

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. 14

The Arbitral Tribunal

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

22 January 2025

I. PROCEDURAL BACKGROUND

1. Prior to commencing the current arbitration, on 26 July 2019 the Claimant had brought an application (the “**Annulment Application**”)¹ before the Court of Justice of the European Union (“**CJEU**”) for the annulment of Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 (the “**Amending Directive**”)² pursuant to Article 263 of the Treaty on the Functioning of the European Union (“**TFEU**”).³
2. On 20 May 2020, the General Court of the CJEU dismissed the Annulment Application, as inadmissible due to the Claimant not being “directly concerned” by the Amending Directive and thus lacking standing to bring the action⁴; the Claimant appealed this order on 28 July 2020.⁵ The eventual judgment of the Grand Chamber of the CJEU, delivered on 12 July 2022, partially upheld the admissibility of the Claimant’s claims and referred the case back to the General Court of the CJEU for a decision on the merits.⁶
3. On 16 March 2022, the Tribunal issued Procedural Order No. 7, suspending the proceedings on the Claimant’s request substantiated 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.
4. On 8 June 2022, the Claimant informed the Tribunal that it had received an initial provisional composition moratorium in its proceedings before the Cantonal Court of Zug. The composition proceedings would eventually end with either the restructuring of the Claimant and/or reaching an agreement with creditors or bankruptcy of the Claimant.⁷
5. On 16 October 2023, the Tribunal issued Procedural Order No. 12 resuming the proceedings at the request of the Claimant, after a year-and-a-half suspension of the arbitration, and establishing a Procedural Calendar providing for two additional rounds of supplementary submissions from the Parties.
6. By letter of 21 March 2024, the Tribunal fixed the Hearing on Jurisdiction and Merits (“**Hearing**”) for the period of 10-14 February 2025.

¹ Ex. CLA-170A/Ex. RLA-2, Nord Stream 2 AG v. European Parliament and Council – Application for Annulment pursuant to Article 263 TFEU brought before the General Court of the European Union (Case T-526/19) (2019/C 305/80).

² Ex. CLA-3/Ex. R-89; Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.

³ Ex. CLA-42/Ex. RLA-69, the Treaty on the Functioning of the European Union.

⁴ Ex. CLA-67/Ex. RLA-3, Order of the General Court of 20 May 2020 in Case T-526/19, Nord Stream 2 AG v. European Parliament and Council of the European Union, paras. 118, 124.

⁵ Ex. CLA-171A, Nord Stream 2 AG v. European Parliament and Council – Appeal to the Court of Justice of the European Union pursuant to Article 56 of the Statute against the order of the General Court of the European Union of 20 May 2020 in Case T-526/19 (Case C-348/20 P).

⁶ Exhibit CLA-323, Judgment of the European Court of Justice (Case C-348/20 P), 12 July 2022, *dispositif* following para. 168.

⁷ Exhibit C-308, NSP2AG’s letter to the Tribunal 08-06-22. See also Claimant’s Supplementary Memorial on Jurisdiction and Merits, Section V.

7. By e-mail of 2 September 2024, the Claimant informed the Tribunal that it:

respectfully reserve[d] the right to update the Tribunal on the status of the action for annulment at the EU General Court, and on the status of the composition moratorium proceedings at the cantonal court in Zug, in case of relevant developments before the hearing starting on Monday, 10 February 2025.
8. On 4 November 2024, the Respondent submitted its Supplementary Reply on Merits, the final substantive written submission foreseen under Procedural Order No. 12.
9. By e-mail of 12 November 2024, the Claimant announced that it “plan[ned] to update the Tribunal, and comment on [the CJEU] judgment, in December”, adding that it “would like to combine the aforementioned update and comments with written comments on Respondent’s latest submission” and alleging that

Respondent has now shifted its focus to Article 24(3) of the ECT relying heavily on purported concerns relating to competition and security of supply and on supporting documentation.
10. On the same day, the Respondent submitted an e-mail objecting to the Claimant’s application and requesting that the Tribunal:
 - order the Claimant to abstain from filing any comments on the GC’s Judgement before the hearing;
 - reject the Claimant’s request to be allowed an opportunity to respond to the EU’s Supplementary Reply before the hearing.
11. By letter of 14 November 2024, the Tribunal rejected the Claimant’s request, expressing its preference for the Parties to address the matters raised by the Claimant in oral submission at the upcoming Hearing.
12. By e-mail of 19 November 2024, the Claimant reiterated that it would:

comment on Respondent’s brief, including the exhibits, at the oral hearing and submit rebuttal documents which it considers necessary. In addition, Claimant will submit comments on the expected decision from the General Court.
13. By e-mail of the same day, the Respondent objected to the Claimant’s intention to submit additional written submissions and evidence, and made an application for the Tribunal to confirm its decision of 14 November denying the Claimant’s application.
14. By e-mail of 20 November 2024, the Claimant renewed its request to be allowed to submit a brief with rebuttal arguments and documentation.
15. By e-mail of 21 November 2024, the Respondent requested that the Tribunal:
 - Confirm its previous ruling that the Claimant is not allowed to file an additional written submission before the hearing;
 - Reject the Claimant’s subsidiary request to be allowed to submit “rebuttal documents” at the hearing.
16. By e-mail of the same day, the Claimant reiterated that it “must be given an opportunity to provide rebuttal arguments and documentation relating to Respondent’s meandering case” and argued that

“[g]enerally accepted rules and principles of international arbitration require that Claimant be given an opportunity to address Respondent’s latest brief.”

17. By e-mail of 27 November 2024, the Claimant advised that the General Court of the CJEU had issued its decision on the Claimant’s action for annulment (“the **November 2024 CJEU Decision**”) and reiterated that it would “appreciate to be given the opportunity to comment on this judgment as well as on Respondent’s latest submission.”
18. By letter of 2 December 2024, the Tribunal invited the Respondent to provide any comments it might have on the Claimant’s e-mails of 21 and 27 November 2024, which the Respondent did in its letter of 5 December 2024.
19. On 9 December 2024, the Tribunal issued Procedural Order No. 13, inviting the Parties to submit:
 - a) a skeleton outline, limited to a total of five pages, summarizing the essence of their arguments on the Respondent’s **ECT Article 24(3) Defence**, with the Claimant’s outline due by Wednesday, 18 December 2024 and the Respondent’s by Friday, 10 January 2025;
 - b) requests to produce specific additional exhibits on the Respondent’s ECT Article 24(3) Defence, if they wished to do so, for the consideration of the Tribunal and subject to its leave, by 18 December 2024;
 - c) the text of the November 2024 CJEU Decision; and
 - d) written submissions on the November 2024 CJEU Decision limited to 10 pages each, accompanied with up to 10 factual exhibits and 10 legal authorities, to be filed by no later than Wednesday, 18 December 2024.

and deferring its decision on costs related to the points discussed in Procedural Order No. 13 until a later stage of the proceedings.

20. By e-mail of 9 December 2024, the Claimant made its “suggestions for the re-organisation of the next phase of this Arbitration”, requesting
 - A new round of written submissions on the Respondent’s ECT Article 24(3) Defence and the November 2024 CJEU Decision;
 - The postponement of the Hearing scheduled for 10-14 February 2025, with 15 February 2025 in reserve to “some point later in 2025”; and
 - The extension of the Hearing time to 10 working days.
21. By e-mail of 11 December 2024, the Respondent provided its comments on the Claimant’s e-mail of 9 December 2024, objecting to the Claimant’s proposals and requesting that the Tribunal “confirm the hearing shall proceed in accordance with the procedural calendar.”
22. By e-mail of 13 December 2024, the Claimant reiterated its requests from the e-mail of 9 December 2024 and argued that:

Adhering to the limitations set out in Procedural Order No. 13 would put Claimant in a position to submit something in writing which does not correspond to what we deem necessary, and to what we have asked for in order to present our case.

23. In the same communication, the Claimant also announced that it would “not submit written documents by 18 December 2024”.
24. By letter of 17 December 2024, the Tribunal stated that,

[a]s the Claimant ha[d] declined the Tribunal’s invitation under Procedural Order No. 13 for the Parties to make certain further submissions, it [would] be unnecessary for the Respondent to offer any written response either.
25. By e-mail of 18 December 2024, the Respondent announced that it would submit pleadings and exhibits in accordance with Procedural Order No. 13. Later on the same day, the Respondent submitted its written submission on the November 2024 CJEU Decision, alongside factual exhibits R-457 through R-460 and the November 2024 CJEU Decision itself, labelled as legal exhibit RLA-416.
26. By letter of 19 December 2024, the Tribunal invited the Claimant’s comments on the Respondent’s e-mails of 18 December 2024 and on “whether it should admit the materials attached thereto into the record of these proceedings”.
27. By e-mail of 23 December 2024, the Claimant requested that the Tribunal to “ignore Respondent’s comments on the GC judgment of 27 November 2024, and also to ignore Respondent’s factual exhibits R-457 to R-460”, while voicing no objection against admitting the November 2024 CJEU Decision itself. The Claimant also informed the Tribunal that the Cantonal Court of Zug had deferred its decision until 9/10 January 2025.
28. By e-mails of 6 January 2025, the Parties informed the Tribunal of the witnesses and experts of the opposing Party they planned to cross-examine at the Hearing.⁸
29. By letter of 7 January 2025, the Tribunal decided to admit the factual exhibits and the November 2024 CJEU Decision into the case record, but, for the moment, “not to admit [the Respondent’s written submission on the CJEU Decision] into the case record”.
30. On 13 January 2025, the Tribunal circulated draft Procedural Order No. 14 on the Hearing for discussion at the pre-hearing conference, along with an agenda for the meeting.
31. By e-mail of 14 January 2025, the Claimant announced that it would provide an update on its composition proceedings during the pre-hearing conference, and that it would reiterate its request to postpone the hearing during that meeting, in accordance with one of the points of the agenda.
32. On 15 January 2025, the Tribunal held a virtual pre-hearing conference with the Parties. At the pre-hearing conference, the Claimant gave a briefing on its composition proceedings and explained that the Cantonal Court of Zug extended the Claimant’s composition moratorium.
33. The Claimant further explained that there are two deadlines which may affect the Claimant’s participation in the current arbitration: the first one, for making payment of amounts owed to “small creditors”, by 9 March 2025; and a second one, for obtaining consent from a sufficient number of creditors to enter into a composition agreement, by 9 May 2025. If such agreement is not reached by this deadline, the Claimant will be declared bankrupt.

⁸ The Claimant did so “[n]otwithstanding the discussion about the dates and duration of the hearing”.

34. The extension of the composition moratorium granted by the Cantonal Court of Zug was, in the Claimant's view, highly unusual, and has placed the Claimant in an unexpected situation.⁹ The Claimant committed itself to promptly submit the decision of the Cantonal Court of Zug extending its composition moratorium.
35. The next item on the agenda of the pre-hearing conference consisted in the Parties presenting their respective arguments on the Claimant's requests to postpone and lengthen the Hearing, and for the Tribunal to order a further round of written submissions. The discussions on the draft Procedural Order on the Hearing were postponed for procedural efficiency, in view of the Claimant's request to postpone the Hearing.
36. On 16 January 2025, the Claimant submitted an original in German and an English translation of the decision of the Cantonal Court of Zug of 9 January 2025.

II. PARTIES' SUBMISSIONS

A. The Claimant's Position

37. The Claimant requests that the Tribunal postpone and extend the Hearing to a duration of 10 days, and that the Parties be granted leave to submit another round of written submissions.
38. The Claimant has complained, both in writing and during the pre-hearing conference of 15 January 2025, that the Respondent has changed its line of argumentation in the arbitration in its Supplementary Counter-Memorial on Jurisdiction and Merits and Respondent's Supplementary Reply on Merits, with a new focus on Article 24(3) of the ECT.¹⁰ The Claimant avers that the Respondent's arguments in this respect were unforeseeable.¹¹ With regard to the November 2024 CJEU Decision, the Claimant argues that it addresses "[...] factual and economic elements [which] are highly relevant in this arbitration".¹²
39. The leave granted by the Tribunal for the Parties to submit certain new evidence and limited written pleadings under Procedural Order No. 13 was, in the Claimant's view, insufficient "to squeeze in Claimant's comments [...] in any meaningful manner" and, likewise, "it is not practicably possible, nor meaningful, to identify supporting documents without first having developed the full argumentation in question".¹³
40. The Claimant argues that it must be given an opportunity to address the alleged change in the Respondent's approach, as well as the November 2024 CJEU Decision, meaningfully, which could only happen if the currently scheduled Hearing is postponed and extended, and the Parties be granted leave to provide a "full round of written submissions" on these "new elements".¹⁴
41. In addition, the Claimant submits that the current six-day Hearing is insufficient in length for the Parties to fully develop their respective cases and argues that it "must be given the time and means

⁹ Claimant's oral submissions during the pre-hearing conference.

¹⁰ Claimant's oral submissions during the pre-hearing conference; Claimant's E-mail of 9 December 2024; Claimant's E-mail of 20 November 2024.

¹¹ Claimant's E-mail of 9 December 2024.

¹² Claimant's E-mail of 9 December 2024.

¹³ Claimant's E-mail of 13 December 2024.

¹⁴ Claimant's oral submissions during the pre-hearing conference; Claimant's E-mails of 9 and 13 December 2024; Claimant's E-mail of 20 November 2024; see also Claimant's E-mails of 12 and 21 November 2024.

needed in order properly to present its case”.¹⁵ The Claimant thus requests that a 10-day hearing be ordered by the Tribunal, at “some point later in 2025”.¹⁶ This extension is warranted by the complexity of the case, the number of witnesses and experts called for cross-examination and the recent developments in the case, including, to some extent, the current highly uncertain status of the Claimant’s composition proceedings.¹⁷

42. Furthermore, the Claimant submits that postponing the Hearing would not lead to any prejudice for the Respondent.¹⁸
43. As regards any options for bifurcation, the Claimant avers that this discussion has already taken place, with the Tribunal deciding to hear the jurisdictional objections together with the merits of the case; thus, the Hearing should be maintained in a single block.

B. The Respondent’s Position

44. The Respondent asks the Tribunal to reject all of the Claimant’s requests and to maintain the Hearing dates in February 2025.
45. The Respondent has argued that “the European Union has not ‘shifted its focus’ to Article 24(3) of the ECT. That provision has been invoked as a subsidiary defence, in the further alternative, with regard to certain claims”¹⁹ and justified the inclusion of its subsidiary defence as a response to the new factual developments, which the Tribunal specifically asked the Parties to update it on.²⁰
46. The Respondent has also pointed out that the Claimant has already had the opportunity to, and in fact has addressed the Respondent’s Article 24(3) defence in the Claimant’s Supplementary Rejoinder on Jurisdiction and Merits.²¹ The Respondent further avers that the Tribunal has granted the Parties an additional opportunity to present skeleton arguments on this subject, and the Claimant has chosen not to avail itself of this opportunity willingly—which means it has waived its right to make any complaints in this regard.²²
47. Likewise for the November 2024 CJEU Decision, the Respondent avers that the Parties have already been granted an opportunity to provide comments on it, which the Respondent duly did, and the Claimant chose not to do. The Claimant thus has no right to complain about not having been given the opportunity to present its case on this subject.²³
48. According to the Respondent, the case is not nearly as complex as averred by the Claimant and the current six-day Hearing schedule is sufficient to allow for the Parties to fully present their

¹⁵ Claimant’s oral submissions during the pre-hearing conference; Claimant’s E-mails of 9 and 13 December 2024.

¹⁶ Claimant’s E-mail of 9 December 2024.

¹⁷ Claimant’s oral submissions during the pre-hearing conference.

¹⁸ Claimant’s oral submissions during the pre-hearing conference.

¹⁹ Respondent’s E-mail of 21 November 2024.

²⁰ Respondent’s Letter of 5 December, paras 6, 12; Respondent’s E-mail of 21 November 2024.

²¹ Respondent’s oral pleadings during the pre-hearing conference; Respondent’s Letter of 5 December, para. 6; Respondent’s E-mail of 21 November 2024.

²² Respondent’s E-mails of 11 and 18 December 2024; Respondent’s oral pleadings during the pre-hearing conference.

²³ Respondent’s E-mails of 11 and 18 December 2024; Respondent’s oral pleadings during the pre-hearing conference.

respective cases. The number of witnesses and experts for cross-examination, which is fairly limited, does not warrant an extension to the Hearing length, either.²⁴ The Respondent also presented various bifurcation options, including one under which the current Hearing dates would be maintained, with an additional virtual hearing day called at a later stage.²⁵

49. As regards the alleged lack of prejudice to the Respondent if the Hearing were postponed, the Respondent avers that it has engaged its resources in preparations for the scheduled February dates, and a postponement would be prejudicial to the Respondent's position.

III. THE TRIBUNAL'S DECISION

50. The Tribunal must make a decision on the Claimant's requests to (i) postpone the Hearing on Jurisdiction and Merits scheduled to take place on 10-15 February 2025, (ii) extend the hearing to 10 days, and (iii) grant the Parties leave to submit an additional round of written pleadings on the Respondent's ECT Article 24(3) Defence and the November 2024 CJEU Decision. The Respondent objects to both of these applications.

51. The Tribunal recalls Article 15(1) of the UNCITRAL Rules, which provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

52. The Tribunal has taken into account the arguments presented by both Parties in writing and orally during the pre-hearing conference and, having deliberated on the matter, has reached the decisions set out below.

53. Under the current circumstances of the case, as presented by both Parties, the Tribunal considers that the Hearing could proceed as currently planned without substantial prejudice to either Party. The Parties have been provided with sufficient opportunities to present their respective cases. The recently issued Procedural Order No. 13 allowed the Parties to submit new written pleadings and to request leave to file additional evidence and legal authorities, specifically in response to the Claimant's concerns about the Respondent's ECT Article 24(3) Defence and the November 2024 CJEU Decision. The Claimant refused the Tribunal's invitation to submit any additional arguments or evidence.

54. The Claimant has also failed to prove that maintaining the current Hearing dates would create prejudice in relation to its composition proceedings. Quite the opposite was revealed during the pre-hearing conference, with the Claimant announcing that the Cantonal Court of Zug had granted a four-month extension to the moratorium on the Claimant's composition proceedings, with little to no impact on the currently scheduled Hearing dates. The additional three-month deadline ordered by the Cantonal Court of Zug for the Claimant to pay off small creditors does not seem to have any impact on the February Hearing dates, either.

55. Therefore, the Tribunal does not comprehend any unfairness to the Claimant that would require the postponement of the Hearing. However, the Claimant has sought more time to prepare for the hearing and set out its arguments in more detail in respect of the Respondent's Article 24(3) defence and the 2024 CJEU decision. The Tribunal has taken careful note of the views expressed

²⁴ Respondent's E-mails of 11 and 18 December 2024; Respondent's oral pleadings during the pre-hearing conference.

²⁵ Respondent's oral pleadings during the pre-hearing conference.

by both Parties, including the Respondent's objection to any delay. On balance, and not without some hesitation, the Tribunal has concluded that it is willing to accede to this request. It does so not because fairness dictates this outcome, but rather because the Claimant has indicated its need for this time to be fully prepared for the hearing in what is a complex case.

56. In addition, the Tribunal notes that the decision of the Court of Zug submitted by the Claimant after the conclusion of the pre-hearing conference has introduced an additional layer of uncertainty related to the Claimant's status and, by extension, its ability to continue pursuing this Arbitration. Both Parties have previously acknowledged that the outcome of the composition proceedings can affect the future of the current Arbitration.²⁶
57. The Court of Zug delivered an unorthodox decision, granting an "extraordinary extension of the composition moratorium exceeding statutory time-limits",²⁷ apparently going beyond the letter of Swiss law, which provides a duration limit of up to 24 months for moratoria, even in complex cases:²⁸

At the request of the administrator, the moratorium may be extended to twelve months or, in particularly complex cases, to a maximum of 24 months.

58. The Tribunal thus expected the Claimant's status to be fully clarified by 10 January 2025, which was the day on which the 24-month maximum moratorium period ended.²⁹ The "extraordinary extension" by the Court of Zug proves that the Claimant has been unable to obtain a favourable resolution of the composition proceedings within the statutory 24-month period. This, in turn, calls into at least some doubt whether the Claimant will be able to continue with the Arbitration, leading to the possibility that the February Hearing might become moot. A consequential benefit of postponing the February Hearing is that this uncertainty will in all likelihood have been resolved by the time of the new Hearing dates.

²⁶ See detailed explanations by the Claimant in Section V.3 of its Supplementary Memorial on Jurisdiction and Merits and the Respondent's respective response, in para. 96 of its Supplementary Counter-Memorial on Jurisdiction and Merits, that:

The European Union reserves its right to object to the continuation of the present arbitration proceedings once the outcome of the ongoing composition/bankruptcy proceedings becomes clearer.

²⁷ Cantonal Court of Zug decision dated 9 January 2025 regarding the composition moratorium/agreement, English translation submitted by the Claimant on 16 January 2025, para. 6.

²⁸ Ex. CLA-318, Swiss Debt Enforcement and Bankruptcy Law (DEBL), Art. 295b, para. 1.

²⁹ The Tribunal formed this understanding on the basis of the Claimant's previous statements which have not been objected to by the Respondent:

The definitive composition moratorium will last for a maximum of 24 months, i.e. until 10 January 2025.

(Claimant's Letter of 1 February 2023, p. 2)

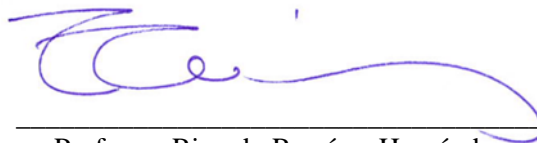
and

Thereafter, another extension can, and is expected to be granted until 10 January 2025, as the definitive composition moratorium can last for a maximum of 24 months.

(Claimant's Supplementary Memorial on Jurisdiction and Merits, para. 91)

59. The only prejudice connected with the postponement of the Hearing appears to be the time and costs incurred by the Parties and the Tribunal for Hearing preparations which have already been undertaken. These costs may not be wasted costs, and to the extent that the postponement of the Hearing has an impact on the costs incurred by the Parties, the Tribunal may take this into account in apportioning these costs in an eventual award. The Tribunal also points to the potential cost savings, should the proceedings be ultimately discontinued due to the outcome of the composition proceedings.
60. In the light of the above, recalling Article 15(1) of the UNCITRAL Rules, and primarily as an indulgence to the Claimant, the Tribunal hereby vacates the February 10-15 Hearing.
61. The Claimant has also made two further requests: to extend the Hearing period to 10 days and to allow the Parties to submit another round of written submissions.
62. With the additional time allowed by the postponement of the Hearing, the Tribunal sees merit in allowing the Parties to submit an additional round of written submissions, strictly on the Respondent's ECT Article 24(3) Defence and the November 2024 CJEU Decision.
63. As both Parties will have had an opportunity to address these two subjects in detail ahead of the Hearing, the Tribunal foresees that the Hearing will not require any extension in length.
64. In the interest of time, the Tribunal issues the current order vacating the 10-15 February 2025 Hearing dates and will engage the Parties separately to discuss the new Procedural Calendar, including the new Hearing dates and the timeline for the submission of additional written submissions by the Parties.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal