

PCA CASE N° 2020-07

**IN THE MATTER OF AN ARBITRATION
UNDER THE ENERGY CHARTER TREATY**

- and -

THE UNCITRAL ARBITRATION RULES

-between-

NORD STREAM 2 AG

-and-

THE EUROPEAN UNION

PROCEDURAL ORDER NO. 10

The Arbitral Tribunal

Professor Ricardo Ramírez Hernández (Presiding Arbitrator)
Professor Philippe Sands KC
Justice David Unterhalter SC

27 October 2022

I. PROCEDURAL BACKGROUND

1. By e-mail of 1 March 2022, the Claimant informed the Tribunal as follows:

The designation of Nord Stream 2 AG as a US Specially Designated National (SDN) on 23 February 2022 and recent geopolitical developments have led to an inability on the part of the Claimant to pursue the arbitration at this time. In particular, the Claimant's bank accounts have been blocked, meaning NSP2AG is unable to make any payments or access finance.

2. The Claimant consequently requested a suspension of the arbitration.
3. By letter dated 7 March 2022, the Respondent requested that the Tribunal order the Claimant to provide a more complete description of its current circumstances, and opposed the Claimant's request for a suspension, except under certain conditions.
4. By letter dated 14 March 2022, the Claimant informed the Tribunal that its external counsel no longer represented it and reiterated its request for a suspension of the arbitration until 1 September 2022, proposing to update the Tribunal in three months as to its ability to continue the proceedings.
5. On 16 March 2022, the Tribunal issued Procedural Order No. 7, suspending the arbitration and scheduling a procedural meeting for 20 June 2022 at which the Claimant would be invited to update the Tribunal on its circumstances and ability to continue the proceedings.
6. By letter dated 8 June 2022, the Claimant informed the Tribunal that it had been granted a provisional composition moratorium until 10 September 2022 by the Cantonal Court in Zug, by which date the Cantonal Court would decide on a definitive composition moratorium, an extension of the provisional composition moratorium, or a declaration of bankruptcy. The Claimant noted that, given these circumstances, until "that point in time [it] will not be in a position to give any further substantial indication concerning its circumstances, its ability to continue the proceedings, nor on the further conduct of the proceedings, or on timing." Accordingly, it requested a continuation of the suspension of the proceedings and a postponement of the 20 June 2022 procedural meeting until a date after 10 September 2022. At the same time, the Claimant undertook to update the Tribunal and the Respondent should circumstances change substantially prior to that date.
7. By letter dated 13 June 2022, the Respondent submitted that it would be prejudiced by a suspension of the proceedings, as it would unnecessarily prolong a situation of legal uncertainty and would generate continuing legal costs for the Respondent. The Respondent also submitted that the Claimant had insufficiently explained how the proceedings before the Cantonal Court of Zug resulted in a continued inability of the Claimant to pursue the arbitration. In particular, the Respondent asserted as follows:

According to the Claimant's email of 1 March 2022, its inability to pursue the arbitration was the consequence of the U.S. sanctions and "recent geopolitical developments". In view of that, and in the absence of any other explanation, the European Union fails to understand how the outcome of the ongoing proceedings before the Cantonal Court of Zug referred to by the Claimant could have any impact on such alleged inability. [...] The Claimant should explain how its alleged current inability to pursue the arbitration might be overcome given, in particular, that there is no indication whatsoever that the U.S. sanctions imposed on the Claimant, which have caused such inability, may be lifted by the U.S. authorities within a reasonably foreseeable timeframe.

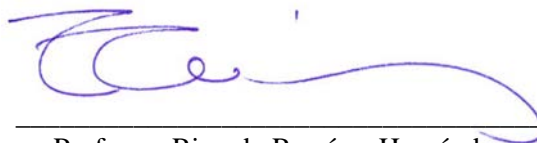
8. Accordingly, the Respondent requested that the Tribunal “order the Claimant to provide a properly substantiated justification of the reasons for the Claimant’s request to maintain the suspension.” The Respondent further requested that any further suspension be limited to a maximum additional period of four months and that the Claimant should bear any additional legal costs incurred by the Respondent as a result of the suspension, regardless of the outcome of the arbitration.
9. By letter dated 15 June 2022, the Tribunal cancelled the procedural meeting scheduled for 20 June 2022 and invited the Claimant to submit comments on the Respondent’s letter dated 13 June 2022.
10. By letter dated 20 June 2022, the Claimant informed the Tribunal that it had no additional information to provide at this stage and reiterated its request for a suspension of the arbitration until after 10 September 2022.
11. On 30 June 2022, the Tribunal issued Procedural Order No. 8, fixing a new procedural meeting for 13 October 2022, at which the Claimant would be invited to update the Tribunal regarding its circumstances and ability to continue the proceedings, and the Parties may thereafter make submissions on the further conduct of the proceedings. The Tribunal also indicated that, for any further suspension to be granted, the Claimant would be required to provide further information demonstrating a reasonable possibility of resuming the arbitration. In the absence thereof, the Tribunal would commence the procedure for terminating the present arbitration in accordance with Article 34(2) of the UNCITRAL Rules.
12. By e-mail of 22 July 2022, the Respondent submitted a Request for Security for Costs.
13. By e-mail of 22 August 2022, the Claimant submitted its Response to the Respondent’s Request for Security for Costs.
14. On 2 September 2022, the Tribunal issued Procedural Order No. 9, deciding that a case had not been made for urgency to determine the Respondent’s Request for Security for Costs, given that the arbitration is suspended, and may not proceed further. The Tribunal further stated that should the Claimant indicate an intention to resume the arbitration or in the event of any other material change of circumstances, the Respondent may resubmit a Request for Security for Costs.
15. By letter dated 16 September 2022, the Claimant informed the Tribunal that the Cantonal Court in Zug has decided to extend the provisional composition moratorium until 10 January 2023.
16. By letter dated 3 October 2022, the Respondent submitted that a further suspension of the arbitration would be unwarranted, and that the Tribunal should terminate the present arbitration in accordance with Article 34(2) of the UNCITRAL Rules. The Respondent submitted that the Claimant failed to demonstrate a reasonable possibility of resuming the arbitration. The Respondent further asserted that the continuation of the arbitration had become manifestly unnecessary.
17. On 13 October 2022, the Tribunal held a procedural meeting with the Parties by videoconference. The Claimant informed the Tribunal that its administrator appointed pursuant to the provisional composition moratorium would allow the arbitration to continue, provided that a third party provides the financing necessary to pursue the arbitration. The Claimant further advised that there were ongoing discussions at shareholder level in this regard, and that it was optimistic that one of its shareholders would agree to finance the arbitration. The Claimant stated that the discussions would take approximately six weeks to conclude, and requested that the Tribunal refrain from deciding on the termination of the arbitration until at least 24 November 2022.

18. In response, the Respondent submitted that the Claimant failed to demonstrate a reasonable possibility of resuming the arbitration, and that the additional information provided by the Claimant did not justify a further extension of the suspension of the arbitration. The Respondent also reiterated that the present arbitration has become unnecessary, because the Claimant would be unwilling and unable to operate its gas pipelines in any case, for reasons not attributable to the Respondent.
19. By e-mail of 26 October 2022, the Respondent submitted another Request for Security for Costs.

II. THE TRIBUNAL'S DECISION

20. Having carefully considered the circumstances and the Parties' respective submissions, the Tribunal has decided to continue the suspension of the proceedings pending the consideration of the further submissions from the Parties invited below.
21. The Tribunal directs the Claimant to provide, by no later than **Thursday, 24 November 2022**, further information demonstrating a reasonable possibility of resuming the arbitration, including but not limited to the details of its funding arrangements (including as to adverse costs), the adequacy of the funding, and its intended representation going forward. In its submission, the Claimant shall also address the Respondent's submission on the necessity limb for termination of the arbitration under Article 34(2) of the UNCITRAL Rules and the Respondent's Request for Security for Costs dated 26 October 2022.
22. The Respondent is invited to respond, by no later than **Friday, 2 December 2022**, to the Claimant's submissions made in accordance with the preceding paragraph.
23. The Tribunal shall then consider again the Respondent's request for termination of the proceedings and reserves the possibility of holding a further procedural meeting at which the Parties may make oral submissions thereon.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal