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INDIA ADR WEEK 2026 – 10 SEP 2026

SESSION 4

THE GEOPOLITICISATION OF COMMERCIAL DISPUTES: CHALLENGES FOR INTERNATIONAL ARBITRATION

SPEAKERS:

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ALISHA SHARMA: Ladies and gentlemen, we will now begin with our next session for the day. So, if I may, please request everyone to kindly take their seats. I welcome you all once again and I hope you all had a very fulfilling lunch which was graciously organised by ADT Law. We shall now move on to our next session for the day hosted jointly by Numen Law Offices, Oban Partners and the Vienna International Arbitration Centre, commercial disputes rarely arise in isolation from the wider world in recent years, geopolitical developments, shifting alliances, sanction regimes and regulatory divergence among states have increasingly shaped the character of cross-border disagreements. This intersection between the politics and commerce poses a distinct challenge for international arbitration, which has traditionally prided itself on neutrality and insulation from state interests. It is precisely this challenge that our next session sets out to explore in a discussion titled: "The Geo-politicisation of Commercial Disputes Challenges for International Arbitration." With this, the session will be moderated by Professor Dr. Alexander, joined by Ana, Arush, Dr. Crenguta and Dr. Zeina. And I would now request the speakers and the panellists to join us on the stage. Thank you.

PROF. DR. ALEXANDER PETSCHE: So, ladies and gentlemen, thank you for coming back after the lunch, which shows your interest. I'm so grateful and thank you, Arush, for having organised this, you know you are... we have three board members of DIAC sitting here. It's a strong delegation and we are so pleased to be here in this wonderful place. Thank you so much for having us. Before we start, let me do a short... maybe you can close the doors. Let me do just a short introduction. What we are going to talk about. You know that we as lawyers, we have we have learned to adapt very quickly. When I started studying law, nothing changed. I mean, for decades you had your Code of Civil law from the 1700 or 1800 and everything was stable. You had some court precedents and you were, let's say in a kind of stable situation as a lawyer, but we have started to learn and to adapt, especially when COVID came, you remember. Everything changed. Supply chains were disrupted, people could not go to come to work, you could not travel and we had to learn on a daily basis about the new rules, regulations and government decisions so, to say. And then suddenly the next thing came. It was war and sanctions. We were not so much used to have this kind of situations of course we had this old sanctions with regard to Iran and some US sanctions, but for European countries that was just a theoretical question and all of that led to... how to, say, reshape or revive the concept of *force majeure*. *Force majeure*, when you I don't know when you have studied law force majeure, but somewhere in the textbook. It was something which did not apply in practice good to know but nobody used that and *force majeure* became, you know, one of the most important topics in international commercial law. Then we had the sanction regimes and sanction means Counter-sanctions. And I have heard from Arush that India is also planning now to have his own sanction regime. So, the countries are fighting against each other, let's say commercially with sanctions, but this kind of sanctions is not only about trade, it's about business models.

Imagine we have, for example, an Austrian company who wants to invest largely in China and do the production in China, but producing in China means you have to think about where can you export the products? Because there will be some sanctions against Chinese products as well. So, every business the business models are impacted and lawyers are very much asked to solve this kind of problems. I give you another example and then I will introduce my panellists. Another example, if you have one of my cases, if you have as an Austrian company, a Russian supplier and you cannot pay the Russian supplier because one of the owners is a sanctioned person, but the Russian company needs to pursue the claim because of Russian rules. They cannot just keep the claim, they cannot do that, let's say a standstill agreement. They have to go into arbitration and you end up in arbitration and the Tribunal has to decide whether you ought to have to pay and you argue but I'm not allowed to pay under Austrian law because the banks will not do the transaction. So, it's just impossible to fulfil the agreement. So, this kind of issues I think will arrive in international arbitration more and more. We will have majorly two parts. One part is about *force majeure* hardship and adaptation clauses and then in the second part, we will move to sanctions. Of course, things are, so to say, interrelated, but we try to have this kind two topics separated, more or less. Before we start, let me make a short introduction about my panellists to my left, Ana Stanic, she's a UK qualified lawyer so distinguished panel here UK lawyer, Indian lawyer, Swiss-Romanian lawyer, Romanian-Swiss lawyer and a lawyer from the Middle East. So, that's more or less, I would not say the planet but a major part of the planet is represented here. Ana Stanic has her own law firm. She's a distinguished leading Arbitrator all over the places and if you Google her, you will find a European pop star. So, Ana, you can either sing today or make a speech, you can decide. So, then you have you know Arush Khanna, you know him of course he's has organized us like an orchestra and I'm very grateful for that he has built up his own law firm Neuman, which when I watch it closely is developing fantastically and with top lawyers in international disputes congratulations to that.

Then we have my best friend Crenguta Leaua from Romania, she's located in Switzerland, one of the leading Arbitrators in Central and Eastern Europe also professor she was also vice president of ICC etc, etc. It's a long list to mention.

And at the very end we have Zeina Obeid from Dubai. She's a well-known, studied in Paris. I have read all your CV doing a lot of things, especially in international commercial disputes and arbitration. So, my first question goes to Crenguta, now we look into the Central and Eastern European region and we, as Vienna International Arbitration Centre, we would like to offer you Vienna and VIAC as kind of bridge when your companies invest in the region, what is Crenguta, concept of *force majeure* and what do we have to consider when we look into Central and Eastern Europe?

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DR. CRENGUTA LEAUA: Thank you Alexander, also for your kind words. I'm very happy to be here and honoured to address you and please allow me to switch my thinking into imagining that I am you and try to tell you something that I would like to know if I have been in a different position, namely in the audience. And I would like to know first one key sentence about central Eastern Europe and that is diversity. You have very diverse legal systems. What does it mean? It means that you will have a specific type of situation in which after 100km the legal system change and after another 100km, it may change again. And you may invest for a region and therefore you may have to think about understanding all of this. What are the key differences? First of all, the current situation divide Eastern Europe central Eastern European countries into EU members and not EU members. That changes the legislation because you might have EU law applicable or not. Second, you have different historical heritage which means that the case law in the past has been formed through different legal type of schools and legislation because of Austrian-Hungarian Empire influence, French influence, German influence, Turkish influence, the Ottoman Empire, Russian influence; all of them have legal concepts that were specific and all of them are to be found in the old case law. War and *force majeure*, in general, it's not very frequent. And therefore, if one looks for case law, it goes back in time quite a long way and if they look for case law, that they would like to present, that is already a situation that may bring diversity.

Now the first thing that I would like to point out is that in total honesty, what I would do is first of all make sure that I understand how *force majeure* is defined in the country in which I'm going with the investment or in the countries that I am related with the trade. Understand what is the concept there and then make sure that contractually, I address that issue. I just don't put it there because it's *force majeure*, everybody knows what it is no, put it into the contract in a way that is specific enough and clear enough. And therefore I suggest that because of the domestic concepts of *force majeure* and the change of circumstances that may be treated or not treated as *force majeure* in different countries to have it addressed contractually in a broad way in very detailed elements and list the situations that you want to be considered and more of that, list the type of events that you want to fall into a specific situation. Why? Just to give you an example, a recent question that has been placed is: What does war means? War means whatever it has been defined in the public, international law related with the armed forces etc., is a different type of situation that would not use the armed force, but it would use different kind of words like economic war or like type of tensions that are taking place in the cyberspace, etc. What is that? These are alternatives that are modern in a way. And do they fall, do they not fall into the concept? So, one may wish to put that upfront into the contract and make sure they address it clearly because case law will not be addressing that properly and definitions are very broad.

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Then another element that it is also important in Eastern Europe to and central Eastern Europe to look into is: when you have a specific list, is it limitative or is it by the way of example? Because if the contract is not clear, you will find that the interpretation rules of different countries differ, and it is not always given that they have the same order. It's not always given that for instance, the first interpretation is by the common intention of the Parties or by the express wording or it is in the favour of the Debtor or in the favour of, I don't know, maybe consumer. Where do you find the type of reference? And that is something that you may wish to look into and prepare.

And the third point, if I may, when addressing the *force majeure* is to understand that many countries in Eastern Europe do address and some of them by the way of jurisprudence. So, it's a doctrine or a construction and some of them by the way of a specific legislation, the possibility of adaptation clauses, and those adaptation clauses, when possible, are usually considered to be in the jurisdiction of the state courts of law. What does it mean? It means that if you have an Arbitration Agreement and you want to make sure that an Arbitrator also would have jurisdiction into intervening and adapting the contractual clauses to the changes that are happening in the market because of different elements, like for instance, border closures, prohibitions of certain commercial relationships that are changing the market price in exceptional way for a specific time-frame in which the contract is to be performed. So, in all these cases, you may wish to look whether you an Arbitral Tribunal is considered or not to have jurisdiction. And it's better and that is a personal thought that I share with you with open heart, I would say, preventively to address it in the Arbitration Agreement. So, to make sure that an Arbitral Tribunal would have jurisdiction not only to interpret the contract; not only to discuss and decide on the termination or on the enforcement of the contractual obligations, but also to the Adaptation clauses and the adaptation of the contract, if indeed that's the intention of the Parties.

And to conclude, because I know that now my time is rather to provoke questions at the end, I would only suggest one more thing. And I know that for you this is very much intellectually permissible because we are in India. In India, it's a very rich country in terms of cultural diversity, but at the same time, very much prepared to respect other cultures and diversities. In central Eastern Europe, you have very many languages, and some of them are nuances of a core language that sometimes are just slightly changing the legal concepts, not a lot, but sufficiently to create the need for interpretation. So, when you are going to a root language and for instance, I will give Romanian language, and you work both in Romania and in Moldova, which are sharing Romanian language historically, they were even the same country at some point in time. Just pay attention because little nuances, small words may make a difference and be mentally prepared to address that and to respect this kind of differences as also potential source of future disagreements as to the interpretation and avoid them. For that with time in mind, I would stop here and be available for further comments later on.

PROF. DR. ALEXANDER PETSCHE: Thank you so much for all these nuances. Ana, any comments from a UK perspective?

ANA STANIC: Yes. So, no singing at this point. Good afternoon. It's my pleasure to be here. My first time in Delhi, not first time in India but very much excited to be here. I will... You will be more familiar I would imagine, with English law than with the law of Central and Eastern Europe. I am partly from Central and Eastern Europe, so the complexities I fully agree with Crenguta are there and I know that now with the free trade agreements being signed between the EU and India. There are expectations of many more business opportunities, particularly with central Eastern Europe. So, that's an important new development in terms of India's hopefully relations with Europe, but the relations with the UK go back further and so, I'm sure you are more familiar with English law as it is also, was part of your own legal system at some point in time and you are fairly closely connected. But the key aspect in terms of *force majeure*, which you already know is that *force majeure* in terms of English law is a contractual matter. So, unless you have it in the contract, you don't have protection in terms of *force majeure*. So, the points that Crenguta are made in terms of the importance of drafting are even more so under English law are the key and here I really wanted to draw your attention to a specific case which actually links sanctions and *force majeure* and we now have a Supreme Court decision of 2024, which is in the case of ***RTI Ltd v. MUR Shipping***, which you may be familiar with, which went backwards and forwards so the Court of Appeal decided the opposite of what the Supreme Court did it is a case of a shipping contract and it had a *force majeure* clause and it had the very standard provisions that I'm sure you're familiar with respect to the event being beyond the reasonable expectations of the Parties and beyond their control, it had a list as Crenguta said of what the events were and it had the reasonable endeavours of requirements. So, if it was an event that could be under the reasonable endeavours dealt with by the Party, the opposite Party to the one that's being that is invoking it, then it wouldn't amount of *force majeure*. What the facts of the case were is that very simply for the purposes of the supply of the shipping material, the Party agreed to make the payment in US dollars. The ultimate owner of this company, RTI Shipping, ended up finding itself on the US sanctions list and so it wasn't a case of actually the sanctions prohibiting the payment. It would have just made the payment more difficult to make, take a take a longer time to make. The *force majeure* clause provided for something preventing or delaying the payment or the performance of activities to be to amount to *force majeure*. The company, RTI said okay, well, we can't pay in US dollars, we will pay in euros and we will pay you the difference in any loss in exchange rate between US dollars and Euros. And so we invoke your reasonable endeavours requirement and we offer to

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pay. Originally all the way to the Court of Appeal, the Court of Appeal was in agreement that that fell within the reasonable endeavours obligation and that therefore there was no *force majeure*. the Supreme Court disagreed and so the rule of the law in the land now in the England is that basically you have to be much more careful in how you draft your *force majeure* clause. A contractual obligation which involves and includes payment in US dollars cannot be made, resolved by a payment in another currency. So, that will be *force majeure*. So it's a very harsh decision. When I told this story to Austrian lawyers, they said that the Austrian court would not have agreed with this approach. And so what do you have to do? What's the lesson we can learn from this case? Well, the lesson is that actually not only do you put a reasonable endeavours obligation or the requirement in the definition of what is a *force majeure* event but that you perhaps especially with respect to sanctions actually provide that if there is a *force majeure* event that occurs, and perhaps you even provide for sanctions as a *force majeure* event, that you then have a reasonable endeavours, the other has a reasonable endeavours obligation to try to overcome that reasonable, that *force majeure* event, in which case, in this particular factual scenario then it would have been reasonable to accept payment in Euros. So, the difference being what is a reasonable endeavours obligation under the definition of a *force majeure* as opposed to reasonable endeavours obligation after a *force majeure* occurs. So, I think that's the key thing I would draw your attention to with respect to the developments of *force majeure* in English law in the most recent years. Thank you.

PROF. DR. ALEXANDER PETSCHE: Thank you so much. maybe Arush, you want to take on?

ARUSH KHANNA: Thank you Alexander firstly, it's an honour to be here at this marquee event, which is the India ADR Week, share the dais with people. I admire so much. So, thank you very much for having me so just like what you know Anna highlighted in India also FM... I mean the concept is not a statutory concept, it's not explicitly explained in the statute, it is still very much a contractual concept and the courts of late have given a very narrow construction to the concept. So, mere commercial hardship will not qualify as a prohibition category, but there was one blemish on that particular profile. I mean, India largely when it comes to enforcement of foreign awards has had a pro-enforcement approach, but there was a case of ***Nafed versus Alementa*** I think a lot of my friends who are very well versed with the Indian landscape would be aware now this is a national fertilizer agency, largely a government of India undertaking contracts with a Swiss company, Alementa, to export groundnut extractions and there is a prohibition clause in that contract to say that if the if the government of the day in India has issued a export restriction order, then the company can abandon further performance of the contract it so happened that a part of the contract was performed and then a government order came because there was some damage to some

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fertilizers and therefore they had to curb on exports and they of course abandoned the balance quantity which was to be provided to the Swiss company. The Swiss company, of course, alleged termination invoked arbitration and got an award for about $4 million against the Indian company. Now when that award was trying to be enforced in India, the award, it was a London-seated arbitration governed by English law. I mean the contract the law of the contract was English law, so the enforcing court actually went into interpreting the terms of the contract and saying that no, the fact that there was a prohibition clause specifying that if there was a government order that the Party, I mean the Fertilizer agency would be entitled to not perform the contract meant that it was a Contingent contract, which is a part of 32 of the Indian Contract Act, which of course, my friends from India are aware. So therefore, they also went on to reason that it would be opposed to the fundamental policy of Indian law, which is a ground to resist enforcement of foreign awards, like it is in most countries which have ratified the New York Convention. So, that so happened and the enforcement of foreign awards was reduced. I don't know of many such cases in the last 4 or 5 years where enforcement has been refused, but this was one such case where this concept actually came as an embargo for refusal of foreign awards enforcement. This ruling did come under some scrutiny, although in my particular view, this was actually under the erstwhile Foreign Awards Act. So, it was not under the UNCITRAL-inspired Model law that we have today. So, therefore, you know, I wouldn't want to take that as a marker, but I mean, according to me, I don't think the Supreme Court should have gone into interpretation of the contract, especially when the Tribunal had examined it and it was governed by English law. So, this was... I thought I'll just share this perspective with you from an Indian enforcement point of view.

PROF. DR. ALEXANDER PETSCHE: Yeah, thank you so much. Let's move on a little bit and look at the Arab jurisdictions and try to work on distinction between, you know, *force majeure* and hardship and what would typically courts in the Arab jurisdictions rule. Zeina, over to you.

ZEINA OBEID: Thank you Alexander. It's always... it's also an honour to be here. It's not my first time in Delhi, but first time in the ADR Week and it's a privilege to share this panel with very distinguished speakers. Now to go back to the Arab jurisdiction, the Civil Codes of the most, of most Arab countries contains a provision on *force majeure*, but it's... the scope of it is not defined except for Morocco and Tunisia. So, as Crenguta and Ana said, it is highly recommended to draft detailed *force majeure* clauses in a contract with specific events being mentioned. But the conditions for invoking *force majeure* are broadly the same in all Arab countries which the which are that the event needs to be extraneous, irresistible, unforeseeable and impossible to perform. And the impossibility criteria is very important and the courts have been interpreting this condition in a very restrictive manner.

Now, in contrast, the theory of exceptional circumstances or what we call a provision or hardship, historically, it has a deep root in both Civil law and Islamic legal tradition. And here the underlying objective, is not to relieve the Parties from a bad bargain but to restore a sort of a justice and contractual justice to the contract and to the Parties. The obligation is not impossible to perform, but they become so onerous that it becomes burdensome on one Party and it would require and it would lead to a significant loss. So here, unlike *force majeure*, the Tribunal has the power to rebalance this contractual relationship and to reduce the obligation to what it would consider as reasonable. Now conceptually, this sounds quite straightforward, but particularly in practice and in arbitration, it raises some interesting issues. Because in practice commercially, the projects continue, contractors continue performing, the Parties would absorb the delay, the disruption and additional cost because they have often very little practical choice. So, what frequently happened in practice is that the Party proceeds with performance despite the hardship and incurs the associated costs and only later seeks retrospectively relief in arbitration. And this is something interestingly, we see increasingly in international arbitration cases involving projects in the region where tribunals effectively are asked whether financial compensation can operate as the practical mechanism through which contractual equilibrium is restored after the event. So, by the time the dispute reaches the Tribunal, the obligation has already been performed, albeit at an enormous cost. So, as the issue is no longer whether performance should be adjusted prospectively, but whether the economic burdens retrospectively borne by one Party can be redistributed. So, this is the theoretical distinction between these two doctrines and we'd be happy to give some other examples, if you wish.

PROF. DR. ALEXANDER PETSCHE: Thank you Zeina, before we move on to sanctions, any further remarks with regard to *force majeure*?

ZEINA OBEID: No.

PROF. DR. ALEXANDER PETSCHE: No? Fine. So, sanctions is something which became a real issue and threat, especially for continental Europe. We were not used to sanctions at all. So, we had the US sanctions with Iran, okay? Then Austrian companies did not export to Iran. If you have some, you know, connection to the US, you had just obeyed. So, to say, but then suddenly with the Ukraine-Russian war, suddenly more or less on a daily basis, the list of sanctioned persons changed or increased. So, on Monday, you have a supplier where you buy from who is supplying and on Wednesday, the person or the company is on the sanctions list and all your chain, supply chain becomes big, big headache, and that on a daily basis. So, I know the General Counsels were looking more or less on, you know, on the sanctions list more or less every day when the new list came and then go through it, go through the products is caviar listed, yes or no shellfish- yes or no, what kind of ladder, what kind of wood; a nightmare situation for lawyers and then don't forget at the same time you have the banks who are players, banks who need to do the transactions. And in a supplier situation where you have to change your supplier because it was your only supplier for wood, you have suddenly to change your whole supply chain and if you have a single sourcing strategy, you adjust, you adjust, end up in a lock-up situation

The second is your banks are not transacting, they're not paying the open amounts and then came the tricky situation the let's say the Trix. Trix is sanctioned companies changed their ownership, they said, okay, let's do it very easily sell the shares, you have to find a buyer of course, for the shares that's the first problem but let's change ownership. We solve it like this and the sanction persons has stopped to be the owner of the company. no headache anymore. Then the answer of the banks was this is a circumvention clearly, clearly because this the shareholder has changed 1 or 2 weeks after the sanction list has been published. So, gentlemen, this does not work. Give me a proof that the change in the shareholding has nothing to do with the sanctioning. So, on this kind of proof is kind of important impossible to bring so. And but I have one question for you for *force majeure* or maybe also for the audience. Ladies and gentlemen, do we still have *force majeure* at all? Is there anything which you cannot imagine to happen in these days? Is there anything which is a surprise for you? Listen, we had... is pandemia surprise. I don't think so. I mean we have faced that. So, is sanctions becoming normal, more and more *en vogue* like the French would say, look at India you are discussing this as well is war becoming normal and what kind of war do we have is when the drones over Poland fly in, is this a war already or is it just, you know, a flight attendant's game? The introduction of tariffs, is that now normal? I mean if your product costs 50% more from one day to the other and your buyer tells you, I'm not going to purchase this because I'm not ready to pay the tariffs, I will source differently, but tariffs have become normal. And then my last point would be is craziness normal? Yes, I think so craziness has also become normal. So, but there's nothing for *force majeure* but that's our situation. So, as a lawyer is there anything, ladies and gentlemen, you can imagine that will not be possible to happen because unexpected. We can expect everything these days everything. So, that's why I think your advice to put a lot into the contract and define it and say, okay, we have to deal somehow with it, otherwise everything can be expected; that's my suggestion for *force majeure*.

DR. CRENGUTA LEAUA: May I add to your idea to reinforce it a little bit more and say that if before the unpredictability for instance, Romanian legislation provides as a condition for *force majeure* to be an unpredictable event? So, or unpredictable or unforeseeable depends on how you translate it from Romanian. But anyway, the idea is to a human or to an AI. Because the predictability is actually a large type of situation in which you operate with

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whatever it is data in the past and you say, may it happen in the future, yes or no? And if it is a human mind operating that prediction or it is an AI operating that prediction, the answer will be different. If we make a pool of situation that we may imagine as being predictable by us here in the whole room, we will maybe list, I think each of us maybe 100, maybe 200, but none of us will list 1 million of situations. An AI, if you don't put a limit and you tell list as many as you can, they will not stop working, they will keep on listing for days. So, I would like to broaden the hypothesis that was put by Alexander to make it even more hard to respond.

PROF. DR. ALEXANDER PETSCHE: Ana, your reaction please.

ANA STANIC: Yeah, maybe just to say that from an English law point of view, we don't really talk about foreseeability so much in a *force majeure* clause, we talk about something being beyond or reasonable control of the Parties. So, all the things that you've listed still fall within the *force majeure*. So, I'm still happy with my basic clause. I would certainly put sanctions in there, but foreseeability is not commonly put in our *force majeure* clauses because it's not about foreseeability or whether you can or not predict it that's but whether it is in your control or not. So, that's how we approach it from an English law point of view.

PROF. DR. ALEXANDER PETSCHE: Yeah, we understand you're very harsh all the time. Before we go to sanctions, please let me know Ana, we were not prepared for this question, but when you were talking about this UK judgment, then I thought to myself how... and you say that under Austrian law, this would never have happened, this kind of decision but typically, you have in the contracts a sentencing, in case of a clause which is invalid or not enforceable, it is replaced automatically by a valid or enforceable clause, so to say? No, I mean if you cannot pay in US dollars and pay in Euro but who cares, or in Swiss Franc.

ANA STANIC: Well, this is the thing we don't have that kind of a clause.

PROF. DR. ALEXANDER PETSCHE: Okay

ANA STANIC: So, we and we don't have the concept of good faith and I assume you have a similar thing in Indian law that a good faith is again, something you need to put in your contract, you can't invoke it as a principle so and hardship, we also don't have as a concept outside of the four corners of a contract. And so, if we step back from the geopolitical uncertain events and look at other risks, including regulatory risks, the kind of things we're seeing in English law, governance contracts are certainly contracts that I try to encourage my clients to put in it's not only have a *force majeure* clause that has this reasonable endeavours thing that I mentioned before as an obligation after *force majeure* is called but also potentially a stabilisation clause, particularly if you're negotiating with a government with a state and then as Crenguta was talking about adaptation clauses, economic rebalancing clauses. So, these are the kind of new tools that we now use in terms in in these geopolitical times.

PROF. DR. ALEXANDER PETSCHE: Okay, now we understand why you need 100 pages instead of 10. Fine, so now...

ANA STANIC: We pay by the word.

PROF. DR. ALEXANDER PETSCHE: Exactly. So, now let us let us go and move on to sanctions, maybe Arush, we can start with you about telling us and introducing us you know this case?

ARUSH KHANNA: Well, yeah, I think India got I mean, from a mainstream perspective, our first trust with sanctions as a concept came through the ***EuroChem*** case and it's quite interesting on as to how that actually ended up in the Bombay High Court. Now EuroChem is a Russian company into the business of fertilizers and other agro products; they had contracted with an Italian company, an EPC contractor for construction of a urea ammonia plant in Kingsepp in Russia. And this contract was London seated again ICC administered and English law was the governing law of the contract and this contract was in the year 2020. Now in the aftermath of the Ukraine-Russia war 2022, the EU of course imposed sanctions on Russia, including on the promoter of EuroChem there was, you know, individual orders passed as well the Russian company, you know, abandoned further performance of the contract. The contractors then invoked arbitration. The Russian company participated in the arbitration for three years. They filed their counterclaim and more importantly, they did not challenge the competence of the Tribunal or the validity of the agreement and this was all happening from 2022 to 2025. It was in August 25th as early as I mean, as recently as 12 months back, that the English Commercial Court passed an adverse order vis-a-vis a Bank Guarantee for EuroChem. So, the English court passed an adverse order and overnight, there was a change in strategy. Td he Russian company invoked what is Article 248 of the Russian arbitrage code, which is colloquially or commonly known as the Lugovoy law. I had no clue about it until I heard Ana in the workshop in Vienna last year or this year actually in January. So, that happened and essentially I mean, I'm not a Lugovoy law expert in that sense, but Article 248 of the arbitrage code essentially gives the Russian court an overriding power to sort of, you know, make a decision, which is affected by foreign restrictions. So, they can basically take over a matter, *dehors* the existence of an arbitration agreement even though 248 later on clarifies that, you know, it is yielding to an arbitration agreement, but it's, so I mean, that's I'm not going to go into the contractual or the statutory interplay of that. What happened was that then the Italian company moves the English court, gets an anti-suit injunction against the proceedings that are going on under Article 248. The Russian court almost simultaneously passes an Antiarbitration injunction, and the Russian court then basically overlooks or shows no regard for the initially issued Anti-suit injunction and orders a decree allowing a part of the claim for EuroChem, it was close to 2 billion USD. So, a decree is passed in favour of the Russian company under the Lugovoy law, *dehors* the fact that there is an ongoing arbitration which has been duly participated by the Russian entity itself, it only abandons it in August 2025. Now obviously, EU is not... there's going to be no place in the EU, given the sanctions, given the respect for the arbitration agreement, the award is not going to be enforced in the EU. So, it so happens that the Italian contractor has assets in Bombay or in Maharashtra, I don't know where exactly the assets were but likely in Maharashtra. So, then they moved the Bombay High Court. They moved the Bombay High Court and since Russia is not a reciprocating country under Sections 13 and 44 of the CPC for all my Indian lawyers here, they need to file a fresh commercial suit along with an interim application seeking a Mareva style freezing of assets. Now when the injunction is argued, it's argued for quite a few days because of the scale of the matter and the entire, you know, geopolitics involved in this, you know, and India has largely remained neutral to whatever is happening in Russia and Ukraine, we've we are trading with both regions in a very robust way. So, it lands up in Bombay. The Bombay High Court refuses to issue a freezing order in favour of the Russian company, saying that in view of the fact that there was an Arbitration Agreement and the Parties had commenced arbitration, the Russian court was actually not a competent court to pass the decree in the first place. Now being... for a foreign judgment to be enforced in India, it needs to come from a competent court. That is embedded in our Procedure Code. So, that's how you know that happened. I mean, yes, it's only an interim order, I wouldn't say it is a marker for how Indian courts are going to see themselves as a venue where Parties are using the Indian courts to outflank the Arbitration Agreement in a way. I don't know how it's going to play out, but I mean, I'm not an astrologer, but it's highly unlikely that the observations made in the interim order are going to be reversed in the final order. So, I think we will follow the ethos of what our Arbitration law stands for, and therefore, incompetent courts, which disregard arbitration agreements, the orders will not be entertained. Thank you.

PROF. DR. ALEXANDER PETSCHE: Ana?

ANA STANIC: Yes, so we've heard how the Indian court has approached this issue and it looked at it very much from the point of view, as Arush said, with respect to they exist in... their being in existence in Arbitration Agreement to which the court gave in force, gave in, you know, enforced that basically saying that the Russian court's decision was an attempt or basically to replace an otherwise valid Arbitration Agreement. I would suggest that the context is actually a bit more complicated in the sense that if you look, if the Indian courts looks at it just from that point of view, then as Arush says, that is exactly what the decision is going to be.

But to the extent that India is considering introducing, and I would I imagine that it's actually considering introducing measures to counter measures to sanctions. So, similar to something that Article 248, that the Russians have done or the Chinese have done just recently with Article 12 of their Anti-Foreign Sanctions Act. So, I encourage you to look at that because the key thing that we're dealing with when we're dealing with sanctions. As Alexander said, we are dealing with measures that are unilateral sanctions. So, we're not so what the Europeans and the US and the UK and predominantly the Western world has done and it has actually put under sanctions over 40% of the world. So, to the extent where I think at this point in time, I think there are only four Indian companies that are directly on the sanctions list, but there are many Indian companies that are dealing with companies that are on the sanctions list.

So, I think sanctions to the extent is something that the government is therefore, looking into figuring out how to address, particularly with respect to countermeasures and just in terms of the context of history. We saw an escalation in terms of the introduction of sanctions with the invasion of Russia of the Ukraine, but the measures against Russia in terms of the EU were pre-existing, that we've had measures against Russia for many years before the Ukraine invasion. So, it's been an escalation of those. And in respect of what Alexander mentioned, the kind of sanctions we had in the past, particularly by the US against Iran and so on, we in Europe ourselves have countermeasures to prevent the enforcement of US sanctions. So, what the Lucivoy law does, I would suggest, is something similar to what the Europeans had done already before with respect to countermeasures taken by the United States, and that may well be something that India will look into doing, going forward. So, we are going to have and what we are experiencing is a clash between arbitration on the one hand, which is based on the concept of Party autonomy and the Parties being able to agree to arbitrate. And then regulations that come in and then the argument is are they foreseeable or not and so on. That come in that prevent actually. They will from the point of view of European law or the matter, your English law, they will allow you to arbitrate. But they won't allow you to actually make a payment under a claim. So, a Russian Party or for that matter a Party from Europe, that gets an award, cannot receive the monies under an award. It can at this point in time and that is just a recent development since July of this year, European company that wins against a Russian company will be able to get its costs back, and that's just recently. So, up until like for the last four years, any dispute that has been won by a European Party, they themselves couldn't get paid and they couldn't even get their costs. So, this is not just a one-way street, it doesn't just affect Russian companies or for that matter, any company that has sanctions imposed on them. It actually also affects the counterparty and to the extent that Indian companies are shareholders in any of these kind of companies, they are also affected. So, the complexity of sanctions is not only something that you consider by putting clauses in your contracts and you may want to put them in even if you are nowhere near a Russian company.

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Because we actually cannot predict as Alexander has told us, who is going to be on the sanctions list and which country is like we didn't know with the tariffs is going to be a basically slapped with sanctions or anything else. We are in this strange world where as Crenguta told us war is not just war in the sense of military, but sanctions and economic measures are part of a warfare and the example that Arush gave us is a very good example of that not only is our economic measures or direct military measures part of warfare, but law is part of warfare, in the sense that sanctions and regulatory measures, also in terms of preventing investments, the EU is now considering again tightening its policies in terms of who can actually make investments in Europe. These are all things that cross over or into arbitration in a way that we cannot longer ignore it, we cannot just talk about arbitration and Party autonomy without really considering the impact that all these other things have on what was otherwise the sanctity of a contract. So, I'll stop there. It's a very big topic, but perhaps just to give you an indication of all the aspects that sanctions imply.

PROF. DR. ALEXANDER PETSCHE: Yes, thank you Ana, where the concept of unforeseeability came and continental Europe, it's the major cases are about insurances. So, you build your house in the landscape and then you have a water flood and the insurance will tell you that's a *force majeure*, ladies and gentlemen, we don't pay for the reconstruction of your house. And then the court will say, yeah, but 100 years ago we had a one-water flood, so it was foreseeable. You took the risk on purpose and you had to calculate with the risk. So, that's where the concept comes from. So, the unenforceability as I proposed to you nothing is unforeseeable. The only the only what we can foresee. We have nine minutes left; that means we are opening the floor for questions please.

ANA STANIC: If you don't ask any questions, I'll have to sing or become philosophical and ask questions to ourselves, you know.

PROF. DR. ALEXANDER PETSCHE: But coming back to India and sanctions is it… Arush can you give us as a you know, foreigner’s impression will or something maybe we have some petitions here, will India introduce his own sanction regime? What is the plan?

ARUSH KHANNA: Firstly, while Ana was talking about the concept, I was just thinking of a theme for a conference. I think India amidst arbitration warfare because I think this is the, I mean what's played out in the Bombay High Court is a classic example of arbitration warfare, but with regard to India having its autonomous sanctions law, I think we're the only major economy in the world that does not yet have one. I'm not a foreign policy expert. So, I can't really say whether we should have one or not, but even if today the world which is closely affected by sanctions is looking at India as a good enforcement battleground. Because the thing is that a lot of foreign Parties have assets in India and therefore, given the kind of sanctions

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that are in place, the likelihood of enforcement in those regions does get affected and therefore it does attract cross-border litigation or arbitration in India where India actually has no connection as regards the Sanctions law is concerned, I think it'll have to be calibrated and harmonized with India's commitments under the New York convention. I think they'll have to be carve outs. I think matters of national interest and security should be kept away from matters of ordinary commercial adjudication. Otherwise from whatever little I have heard, and you two as well, Ana, at the workshops in Vienna is that we might turn our sanctions law into an another form of Lugovoy law which may not be in our best interest given that India does have genuine ambitions of becoming a hub for arbitration. So, that's what I would like to say.

PROF. DR. ALEXANDER PETSCHE: Of course, we have promised ourselves not to talk about politics.

ARUSH KHANNA: Yes, yes.

PROF. DR. ALEXANDER PETSCHE: Yes, and no. No, I was just thinking about a few sentences which have not been formulate as such, I just wanted to reflect that you should not follow every trend so to say, and maybe you are a very lucky position where you are now that, full stop. But I remember your Prime Minister and that's not a political statement. I just admired him when he was interviewed and that comes back to what you said he was asked in which corner are you standing. Are you in the Russians corner, US corner? I don't know if you know that, but this was running out through all of Europe, this two minutes and he was saying, you know to whom you are talking about? We're talking about India this is the biggest country in the world. So, we're not standing in anybody's corner, we are just India. It was not arrogant, it was really nicely said and with self-confidence and that was really a fantastic. And I think what I would reflect give back to you is you can go maybe your own way and not follow US model or EU model. It was a very strong statement. So, any questions please? Yeah, don't talk about politics.

DR. ZEINA OBEID: No, maybe I can please a few points that have been discussed in the panel. Maybe first, it would be important to mention that the new UAE Civil Code, other than having a special provision on exceptional circumstances that reiterated the same provision and the construction section of construction contract. Although it's a repetition maybe just to remind dispute... Parties having disputes and construction cases that they can prevail themselves from this theory. And here I want to mention about foreseeability and the course and across the region when the theory of exceptional circumstances is advanced, they have... it has failed mainly because the foreseeability event is not met. And I can give you some example. For example, financial crisis and delays and permits or administrative approval have been considered as foreseeable, and therefore the Parties couldn't avail themselves from this theory. Even worse, in some cases have been considered as foreseeable. Now going back to the *force majeure*, unlike in Western and Eastern Europe countries, we have a big jurisprudence in relation to *force majeure* and which events would qualify or not, and I've co-authored an article on this and if it is of interest, I can give you just a few examples. For example, political events, major political events have generally been recognized as *force majeure* but more localized, unrest, labour strikes, disturbance at project sites; these were not considered as *force majeure* events. Government action and regulatory intervention, which is one of the most active areas in the GCC countries, often the courts would consider them as a no ordinary risk of doing business in the region. And with respect to disruption and supply chains, which is now quite a hot topic. From the UAE and GCC perspective, the analysis tends to be less abstract and more commercially grounded, and here the courts would look more into causation, allocation of risk and whether the obligation became impossible or more onerous. And for floods and which we have been discussing in the panel, they can qualify as *force majeure* but not automatically. And it would... you would really need here to look at foreseeability. So, it would really depend on the circumstances.

And one last comment on good faith because it was mentioned by Ana from an Arab perspective, Civil law jurisdiction, it's a different concept. The good faith is considered as a mandatory principle and it does play a role to rebalance in a sense sometimes contractual obligation, or at least for the interpretation or to see implied obligations arising out of good faith. And it's quite a strong argument that you can advance in a case and where you can win on this basis. So, it's a standalone obligation which is quite differently applied in civil law jurisdiction than in common law jurisdiction.

PROF. DR. ALEXANDER PETSCHE: Yes, please.

RASHMI KATHPALIA: Thank you. I'm Rashmi Kathpalia. I'm an Arbitrator and Advocate and Mediator. My background is construction law my question is to any of the panellists who can tell me; have you ever been successful in having sanctions within *force majeure* because we always treat it as act of God? And wouldn't in the contracts that I have always been dealing with, sanctions have always... there's always a reservation against them and also that more included in change of law. So, what is your experience been in this regard in EU as well as any of the other jurisdictions? Very difficult in India to get sanctions within *force majeure?*

PROF. DR. ALEXANDER PETSCHE: I can tell you about one case where I was representing an Austrian company against a Russian company, where the owner was sanctioned oligarch. And the Austrian company was under the contract obliged to erect a plant in Russia, production plant. Based on the sanctions, the Austrian company had to stop the work. The performance and the Russian contracting partner brought an arbitration claim for fulfilment of the contract. It was an arbitration in Moscow, with President was Russian. The second Arbitrator, of course was a Russian, and the Arbitrator appointed by the Austrian company. Now it's a difficult task because the difficulty begins very easily with logistics, who can enter the country easily? So, sanctions is, you know, 100 fold and who is willing to travel in this kind of situation? And we found a Lithuanian person, who was willing to travel and to defend the case, and as a surprise to Tribunal held that based on the sanctions which is against Russian law, the Austrian entity cannot... is not in the position to perform. It would be a criminal offense, and it is part of the public order. So, it's just not possible. That went for us a surprise. We were going there and we will lose the case 100% surprise that has been challenged before Russian courts and the Russian state courts have upheld the Tribunal's decision.

DR. ZEINA OBEID: If I can give another example. For example, in a case, in an ICC case applying Libyan law, a *force majeure* claim based on US export restrictions was rejected because alternative performance was possible and the contract didn't specifically the use of US technology. So, this goes back from a civil law perspective how the conditions are interpreted in these circumstances.

ANA STANIC: Just from a... so the case that I gave you at the beginning the ***RTI against MAUR Shipping*** is an example of English law finding that sanctions is a *force majeure* event, but perhaps another one that you might want to consider is under Swiss law. So, Swiss law has made it very clear that unilateral sanctions are not part of mandatory rules and that they will recognize as Swiss mandatory rules. So, they will recognize their own sanctions as mandatory rules and have found that a bank that has refused to make payments or allow a company to make payments on the basis that they are on a US sanction list that, that is not able to be invoked by a Swiss company. So, there are differences in how the issue is approached in terms of sanctions, as you as you rightly suggested.

PROF. DR. ALEXANDER PETSCHE: But I think Ana and ladies and gentlemen, I think that is also an argument for going for arbitration because the case I mentioned to you, it would never have happened before Russians did court, for sure. But I think the Tribunal find the right balance in regarding the positions of both Parties, what is permissible, what is not. And I think that's a further argument in this kind of uncertain times to have to go for arbitration, have the right people who understand geopolitical circumstances. Time is up. Thank you very much. Thank you for your question, thank you for your contributions.

ARUSH KHANNA: Thank you, Alexander, for the excellent moderation.

ALISHA SHARMA: Thank you to our distinguished panellists for an engaging and thought-provoking discussion. I would also like to extend my sincere appreciation to our Moderator

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for skilfully balancing this session and maintaining a balanced perspective, particularly given the complex and at times controversial nature of the topic. The discussion has undoubtedly deepened our understanding of how global political currents are influencing and reshaping the international arbitration across the globe. With this, I would now request our panel to step forward for a group picture. We will shortly begin our next session.

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