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Int'l Dispute Resolution Options For Investors In Russia

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With the geopolitical and economic crisis in Russia and Ukraine growing rapidly from recent events, international commercial operations in both regions will be severely affected in some manner, and many such effects will result in disputes with Russia.

Companies from Western countries that have been operating for years in Russia are finding that their businesses and assets may be subject to expropriation. For these companies, one thing is certain: Russia will be subjected to the many international disputes that will follow. And, if it ever wishes to join the global economy again as an active and trusted participant, it will need to resolve them.

The events surrounding the peso crisis in Argentina in early 2000s, as well as those in Venezuela from the actions of former President Hugo Chavez, and others arising out of the Arab Spring, all resulted in dozens of complex international commercial disputes.

We may see the same fallout from current events. There will be dispute options available to investors and companies with operations in Russia — which are experiencing severe disruptions of operations, loss of profit or destruction of property — potentially including investor-state arbitration, domestic litigation or claims tribunal recovery.

From an immediate and practical perspective, as the situation is developing, companies should begin compiling and preserving all materials relating to communications with Russian government officials, documents relating to the ownership and corporate structure of their foreign investment, to operations and profitability, and to insurance carriers and other coverage.

Companies should also compile and preserve inventories of all assets currently in Russia, and record and preserve contemporaneous notes of all developments. To the extent possible, such information should be stored in or at least accessible from a location outside of Russian territory.

Perhaps most importantly, because Russia has over 60 operating treaties that provide foreign investors

with certain protections, investor-state dispute settlement mechanisms may be available for parties eligible to bring claims under those treaties.

Specifically, the treaties provide a process to seek compensation for expropriation and nationalization, such as may occur if the proposed legislation currently before the Russian Parliament is approved and implemented.[1]

Affected parties in Russia may also consider pursuing recovery of their commercial damages through other avenues, including domestic litigation in the U.S. or elsewhere, international commercial arbitration or potential future mass claims tribunals that may be formed after the conflict is over. Each avenue of recovery will present unique challenges.

And, if none of these options offer a viable avenue for recovery against states or state entities, affected parties should consider if their agreements or applicable treaties allow for actions against third parties.

Investor-State Arbitration

Foreign investors in Russia may consider pursuing investor-state arbitration if:

- The investor is a national of a state that is a party to an in-force international investment agreement, or IIA, such as defined by a bilateral investment treaty, a free-trade agreement or another similar international instrument; or

- The investor is itself a signatory to a contract or some form of investment agreement with the state, its municipalities, or agencies or instrumentalities, which includes an international dispute resolution clause.

There are currently more than 60 in-force investment treaties to which Russia is a signatory, and they all provide for procedures by which foreign investors may seek compensation arising from direct and indirect expropriation. The signatories to these treaties include the major members of the European Union, Canada, Japan and others.

Although there is not currently an in-force bilateral investment treaty or other investment agreement between the U.S. and Russia, American investors may consider whether their investment structure would permit bringing an investor-state claim through an affiliate or subsidiary under the auspices of another bilateral investment treaty or IIA, such as those to which the United Kingdom, Italy, Germany, France or the Netherlands are a signatory.

Such treaties may also include protections against arbitrary and discriminatory treatment, fair and equitable treatment, full protection and security, assurances of monetary transfers out of the country, and obligations of general compensation for losses caused by war and armed conflict on a most-favored nation basis. An example of the latter protection, called a "protection from strife" clause, is found in Article 4 of the U.K.-Russia bilateral investment treaty:

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to any armed conflict, a state of national emergency or civil disturbances in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that

which the latter Contracting Party accords to investors of any third State. Resulting payments shall be made without delay and be freely transferable.

Companies should carefully review the applicable IIA for a full understanding of what claims may be brought and to what damages they may be entitled. In the event that a company is a signatory to an investment contract with Russia, its municipalities, or the agencies or instrumentalities of the state or municipality, the party should also carefully review their contract to determine what dispute resolution mechanism, if any, is identified, and what claims may be available outside or beyond the scope of the IIA, to the extent that any are applicable.

A state party to an IIA may also consider directly engaging in state-to-state investment arbitration against Russia on behalf of its investors, likely depending on the breadth of claims, the investors affected in that particular state, and the will of the home state to espouse its nationals' international rights through such diplomatic protection.

Litigation

Depending again on the individual circumstances and factors present, companies may consider initiating litigation proceedings under the relevant and applicable domestic law. Companies should pay particular attention to questions of jurisdiction and which parties it can or should bring claims against.

Companies should also review their underlying contracts and the applicable domestic law to address these questions. In the U.S., for example, the Foreign Sovereign Immunities Act provides broad jurisdictional immunity for sovereigns, subject to a few key exceptions that may be applicable in a given context.

Claims Tribunals, Commissions and Funds

Although most mass claims tribunals and commissions that are organized following acts of war, invasion and occupation are largely designed to address the critical issues pertaining to humanitarian needs, such tribunals have also been used to compensate individuals and businesses whose commercial activities were disrupted as a direct result of war.

One of the best-known examples of an international claims tribunal is the Iran-U.S. claims tribunal, which arose after the 1979 Iranian Revolution and the widespread expropriation of U.S. investments. Approximately 4,700 private U.S. claims were filed against the government of Iran at the tribunal, resulting in more than $2.5 billion in awards to U.S. nationals and companies.

Such tribunals and commissions have been created in myriad ways, including through United Nations resolutions and domestic legislation. However, the creation of a commercial claims tribunal following Russia's war with Ukraine in this instance is likely to face significant obstacles.

For example, the U.N. Security Council has been previously responsible for passing the resolution that created the United Nations Compensation Commission, which was designed to compensate individuals and businesses for claims arising out of the 1990 Iraqi invasion and occupation of Kuwait.

Under the commission, around 6,600 commercial claims were submitted by approximately 70 governments seeking $79 billion in compensation; the U.S. made 95 claims on behalf of its investors, resulting in more than $633 million in compensation. However, Russia's position on the U.N. Security

Council makes a similar process unlikely, as Russia could be expected to veto any attempt. Similarly, the international community justifiably has little optimism that Russia would pass domestic legislation creating a commission itself.

Realistically, the only way that parties could expect a tribunal to address these claims would be if the affected states included some framework as a condition in any future diplomatic resolution with Russia.

Alternatively, states could establish their own claims tribunal, commission or victims' fund — independently or in collaboration with the broader international community — to compensate their investors and pursue their own recovery independently, in any actions they take with respect to effects resulting from the war against Ukraine.

Parties should not rely exclusively on this avenue, however, as all control and determination will be subject to individual governments, and recovery — if any — is likely to be relatively far off.

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[1] https://www.crowell.com/files/Russia-New-Draft-Law-re-Ext-Management-March-9-Engl-Translation.pdf.