

# Year in review 2023

## International Dispute Resolution and Arbitration

ARZINGER 20 YEARS



In Ukraine, the year 2023 was full of disputes-related events, and most of these events in one way or another had to do with compensation for damages caused by the war of the russian federation against Ukraine.

This year, both the state and Ukrainian business became more active and made great efforts to make russia bear real responsibility.

While the state's activities are mostly concerned with establishing an International Compensation Mechanism in the near future, investors are increasingly looking for available and effective ways to compensate at least part of the damages – and the sooner, the better.

### INTERNATIONAL REGISTER OF DAMAGE

In 2023, the first component of the International Compensation Mechanism, the Register of Damage caused by the russian federation's aggression against Ukraine (The Hague), was announced, the governing bodies of the Register were established, and the first meeting of the Register of Damage Board was held.

The Register is only a database of damage, but not the entire compensation mechanism. Other elements of the compensation mechanism are to be developed, which currently remain at the initial stage: The Commission, which will consider cases, and the Fund, which will pay compensations.

Unfortunately, **the damage dealt by russia in Crimea and Donbas until 24 February 2022 does not fall within the scope of the Register and the Compensation Mechanism.**

### RINAT AKHMETOV INITIATES ARBITRATION AGAINST RUSSIA FOR SEIZED ASSETS IN DONETSK AND LUHANSK REGIONS BY 2022

Ukrainian businessman Rinat Akhmetov will demand compensation from russia for all damage incurred because of the seizure of assets and investments by the so-called DPR and LPR under russian leadership/control in 2014-2017. These assets include dozens of enterprises in the mining, metallurgical and energy sectors, as well as real estate, including the Donbas Arena Stadium, in the construction of which over \$400 million were invested.

### INVESTMENT ARBITRATION

#### TERMINATION OF THE UKRAINE-RUSSIA BILATERAL INVESTMENT TREATY

In August 2023, Ukraine terminated the Agreement between Ukraine and russia on the Encouragement and Mutual Protection of Investments (BIT). The BIT constituted a legal basis for investment arbitrations against russia for lost investments in the territories occupied by russia.

The BIT will be terminated on **27 January 2025**, however, investments **made before the termination date** will be protected for the next 10 years (until 2035). This means that if russia commits violations with regard to such investments before 2035, investors will still be able to initiate investment arbitration against russia.

One potential risk of such termination is that the Ukrainian regions close to the front line may possibly lose a significant part of its for investment attractiveness and reconstruction potential. If the front line changes and russians occupy new territories, it will no longer be possible to receive compensation for the loss of investments made after 27 January 2025 under the BIT.

#### ACHIEVEMENTS IN "CRIMEAN CASES"

##### Naftogaz and others v. Russia

On 12 April 2023, the arbitral tribunal issued a final award in the case, ordering russia to pay \$5 billion in compensation for the seized property of Naftogaz in Crimea. In December 2023, Naftogaz and the group companies received an order from a British court to recognise and enforce the arbitral award. In parallel, Naftogaz continues the enforcement of the arbitral award in the United States and other target jurisdictions with russian assets.

##### Oschadbank v. Russia

In March 2023, Oschadbank filed an application with the Court in the District of Columbia, USA, to enforce the arbitral award to recover \$1.3 billion of compensation.

##### Lugzor and others v. Russia

In early 2023, it came to light that the investment arbitration tribunal upheld the claims of Ukrainian investors.

##### DTEK v. Russia

The arbitration tribunal resolved the dispute in DTEK's favour and ordered russia to pay compensation in the amount of \$267 million. In November 2023, DTEK filed an application with the US District of Columbia Court to enforce the award.

#### RUSSIAN BILLIONAIRE FRIDMAN FILES A LAWSUIT AGAINST UKRAINE

ABH Holdings S.A., a company owned by russian billionaire Mikhail Fridman and partners, has filed a lawsuit against Ukraine with the International Centre for Settlement of Investment Disputes (ICSID) in Washington, seeking \$1 billion in damages for the forced nationalisation of Sense Bank. The legal basis for the claim is the Agreement between the Government of Ukraine and the Belgium-Luxembourg Economic Union on the reciprocal promotion and protection of investments.

In 2023, the Supreme Court continued to take steps to promote arbitration in Ukraine and to make Ukraine perceived as an arbitration-friendly jurisdiction.

## **SUPREME COURT: TWO UKRAINIAN COMPANIES CAN ARBITRATE ABROAD**

The Grand Chamber of the Supreme Court adopted a progressive Ruling in case №910/3208/22, thereby once again confirming its pro-arbitration approach: **(1)** the arbitration clause in the Contract also applies to non-signatory, who subsequently assumed the rights and obligations under the Contract, and **(2)** the dispute between two Ukrainian entities can be resolved by international commercial arbitration outside of Ukraine if their contract has a certain international element.

In this case for the first time in its history the Supreme Court turned to the professional arbitration community and requested Amicus Curiae briefs from the Ukrainian Arbitration Association (UAA) and International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. **Timur Bondaryev, Volodymyr Nakonechnyi and Anastasiia Kotliarchuk of Arzinger took part in the UAA working group to provide an independent opinion for the Grand Chamber of the Supreme Court.**

## **ICAC AND UMAC AT THE UKRAINIAN CCI: IMPLEMENTATION OF MEDIATION AND COMBINED DISPUTE RESOLUTION PROCEDURES**

ICAC and UMAC at the Ukrainian CCI introduced mediation and combined dispute resolution procedures **“Arbitration-Mediation-Arbitration”** and **“Mediation-Arbitration”**.

In combined procedures, enforceable agreements can be concluded as a result of mediation, which is achieved by fixing them in an enforceable arbitral award on agreed terms (opposed to a mediation agreement, which cannot be enforced).

When settling a dispute through combined procedures, the parties receive discounts on fees and expenses.

## **THE HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS ENTERED INTO FORCE FOR UKRAINE**

The Hague Convention of 02 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters entered into force for Ukraine **on 01 September 2023**. Previously, Ukrainian court judgments abroad and foreign judgments in Ukraine were recognised and enforced mainly on the basis of reciprocity between states.

The Convention will now apply to the cross-border recognition and enforcement of judgments between 28 signatory states including Ukraine. The Convention creates a regime similar to the mechanism for the recognition and enforcement of foreign arbitral awards under the New York Convention and should facilitate the enforcement of judgements.

**The Convention does not apply** to tax, customs or administrative matters.

## **A LOOK INTO 2024:**

■ In 2024, we expect that **the rules and procedures of the International Register of Damages are approved**, the categories of losses are determined and that Ukraine continues its work on other elements of the compensation mechanism – the Commission and the Fund. The Ministry of Justice of Ukraine predicts the global launch of the Register in the second quarter of 2024, but we consider this to be a rather optimistic scenario

■ In 2024, the increase in **the number of investment disputes against the Russian Federation regarding losses caused** by the occupation of Donbas in 2014-2022 is almost certain. As this category of damages is not included in the scope of the International Compensation Mechanism, investment arbitration remains the only effective way to obtain compensation, and many Ukrainian companies and business owners are already taking and will continue to take active steps in this direction.

■ **It is possible** that investment arbitration proceedings against Ukraine, which were on pause, will be continued this year. Unfortunately, Ukraine’s state authorities, including the Ministry of Justice, had to adapt to the new realities and were able to effectively renew their work in the wartime. This may be taken into account by the arbitral tribunals that previously suspended proceedings at the beginning of Russia’s full-scale war – especially as new investment disputes against Ukraine are already surfacing (the Fridman case).

■ At the same time, we do not expect a significant increase in the number of investment disputes against Ukraine.

**We anticipate** that new investment disputes will mostly be initiated by Russian businesses, whose assets have been nationalised in Ukraine.

