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International Arbitration in Gold Swap Transactions and Syndicated Loans for Infrastructure Projects

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Complex arbitration cases in financial transactions might arise within emerging markets involving gold swap transactions and syndicated loans for infrastructure projects. Gold Swaps allow central banks to receive cash from financial institutions in exchange for lending gold during a specific period of time. On the other hand, syndicated loans provide funding for large-scale, capital-intensive infrastructure projects.

Gold Swap Agreements

First, there are many ways in which a sovereign central bank (a “Central Bank”) can obtain financing for its operations. One way is by using the foreign gold reserves of the country through gold swaps, which are typically undertaken when the cash taking monetary authority or Central Bank needs foreign exchange but does not wish to sell outright its gold holdings. In this type of swaps the gold is a leveraging device for investment banks. Notably, the Central Bank’s gold subject to the gold swap is held at a neutral and well-recognized jurisdiction, like the Bank of England.

The risks of gold swaps are similar to repos and securities lending in that market risk toward the underlying asset, the gold, remains with the original holder or the Central Bank. If gold prices increase, the volume of gold returned is the same as that swapped, while the same value of the foreign exchange is returned.

A possible international arbitration might arise in connection with gold swap agreements when the Central Bank falls into an event of default (“EoD”) or a termination event due to its failure to pay the investment bank. Additionally, Termination Events include 1) the occurrence of any change or interpretation where the Central Bank’s local law could affect or undermine the applicability of the gold swaps; 2) any governmental authority of the Central Bank takes any steps with a view to, or to the effect of, redenominating the payment or other obligations of either or both parties under the gold swap agreement from dollars to the lawful currency of the Central Bank country.

Generally, these types of disputes are governed by the [London Court of Arbitration Rules](#) (LCIA Rules), with English Law governing the gold swap agreement. Consolidation of disputes is applicable when a related dispute arises before the Request of Arbitration has been served, which might occur in the case of an EoD due to the [international sanctions](#) against the Central Bank, that restrict transactions with the investment banks.

For instance, between 2014 and 2016 the Venezuelan Central Bank (the “BCV”) used part of its foreign gold reserves to guarantee financial operations with banks to improve liquidity, with the original intention of repaying the loans in order to keep the gold. The BCV has been involved in several of these gold swap agreements, one of these was with [Deutsche Bank AG](#). In 2016, the BCV had put up to 20 tons of gold as collateral with Deutsche Bank AG. The agreement was set to expire in 2021. In 2019, according to a [news article](#), the BCV defaulted on a US\$ 750 million agreement for missed interest payments to Deutsche Bank AG. The missed interest payments caused the early settlement of the agreement, which generated US\$ 120 million, this amount represents the price difference from when the gold was acquired to current levels when Deutsche Bank AG took ownership of the collateral. In this case, an international arbitration could arise if the BCV does not agree with the amount of the early settlement of the agreement, or if there are any issues with the interpretation of the EoD or the termination event under the agreement.

Syndicated Loans

Second, another type of financing in emerging markets for large [infrastructure projects](#) is through syndicated loans (a “Credit Agreement”). In this type of loan, there is (i) a single borrower, the company or a sovereign government that is going to use the loan for a project, and (ii) several international banks that are going to unload the loan in several installments or pursuant to the conditions established in the loan.

These types of loans are used commonly for large infrastructure projects, especially in circumstances where the project is too large, like a major infrastructure investment for a new airport, subway system or energy project, and the risk of default needs to be distributed between several lenders, or when the project needs a tailored-made lender with experience. Within these syndicated loans usually, a lead bank or underwriter takes part in this loan syndication transaction to guarantee risk mitigation and large exposure.

An international arbitration dispute could arise in case of an EoD established in the Credit Agreement. Nowadays, EoDs include violations of international sanctions, like the ones issued by the United States Treasury Department through [the Office of Foreign Assets Control](#) (OFAC), or the [Council of the European Union](#), due to violations of human rights, corruption, and deterioration of democracy in emerging markets. Also, these include trade embargoes or restrictive measures imposed, administered or enforced from time to time by any sanctions authority.

Under the EoDs if the loan proceeds are used by any person, company or government

subject to or target of sanctions, or located in a sanctioned jurisdiction the EoD could be violated. Other EoDs include the failure to pay any principal of or interest under the Credit Agreement, if the governmental authority imposes control exchanges affecting the compliance with payments in foreign exchange that would be applicable to the Credit Agreement, or takes any action to condemn, seize, nationalize, expropriate or appropriate all or any substantial part of the property of any loan party, either with or without payment of compensation an EoD could be violated.

An example of projects where this type of disputes may arise is China National Petroleum Corp.'s (CNPC) and Total SA's [withdrawal](#) of their participation in Iran's biggest natural project between 2018 and 2019 because the Trump administration abandoned the 2015 nuclear accord (the "Joint Comprehensive Plan of Action") and re-imposed sanctions on Iran. The project was the largest infrastructure development in Iran being developed by foreign investors. In this case, an international arbitration could arise if the credit agreements for the development of the infrastructure project in Iran are conditioned upon sanctions under the EoDs, which could generate disputes regarding the interpretation and extent of the sanctions events within the credit agreements.

Thus, under these scenarios complex international arbitrations might arise within emerging markets involving financial transactions like gold swaps between Central Banks and investment banks, and syndicated loans among governments, its instrumentalities, mayor international companies, and banks.

The views contained in this article only express a personal scenario on possible international arbitration trends.

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