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# Investor Claims Over Russian Nationalization Won't Be Easy

By **Caroline Simson**

*Law360 (April 5, 2022, 8:14 PM EDT)* -- Russian President Vladimir Putin's threat to nationalize the assets of departing Western companies would result in a wave of investor-state claims, but any resulting award would likely be a hollow victory for years to come because of the complications of enforcing a money judgment against a rogue nation.

News outlets reported that Russia had laid the groundwork in early March to nationalize the assets of any company that is more than 25% owned by foreigners from "unfriendly" countries, including the U.S., Canada, the U.K. and those in the European Union.

At this point, it's unclear whether the plan, which appears to have stalled, will be realized. But there are signs that it could, including the Kremlin's response to Germany's announcement on Monday that it had seized control of Gazprom Germania, a local unit of the Russian state-owned energy company Gazprom, until at least Sept. 30.

Reports indicate that Putin subsequently referred to the nationalization of Russian assets abroad as "a double-edged weapon," apparently implying that nothing is off the table.

If the Russian nationalization plan does come to fruition, it would leave the companies whose assets are expropriated at the beginning of a complicated and expensive process to seek compensation for lost assets.

"It's going to be messy, and it's going to take a long time," said Ian A. Laird, a Crowell & Moring LLP partner who co-chairs his firm's international dispute resolution group.

Still, experts say options will be available to creditors who are patient. They could include targeting assets that fall within a commercial activities exception to sovereign immunity, such as real estate being used for commercial, rather than diplomatic, uses. Or creditors could try to target the assets of Russian state-owned enterprises that are tightly controlled by the Kremlin, a strategy aimed at proving that the state-owned entity is an alter ego of the country, sometimes referred to as piercing the corporate veil.

Russia has been known to stymie efforts by creditors to enforce arbitral awards, most notably $50 billion issued to former shareholders of Yukos Oil Co. in 2014. Years later, the awards remain tangled up in annulment proceedings after the Netherlands' highest court sent the case back to a lower court to reconsider a procedural issue last fall.

That history could prove useful to creditors if courts view Russia's nonpayment as a reason to expand what's covered under the commercial activities exception, or to take a broader view of the appropriateness of allowing a creditor to target Russian state-owned assets, according to Covington & Burling LLP partner Marney Cheek. She is representing several Ukrainian entities seeking damages after Russia annexed Crimea and expropriated their assets in 2014.

"I'm not aware of any current cases that are litigating this in the Crimea context … but I think it's currently possible, given the legal landscape and Russia's history of nonpayment, that there would be room to run these arguments," Cheek said.

Her comments were echoed by GST LLP managing partner Quinn Smith, who said he believed Russia would have a tough time trying to shield its assets in court. He pointed to a decision from the Third Circuit affirming a Delaware federal court order allowing the now-defunct Canadian mining company Crystallex to target assets held by the Venezuelan state-owned oil company PDVSA to enforce a $1.2 billion arbitral award against Venezuela.

"We've seen a real heavy hand from the Kremlin, and that's going to make your claims for alter ego better," Smith said. "If you look at the decision in [Crystallex], I think that decision really opens the door for more claims against instrumentalities or others who might be holding assets for the Russian Federation. It's going to encourage creditors to be more aggressive."

Another possibility for creditors, especially smaller ones, could be a claims commission. There have been several set up in recent memory, including the Iran-United States Claims Tribunal, established in 1981 to resolve disputes between the two countries and their nationals. The tribunal resolved almost all the approximately 4,700 private U.S. claims filed against Iran, resulting in more than $2.5 billion in awards to U.S. nationals and companies, according to the U.S. Department of State.

Still, if investors do decide to follow the investment arbitration route, it will not be an easy one. To get an idea of the uphill battle that will be faced by any company trying to enforce an arbitral award against Russia, it's helpful to consider what happened in Venezuela under President Hugo Chávez in the years before his death in 2013.

Beginning around 2007, the Venezuelan government nationalized many assets in industries such as oil and gas, mining, agriculture and others. The investors who owned these assets filed investor-state claims against the country, and many won enormous awards.

One of those was Crystallex, which won $1.2 billion in 2016 after being booted from an operating contract for one of the world's largest undeveloped gold deposits. Despite the 2018 order allowing it to seize certain PDVSA's assets, its efforts to enforce the award remain ongoing. Last week, Venezuela and PDVSA announced they would launch another appeal over a related aspect of the case, sending the litigation on its third trip to the Third Circuit.

ConocoPhillips is another example. Three of its Dutch subsidiaries won an $8.5 billion arbitral award in early 2019 after Venezuela nationalized three of its oil projects, but its enforcement efforts remain mired in an ongoing annulment proceeding before the International Centre for Settlement of Investment Disputes. Two other ConocoPhillips subsidiaries are owed $2 billion by PDVSA, and enforcement litigation remains ongoing after an initial attempt at a settlement fell through.

Still, experts say there are reasons to believe that the Russia scenario could result in a different outcome than the situation in Venezuela.

"The truth of the matter is that Russia is a creditor to many Western states, and to the extent that payments are owed to Russia … these payments" could be used to enforce an award, said Pedro Martinez-Fraga, a partner at Bryan Cave Leighton Paisner. "That these are Western countries facilitates it all the more."

Another reason for optimism is the widespread and unprecedented sanctions and freezing orders on Russian assets, which could prove useful to creditors of the country as well, according to Laird.

"With that money frozen and identified, that will create a lot more risk for Putin and his associates in terms of actually having to pay the bills," he said.

More than that, however, is what some see as an inevitable pivot by Russia to rejoin the world economy. Laird noted that while Russia may be able to survive on its own for now, such a model would be unsustainable due to the Russian economy's dependence on international trade.

"Really? Russia as the new Albania? … They can't survive as Albania," he said. "They just can't, long term. Maybe short term, for a year or two, but with the current sanctions, there's no way. The country will collapse. There's going to be a price to pay, and they're going to have to pay it. Arbitration may be one mechanism."

BCLP's Ryan Reetz, managing partner of the firm's Miami office, likened it to the situation after a wave of investor-state claims were brought against Argentina in the early 2000s following a financial crisis that caused the country to default on some $93 billion in sovereign debt.

Although the process of resolving those claims was notoriously contentious, costly and time-consuming, they were eventually resolved as the country sought to put its economy back on track and lure foreign investors back in.

Russia "will likely want to restore investor confidence at some point in the future, and not having a mechanism for awards to be honored will be problematic," Reetz said. "Hopefully, the desire for some form of return to normalcy will allow for collection of awards, where in the past it hasn't been tremendously successful."

--Editing by Jay Jackson Jr.