

# Kluwer Arbitration Blog

## LIDW 2023: Disputes Involving States Arising Out of War

Mustafa Mert Dicle · Saturday, May 20th, 2023

London International Disputes Week 2023 (“**LIDW 2023**”) carried on with full pace on its third day, 18 May 2023. This blog post covers one of the most attention-grabbing events of the day, namely, the “Disputes Involving States Arising Out of War” event. The moderators for the event were **Professor Loukas Mistelis** (Queen Mary University of London / Clyde & Co), who emphasized that LIDW 2023 is a collaborative effort that brings together different law firms and barristers, and **David Goldberg** (White & Case) who stated that each year White & Case traditionally organizes an event on public international law in LIDW. So, a whole range of disputes was analyzed by the distinguished panel consisting of **Naomi Briercliffe** (Squire Patton Boggs), **Prof. Yarik Kryvoi** (BIICL / Keidan Harrison), **Alison Macdonald KC** (Essex Court Chambers), **Andrea Menaker**(White & Case), and **Mark Wassouf** (3VB).

### Consent and Jurisdiction

Alison Macdonald KC started by laying out the basics. She underlined that consent is required in terms of jurisdiction since there is state sovereignty on the other side of the equation. So, a dispute resolution clause would be the basis of this jurisdiction. She further emphasized that only with the inclusion of a dispute resolution clause consent could be put forward and the mechanisms in the toolbox could be used in the disputes arising out of war.

### State-to-State Cases

Next, Andrea Menaker also stressed the significance of consent and jurisdiction, and she explained that, in addition to the cases before the ICJ, there are cases before the PCA as well. She gave the example of the arbitration which has been filed by Ukraine against Russia back in 2016. This arbitration was related to a dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait. In [the award dated 21 February 2020](#), the Arbitral Tribunal unanimously upheld “the Russian Federation’s objection that the Arbitral Tribunal has no jurisdiction over Ukraine’s claims, to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine’s claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea”. Andrea Menaker added that in 2019 Ukraine filed another PCA arbitration regarding the detention of the Ukrainian Naval Vessels and Servicemen. Jurisdictional objections played a significant role in this arbitration as well.

Andrea Menaker carried on with another example of a case in which “the Government of Sudan and the Sudan People’s Liberation Movement deposited an Arbitration Agreement with the PCA. A five-member arbitral tribunal was then constituted to decide the case, with the PCA acting as the registry and providing administrative support. The arbitration was conducted under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State”. This case is interesting because the substantial part of the dispute is regarding substantive excess of mandate in determining the border between the disputing parties.

The next arbitration case mentioned by Andrea Menaker was Azerbaijan’s [Energy Charter Treaty](#) claim against Armenia regarding the dispute arising out of the Nagorno-Karabakh conflict. This case is unique because it is the first state-state arbitration under the Energy Charter Treaty. According to the [Azerbaijani Foreign Ministry’s statement](#), “[i]n a Notice of Arbitration served on Armenia, Azerbaijan seeks redress and financial compensation for Armenia’s violation of Azerbaijan’s sovereign rights over its energy resources during Armenia’s nearly 30-year illegal occupation of Azerbaijan’s territory from 1991 to 2020”.

At this point of the discussion, Professor Mistelis suggested that there is an increasing trend in terms of the number of provisional measures requested. Andrea Menaker agreed by stating that the most common type of provisional measures sought in those cases is the type that seeks a type of action to stop. Also, she added that both states applied for provisional measures in the Azerbaijan case where the tribunal only granted provisional measures regarding the prevention of harm; whereas declined the requests regarding the land mines. However, she elaborated on the fact that there are compliance issues regarding those provisional measures even if they are granted. Still, she wrapped up this part by critically reflecting on the fact that these provisional measures may be seen as political victories in a way where the state that obtains such measures will be victorious in the eyes of its nation as well.

## **Investment Treaty Cases**

In the following part, Naomi Briercliffe explained that there are a number of investment treaty cases based on disputes arising out of war. She asserted that investment treaty arbitration is a forum in which disputes involving states arising out of war can be resolved. Next, she gave as an example [the very first known ICSID case on the issue where the shrimp farm was destroyed as a result of an operation by the Sri Lankan Security Forces](#). Naomi Briercliffe added that there are other more recent examples such as the cases related to the Arab Spring. She explained that full protection and security claims were the basis of these arbitrations and the question was whether all adequate measures were taken or not. Moreover, she underlined that the war clauses also give investors the right to seek compensation. However, she emphasized that this will depend on the context of such clauses. Finally, two state defenses – force majeure and necessity – were mentioned by Naomi Briercliffe. Those are defenses based on customary international law and stem from events or circumstances beyond the control of the host state. As per Article 23 of the [ILC Draft Articles](#), the criteria that must be satisfied for a State to invoke the defence of force majeure are therefore the following: (i) there must be an irresistible force or an unforeseen event; (ii) the force or event must be beyond the control of the state; and (iii) the force or event must make it impossible in the circumstances to perform the obligation. As for state of necessity, it is regulated under Article 25 of the ILC Draft Articles.

## Compensation Commissions & One Voice Principle

In the final part of the session, Prof. Yarik Kryvoi elaborated on the compensation commissions, while Mark Wassouf explored the English courts' approach and explained the one-voice principle.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

This entry was posted on Saturday, May 20th, 2023 at 10:00 am and is filed under [International arbitration](#), [LIDW 2023](#), [State](#), [War](#)

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