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TABLE OF CONTENTS

1 A FEW INTRODUCTORY REMARKS

ALL THE LEAVES ARE BROWN!
ROBERTO CUCHÍ OLABUENAGA

2 FROM ACADEMIC COURAGE TO THE UNIFICATION OF PRIVATE INTERNATIONAL LAW

A CONVERSATION WITH PROF. FRANCO FERRARI
ROBERTO CUCHÍ OLABUENAGA

5 CRUNCH TIME: PRACTICAL TIPS FOR A SMOOTH FILING DAY

PRACTITIONER'S GUIDE
NOIANA MARIGO, SANTIAGO GATICA

9 CRAVING CLIMATE CARVEOUTS

ACADEMIC COMMENTARY
ARIQ HATIBIE

16 PERSUASION BY DESIGN: CRAFTING MEMORABLE ADVOCACY IN ARBITRATION

PRACTITIONER'S GUIDE
ELIZABETH CHAN, ISABEL LIGHTBODY, COURTNEY LOTFI

24 THE CIVIL LIABILITY OF ARBITRATORS: A TRANSITION FROM ABSOLUTE TO QUALIFIED IMMUNITY IN THE UNITED STATES

ACADEMIC COMMENTARY
JOSE RAMON VILLAREAL

31 PREPARING FOR AN INTERNATIONAL ARBITRATION HEARING

PRACTITIONER'S GUIDE
ELIZABETH SILBERT, SAMAA HARIDI, JESSICA BEESS UND CHROSTIN, EMMA NGUYEN

36 INTERNATIONAL INVESTMENT LAW ENABLES THE USE OF FROZEN RUSSIAN ASSETS TO COMPENSATE FOR WAR DAMAGE IN UKRAINE

ACADEMIC COMMENTARY
CSONGOR ISTVAN NAGY

45 LITIGATION; ANALYZING THE LEGAL FRAMEWORK FOR THE NEXT GENERATION OF LITHIUM DISPUTES

INDUSTRY HIGHLIGHT
TOM VILLALON

50 DO'S & DON'TS OF OPENING STATEMENTS IN INTERNATIONAL ARBITRATION

PRACTITIONER'S GUIDE
JULIO RIVERA RÍOS, SEBASTIAN BRICEÑO

55 IN DEFENCE OF THE IMPARTIALITY OF BARRISTERS AND DOOR TENANTS IN ISDS

ACADEMIC COMMENTARY
BATUHAN BETIN

61 MAXIMIZING SETTLEMENT POTENTIAL IN INTERNATIONAL ARBITRATION CASES

PRACTITIONER'S GUIDE
JORGE ASALI, LUIS ASALI, SANTIAGO ESCOBAR

66 BRUSHING LEGAL BOUNDARIES: ABOUT THE INTERSECTION OF LAW AND ART

A CONVERSATION WITH PROF. ALFREDO BULLARD
ANA ISABEL COBO ORDOÑEZ

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LI+IGATION

**ANALYZING THE LEGAL
FRAMEWORK FOR
THE NEXT GENERATION
OF LITHIUM DISPUTES**

Tom Villalon
Three Crowns LLP

INTRODUCTION

Given the strategic nature of lithium and its importance to the electric battery market, global mineral companies are expected to continue to invest heavily in lithium extraction and refinement projects. Increased international investment, in turn, will almost certainly lead to increased disputes, many of which will involve familiar legal issues found in other mining projects, and some of which may concern novel legal issues.

This article first analyzes the differences in extraction processes for different types of lithium resources and explores particular legal risks associated with each. It then examines jurisdictions where lithium-related disputes have emerged (or appear set to emerge) and analyzes the underlying legal issues at play. Finally, it concludes with a look forward into possible trends in the lithium-disputes sector.

PEGMATITE DEPOSITS

PROCESS BACKGROUND

Lithium resources can be broken down—very generally—into two categories: hard rock and liquid brines. While many commentators focus on Latin America’s “Lithium Triangle” brines, most of the lithium mined today comes from hard rock, most often in the form of pegmatite deposits.

The process of mining lithium from pegmatite resources, while similar to other “traditional” mining projects, contains several nuanced but important differences. Like its traditional mining counterparts, pegmatite mining generally includes blasting, crushing, grinding, flotation, thickening, acid and/or pressure leaching. However, pegmatites require additional steps related to mineral processing which are generally not found in other mining projects, including calcination, decrepitation, ion-exchange, crystallization, and filtration. These steps may present unique risks to lithium projects compared to traditional mining operations.

POTENTIAL LEGAL RISKS: CALCINATION/DECREPITATION RISKS

On the technical side, the role of calcination and decrepitation could very well become a source of legal disputes for lithium spodumene projects. This process requires processing the spodumene ore within a specific temperature range of 1832°F and 2012°F (1000°C and 1100°C). If temperatures are not carefully monitored, undesirable eutectics can form from the α -spodumene (the monoclinic crystal structure of spodumene) as well as other undesirable silicates, potentially spoiling the process and resulting in significant delays and/or added costs. Project owners may consider revising their contracts with operators to contain detailed descriptions of obligations for who bears the financial knock-on risk for imprecise temperature regulations.

EAST-WEST JV RISKS

Another area for potential legal disputes stems from the macro global trend of “East-West” joint ventures (“JVs”), that is, where Asia-based mining companies partner with western mineral interest to extract resources in foreign jurisdictions. This trend may reflect deeper geopolitical forces whereby Asian economies, particularly China, are securing strategic mineral resources abroad to fuel domestic demand.

This is the case with Australia’s Greenbushes project—the world’s largest operational lithium pegmatite mine—operated by Talison Lithium. Talison, 51% owned by Chinese Tianqi Lithium Corp and 49% owned by US-based Albemarle Corp, has faced a set of evolving legal disputes, including an expansion dispute against Global Advanced Metals concerning tantalum processing. Tianqi Lithium Corp has also been involved in domestic litigations with its local contractors, namely MSP Engineering, in connection with its battery-grade lithium hydroxide plant.

State actors may also increasingly play a role in such JV disputes as well, as is the case with the Manono lithium mine in the Democratic Republic of the Congo (“DRC”). No less than six international arbitrations have been filed in connection with this pegmatite project. While the details of each individual dispute vary, they generally emerge from a similar factual nexus: the attempt by the DRC’s state-owned mining company to terminate its joint venture with Australia’s AVZ Minerals and transfer its shares to Chinese-backed mining companies, including Zijin Mining and Jinxiang Lithium.

As global mineral companies continue to develop pegmatite projects in foreign jurisdictions, such shareholding disputes could very well continue to emerge.

SALARES

PROCESS BACKGROUND

Lithium-rich salt brines, or salares, are continental brine deposits consisting of saline water aquifers concentrated in areas with geothermal activity. Extraction and processing from salares generally presents less upfront capital costs compared to hard rock mining. In recent years, this process has been largely expedited by a suite of technologies known as direct lithium extraction (“DLE”).

DLE technologies can shorten this process to a matter of days, if not hours, while also nearly doubling yield rates.

DLE technology encompasses a range of highly technical, often secret processes by which lithium cations are preferentially collected from lithium brines. These processes typically involve closely held IP.

POTENTIAL LEGAL RISKS:

WATER SCARCITY AND COMMUNITY INVOLVEMENT RISKS

As salares are found in high altitude, arid environments, water scarcity and water contamination are particularly sensitive concerns. Disputes have already emerged in both Chile and Argentina related to issues of water scarcity and contamination. Given increased political pressure from local communities, it is entirely possible that such disputes may continue, particularly given the increased investment from foreign companies in Latin American lithium projects.

INTELLECTUAL PROPERTY RISKS

Unlike more “traditional” forms of mining, extracting lithium from salares may entail significant IP risk, particularly for DLE companies that joint venture with local companies or state actors. This risk is further accentuated in certain jurisdictions, such as Chile, where the President has indicated a preference that future lithium projects should use such technologies. As such, DLE companies who possess closely-held IP should be aware of potential infringement risk,

and in the case of complex value chains, parties should be sure their relevant contracts contain arbitral clauses allowing such disputes to be properly heard in a single adjudication.

EAST-WEST JV RISKS

Like pegmatite mining, the lithium brine processing sector has seen a proliferation of international JVs. Argentina is a prime example. As discussed infra, multiple international JVs have formed in recent years. Disputes may very well emerge as foreign parties form international working relationships under significant commercial and market pressure.

LOCAL REGULATORY REFORMS/ NATIONALIZATION RISKS

Regardless of the type of lithium deposit, all lithium projects are impacted by local regulations. Understanding the strategic economic value of lithium, many countries have sought new regulatory policies to help onshore increasingly larger portions of the lithium value chain. As discussed below, Mexico, Chile, and Argentina have each created a distinct regulatory framework for the extraction and refining of lithium. These regulations, some of which are both recent and far-reaching, may become a source for both commercial and investor-state arbitrations.

MEXICO:

Several countries are attempting to capture larger portions of the global lithium value chain by announcing broad legal reform in connection with critical minerals. Mexico is, perhaps, a prime example. Mexico, which according to the US Geological Service possesses the ninth largest identified lithium reserves, announced the nationalization of all lithium resources in 2022, handing over control of the resource to the energy ministry. This sweeping reform will undoubtedly affect the nearly dozen foreign companies with claims to lithium concessions that predate the 2022 decree. This reform is connected to recent announcements by the state that it will develop an ambitious “clean energy hub,” complete with battery factories and even electric vehicle factories. In this context, international disputes, particularly international arbitrations, seem likely.

In the investor-state context, two foreign investors may soon launch claims against the Mexican state. UK-based Cadence Minerals, along with its Mexican subsidiary REM Mexico, recently issued a request for consultations under the UK-Mexico BIT. The dispute concerns the revocation of mining concessions valued at some US\$800 million for the Sonora Lithium Project, which Cadence alleges to be unlawful expropriation and breach of the obligation for fair and equitable treatment under the BIT. According to the company's press release, Cadence is contemplating an investment treaty arbitration if the consultation process proves unsuccessful. In a related dispute, China-based Ganfeng Lithium announced in a press release that it is contesting Mexico's revocation of its concessions for lithium mining, which concerns the same Sonora Lithium Project. According to some industry analysts, Ganfeng could raise an investor-state claim under the China-Mexico BIT.

In addition to bilateral treaties, certain foreign investors may contemplate bringing investor-state claims against the Mexican state under multilateral treaties, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"). In fact, a Canada-based mineral company appears to be considering arbitration for a gold and silver project, and has filed an official request for consultation with the Mexican government under the CPTPP. If the dispute is not resolved during the six-month consultation period and then proceeds to arbitration, this would be the first arbitration ever filed under the CPTPP. Presumably, investors from CPTPP signatory countries could also consider bringing similar claims under the CPTPP in the context of lithium.

CHILE:

On April 20, 2023, Chilean President Gabriel Boric announced that private companies will need to partner with the state to extract lithium, a move that is considered by some to be a sign that the government may nationalize a substantial portion of country's lithium mining sector. This new Chilean National Lithium Plan ("CNLP") is not yet law and must gain approval by the Chilean National Congress ("CNC"), which introduces uncertainty, as President Boric does not currently have a legislative majority in the CNC. Part of the CNLP includes a move away from traditional solar evaporation to using new DLE technologies, a transition that could very well see the formation of new international JVs, and possibly result in IP exposure for junior DLE companies.

Chile's lithium deposits, primarily concentrated in the Salar de Atacama, have attracted disputes in recent years. The two companies which operate in the country—US-based Albemarle, and Chilean Sociedad Química y Minera ("SQM")—have both accused each other of pumping lithium brine in excess of amounts allowed by their permits. In 2016, an investigation from the Chilean authorities probed whether Albemarle had pumped lithium brine in excess of its permits. Off-take contracts in the sector have given rise to disputes: in 2018, Chile sought ICC arbitration against Albemarle in connection with the company's alleged failure to arrive at a preferential price for selling 25% of its annual lithium production to local Chilean companies, as required by its lease. The dispute ultimately was settled between the parties, though Chile initiated a new arbitration in 2020 for Albemarle's alleged underpayment of royalties.

Disputes have also emerged in connection with competitor companies, and their relationships with the state. In early 2021, Chilean regulators threatened legal action against Albemarle for alleged failure to turnover technical data relating to Atacama lithium reserves. This dispute was ultimately settled in 2021. That same year, Albemarle accused the Chilean regulators of "unjust discrimination" for refusing to make public a joint report regarding the impact of mining in Atacama. Both Albemarle and SQM contributed data to the report, but only SQM's contract with the government allowed it to review the study.

Environmental disputes in connection with lithium extraction from salares have also surfaced in Chile. In April 2022, the Chilean State Defense Council filed suit against three mining companies, including Albemarle (but not SQM) for alleged environmental damage in the Salar de Atacama. The State Defense Council is a state body that answers to President Boric, who has made environmental protection a key focus of his administration.

ARGENTINA:

Argentina has taken a different approach to the lithium sector, due in large part to the strong pro-investor stance of the new right-of-center administration of President Javier Milei. Despite efforts by the state energy firm to explore lithium deposits, the lithium sector in Argentina is primarily driven by private investment. While Argentina only has only two operations currently in production, there are six additional projects under construction and 15 more in the advanced exploration/feasibility stage.

A staggering 18 lithium projects are slated to begin production within the next four years.

China has dominated the new investment into Argentine lithium resources. China-based Zijin Mining acquired the Tres Quebradas project from junior lithium miner Neo Lithium in October 2021 for US\$737.14 million, and subsequently obtained government approval for construction and operation of the resource. The company is also in talks with the Argentine government regarding the potential construction of a lithium carbonate factory, reflecting an additional investment of US\$380 million. In 2017, China-based Ganfeng Lithium partnered with Canada-based Lithium Americas to jointly develop the Caucharí-Olaroz project, located in Argentina's Jujuy Province. However, because of geopolitical tensions between the US and China, Lithium Americas spun off its Argentine unit into a separate entity to distance itself from its Chinese partner.

Korea-based POSCO has announced plans to invest over US\$1.6 billion in the Sal de Oro lithium project, and has indicated the possibility of additional amounts up to US\$4 billion. The Sal de Oro project commenced in March 2022. Notably, the Korean company has secured a relationship with US-based DLE startup EnergyX, with plans to supply cathodes to GM. The Argentine Foreign Minister has indicated that the State has talked to POSCO about "opportunities to develop new value-added chains that include Argentina." Finally, China-based Tsingshan has teamed up with France-based Eramet to exploit the Centenario-Ratonnes project, which is expected to produce 24,000 tons of LCE by the end of 2025 before running at full capacity onwards. The companies are planning to invest over US\$1.7 billion in the project.

In addition to risks associated with these new JVs in Argentina, environmental risks also loom. The exploitation of salares has recently sparked protests by indigenous groups claiming to be dispossessed of their resources. Concerns have emerged about how the emerging lithium industry would impact their way of life, which is heavily dependent on salt extraction and tourism.

LOOKING FORWARD

With increased foreign investment into lithium extraction and refining project worldwide, it seems highly likely that international disputes may emerge in the lithium sector, both in the context of commercial arbitration as well as investor-state disputes. Careful attention should be paid to investment trends in this space, and to the new technological developments, such as DLE. Finally, in jurisdictions that have announced broad regulatory reforms over lithium resources, parties should pay particular attention to protections offered by their contracts, as well as by bilateral investment treaties (BITs) and multilateral treaties where applicable.

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