

# Kluwer Arbitration Blog

## 2024 Petersberg Arbitration Days Recap: “Arbitration in Times of War and Crisis”

Allison Torline (Busse Disputes, Germany) · Saturday, March 16th, 2024

One of Germany’s most prestigious arbitration-related events, the “Petersberg Arbitration Days” (*Petersberger Schiedstage*) was held for the twentieth time on 23 and 24 February 2024. The organizers of the annual conference, the [Beck Academy](#) and the [German Arbitration Institute \(DIS\)](#) focused this year’s event on a difficult but contemporaneous topic: how international crises create additional challenges for arbitration proceedings and how arbitration may continue to be used as a tool to help resolve international conflicts. This post briefly recaps the discussions held during the event.

### Setting the Tone – The Influence of Individual Actors in Times of Crisis

To open the event, author and journalist [Stephan Lamby](#) gave a keynote dinner-lecture which peered into history to examine the important role that individual actors and circumstances play in determining the outcome of international conflicts. History became noticeably palpable when Mr. Lamby discussed the 1938 visit to the Petersberg Hotel (i.e., the event location) by the then UK Prime Minister, Neville Chamberlain, who resided there in preparation for a meeting with the German dictator, Adolf Hitler. Using this meeting as a lens, Mr. Lamby drew parallels to present-day global crises, applying conclusions from his latest book “Emergency – Governing in Times of War” (*Ernstfall – Regieren in Zeiten des Krieges*).

The next day, [Dr. Reinmar Wolff](#) (University of Marburg/DIS) commenced and moderated the conference by calling on the speakers and attendees to consider the multiple crises currently affecting the world – including the climate crisis, ongoing wars, and overlooked global conflicts – and to ponder how arbitrations are affected by these crises and how arbitration can potentially play a role in their resolution.

### Can War and Crisis Be Avoided Through Arbitration?

The first speaker, [Professor Dr. Christian J. Tams](#), opened his presentation by discussing South Africa’s claim against Israel at the [International Court of Justice \(ICJ\)](#), arguing that this case highlights the boundaries of and opportunities for international courts. To illustrate this point, Dr. Tams invited the audience to consider the historical development of inter-state dispute resolution,

starting with the famous *Alabama Claims case* – a diplomatic dispute between the United States and Great Britain that arose in the 1860s. Dr. Tams explained that this case demonstrated to the world that arbitration could be used as a rules-based alternative to war.

However, in the 19<sup>th</sup> century, arbitration moved away from the goal of avoiding war because states were not prepared to give up their related decision-making powers. Although wars cannot be avoided by asserting claims before international courts, Dr. Tams argued that such claims have indirectly led to a decrease in the number of wars. In this regard, he asserted that cases before the ICJ offer something that other fora do not, namely: (i) a platform for transparency – which exerts pressure on war criminals; and (ii) a platform for mobilizing the public – which can lead to public outcry and demonstrations as well as a shift in strategy by the [UN Security Council](#).

### **The Effect of War and Crisis on Arbitration**

[Vladimir Khvalei](#) continued the discussion by providing real-world examples of how war and economic sanctions affect arbitration proceedings. To begin, Mr. Khvalei discussed the arguments that parties frequently make with respect to *force majeure*, highlighting the difference in standards that may apply depending on the applicable law. As an example, Mr. Khvalei compared the standard for *force majeure* under Article 79 of the [CISG](#) with Articles 11-12 of [EU Council Regulation No. 269/2014 dated 17 March 2014](#), explaining that these provisions apply different standards concerning the burden of proof; foreseeability; and the duty to overcome.

Mr. Khvalei also considered how sanctions can play a role on the enforcement of contracts as well as the enforcement of arbitral awards. He also discussed practical difficulties caused by sanctions that some Russian companies and individuals face when participating in arbitration proceedings and asked the audience to consider whether such circumstances potentially amount to an incapacity of the arbitration to be performed within the meaning of Article V(1)(a) of the [New York Convention](#).

### **Economic Sanctions and Arbitration**

[Dr. Eric Decker](#) provided a more detailed explanation of how economic sanctions affect arbitration proceedings, emphasizing that – although sanctions are not specifically directed against arbitration proceedings – they can make arbitrations substantially more difficult to carry out. As an example, Dr. Decker discussed how financial sanctions, including the freezing of assets, the prohibition of access to funds and resources, and travel restrictions, can negatively affect access to justice.

Dr. Decker also asserted that sanctions create blatant disadvantages when it comes to enforcing arbitral awards. In particular, EU regulations allow awards against sanctioned parties to be satisfied from that party's frozen assets only if the award was rendered *before* the sanction was ordered whereas EU court judgments may be enforced against frozen assets even if the judgment was made *after* the sanction was ordered.

As another example, Dr. Decker discussed how sanctions can affect the network of relationship involved in arbitration proceedings. For example, he emphasized that arbitral institutions need to check whether the initiation of arbitral proceedings (e.g. through payment of cost advances) could

potentially violate sanctions. Dr. Decker concluded his presentation by arguing that, since arbitration can significantly contribute to the containment of international crises, it should not be used to gain political leverage.

### **Economic Sanctions and Arbitration Panels of Higher Regional Courts**

Dr. Susanna Hollweg-Stapenhorst provided unique insight into the role courts play when faced with questions concerning arbitrations involving a sanctioned party. Specifically, Dr. Hollweg-Stapenhorst discussed her experience from a case at the Higher Regional Court of Berlin arising out of a long-term supply/maintenance contract concluded between a German company and a Russian entity.

The contract was subject to German law but contained an arbitration agreement which stipulated Vienna as the seat and the application of the [VIAC Arbitration Rules](#). In response to sanctions against the Russian party, the German party terminated the contract. Thereafter, the court was called on to determine the admissibility of arbitration based on the contract pursuant to Section 1032(2), Section 1025(2) and Section 1062(2) of the [German Code of Civil Procedure](#).

Guided largely by the VIAC Rules, the court made a positive determination of admissibility. Dr. Hollweg-Stapenhorst emphasized that national restrictions (e.g. Russian anti-suit injunctions) cannot be allowed to torpedo international obligations; arbitration agreements should generally be upheld; and it is generally possible to enforce arbitration agreements as well as arbitral awards even if a party is subject to sanctions.

### **The Iran-United States Claims Tribunal as Example**

Shifting to the next phase of the conference, [Dr. Henriette Sigmund](#) provided a detailed analysis of the historical development of the [Iran-United States Claims Tribunal](#) (Claims Tribunal) to understand how arbitration was successfully utilized to resolve an international conflict between two states that were on the brink of war. She concluded that it was not the structure of the Claims Tribunal that led to its success. Rather, she attributed its success to the several factors, including *inter alia* the involvement of meaningful individuals (e.g., U.S. President Carter instead of U.S. President Trump) and the application of intense time pressure.

In conclusion, Dr. Sigmund asserted that the Claims Tribunal demonstrates that international arbitration is an instrument that states can turn to in times of crisis, arguing the arbitration community can help pave the way for the peaceful resolution of future conflicts through further transparency and contributions to legal guides such as those published by the [International Bar Association](#) and other organizations.

### **What Can Arbitration Achieve in the Future?**

Last but not least, Dr. Judith Knieper addressed the lessons that can be learned from the development of [UNCITRAL](#) and how said organization can contribute to the peaceful resolution of

international conflicts. She explained that, pursuant to the [UN Charter](#), states should try to resolve their disputes peacefully. This includes the resolution of inter-state disputes through arbitration, which leads to the depoliticization/demilitarisation of the conflict.

For this goal to succeed, UNCITRAL was created as a forum where states can have an open discourse regardless of what is happening in the outside world. In the time since it was founded, UNCITRAL has grown from 30 to 70 member states. Dr. Knieper credits this success to UNCITRAL's ability to find consensus among a highly diverse group. Through this mandatory consensus-based approach, UNCITRAL was able to establish foundational texts that are widely accepted and utilised in arbitrations including, for example, [the Model Law](#) and [the Arbitration Rules](#). To achieve the requisite consensus, Dr. Knieper emphasized that UNCITRAL has adopted an integrative approach and has developed a protected space where opinions can be openly exchanged on (frequently) controversial topics.

## Conclusion

This year's Petersberg Arbitration Days was not an average arbitration conference. It invited the arbitration community to expand their conversations beyond the usual networking topics and to engage in a discourse about challenging and potentially divisive issues. But difficult topics are necessary in times of war and global crises, and I am grateful to the organizers and speakers for rising to the challenge.

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