Indeed, authors have interpreted that even in the absence of a contractual provision regulating a hardship situation, the applicability of

774 *Thames Valley Power Ltd v. Total Gas & Power Ltd*, [2006] 1 Lloyd's Rep. 441.

775 *Ibid*, para. 50.

776 A. Williams, *Market volatility driving oil prices*, HFW, November 2014.

777 *Ibid*.

778 F.R. Fucci, *Hardship and Changed Circumstances as grounds for adjustment or non-performance of contracts*, Practical Considerations in International Infrastructure and Finance, American Bar Association Section of International Law Spring Meeting, April 2006, p. 3.

779 H. Wei, *Liabilities and remedies of the changed circumstances caused by the COVID-19 in construction projects around the world*, 2020(55) Revista Derecho & Sociedad.

780 Swiss Civil Code, Article 2; C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, pp. 394–395; C. Chappuis, *Commentaires des art. 2 et 304-306 CC*, in P. Pichonnaz et al. (eds.), Commentaire Romand Code Civil I (2010), Article 2 N 56, fn 228 with reference to ATF 122 III 97, c. 3a; ATF 100 II 345, c. 2b; ATF 93 II 185, c. 4 i.f.

clausula rebus sic stantibus will be premised on good faith for filling-in contractual gaps.[781]

For hardship to be triggered under Swiss law, there must be a new, extraordinary, unforeseeable change in circumstances after conclusion of the contract,[782] which is of such nature so as to cause excessive burden to the debtor, to the extent that risk allocation is no longer bearable for one of the parties, despite all attempts at contract renegotiation and adaptation in good faith.[783]

Although generally, the Swiss legal system does not provide the possibility for parties to adapt a contract due to unforeseen changed circumstances, there are some very limited exceptions which allow a party to discharge its contractual obligations "where its performance is made impossible by circumstances not attributable to the obligor".[784] The Federal Tribunal has ruled that a change in circumstances surrounding a contract maybe a ground for modification or even if termination of the contract, if the change results in a blatant and excessive disproportion of the respective obligations of the parties (*clausula rebus sic stantibus).*[785]

Arbitral practice tends to follow the same approach. [786] The PILA does not contain an express provision addressing the arbitral tribunal's authority to adapt or supplement a contract.[787] However, in 2001, the Federal Tribunal held that a Swiss seated arbitration could have the jurisdiction and the power to fill gaps or to adapt a contract, even in the absence of an express authorization from the parties to do so.[788]

The question remains of the possible interaction between hardship and the price review mechanism.[789] Considering their extensive history, price review mechanisms are rarely omitted in GSAs, and therefore two possible interactions between hardship and price review mechanism can be, either both hardship and price review clauses are provided for in the contract (**"Scenario I"**), or there is a provision for price review mechanism but without a hardship clause (**"Scenario II**"). Both of these are explored in turn.

a. Scenario I

Clearly defined hardship clauses typically identify that where the continued performance of a contact has become extensively onerous due to an event beyond the parties' control, the party is allowed to negotiate alternative contractual terms. In other words, they are inserted to mitigate effects of extraordinary unforeseeable events.[790]

Contrary to price revision clauses, hardship clauses can be triggered at any time and cover all rights and obligations of the parties arising under the contract, not just price. They are designed to readapt the entire contractual equilibrium, modify the original bargain pursuant to a changed circumstance. They envisage a complete rebalancing.[791] However, for this very reason, hardship clauses also give way to price revision provisions which prevail in any modification of the price indexation formula in a long-term energy contract. Even though they remain applicable for modification of other contractual terms.[792]

781 C. Chappuis, *Commentaires des art. 2 et 304-306 CC*, in P. Pichonnaz et al. (eds.), Commentaire Romand Code Civil I (2010), Article 2 N 56, fn 227 with reference to ATF 57 II 368, c. 3; ATF 51 II 303, c. 4.

782 P. Tercier and P. Pischonnaz, *The Law of Obligations* (2012), p 48, with reference to ATF 107 II 343 c. 2, p 347; ATF 69 II 139 c. 4b p 144; ATF 59 II 373 c 4.

783 P. Tercier and P. Pischonnaz, *The Law of Obligations* (2012), p. 221, para 979b.

784 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 7.

785 S. Nessi, Price Revision in Long Term Energy Contracts: when is it possible to adjust prices or modify the terms of a long-term energy contract under Swiss law?, in C. González-Bueno (ed.), 40 under 40 International Arbitration (2018), pp. 385-397.

786 *Ibid*.

787 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 7.

788 Swiss Supreme Court, Decision 4P.114/2001 dated 19 December 2001, see also S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 8.

789 S. Nessi, *Price Revision in Long Term Energy Contracts: when is it possible to adjust prices or modify the terms of a long-term energy contract under Swiss law?*, in C. González-Bueno (ed.), 40 under 40 International Arbitration (2018).

790 *Ibid*.

791 *Ibid*.

792 *Ibid*.

b. Scenario II

If parties have not included an express hardship clause and only a price review mechanism, in that situation parties have only agreed to a specific procedure for price revision but not an overall modification or adaptation of the entire contract even if there was a sufficient enough "changed circumstance". In other words, they did not intend for a complete reshuffle of their general obligations, irrespective of any changed circumstances and only allowed for a price review.[793]

In this context, authors argue for the possibility of relying on the *lex causae* and through the chosen governing law, the applicability of *clausula rebus sic stantibus.*[794] The presumption being that in choosing the governing law, parties have impliedly allowed for the possibility of contract renegotiation and adaptation of even the general terms, through the doctrine *clausula rebus sic stantibus,* if it is recognised in that jurisdiction.

In international arbitration the tribunal's authorization and its procedural competence to adapt contracts and fill gaps, is distinguishable from the substantive requirements and validity of that decision.[795] Ideally, it is the law applicable to the substance of the dispute which has to be consulted to decide on the methods of adaptation that shall be applied by the arbitrators if the contract does not contain specific instructions for such modification by the tribunal.[796]

Whether an arbitral tribunal has the jurisdiction under the *lex arbitri* to adapt a contract through hardship principles without express contractual provisions, despite meeting the applicable substantive law threshold,[797] is arguable. It is also an aspect that a London seated tribunal deciding on a Swiss law governed GSA might very well come across.

Presumably, the answer would depend on whether the issue is characterised as substantive or procedural.[798] Since, if Swiss law is the *lex causae*, then the tribunal will be vested with the power to adapt the contract by placing reliance on doctrines of good faith and abuse of rights,[799] to carry out any modification through application of hardship principles. However, the English courts, which have historically rejected the notion of relief for changed circumstances that does not amount to impossibility,[800] may choose to not recognise the award as enforceable.

If Swiss law is the *lex arbitri*, then the contract can be adapted either by termination or performance **without** adaptation to the new circumstances.[801] This is done to prevent an arbitrator from acting in a legal vacuum specifically when *lex arbitri* allows contractual interference by the arbitrator, but the *lex causae* does not.[802]

From the above, a Swiss seated tribunal ruling upon a price modification and contract adaptation dispute between the parties under a Swiss law governed GSA, is likely to award in favour of modification, depending on the words of the contract. While, a Swiss seated tribunal ruling on an English law governed GSA may very well have to restrict its award to either terminating the GSA or performance without modification. The verdict will be trickier to assess in the reverse.

In a Gas Price Cap dispute, only the price adaptation, would be governed by the price review mechanism of the contract for the pricing issue. However, other potential disputes relating to the changed circumstances (sanctions and other potential material breaches) which make the overall performance of the contract onerous for

793 *Ibid.*

794 *Ibid.*

795 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 13.

796 *Ibid.*

797 C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, p. 493. See also S. Nessi, *Price Revision in Long Term Energy Contracts: when is it possible to adjust prices or modify the terms of a long-term energy contract under Swiss law?*, in C. González-Bueno (ed.), 40 under 40 International Arbitration (2018).

798 S. Nessi, *Price Revision in Long Term Energy Contracts: when is it possible to adjust prices or modify the terms of a long-term energy contract under Swiss law?*, in C. González-Bueno (ed.), 40 under 40 International Arbitration (2018).

799 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 13.

800 C. Brunner, *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, 2009, p. 409.

801 S. Dolea, *Determination of the price in Gas Price Review Arbitration*, Gas Price Arbitration Handbook, Cartea Juridicia, 2020, p. 14.

802 *Ibid*, p. 15 (emphasis added).

the affected party will be determined not only on the wording of the contract but also the governing law and the *lex arbitri*.

V. Conclusion

The mandatory nature of sanctions, although not public policy, do form part of domestic law, and international arbitrators will be obliged to consider, if not directly apply, the pertinent sanctions regime. As restrictive economic measures aimed at achieving political objectives, the main purpose of sanctions is to impose difficult conditions on a State, usually resulting in instances of hardship.

Hence, even when there are existing contractual terms, sanctions can be seen as a significant and unexpected change in circumstances that upsets the equilibrium of the contract, requiring either renegotiation and contract modification to restore fairness, or suspension/termination under *force majeure*, depending on the circumstances, wording of the contract, applicable law and of course the seat of arbitration.

The Gas Price Cap by virtue of being a market correction mechanism, mandates payments for gas supplies based on a regulated gas index, is designed to limit and protect against rising gas costs and therefore is seemingly at odds with party autonomy to contract, which allows for a price review mechanism under the GSAs. It is applicable on EU and Swiss buyers as domestic law but Gazprom, as a Russian entity, is under no obligation to observe it and any disputes thereunder are likely to face jurisdictional challenge in light of Russian Amendment to Commercial Code.

Ideally, depending on contract wording, the parties' recourse to a price fluctuation such as the 2022 energy crises, should have resulted in triggering the price review mechanism without necessitating government intervention. Instead the predominantly preferred remedy was *force majeure* principally driven by the exclusion of Russian banks from SWIFT.

From an objective standpoint, the question arises as to whether Gazprom had a viable course of action when faced with the situation of supplying gas without receiving payment. Alternatively, considering the SWIFT exclusion, it maybe contemplated whether Gazprom had any alternative choices besides seeking payment in Roubles for gas it had already supplied or, in certain instances, continued to supply.

Be the above as it may, the dynamics of future gas arbitrations is undergoing significant transformation and its potential impact within the established gas matrix and legal framework presents a compelling picture. The recent spate of arbitrations signals an onset of the long night of arbitrations against Russia and by all accounts the litigious war over gas has only just begun.

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