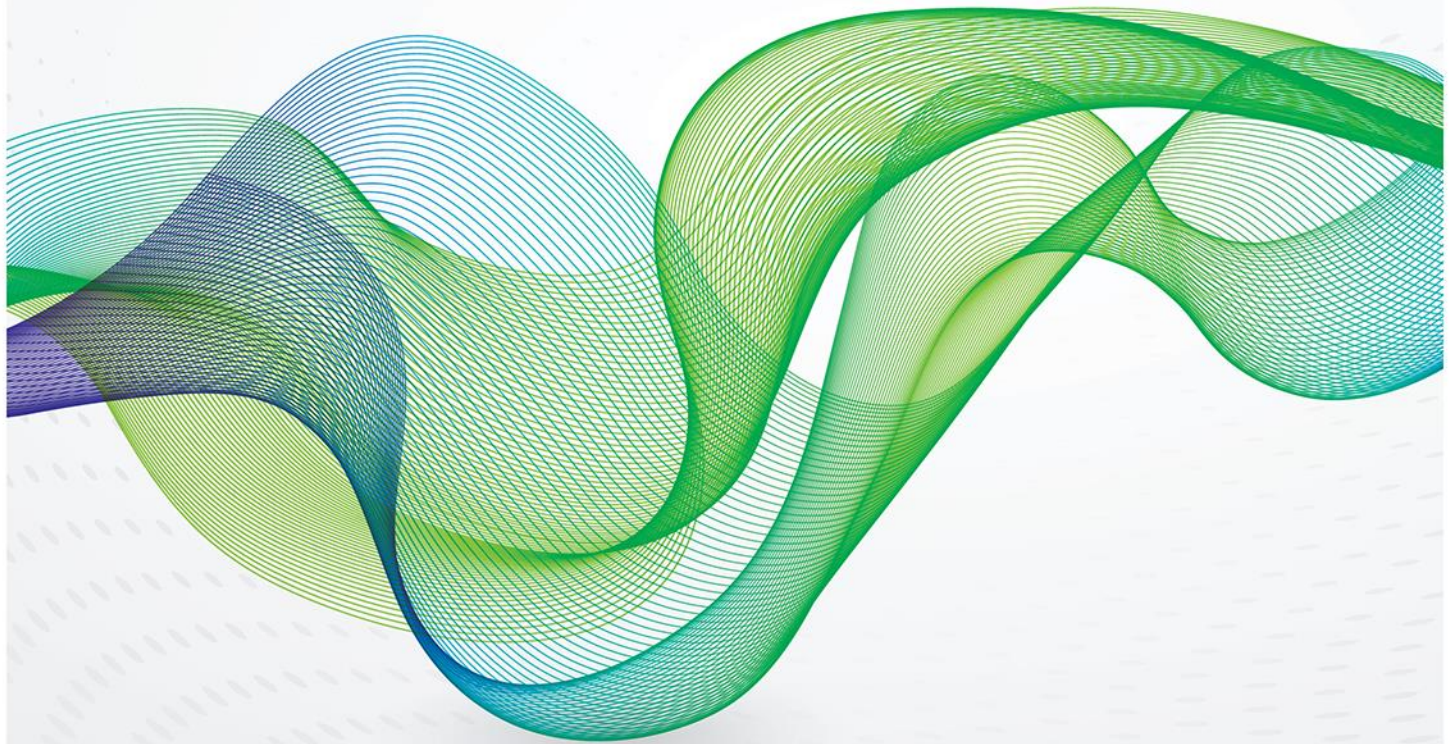


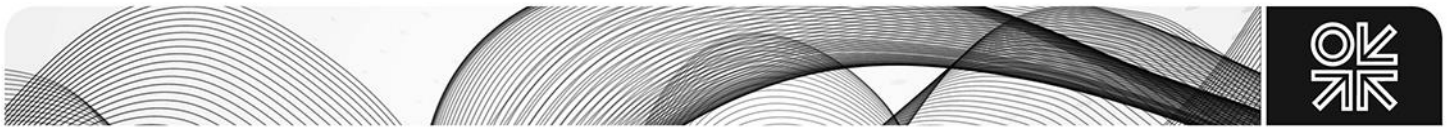
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## **The Uniper-Gazprom Arbitration Ruling: Is the final curtain coming down on remaining long-term Russian gas supply contracts to Europe?**



**OIES ENERGY COMMENT**

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## Introduction

The EU-Russia gas relationship came under unprecedented strain in the aftermath of the Russian invasion of Ukraine on 24 February 2022. In March 2022, the Russian president, Vladimir Putin, signed a decree requiring buyers from “unfriendly” countries (including all EU Member States) to pay for Russian gas supplies delivered to them after 1 April 2022 in roubles (instead of euros or dollars) using a special payment mechanism.<sup>1</sup> This measure was largely interpreted as an attempt to put pressure on European gas buyers. However, adopting this measure allowed Russia to safeguard future gas payments from being frozen or confiscated by European authorities since, unlike the existing payment mechanism, the new one would not be subject to sanctions. Some European buyers switched to making payments under the new mechanism,<sup>2</sup> while others rejected it and saw their supplies cut off.<sup>3</sup> Several European buyers, including Finland’s Gasum and Poland’s PGNiG (now Orlen), decided to launch arbitration proceedings against Gazprom Export, a wholly-owned subsidiary of Gazprom. The first such arbitration concluded in November 2022, when a tribunal issued an award in the Gasum arbitration, to the effect that Gazprom was entitled to cut off supplies owing to *force majeure*.<sup>4</sup> Other cases related to the rouble payment mechanism are pending.

When in mid-June 2022, Russian gas supplies through Nord Stream started to dwindle and stopped altogether by the end of August, more European buyers decided to start proceedings against Gazprom Export, unleashing a second wave of arbitrations, this time in respect of reduced deliveries through Nord Stream. These claimants included Germany’s Uniper and RWE, France’s Engie, Italy’s ENI and Czechia’s CEZ. In the most recent development for second wave arbitrations, a tribunal issued its ruling on 7 June 2024 in the arbitration brought by Uniper over gas volumes it had contracted under its long-term supply contracts (LTSCs) with Gazprom Export but which had not been delivered, either in full or at all since June 2022. Other cases related to reduced delivery through Nord Stream are pending.

This comment explains the factual background, and the Uniper-Gazprom arbitral tribunal ruling which terminated the long term contracts between the parties, and its implications in a broader context, for European gas markets. The consequences are of potentially enormous importance to the future of EU gas markets which we believe most commentary has thus far missed. The potential for similar arbitral decisions to terminate the remaining Russian long term contracts will give other suppliers – particularly LNG suppliers – more confidence that EU countries will need their gas imports for a longer period of time. European sanctions imposed on Russian LNG supplies and trans-shipment (which we shall examine in a forthcoming publication) will add to this confidence.

The tribunal’s ruling has not been published and we have not had access to it. This comment is therefore based on our understanding of the ruling and its implications on the basis of publicly-available sources.

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<sup>1</sup> See Ason (2022), ‘Rouble gas payment mechanism: implications for gas supply contracts’, OIES, <https://www.oxfordenergy.org/publications/rouble-gas-payment-mechanism-implications-for-gas-supply-contracts/> and Yafimava (2022), ‘The EC guidance on the Russian ‘gas for rubles’ decree: all things to all people?’, OIES, <https://www.oxfordenergy.org/publications/the-ec-guidance-on-the-russian-gas-for-rubles-decree-all-things-to-all-people/>

<sup>2</sup> Based on media reports, buyers from the following countries have accepted the mechanism: Germany, Italy, France, Austria, Hungary, Slovakia, North Macedonia, Romania, Greece, Belgium, Switzerland, Croatia.

<sup>3</sup> Based on media reports, buyers from the following countries have rejected the mechanism: Poland, Bulgaria, the Netherlands, Finland, Denmark, Latvia, Lithuania, Estonia, Czech Republic, Slovenia.

<sup>4</sup> ‘Gazprom Export says court ruled Finland’s Gasum must pay more than 300 million euros’, Reuters, 17 November 2022, <https://www.reuters.com/business/energy/gazprom-export-says-court-ruled-finlands-gasum-must-pay-more-than-300-million-2022-11-17/>

## 1. The arbitration case: Uniper Global Commodities SE and METHA – Methanhandel GmbH v. Gazprom Export, PCA Case No. 2023-02

In November 2022, Uniper announced that it had initiated a Stockholm-seated arbitration against Gazprom “claiming damages incurred by the company in connection with the gas volumes not delivered by GPE since June [2022].”<sup>5</sup> For many years, Germany had been importing all its Russian gas – including volumes contracted by Uniper – through the offshore Nord Stream pipelines. On 14 June 2022, Gazprom announced it was reducing the flow on Nord Stream from 167 mmcm/d to 100 mmcm/d and further again on 16 June to 67 mmcm/d. It justified its actions by technical problems at Portovaya – a giant compressor station feeding the Nord Stream pipelines with gas – blaming western sanctions on the interruption of the compressor station’s turbine maintenance and repair cycle. However, the reduction was largely viewed by Europeans as an attempt to put political pressure on the EU, as a response to the sanctions levied on Russia in the aftermath of its invasion of Ukraine on 24 February 2022.<sup>6</sup>

The reduction of flows on Nord Stream led to reduced deliveries to Germany and to several other European countries, including Italy, Austria, Slovakia, and France.<sup>7</sup> Uniper was one of the first companies to report deliveries below nominated volumes, alongside Germany’s RWE, Italy’s Eni, Austria’s OMV, and Slovakia’s SPP.<sup>8</sup> Meanwhile, the LTSCs underpinning these supplies remained in force, although deliveries were below contracted volumes since mid-June 2022 and, according to Uniper, no gas at all was delivered from the end of August 2022.

On 14 July 2022, Gazprom Export sent a letter to its European buyers – including Uniper – declaring *force majeure* in respect of supplies through Nord Stream, backdated to 14 June – the date when supplies through the pipelines were first reduced – stating that it could not guarantee gas supplies because of ‘extraordinary’ circumstances.<sup>9</sup> Initially it claimed this was due to maintenance at the Portovaya compressor station where the turbine and repair cycle had been interrupted due to the sanctions noted above. But subsequent subsea explosions on the Nord Stream (and Nord Stream 2) pipeline systems in September 2022 damaged three out of four pipelines rendering them unusable for gas transport for the foreseeable future. The significant damage would require months (and possibly years) to be repaired and that could not start until Swedish, Danish and German investigations had concluded.<sup>10</sup> Our understanding is that repairs would in any event have been severely impeded by the western sanctions regime. The explosions therefore effectively served to foreclose the prospect of a return of Russian pipeline gas to Europe on any significant scale for an indefinite period. This was compounded by uncertain prospects for Russian gas transit across Ukraine once the existing contract expires at the end of 2024 and a breakdown of the contractual relationship underpinning transit across Poland, all of which have significant consequences for the remaining long-term contracts with European buyers.

By declaring *force majeure*, Gazprom sought to protect itself from the buyers’ claims for non-performance and their claims for damages. *Force majeure*, broadly speaking, refers to unexpected external circumstances that impede performance under a contract. Gas supply agreements routinely contain *force majeure* clauses and often provide illustrative examples of *force majeure* events. Such examples include circumstances related to the damage caused to gas infrastructure facilities used for providing contracted service and more generally to unavailability of facilities or materials.<sup>11</sup>

<sup>5</sup> Uniper, ‘Uniper initiates arbitration proceedings against Gazprom and further ringfences Russian business unit’, press release, 30 November 2022, <https://www.uniper.energy/news/uniper-initiates-arbitration-proceedings-against-gazprom-and-further-ringfences-russian-business-unit>

<sup>6</sup> The Nord Stream turbine incident is analysed in detail in Fulwood, Stern, Sharples and Yafimava (2022), ‘The curious case of the Nord Stream turbine’, OIES, <https://www.oxfordenergy.org/publications/the-curious-incident-of-the-nord-stream-gas-turbine/>

<sup>7</sup> ‘Russia’s Gazprom tells European buyers gas supply halt beyond its control’, Reuters, 19 July 2022, <https://www.reuters.com/business/energy/russias-gazprom-declares-force-majeure-gas-supplies-europe-2022-07-18/>

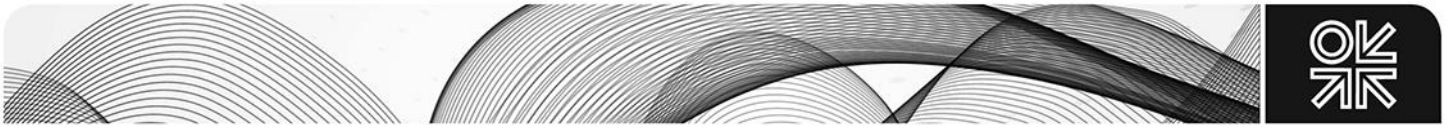
<sup>8</sup> ‘Nord Stream 1 gas supply cut aimed at sowing uncertainty, Germany warns’, Reuters, 15 June 2022, <https://www.reuters.com/business/energy/german-minister-accuses-russia-finding-excuse-cut-nord-stream-1-gas-2022-06-15/>

<sup>9</sup> ‘Russia nears gas shutdown in Europe as Germany rejects claims it can’t fulfill contracts’, CNBC, 19 July 2022, <https://www.cnbc.com/2022/07/19/russia-nears-gas-shutdown-in-europe-as-germany-rejects-claims-it-cant-fulfil-contracts.html>; ‘Exclusive: Russia’s Gazprom tells European buyers gas supply halt beyond its control’, Reuters, 18 July 2022, <https://www.reuters.com/business/energy/russias-gazprom-declares-force-majeure-gas-supplies-europe-2022-07-18/>

<sup>10</sup> Danish and Swedish investigations concluded in February 2024 without naming a perpetrator. The German investigation is ongoing.

<sup>11</sup> Ason (2022), ‘International gas contracts’, OIES 2022, <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2022/11/International-Gas-Contracts.pdf>





In November 2022, Uniper formally rejected the *force majeure* claim as “unjustified”<sup>12</sup> and filed a request for arbitration. In a statement sent to the press, Gazprom said it intended to defend itself “within the legal framework” since it did “not recognise any violation of contract or the legality of Uniper’s stated claims for damages.”<sup>13</sup> It is, however, not known whether Gazprom took any active role in the arbitration (including whether it hired external counsel, filed any briefs or appeared for any hearings in this case).

The public record of arbitration proceedings is limited, which is not surprising considering that most international commercial arbitration proceedings are private and confidential. Uniper’s statement clarified that the seat of arbitration was Stockholm. Public databases<sup>14</sup> further clarify: the corporate identities of the parties, with two Uniper subsidiaries (Uniper Global Commodities SE and METHA – Methanhandel GmbH) as Claimants and Gazprom subsidiary (Gazprom Export) as the Respondent; the law applicable to the merits of the dispute (Swiss law); and that it was an *ad hoc* (not institutional) arbitration, with the Permanent Court of Arbitration (**PCA**) in the Hague acting as an appointing authority in this case. The public case record also shows that the first arbitrator was appointed by the Claimant but the second arbitrator was appointed by the PCA (rather than Gazprom Export as the Respondent), which is a strong indication that Gazprom did not participate in the arbitration, not even at the initial, and practically extremely important stage of the arbitration process, when both parties get the chance to appoint their arbitrators.

In March 2024, Gazprom secured an anti-arbitration injunction in the Russian arbitration court for St Petersburg and the Leningrad region. Specifically, the Russian court ruled that Uniper would be fined €14.3 billion if it proceeded with its international arbitration.<sup>15</sup> This was not an isolated case since Gazprom won similar injunctions in the same Russian court against other European companies, including *inter alia* Austria’s OMV Marketing & Trading and OMV Exploration and Production, Czech Net4Gas, France’s Engie and Netherland’s Gasunie, banning all of them from conducting foreign arbitration proceedings and imposing hefty fines for doing so. One of the reasons cited by Gazprom Export for such anti-arbitration injunctions was that it could not get the necessary legal representation and a fair hearing abroad, due to Western sanctions.<sup>16</sup>

## 2. The arbitral tribunal’s ruling of 7 June 2024 and next steps

According to the statement issued by Uniper on 12 June 2024<sup>17</sup>, the tribunal awarded Uniper:

- the right to terminate its long-term gas supply contracts with Gazprom Export;
- an amount of more than €13 billion in damages for the gas volumes not supplied by Gazprom Export since mid-2022.

The tribunal thus granted Uniper a combination of two types of relief which, as we highlight below, have a wider impact on the long-term supply of Russian gas to Europe.

### Contract termination

Contract termination before expiry is considered ‘a nuclear option’ in any long-term gas supply relationship. Circumstances where the contract can be terminated by one party (rather than by mutual agreement), are, in practice, limited. In general, LTSCs tend to provide closed lists of narrowly defined termination events, including cases of a material breach of contract. Nonetheless, contracts can become untenable for either buyer or seller at some point. Accordingly, most LTSCs explicitly allow the affected party to end the contractual relationship in pre-defined circumstances.<sup>18</sup>

<sup>12</sup> ‘Uniper has received Gazprom’s force majeure letter on gas supplies’, Reuters, 18 July 2022,

<https://www.reuters.com/article/ukraine-crisis-gazprom-uniper-idUSL8N2YZ3VA/>

<sup>13</sup> ‘Gazprom rejects Uniper’s claims for billions in compensation over undelivered gas’, Reuters, 30 November 2023,

<https://www.reuters.com/business/energy/gazprom-rejects-unipers-claims-billions-compensation-over-undelivered-gas-2022-11-30/>

<sup>14</sup> See, for example, the case record in Jus Mundi: <https://jusmundi.com/en/document/other/en-uniper-global-commodities-se-and-metha-methanhandel-gmbh-v-gazprom-export-press-release-of-uniper-on-the-outcome-of-arbitration-wednesday-12th-june-2024>.

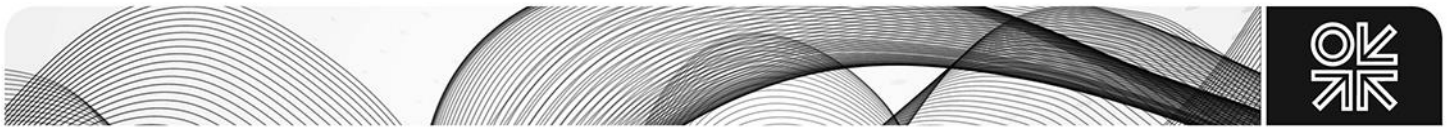
<sup>15</sup> ‘Uniper wins \$14 billion arbitration ruling against Gazprom’, Reuters, 12 June 2024, <https://www.euractiv.com/section/energy-environment/news/germanys-uniper-wins-14-billion-arbitration-ruling-against-gazprom/>

<sup>16</sup> ‘Gazprom Export wins court ruling to halt OMV’s arbitration abroad’, TASS, 22 May 2024, <https://tass.com/economy/1791745>

<sup>17</sup> Uniper, ‘Uniper terminates Russian gas supply contracts’, press release, 12 June 2024,

<https://www.uniper.energy/news/uniper-terminates-russian-gas-supply-contracts>

<sup>18</sup> See Ason (2022).



Uniper's statement refers to the tribunal's ruling of 7 June 2024 "awarding" Uniper the right to terminate its long-term gas supply contracts with Gazprom. Shortly thereafter, on 12 June 2024, Uniper took the decision to terminate these LTSCs.

Uniper took over and continued the contracts from its predecessor companies (E.ON and Ruhrgas) when it was founded in 2016. Since the 1970s, the contracts (initially signed by Sojuzneftexport and Ruhrgas) formed the core of the German-Russian energy relationship. Those early German-Russian gas contracts did not contain termination clauses. While it is not known whether the Uniper – Gazprom Export LTSCs in question<sup>19</sup> (likely including the 30-year Ruhrgas-Gazprom contract signed in 2006) contain any legal basis for contract termination, Uniper stated in its press release that the ruling provided "legal clarity" enabling it to terminate its LTSCs with Gazprom Export.

The fact that Uniper, as reiterated by Uniper's CEO in the press release, "received" this right from the tribunal (rather than had it "confirmed" by the tribunal) further suggests that termination might have not been possible without the tribunal's award.

The tribunal's decision was presumably made on the basis of a prolonged failure to deliver as no deliveries had taken place under Uniper's Gazprom LTSCs since August 2022 or were likely to be resumed in the foreseeable future.

The termination of the relevant contracts relieved Uniper from its obligation to pay Gazprom the remaining multi-billion-euro 'take or pay'<sup>20</sup> bill for another decade (as the contracts in question were not expiring until the mid-2030s). The tribunal's ruling also enabled Uniper to remove ~25.6 bcm<sup>21</sup> of Russian gas from its supply portfolio. The removal of those significant volumes is in line with the policy of the German government (which is the current owner of Uniper following its nationalisation in 2022) to phase out Russian gas from the country's energy balance, and following the EU Versailles Declaration, to phase out Russian gas as soon as possible. These were further developed in the European Commission RePowerEU Plan with a list of measures for phasing out Russian gas that would need to be implemented by 2027.

With the termination of Uniper's LTSCs, the company no longer has any assets associated with Gazprom, having previously written off its stake in the Nord Stream 2 pipeline system as well as in its Russian subsidiary Unipro.<sup>22</sup> Shedding these assets is expected to help prepare the company for planned privatisation reportedly in late 2024 or early 2025. Under the terms of the EU state aid clearance, the German government (which currently holds a 99% stake in Uniper) is obliged to reduce its stake to a maximum of 25% plus one share by the end of 2028.<sup>23</sup>

## Damages

According to Uniper, the tribunal awarded it "an amount of more than €13 billion in damages for the gas volumes not supplied by Gazprom Export since mid-2022."<sup>24</sup>

The valuation methodology applied by the tribunal and the amount of damages claimed by Uniper are undisclosed but, according to the statement issued by Uniper on 30 November 2022, it claimed damages incurred "in connection with the gas volumes not delivered by GPE since June [2022]", adding that it had had to "procure replacement volumes at higher cost" and "bear the entire replacement costs", which at the time of the start of arbitration stood at "at least €11.6 billion" and were expected to "grow further until the end of 2024." This suggests that Uniper claimed all its replacement costs incurred as a result of Gazprom's failure to deliver gas under the relevant LTCs.

<sup>19</sup> The relevant supply contracts have not been identified by Uniper in the press release.

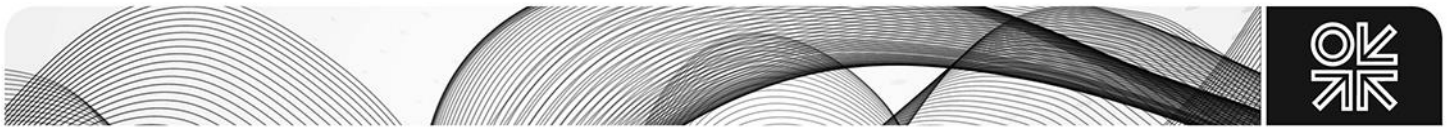
<sup>20</sup> Take-or-pay is a contractual provision that places an obligation on the buyer to pay for gas delivered by the seller even if that gas has not been taken by the buyer.

<sup>21</sup> 'Uniper wins arbitration case against Gazprom', *Energy Intelligence*, 12 June 2024, <https://www.energyintel.com/00000190-0c52-dddb-abf3-0f7fb9b10000>

<sup>22</sup> 'Uniper wins \$14 billion arbitration ruling against Gazprom', *Reuters*, 12 June 2024, <https://www.reuters.com/markets/commodities/uniper-terminates-russian-gas-supply-contracts-after-arbitration-ruling-2024-06-12/>

<sup>23</sup> 'Germany sounds out banks to advise on privatization of Uniper', *Bloomberg*, 31 May 2024, <https://www.bloomberg.com/news/articles/2024-05-31/germany-is-asking-banks-to-pitch-for-roles-on-a-planned-re-ipo-of-uniper>

<sup>24</sup> Uniper, 'Uniper terminates Russian gas supply contracts', press release, 12 June 2024, <https://www.uniper.energy/news/uniper-terminates-russian-gas-supply-contracts>



According to Uniper's 2022 Annual Report, "the realized added cost of procuring replacement volumes of gas alone amounted to about €13.2 billion in the 2022 fiscal year."<sup>25</sup> According to the 2023 Annual Report, "Uniper has hedged the associated gas supply obligations to its customers for the years 2023 and 2024 ... at no cumulative additional cost. Instead, it achieved a cumulative reduction in costs of replacement gas volumes of roughly €2.3 billion in the 2023 fiscal year." As a result of its hedging activities, Uniper "no longer expects any further additional costs of procuring replacement volumes of gas for the years 2023 and 2024 overall."<sup>26</sup> This assessment is a significant improvement in comparison with the earlier situation. In the first nine months of 2022, Uniper reported a €40 billion net loss (reportedly the biggest in German corporate history).<sup>27</sup> Part of that was down to higher costs of replacing lost Russian gas supplies on the more expensive spot market (with average monthly TTF prices at which alternative gas had to be sought in the €80-235/MWh range throughout 2022 – a very substantial increase compared to pre-crisis levels).<sup>28</sup> In 2022, Uniper "suffered on average double-digit million incremental costs daily" having to procure gas at ... market prices to fulfill the contractual obligations towards its customers.<sup>29</sup>

In December 2022, following Uniper's request for a bailout<sup>30</sup> and within weeks of the start of arbitration, the German government nationalised Uniper, acquiring a 99% stake in the company, to prevent its imminent bankruptcy. Thus Uniper remained a state-owned company for the duration of arbitration proceedings, although the German finance ministry stressed that the government had no influence on Uniper's operational management and was "not a party or involved" in the arbitration.<sup>31</sup>

### **Next steps: enforcement and litigation**

It seems unlikely that Gazprom will comply with the arbitral award. Accordingly, the next step for Uniper will be most likely to seek recognition and enforcement of the award in national courts in jurisdictions where Gazprom's assets are located.<sup>32</sup>

As noted by the CEO of Uniper, "it is not yet clear whether significant amounts are to be expected."<sup>33</sup> Realistically the prospects for enforcement of the tribunal's award in relation to Gazprom's assets appear to be limited. Although enforceability of foreign arbitral awards is typically seen as the key advantage of international arbitration, the enforcement is facilitated by a robust legal framework (particularly the New York Convention<sup>34</sup>) and an established "pro-enforcement" approach of national courts. Any enforcement action specifically against Gazprom's assets is likely to be an uphill battle for reasons including sanctions, potential asset concealment and parallel court proceedings.

While Uniper could seek to enforce its damages award in relation to Gazprom's assets in Europe, the practical reality is that Gazprom does not have many assets in Europe. This is largely due to the reluctance of European governments in the past to allow Gazprom to acquire their natural gas infrastructure. The assets that Gazprom has in Europe (mostly but not exclusively in Germany) such as trading subsidiaries and joint ventures, have already been nationalised (e.g. Gazprom Germania and

<sup>25</sup> Uniper, '2022 Annual Report: Financial Results', [https://www.uniper.energy/system/files/2023-03/2023-03-17\\_FY\\_2022\\_Uniper\\_Annual\\_Report\\_.pdf](https://www.uniper.energy/system/files/2023-03/2023-03-17_FY_2022_Uniper_Annual_Report_.pdf)

<sup>26</sup> Uniper, '2023 Annual Report: Financial Results', <https://www.uniper.energy/system/files/2024-04/Annual%20Report%202023.pdf>

<sup>27</sup> "Massive scars": Germany's Uniper posts record 40 bln euro net loss', Reuters, 30 November 2022, <https://www.reuters.com/business/energy/struggling-gas-importer-uniper-unveils-record-40-billion-euro-net-loss-2022-11-03/>

<sup>28</sup> Average monthly TTF prices were €82-111/MWh in the final four months of 2021 but in the first 8 months of that year they were €17-62/MWh.

<sup>29</sup> Uniper, 2023 Annual Report: Financial Results, <https://www.uniper.energy/system/files/2024-04/Annual%20Report%202023.pdf>

<sup>30</sup> 'German Government Nears State-Led Bailout of Uniper', Bloomberg, 19 July 2022, <https://www.bnnbloomberg.ca/german-government-nears-state-led-bailout-of-uniper-1.1794100>

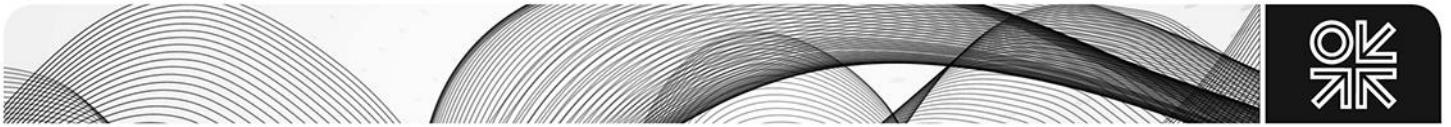
<sup>31</sup> Uniper wins \$14 billion arbitration ruling against Gazprom', Reuters, 12 June 2024, <https://www.reuters.com/markets/commodities/uniper-terminates-russian-gas-supply-contracts-after-arbitration-ruling-2024-06-12/>

<sup>32</sup> In parallel, Uniper is currently seeking to overturn the anti-arbitration injunction issued by the Russian court. The title could potentially allow Gazprom to enforce Uniper assets within Russia and possibly even outside of Russia but, according to Uniper, "the potential enforcement of the title against Uniper assets is not assessed as a major individual risk." Uniper, 'Quarterly Statement Q1 2024: Financial Results', <https://www.uniper.energy/news/download/c961297d-a01d-4083-b9a7-a07693ba46a4/quarterly-statement-q1-2024.pdf>

<sup>33</sup> <https://www.uniper.energy/news/uniper-terminates-russian-gas-supply-contracts>

<sup>34</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is an international treaty with 172 state parties that facilitates global enforcement of foreign arbitral awards.





Gazprom Marketing and Trading). Gazprom's assets in non-EU jurisdictions may also prove difficult to enforce and enforcement proceedings, as such, are likely to take longer than those in the EU courts.

For its part, Gazprom is likely to oppose any enforcement action, invoking grounds that may justify the refusal of enforcement by a national court. According to Article V of the New York Convention, those are (in short): (i) incapacity of the parties or invalidity of the arbitration agreement; (ii) violation of due process; (iii) differences not falling within the terms of, or decisions on matters beyond the scope of, the submission to arbitration; (iv) improper composition of the arbitral authority or non-respect of arbitral procedure; (v) award not yet binding, set aside or suspended; (vi) differences that cannot be settled by arbitration; and (vii) violation of public policy. The grounds for refusal contained in Article V of the New York Convention are exhaustive and must be interpreted narrowly. Gazprom may invoke several grounds but its position in relation to the perceived need for anti-arbitration injunctions due to the lack of legal representation suggests that it might prioritize issues related to a fair trial and most likely raise violations of due process and public policy (being a largely undefined and potentially expansive notion<sup>35</sup>) as grounds for refusal of enforcement.

If Gazprom decides to challenge the award, it will need to initiate annulment proceedings in the relevant court at the seat of arbitration (Sweden), that is in the Svea Court of Appeal in Stockholm. The grounds for setting aside and invalidating the award under the Swedish Arbitration Act largely correspond with the grounds for refusal of enforcement under the New York Convention (noted above) and mainly concern procedural issues and a situation where “the award, or the manner in which it arose, is clearly incompatible with the basic principles of the Swedish legal system.”<sup>36</sup> Like in any potential enforcement actions, Gazprom is most likely to rely on the arguments of alleged due process and public policy violations while seeking to overturn the unfavourable award of the tribunal.

### **The OMV Statement**

A widely publicized statement by Austria's OMV, published on 21 May 2024, highlighted a possibility of payments that are owed to Gazprom Export being seized for the purpose of enforcement. The statement – issued as an “urgent market message” – warned about:

*“a foreign court decision obtained by a major European energy company which, if enforced in Austria against OGMT [OMV's trading arm], would require OGMT to make payments under its gas supply contract with Gazprom Export to such European energy company (instead of Gazprom Export). In this respect, it is currently not known to OGMT whether and when such an enforcement might occur. In case of such an enforcement, OGMT considers it likely that Gazprom Export will halt supplying gas under the gas supply contract with OGMT, thereby affecting the Austrian gas market”.*<sup>37</sup> (emphasis added)

As the identity of either the foreign court or the European energy company were not revealed, there was some confusion as to whether this statement may have referred to the Uniper-Gazprom tribunal's ruling. However, the arbitration award was issued only two weeks after the OMV statement (on 7 June 2024).

On 13 June 2024, the day after Uniper announced that it was awarded more than €13 billion in damages, the CEO of OMV, commenting on the Uniper-Gazprom ruling in an interview on the margins of OMV's capital markets day, expressed the view that “the payments of anybody to Gazprom in Europe could be seized”, recalling that “a few weeks ago” OMV released an urgent market message highlighting “a risk” of its payments to Gazprom being seized.<sup>38</sup> Speaking at OMV's capital markets day itself, he stressed that the company had not received “any kind of request in this regard.”<sup>39</sup>

<sup>35</sup> For a discussion of the notion of public policy in post-arbitration court proceedings several jurisdictions (Switzerland, France, Germany, England, and Poland), see Koepf and Ason (2018), ‘An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings’, *Journal of International Arbitration* 35, no. 2, 157

<sup>36</sup> Global Arbitration Review, ‘Challenging and Enforcing Arbitration Awards: Sweden’,

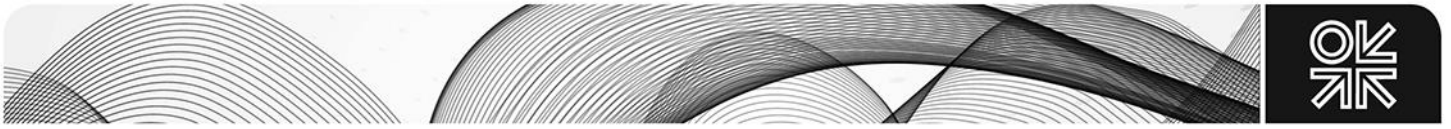
<https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/sweden>

<sup>37</sup> OMV, ‘Statement on gas supplies under Gazprom Export contract for Austrian Market Area East’, 21 May 2024, <https://www.omv.com/en/news/omv-statement-on-gas-supplies-under-gazprom-export-contract-for-austrian-market-area-east>; ‘EU gas prices spike as OMV warns of Gazprom cut-off’, *Energy Intelligence*, 22 May 2024, <https://www.energyintel.com/0000018f-a0cd-d735-a98f-facde5e10000>

<sup>38</sup> ‘OMV is prepared to deliver gas to all customers: CEO’, *Bloomberg*, 13 June 2024,

<https://www.bloomberg.com/news/videos/2024-06-13/omv-is-prepared-to-deliver-gas-to-all-customers-ceo-video>

<sup>39</sup> ‘OMV seeks to reassure on gas supply’, 13 June 2024, *Energy Intelligence*, <https://www.energyintel.com/00000190-122a-d824-a7d5-533ed6c80000#:~:text=OMV%20is%20confident%20it%20can,the%20company's%20low%20carbon%20transition.>



To enforce the Uniper-Gazprom award (or any other ruling of a foreign court or arbitral tribunal) in Austria, Uniper would need to request the enforcement of the relevant decision in the Austrian court. While the refusal of enforcement is rare (especially for foreign arbitral awards and judgments of EU courts), the Austrian court could refuse enforcement, for example if considered it to be detrimental to Austrian security of gas supply (and thus contrary to public policy). In any event, enforcement proceedings will take at least several weeks or months (or even years if opposed by Gazprom) and therefore any potential attempt made at seizing payments owed to Gazprom Export by OMV or other buyers would not be immediate.

It is difficult to see how the enforcement of damages award by Uniper through seizing payments owed to Gazprom Export by European importers of Russian gas – even if it were to decide to do so – could be workable. For example, re-directing OMV payments to Uniper (instead of Gazprom) would leave OMV with no Russian gas supplies and still having to pay for alternative supplies. OMV has repeatedly stated that it would be able to supply gas to all of its customers in Austria ‘at any time’, even if all Russian gas supplies are cut off, having signed new contracts for non-Russian gas supplies and having booked pipeline and LNG import capacity for bringing them to Austria.

At the same time, those countries that do not want to disconnect themselves from Russian gas supplies may take national measures, preventing the enforcement of the damages award. For example, on 31 May 2024 the Hungarian government adopted a decree, which would prevent any re-direction of payments made by the Hungarian gas company, MVM, to Gazprom Export.<sup>40</sup> In particular, the decree specified that “the counter value of natural gas to be paid to the contractual partner cannot be seized or enforced to secure or satisfy the claims of a third party due to its conflict with Hungarian public order.”

Overall, the OMV statement highlighted an issue that has become a common concern for the European buyers of Russian gas, namely that enforcement efforts against Gazprom assets could potentially affect other European gas contracts. Of course if gas transit via Ukraine ceases on (or before) 31 December 2024, there will be no supplies to countries served by this route and hence no payments, and redirection becomes a non-issue.

### 3. Will the Uniper-Gazprom arbitration ruling bring the curtain down on remaining long term Russian gas supply contracts to Europe?

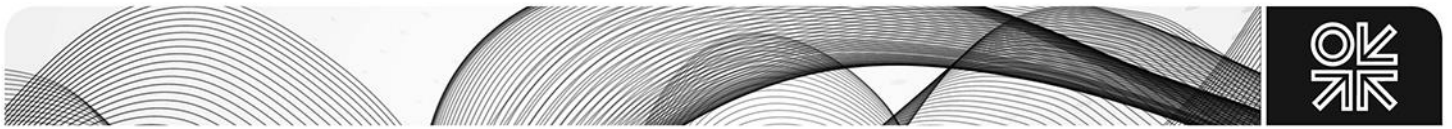
The Uniper-Gazprom arbitration ruling is undoubtedly a significant win for Uniper in the sense that, even if it never receives the substantial damages which were awarded by the tribunal, termination of the contracts removes its very substantial take or pay liabilities which extended into the 2030s. It is unclear whether Gazprom participated in the arbitration but there are several reasons to believe that it did not, including the fact that it did not appoint an arbitrator (noted above in Section 1). Notably, unlike its actions following the Gasum-Gazprom award, Gazprom did not issue any post-award statement. There is no public record of legal counsel representing Gazprom in this case. This all only reinforces the assumption that Gazprom did not play an active role in the case brought by Uniper. The lack of active (or constructive) involvement by the respondent may have several negative consequences on an arbitration, including most crucially, a greater chance the claimant will obtain the full relief sought from the tribunal which is what appears to have happened in this case.

It is certain that the outcome of the Uniper-Gazprom arbitration will not only affect the parties but have a broader impact. The arbitration ruling, Uniper’s prompt decision to terminate its supply contracts and how the company chooses to enforce its damages award could all have significant implications for the remaining holders of Russian long-term contracts, both those under which supplies have been suspended and those under which supplies have continued (including Austria, Slovakia and Hungary).

The tribunal’s ruling also raises the question as to whether it will influence other ongoing arbitrations and actions of European buyers. Although there is no notion of precedent in international arbitration, the tribunal’s award will naturally serve as a reference point and may have an impact on other cases. While it may be natural to expect tribunals in similar arbitrations against Gazprom to reach similar conclusions – including in respect of non-recognition of Gazprom’s declaration of *force majeure*,

<sup>40</sup> ‘They could cut Hungary off from Russian gas! - The government made a serious decision’, Portfolio, 31 May 2024, <https://www.portfolio.hu/uzlet/20240531/levaghatnak-magyarorszagot-az-orosz-gazrol-sulyos-dontest-hozott-a-kormany-689473>





damages, and termination rights – it is not clear whether this will be the case. We examine each of these three grounds, on which other tribunals may differ, below.

### **Force Majeure**

Even without the award being published, the fate of Gazprom's *force majeure* case in the Uniper-Gazprom's tribunal ruling seems clear: the tribunal's decision to award damages in (or close to) the amount requested by Uniper and for the entire period of non-deliveries since mid-June 2022, seems to have set aside any notion of *force majeure*. This is a surprising result, given that Nord Stream was physically damaged in an act of sabotage on 26 September 2022 and has since been technically incapable of transporting any gas. Although there is no public record of any declaration of *force majeure* made by Gazprom in relation to these explosions, it is hard to believe that this argument was not raised by Gazprom to justify the failure to deliver gas through what had – and one would think in a textbook case of *force majeure* – become an inoperable pipeline. It is not clear how (if at all) Gazprom argued its *force majeure* case but the tribunal's decision on damages suggests that the tribunal did not see the explosions as *force majeure* events that would excuse Gazprom from liability for non-performance of its delivery obligations (and therefore save Gazprom billions of euros in compensation).

It is worth recalling here that Gazprom prevailed on the *force majeure* point in its arbitration with Gasum, where the tribunal recognised that the rouble gas payment decree was a *force majeure* event. Although the outcome of the Gasum-Gazprom arbitration may have had some influence on other cases with a similar factual background (and revolving around the buyer's refusal to accept the rouble gas payment mechanism), it does not appear that the tribunal's approach to *force majeure* in the Uniper-Gazprom case provides much guidance for other cases (except perhaps that Gazprom's failure to build a *force majeure* case seems to have played a role in this case). It is therefore not obvious that other tribunals will similarly not recognize the Nord Stream explosions as *force majeure* events.

### **Damages**

In order to judge whether other tribunals will adopt similar views on damages as the Uniper-Gazprom tribunal, it is important to understand the reasoning of the tribunal in the award of such a large amount of damages – more than €13 billion – for the entire period of non-delivery from mid-June 2022. This figure clearly included damages in respect of non-delivery not only during the Portovaya turbines incident (June-August 2022) but also after Nord Stream explosions in September 2022. This, in turn, confirms that neither event was recognized by the tribunal as *force majeure*. The tribunal's award of more than €13 billion raises the question whether Gazprom made any attempt to include gas replacement cost reductions (achieved by Uniper through hedging) in the damages calculation.

The sheer size of the damages award (one of the largest awards reported in international arbitration) reinforces the assumption that Gazprom did not devote significant legal and expert resources to defending the case brought by Uniper. This, in turn, suggests that – in the mass of arbitration cases that Gazprom faces – Gazprom's strategy has shifted from the cases themselves to the satellite litigation context of anti-arbitration injunctions in Russian courts and other post-arbitration proceedings targeting unfavourable international arbitral awards. Whatever the outcome of these proceedings in national courts, Gazprom appears to be betting on what appears to be a general market assumption that the prospects of gas buyers being able to enforce any awards against Gazprom appear bleak.

### **Termination rights**

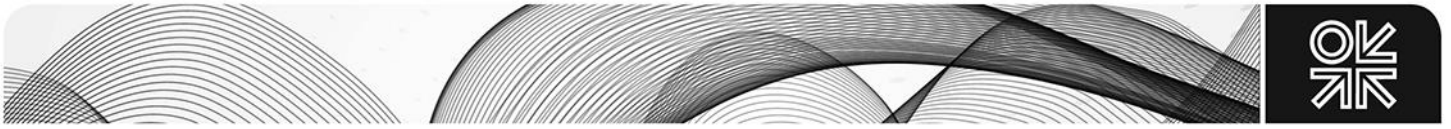
The Uniper-Gazprom tribunal decision to give Uniper the right to terminate its long-term contracts appears to have rested on whether:

- the relevant LTSCs contain a contractual basis for termination
- termination rights can be established under the applicable law

and further whether

- Uniper requested the tribunal to terminate the relevant LTCs
- Uniper requested the tribunal to grant it termination rights under the relevant LTCs

and, separately, whether the tribunal found that Gazprom Export's failure to supply over a prolonged period was a sufficient ground for terminating the contract.



There is no indication that Uniper requested the tribunal to terminate the relevant LTCs. Rather, the tribunal's decision demonstrated that termination rights can be granted by the tribunal – a possibility that is known in theory but not often seen in practice. As such, it may create a certain expectation on part of those claimants – particularly those whose contracts do not have termination clauses – to achieve a similar result in their cases. The fact that the tribunal's approach to termination rights has been explicitly addressed and communicated to the public by Uniper's statement ensures that other tribunals will become aware of it.

At the same time, it is unlikely that any tribunal would make any ruling on Uniper's termination rights on its own unless expressly requested by the claimant, as doing so could be seen as overstepping the tribunal's authority (and could make the award susceptible to a challenge on the grounds of *ultra petita*).

It is not known whether any other European buyer made any requests related to contract termination rights in their arbitration proceedings but it is possible that some might have done so. However, accepting such requests would be far from automatic as each tribunal would be required to make a case-specific judgment under the relevant contract (and the applicable law). Different tribunals could arrive at different conclusions, particularly as cases under consideration could be materially different and subject to different applicable laws.

### Consequences for other arbitrations and suppliers to European markets

Irrespective of whether other tribunals may make similar judgements in other ongoing arbitrations, the Uniper-Gazprom tribunal's ruling, which led to removal of 25.6 bcm of Russian gas from Europe's supply portfolio – and more than a third of total long term “take or pay” obligations – is definitely a landmark judgement. Whether or not it will be the “green light” for contract termination and “the final curtain coming down” for the remaining European LTSCs with Gazprom Export is less clear.

While the enforcement attempts should be expected to continue for years, the relief in the form of termination rights awarded by the Uniper-Gazprom tribunal and, possibly, other tribunals translates into more immediate – but also potentially financially severe – effects on Gazprom in terms of lost revenues.

If other arbitral tribunals reach conclusions similar to those of the Uniper-Gazprom tribunal – effectively enabling buyers to terminate their contracts – and if buyers decide to do so, the future of Russian pipeline gas in Europe would be largely foreclosed – except for those European countries that are served through TurkStream (Hungary, Serbia, Greece) and possibly (but less likely) those that are served through Ukraine (depending on whether an agreement will be reached on post-2024 transit across Ukraine). While it is not certain that all European buyers will choose to exercise the right to terminate their LTSCs with Gazprom, even if granted such rights, many would be inclined to do so, especially if there is no realistic prospect of receiving any physical gas in the near future, or national government or EU policy dictates this course of action.

Ultimately, this would mean the end of significant exports of Russian gas to Europe because these contracts, which were part of European gas supply portfolio until the mid-2030s, could have been revived if political relations between Europe and Russia improved (or other gas and LNG supplies to Europe for some reason became problematic). Termination removes such a possibility.

The significance of this for other suppliers of gas to the EU cannot be over-estimated. For as long as the long-term contracts remained in force – even with supplies suspended – there was always a possibility (however remote) that the end of the Ukraine war, especially if combined with political change in Russia, could create the conditions for substantial volumes of low-cost Russian gas to return to Europe by the end of the decade.

The termination of the Uniper contracts and the potential for similar measures to be applied to other contracts would remove that remote possibility and hence gives other suppliers – particularly LNG suppliers – more confidence that European imports will be needed for a longer period of time. European sanctions imposed on Russian LNG supplies and trans-shipment (which we shall examine in a forthcoming publication) will add to this confidence.