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KLC's News

I. Editorial

“Editor’s note: War in Ukraine and Arbitration”

The war in Ukraine and its domino effects in terms of sanctions and Russian countermeasures and the global energy crisis has fundamentally shook international relations and trade. International arbitration, obviously could not be left intact. This explosive mix of unprecedented events has opened the floodgate to a wide array of direct and indirect ramifications for arbitration practitioners in several business sectors, while the whole spectrum of side-effects still remains to be seen.

The first pressing issue arising out of the war in Ukraine, are the subsequent sanctions imposed by the broader international community, which, largely, bear a significant impact on Arbitration. International sanctions, i.e. penalties imposed by one country on another, to obstruct it from acting aggressively, or breaching international law, have been imposed during the Russo-Ukrainian War by a large number of countries, including the United States, Canada, and the European Union. In 2022, the EU, in similar lines with US economic sanctions, took four packages of sanctions: (i) full blocking sanctions on a large list of individuals and entities, (ii) prohibition to provide specialized financial messaging services to certain banks, i.e., no longer using SWIFT for certain banks, and to sale, supply, transfer or export bank notes to Russia, (iii) prohibition to invest and co-invest with the Russian investment funds and (iv) ban on exportation of certain products and trade restrictions, especially the luxury goods. Lately, the European Union is to ban all imports of oil from Russia that are brought in by sea. The US is banning all Russian oil and gas imports and the UK will phase out Russian oil imports by the end of 2022. International sanctions, have, obviously, severe side effects to arbitration both legal and practical.

Starting with the first, the obvious question, is when and how arbitral tribunals should give effect to international sanctions. There are three possible ways to “characterize” - and accordingly - apply sanctions:

- 1) To view them as force majeure events: Under this approach, sanctions regimes are considered as part of the applicable law to the dispute. The limitation here is that parties can easily escape sanctions, simply by mutually choosing a different set of laws to be applied.
- 2) To avoid this result, sanctions can be construed as overriding mandatory rules which means that they could apply to the dispute regardless of the parties’ choice of law (see *Banco San Juan Internacional Inc v Petroleos De Venezuela SA* case).
- 3) The third possibility is to characterize sanctions as an “international public policy” rule: arbitrators failing to take sanctions in account would endanger the recognition and enforceability of the arbitral award.



Turning to more practical aspects, sanctions in the form of blocking statutes, affect directly the smooth evolution of arbitration proceedings. For example, if a party to an arbitration is (or is owned or controlled by) a designated person or entity whose assets are frozen pursuant to any of the applicable sanctions schemes, none of this party's assets in the sanctioning state(s) may be transferred, to pay the arbitration costs. Moreover, blocking statutes may bear an effect in the way one party presents its case: there may be new restrictions as to the choice of legal representative or arbitrator (whether arbitrators are capable of acting also depends on their nationality and residence, as well as the seat of arbitration), or regarding the appearance of witnesses and experts before the arbitral tribunal. The problem is pressing, given the fast-growing number of designated persons and entities across a wide range of jurisdictions. This turn of events, obviously underestimates the procedural equality of the parties and may endanger the award as whole and pose the burden (to arbitrators or institutions) to regularly investigate, throughout the proceedings, whether any of the parties to an arbitration is (or is owned or controlled by) a person or entity specifically targeted by a sanctions scheme. Several arbitral institutions, have already adopted such mechanisms; notably, VIAC, has a system of checking public websites, including the official website of the parties and entities involved in the arbitration, as well as internal database by using the screening-off and screening-on functions. Additionally, it requires the parties to provide more information on their identity, the related entities, and the ultimate beneficial ownership.

Another major repercussion, touching upon the field of arbitration, are the bans of the Russian athletes and teams from international sports competitions due to of the war in Ukraine, including the World Cup in Qatar (FIFA ban). Russian sports organisations appealed to the Court of Arbitration for Sport over such bans. CAS dismissed the Russian Football Union's (RFU) bid for an urgent interim ruling to freeze the football ban, highlighting in its reasoning, competition integrity and security concerns.

Not least, the war in Ukraine has had noteworthy effects in the field of Investment Arbitration. Many foreign companies operating in Russia have ceased or temporarily put on hold their business activities. In response, the Russian government adopted several retaliatory measures, directed primarily against companies from designated "unfriendly countries". Obviously, such measures have a direct effect on foreign investors, giving rise to investor-state dispute settlement (ISDS) proceedings. The obvious resort would be a claim for expropriation under the BITs, that Russia has entered into with most of such "unfriendly countries". While the "tool" is theoretically available (ISDS claims via BITs), its application in practice by Investment Arbitration tribunals is expected to raise a multitude of interpretation issues and the enforcement of such investment awards will certainly be a challenging task, in the face of the blocking statutes in place, freezing Russian assets.

These "side-effects" were only the tip of the iceberg, in the face of effects to international trade and arbitration that have started unravelling, such as the energy crisis, commodities price increases and inflationary pressure, which are bound to give rise to a multitude of arbitration disputes.

Arbitration is perfectly suited, in view of its flexibility and adaptability as an institution, to adequately address such global challenges.

KLC Arbitration Team

II. Arbitration Selected Alerts

Construction & Infrastructure Industry

Fluor sees off bulk of claim over Belt and Road project

An ICC tribunal in Houston has dismissed the bulk of a US\$42 million claim against Texas-based construction group Fluor over deliveries for a Belt and Road refinery project in Kuwait.

To read the full article, click [here](#).

Shell and Exxon bring claim against Netherlands over earthquake costs

Shell and ExxonMobil have filed for arbitration against the Netherlands over their liability for billions of euros in earthquake damage caused by extraction from a gas field in the province of Groningen.

To read the full article, click [here](#) and for more “inside” information, [here](#).

Energy Industry

Spain fails to annul NextEra v Spain ICSID award

An ICSID committee has upheld the largest award yet issued against Spain (NextEra award) over its renewable energy reforms, rejecting arguments that the investor had “unclean hands” or that the tribunal should not have agreed to hear an intra-EU dispute.

To read the full decision of the Annulment Committee, click [here](#).

Edison loses award challenge in environmental dispute

A Swiss court has upheld an ICC award requiring Italian power utility Edison to pay over €91 million to Belgian chemicals producer Solvay for breaches of for breaching environmental representations and warranties in the sale of the Spinetta Marengo and Bussi sul Tirino sites in Italy to the Belgian group in 2001.

For more information, click [here](#).

Ukraine's Naftogaz starts pre-arbitration procedure against Russia's Gazprom over transit fees

Ukraine's state-owned oil and gas company Naftogaz has launched a pre-arbitration procedure against Gazprom for underpayment of gas transit fees.

For more information, click [here](#) and [here](#).

Renewables claim against Germany clears early hurdle

An ICSID tribunal has refused to throw out an Irish renewables group's Energy Charter Treaty claim against Germany on an expedited basis in light of the European Court of Justice's recent ruling on intra-EU arbitration in Komstroy.

To read the full article, click [here](#).

Peru contemplates arbitration claim against Repsol over oil spill

Peru has said it is contemplating international arbitration against Spanish energy company Repsol after declaring an environmental emergency over a massive oil spill off the country's coast (La Pampilla refinery over oil spill).

For more information, click [here](#).

Polish utility brings fresh claim against Gazprom

Polish state gas company PGNiG says it has launched a fresh arbitration against Gazprom concerning interest on overpayments for gas supplied over a six-year period.

To read the full article, click [here](#).

Gazprom Export seeks arbitration against PGNiG over contract price

Russia 's Gazprom Export said on Friday it was seeking international arbitration against PGNiG for a contract price revision, a demand the Polish state-owned gas monopoly said it would fight in court To read the full article, click [here](#).

Albania faces claim over gas turbine power plant

Albania is facing an Energy Charter Treaty claim by an Austrian engineering company over a failed power plant project – as the state sees a Belgian court issue attachments in relation to an ICSID award won by a group of Italian investors.

To read the full article, click [here](#).

Life Science & Pharma

Genmab loses cancer royalties case against Janssen

Belgian pharmaceuticals company Janssen has defeated a claim brought by a Danish biotech company over royalties due for a blood cancer treatment.

To read the full article, click [here](#).

Austrian pharma group's award partially enforced

A US court has partially enforced an ICC award won by an Austrian pharmaceuticals company against its Taiwanese partner after a €142 million order for damages was set aside in Germany.

To read the full article, click [here](#).

Taiwan pharma group quashes damages award in Germany

The German Supreme Court has set aside a €140 million damages award against a Taiwanese pharmaceuticals company after finding the ICC tribunal violated its right to be heard – in a fight over a blood cancer drug that has spawned a second ICC case worth US\$5 billion and a criminal complaint.

To read the full article, click [here](#).

Bristol Myers moves to enforce transgenic mice award

US pharmaceuticals company Bristol Myers Squibb has asked a US court to enforce an AAA award it won against Switzerland's Novartis over royalty payments due for its use of patented "transgenic" mice to develop therapeutic drugs.

To read the full article, click [here](#).

M&A and Corporate

Alstom requests arbitration for transportation deal claim over €4.4 billion M&A

France's Alstom has filed a request for arbitration before the ICC regarding its acquisition of Canadian Bombardier Transportation. over a €4.4 billion acquisition that closed last year. The French rolling stock manufacturer claimed that Bombardier Inc breached certain contractual provisions of the sale and purchase agreement dated 16 September 2020.

To read the full article, click [here](#).

Bankers fail to revive billion dollar claim against Cyprus

The Paris Court of Appeal dismissed an application for the annulment of an International Arbitral Award, in favour of the Republic of Cyprus concerning FBME Bank. The Lebanese former owners of a bank (FBME Bank Ltd) shut down by authorities in Cyprus after being linked to money laundering and financing terrorism have failed to revive a US\$1.4 billion investment treaty claim against the state.

For more information, click [here](#).

Vietnam media group liable in M&A dispute

A SIAC tribunal has ordered a Vietnamese media group to pay nearly US\$27 million to the Korean buyers of its interest in an electronic payments business that was implicated in an illegal online gambling ring.

To read the full article, click [here](#).

Tech

Ericsson unit threatens claim against Kazakhstan amid criminal probe

A Croatian affiliate of Swedish telecoms equipment maker Ericsson has said it may bring an arbitration against Kazakhstan over a US\$21.5 million contract for a health information platform that has led to criminal proceedings against a former minister.

To read the full article, click [here](#).

Apple wins ICC dispute over confidentiality agreement with headphones maker Koss

An ICC tribunal has ruled that a US headphones maker violated a confidentiality agreement with Apple when it sued the California-based tech multinational giant Koss Corp. for alleged patent infringement over Beats headphones and AirPods.

To read the full article, click [here](#).

Huawei lodged ICSID claim against Sweden over 5G ban

Chinese telecoms giant Huawei Chinese tech initiated arbitration proceedings against Sweden after the Nordic country banned it from rolling out 5G products amid national security concerns.

To read the full article, click [here](#).

Korea's LG wins \$95 mn in damages from Sharp for patent violation

Korea's LG Display can add one-off gain in its income statement as it expects to collect damage compensation of 120 billion won (\$95 million) from Japan's Sharp Corporation upon winning international arbitration over a patent dispute.

To read the full article, click [here](#).

International Commercial Arbitration

Anti-enforcement injunction denied in fight over ship explosion

A UK court has refused to enjoin a German shipowner from enforcing a US\$200 million arbitration award relating to a lethal explosion on a container vessel a decade ago while the ship's charterer pursues litigation to limit its liability for the accident.

To read the full article, click [here](#).

Freezing injunctions against non-signatories in the BVI

Peter Ferrer of Harneys considers a recent British Virgin Islands freezing injunction granted in aid of a foreign arbitration against non-signatories and how it departs from English principles.

To read the full article, click [here](#).

Paris court upholds award against non-signatory

In Société [A] v SNC Legrand and SARL [G], RG no. 20/13575, the Paris Court of Appeal upheld an ICC award extending an arbitration agreement to a non-signatory holding company involved in the performance of a contract signed by its subsidiary..

To read the full article, click [here](#).

Belgian supreme court to rule on tribunal secretaries

Belgium's Court of Cassation has been asked to review a court ruling that found the drafting of an ICC award by a secretary was not an improper delegation of the tribunal's decision-making powers.

To read the full article, click [here](#).

US Supreme Court Limits Section 1782 Discovery in foreign arbitrations

The US Supreme Court has issued a landmark ruling that parties cannot seek discovery for foreign commercial and investor-state arbitration in federal courts. Until now, U.S. participants in international arbitration could face U.S.-style discovery through 28 U.S.C § 1782. This meant they (and third parties) might have to produce documents and face depositions even though they were not in court. That just changed with a decision issued on June 13, 2022, by the Supreme Court that § 1782 does not apply to private international arbitration. That means U.S. companies will no longer face the time, exposure, and expense of U.S.-style discovery that Section 1782 had injected into those proceedings.

To read the full article, click [here](#) and for more information [here](#).

Investment Treaty Arbitration

ICSID Released 2022 Versions of its Rules and Regulations

ICSID has published the 2022 ICSID Rules and Regulations for resolving international investment disputes, which come into effect on July 1, 2022. This is the first amendment to the ICSID rules since 2006, and the most extensive modernization of ICSID procedures in the Centre's history. The arbitration rules further enhance the transparency of ICSID orders, decisions, and awards, while also assisting parties in identifying confidential information and specifying that protected personal information cannot be publicly disclosed.

To access the rules, click [here](#).

Tribunal upholds intra-EU objection in seismic Spain win

For the first time ever an investment arbitration tribunal has upheld a state's intra-EU objection, handing Spain a seismic jurisdictional win in one of the many renewables-related Energy Charter Treaty claims it has faced.

To read the full article, click [here](#).

Poland secures landmark annulment of intra-EU BIT awards

In a landmark pair of judgments, a French court has set aside two intra-EU BIT awards against Poland on the basis of the European Court of Justice's ruling in the Achmea case.

To read the full article, click [here](#).

Three decades after signing, Kyrgyzstan finally ratifies ICSID Convention

To read the full announcement, click [here](#).

EU refers UK to ECJ for enforcement of Micula award against Romania

The Commission has launched infringement proceedings against the United Kingdom before the Court of Justice of the European Union in relation to a judgment of its Supreme Court of 19 February 2020 enforcement of a €178 million ICSID award against Romania.

To read the full EC press release, click [here](#).

Brussels Court Sets Aside denial of justice award

A Brussels court has set aside a US\$10 million UNCITRAL award regarding a claim brought against the Republic of Poland under the US-Poland bilateral investment treaty (US-Poland BIT) that held Poland liable for a denial of justice. This is the first time an investment treaty award has been annulled in Belgium.

To read the full article, click [here](#).

German court refuses to block intra-EU claim

A Berlin court has reportedly refused to declare that an Irish wind power investor's ICSID claim against Germany under the Energy Charter Treaty is inadmissible because it is an intra-EU dispute.

To read the full article, click [here](#).

India seeks to reopen satellite award

India has applied for revision of a US\$140 million investment treaty award won by Deutsche Telekom in a dispute over a cancelled satellite deal – arguing a recent ruling by its own Supreme Court shows the award is “tainted by illegality and fraud”.

To read the full article, click [here](#).

Arbitration in Greece

DEPA v Botaş

Greece’s state-owned gas company Depa has defeated an attempt by Turkish counterpart Botaş to have a Stockholm court set aside a US\$227 million ICC award of 2020 over the price of gas supplied under a pipeline deal. The total amount returned to DEPA’s customers amounted to €120 million. The decision of the Stockholm Court of Appeal puts an end to the commercial dispute between the two companies, which started in 2009, over the adjustment of the contractual price of natural gas.

To read the full article, click [here](#).

Arbitral Institutions

SCC says pandemic has led to caseload dip

The Arbitration Institute of the Stockholm Chamber of Commerce says the coronavirus pandemic has led to a 26% drop in the number of new cases it took on last year, while nearly half of the arbitrators appointed by its board were women.

To read the full article, click [here](#).

PCA names new secretary-general

Polish diplomat Marcin Czepelak has been elected as the next secretary-general of the Permanent Court of Arbitration in The Hague – the first non-Dutch national to hold the role in the institution’s 122-year history.

To read the press release click [here](#) and form more information, [here](#).

CIArb elects new President

UK-based independent mediator Jane Gunn has taken over as president of the Chartered Institute of Arbitrators from Locke Lord partner Ann Ryan Robertson.

To read the full article, click [here](#).

ICC unveils initial figures for 2021

In 2021, the Secretariat of the ICC International Court of Arbitration registered 853 new cases in total, comprising 840 cases filed under the ICC Arbitration Rules and 13 under the Rules of ICC as Appointing Authority. The number is comparable but lower than the record number of filings reported in 2020, according to newly released statistics.

To read the full article, click [here](#).

ICCA taskforce releases a general Report over the right to physical hearing

An ICCA taskforce has wrapped up its investigation into parties' right to a physical hearing in international arbitration, finding that none of the 78 jurisdictions examined expressly guarantee this and courts are unlikely to set aside awards solely based on proceedings having been conducted virtually.

To read the General Report, click [here](#).

LCIA releases Annual Casework Report 2021

The LCIA has revealed it took on fewer cases in 2021 compared with the covid-fuelled high of the year before.

To access the LCIA Annual Casework Report 2021, click [here](#).

New committee for BVI center, of Virgin Islands

After publishing new rules last year, the British Virgin Islands' International Arbitration Centre has announced a new 22-member arbitration committee with members representing the five different regions of the globe.

To read the full press release, click [here](#).



III. KLC's News

4th International Arbitration & Mediation Conference

KLC was present at the 4th International Arbitration & Mediation Conference a leading arbitration conference successfully organised by Nomiki Vivliothiki, the 1st and 2nd of June 2022, in Vouliagmeni, Greece. The first day was dedicated to Mediation: it comprised by the presentation of both the legal aspects and the daily practice of mediation as well as a discussion on the occasion of the two years of implementation of Law 4640/2019. In addition, issues related to family mediation were analysed, with particular emphasis on the position of the child, as well as the framework for the resolution of land disputes through mediation. The second day, was dedicated to Arbitration with a Keynote speaker Franco Ferrari, Professor of Law (NYU), Director of the Center for Transnational Litigation, Arbitration, and Commercial Law, New York. The overriding topic was the drafting of the arbitration agreement. In particular, the meaning, content and types of arbitration clauses were analysed, as well as specific issues arising from mixed/hybrid arbitration clauses and from the extension of the arbitration agreement to non-parties. In addition, issues relating to the conclusion of arbitration agreements with the Greek State were discussed as well as selected recent jurisprudential trends and developments at the international level. The conclusion of the conference was followed by a "conference cocktail by the pool".



Eligible for appointment as arbitrator in bilateral disputes under EU trade agreements with third countries

KLC's Associate, Lito Dokopoulou, has been included in the European Commission's close pool of suitable arbitrators for resolving bilateral disputes under the EU's trade agreements with third countries.

For more information EU Commission's role on BITs and Investment Dispute Settlement with third-countries see [here](#) and for the link to the candidate pool, see [here](#).

Paris Arbitration Week

KLC attended virtually, selected seminars and conferences that took place at the 2022 Paris Arbitration Week on The key industry event dedicated to International Arbitration took place from 28 March to 1st of April in Paris, comprising a week full of conferences and events, dedicated to International Arbitration.

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