

INSIDE ARBITRATION: CRIMEAN INVESTMENT TREATY ARBITRATION CLAIMS: RECENT DEVELOPMENTS

28 February 2020 | London, Moscow

Legal Briefings - By **Nicholas Peacock, Olga Dementyeva and Denise Choung**

Over five years have passed since the upheavals in Crimea. Tensions between Ukraine and Russia continue to run high. Since 2014, a number of investment arbitration claims have been filed, first against Russia, then against Ukraine. Over this period, the landscape around what some have termed the “legal war”¹ between the two countries has been in flux, as more investment claims have been filed and Russia changed its defence strategy in May 2019. This article is a follow-on to our previous reports (June 2019 article and a blog post in October 2019) providing an overview of the dynamic development of the Crimea-related disputes landscape to date.

Whether every claim discussed in this article is directly connected to the events in Crimea is by no means clear-cut. All of these claims do, however, form a part of wider tensions between Russia and Ukraine since the events of 2014.

CRIMEAN INVESTMENT TREATY ARBITRATION CLAIMS: DISPUTE LANDSCAPE OVERVIEW

According to the UNCTAD Investment Dispute Settlement Navigator² and other public sources, thirteen Crimea-related investment arbitration claims have been filed to date (see Summary Table):³

- out of the thirteen claims, twelve claims⁴ were filed under the 1998 investment treaty between Russia and Ukraine (the “**Russia-Ukraine BIT**”)⁵ , and one claim under the 1994 Netherlands-Ukraine BIT (the “**Netherlands-Ukraine BIT**”)⁶ ;
- unlike the early Ukrainian investors’ claims, all of which were administered by the Permanent Court of Arbitration (“**PCA**”) under the 1976 UNCITRAL Arbitration Rules, some of the later disputes are administered by other institutions, such as the Arbitration Institute of the Stockholm Chamber of Commerce (“**SCC**”) and the International Centre for Settlement of Investment Disputes (“**ICSID**”);
- the seats of arbitration vary, and include Paris, Geneva, the Hague, and Stockholm;
- the cases concern various economic sectors such as oil and gas, financial services, air transportation, and real estate.

In addition to these thirteen claims, two actions against Russia may be initiated in the near future. In July 2019, the State Hydrographic Service of Ukraine announced that it was considering bringing expropriation claims against Russia in an investor-state arbitration administered by the PCA because Russia had allegedly been unlawfully producing sea navigational charts that cover the territory of Ukraine.⁷ Later, in October 2019, Ukraine’s state-owned Administration of Seaports announced that it was preparing an investment treaty claim against Russia over the seizure of its assets in Crimea which value was estimated to be US\$51 million.⁸

To date, all arbitral tribunals considering cases against Russia (that went past the award stage; Cases 1-7, Summary Table) have found that they have jurisdiction to hear the claims. Although the bases of such findings have not been fully disclosed, the tribunals appear to have held that the territorial scope of the Russia-Ukraine BIT extends to protect investments in Crimea, a territory currently under the effective control of Russia, but which was not a Russian territory when the BIT was made. During enforcement proceedings in some of these cases, national courts (such as the Swiss Federal Tribunal) have also confirmed the tribunals’ jurisdictions.

RUSSIA’S CHANGE OF STRATEGY: CONSEQUENCES AND FURTHER DEVELOPMENTS

Initially Russia did not participate in the arbitrations other than to issue protest letters and to challenge some of the resultant awards [See, eg, Aeroport Belbek, Case 1, Summary Table]. In particular, Russia refused to recognise the legitimacy of such proceedings and sent letters to the PCA protesting against the formation of the arbitral tribunals and the PCA's powers to administer the claims. Yet, the tribunals proceeded with hearing the claims (and the PCA with administering these claims). Russia attempted to challenge the awards in national courts, however, none of Russia's challenges in set-aside and enforcement proceedings have been successful to date. National courts that reviewed Russia's applications have so far upheld jurisdiction of the tribunals and the admissibility of the claims [See, eg, Cases 3-5, 7, Summary Table].

In May 2019, Russia's Justice Minister Mr Konovalov announced a change in Russia's defence strategy, declaring that Russia would deal with the claims at their "early stages" before awards are made. This meant that, going forward, Russia would fight the cases on all fronts, including issues of jurisdiction, admissibility, liability, quantum, and enforcement.

Russia's change of strategy has already had an impact, with some of the tribunals making orders in favour of Russia. For example, since the change of Russia's strategy, tribunals in PrivatBank [Case 2, Summary Table] and Lugzor [Case 6, Summary Table] have allowed Russia (over the respective claimants' objections) to present its arguments after the final awards on jurisdiction and admissibility were issued. Further, as we describe in more detail below, in Lugzor [Case 6, Summary Table], the tribunal rejected the claimant's security for costs application, ruling in favour of Russia.

Below, we will discuss various updates in relation to (i) the claims against Russia brought by companies associated with Mr Kolomoisky (the "**Kolomoisky Claims**"); (ii) other claims against Russia (the "**Non-Kolomoisky Claims**"); and (iii) the claims Russian investors brought against Ukraine.

KOLOMOISKY CLAIMS

Five cases against Russia have been brought by companies associated with the same Ukrainian businessman, Mr Igor Valerievich Kolomoisky, a former governor of Ukraine's Dnipropetrovsk region⁹ with ongoing strong political connections.¹⁰ An overview of the procedural history of these cases is summarised in Cases 1-5 of the Summary Table, and details of recent developments in these cases are summarised in more detail below.

The parties' submissions on compensation are due in 2020 in Airport Belbek [Case 1, Summary Table] and PrivatBank [Case 2, Summary Table], after the tribunals in those cases ruled that Russia was not entitled to make submissions on jurisdiction following its change in strategy.¹¹

In Ukrnafta [Case 3, Summary Table] and Stabil [Case 4, Summary Table], following the tribunals' rulings in favour of the claimants in both cases in April 2019, Russia challenged the respective awards before the Swiss court on grounds that the tribunal failed to establish that Crimea was the sovereign territory of Russia, and that the claimants acquired the investments in an illegal manner.¹² On 12 December 2019, the Swiss Federal Supreme Court upheld the awards of both the Ukrnafta and Stabil cases and ordered Russia to pay US\$80 million in total.¹³

After the tribunal in Everest [Case 5, Summary Table] issued a unanimous award on the merits in May 2018 awarding Everest US\$159 million in damages, two sets of national court proceedings in Ukraine and the Netherlands followed. Upon receiving the investors' enforcement application in July 2018, the Kiev Court of Appeal arrested assets related to various Russian banks to enforce the award in September 2018.¹⁴ In January 2019, the Supreme Court of Ukraine upheld the Court of Appeal's decision, clarifying that it was for the Ukrainian bailiffs to determine, in accordance with Ukrainian law, whether property held by Russian or Ukrainian legal entities constitutes property of Russia (and was therefore subject to attachment to meet an award against Russia).¹⁵ Meanwhile, Russia moved to suspend enforcement of the award in the Netherlands. In June 2019, the Hague Court of Appeal refused to suspend enforcement of the award or require the claimants to post security, but is still considering Russia's bid to set aside the award.¹⁶

NON-KOLOMOISKY CLAIMS AGAINST RUSSIA

Ukrainian investors other than Mr Kolomoisky-associated companies have also brought claims against Russia. Claimants in three cases—Lugzor, Oschadbank, and Naftogaz [Cases 6-8, Summary Table]—are related to Ukrainian state-owned entities. An overview of the procedural history of these cases is summarised in Cases 6-10 of the Summary Table, and details of recent developments in some of these cases are summarised below.

LLC Lugzor v. Russia¹⁷

After it changed its defence strategy, Russia requested permission to file a request for bifurcation in order to separately address questions of jurisdiction.¹⁸ Russia further indicated that, if the arbitration were to proceed beyond the jurisdictional phase, it wished to make submissions on issues of merits and quantum.¹⁹ The Lugzor tribunal made a procedural order allowing Russia to make a "single, comprehensive submission on all issues of jurisdiction, admissibility, responsibility and quantum."²⁰ The tribunal made this decision, in particular, because no final award had yet been made.²¹ Following this decision, the claimants proceeded to make an application for security for costs requiring Russia to pay all their costs in this phase of the proceedings and provide €200,000 as security for costs.²² In August 2019, the tribunal rejected the claimants' security for costs application, deferring the decision on the allocation of costs between the parties until the conclusion of the proceedings.²³ Russia filed its comprehensive submission on 17 October 2019,²⁴ and the parties are currently awaiting the tribunal's final award.

Oschadbank v. Russia²⁵

Following a November 2018 award that granted Oschadbank US\$1.1 billion in damages plus interest, in August 2019, Russia requested the tribunal to revoke the award and issue a new award declaring that it lacked jurisdiction.²⁶ In support of its request, Russia claimed that, after the award was made, it retrieved Oschadbank's internal documents which showed that the bank's Crimean branch was established before 1 January 1992, the date when the investment protection of the Russia-Ukraine BIT starts.²⁷ The parties are awaiting the tribunal's decision.

Meanwhile, two sets of set-aside and enforcement proceedings have followed in France and Ukraine. Russia challenged the 2018 award in the French courts, but failed to stay enforcement. In October 2019, the Paris Court of Appeal concluded that, since Oschadbank had yet to successfully enforce the award against Russia, Russia had not suffered any harm that justified a stay of enforcement while it pursued a set-aside application before the same court.²⁸ Meanwhile, on 17 July 2019, the Kiev Court of Appeal recognised the award in proceedings held without Russia's participation.²⁹

CLAIMS AGAINST UKRAINE

Russia and Ukraine share a long history of economic integration, so it is no surprise that some Russian investors caught in the increasingly hostile environment between the two countries have initiated their own claims against Ukraine. Among those, three cases may loosely be considered to be Crimea-related: the ongoing Emergofin [Case 11, Summary Table] heard by an ICSID tribunal,³⁰ the VEB case heard by an SCC Tribunal [Case 12, Summary Table], and Gazprom [Case 13, Summary Table]. The Gazprom case was settled in December 2019 together with Gazprom's SCC dispute with Naftogaz.³¹

WHAT NEXT?

While the geopolitical tension between Russian and Ukraine remains, the legal landscape of the Crimea-related cases continues to evolve. Now that Russia has started actively participating in the arbitration proceedings (in some cases after the final award was issued), this will inevitably raise more jurisdictional, substantive, and procedural issues for the parties, tribunals, and potential claimants to consider. Further fights are likely at the set-aside and enforcement stages, especially as the claimants seek to target the assets of state-related entities. The story of the "Crimea cases" still has a long way to run.

[Download Inside Arbitration Issue 9](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



OLGA DEMENTYEVA
ASSOCIATE, LONDON

+44 20 7466 7644
olga.dementyeva@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2022