

8 Ukrainian Arbitration Claims In The Wake Of Crimea Events

By **Nicholas Peacock and Paula Cala** (June 11, 2019, 1:26 PM EDT)

As Volodymyr Zelensky, the former comic TV actor, settles into his latest role as the new President of Ukraine, tensions between Ukraine and Moscow continue to run high at a political and a legal level. Among the fallout from the events of 2014 in Crimea is a wave of investment arbitration claims by Ukrainian companies against Russia, and the beginnings of what may become live investment claims by Russian investors against Ukraine. Last month, the newspaper Vedomosti reported Russia's Justice Minister, Alexander Kononov, as describing the conduct of international arbitration claims involving Russia as "a full scale legal war."^[1]



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Businesses in the U.K., and globally, dealing with Russia or Ukraine, and in particular state-owned entities whose assets may be vulnerable to enforcement actions (whether in those territories, or elsewhere in the work), should keep a close eye on developments.

To date, 12 arbitration claims have been filed under the 1998 investment treaty between Russia and Ukraine.^[2] Eight of these claims have arisen as a result of alleged actions connected with the 2014 incorporation of Crimea into the Russian Federation. Although held in various seats, each of the cases has been administered by the Permanent Court of Arbitration under the UNCITRAL Arbitration Rules.^[3]

Russia has previously refused to recognize the legitimacy of such proceedings and has sent letters protesting against the formation of the arbitral tribunals and the powers of the PCA. For their part, the Ukrainian investors have asserted that, since Russia has claimed that Crimea became part of its territory, their investments fall under the protection of the bilateral investment treaty even if Crimea was not part of Russia when the BIT entered into force and when the relevant investments were made.

Aside from protest letters, Russia has not to date participated in the arbitrations (although it has sought to challenge some of the resultant awards, see below). However, this looks set to change with Justice Minister Kononov's announcement heralding a change in strategy to deal with claims at their "early stages" before awards are issued. This article looks at the claims that have been brought to date and the responses of the tribunals to the unusual factual and legal background to the claims.

The Crimea Cases — Variety and Commonality

The eight claims filed to date span a range of different economic sectors, including oil and gas, financial services, air transportation and real estate. However, belying this diversity of subject matter is a

dominant factor. Five of the cases are brought by companies connected with the same Ukrainian businessman, Igor Kolomoisky. The other 3 cases relate to state-owned Ukrainian companies.[4][5]

The Kolomoisky Claims

Aeroport Belbek LLC and Igor Valerievich Kolomoisky

The case concerns an operations contract for the commercial passenger terminal at an airport near Sevastopol. Aeroport Belbek and Kolomoisky allege that Russia adopted measures that amounted to an expropriation of their contractual and other rights.

An arbitration claim was initiated in 2015. After the arbitral tribunal was constituted in April 2015, Russia is understood to have sent letters in June and July 2015 rejecting the authority of the PCA and the tribunal. The tribunal treated these letters as an objection to its jurisdiction and the admissibility of the claims, and ordered bifurcation of the proceedings to deal first with jurisdiction and admissibility before then (if appropriate) considering liability and quantum.

The tribunal permitted an application by Ukraine to make submissions in the case as a "non-disputing party" to the BIT, but declined to allow Ukraine to participate in or attend the hearings held in Geneva in July 2016. In February 2017, the tribunal issued a unanimous award upholding its jurisdiction to decide the claims under the BIT. A further award followed in February 2019 on issues of liability and outstanding issues of jurisdiction and admissibility. The further questions of liability and quantum of damages were reserved to a further phase.

PJSC CB Privatbank and Finance Company Finilon LLC

The second claim filed in 2015 alleged the expropriation of a banking business in Crimea, including its subsidiary Moskomprivatbankin.

The tribunal was constituted in June 2015 comprising the same members as in the Aeroport Belbek case: presiding arbitrator Pierre-Marie Dupuy, Daniel Bethlehem and Vaclav Mikulka. At the request of the claimants, the tribunal agreed to consider the claims concurrently with the Aeroport Belbek case. Once again, bifurcation was ordered and Ukraine was permitted to file written submissions.

After hearings in July 2016, the tribunal issued a unanimous award on jurisdiction and admissibility in February 2017. A further award followed on liability and remaining issues of jurisdiction in February 2019. The case has now proceeded to quantum.

PJSC Ukrnafta and Stabil LLC & Others

The Ukrnafta and Stabil cases were also heard together by a tribunal composed of Gabrielle Kaufmann-Kohler, Daniel Price and Brigitte Stern.

In both claims, it is alleged Russia undertook actions to nationalize the investors' networks of petrol stations and other associated assets, which included convenience stores and equipment.

The tribunal was constituted in October 2015. Again, proceedings were bifurcated and Ukraine was granted leave to make written submissions, but was not allowed to attend or make submissions at the hearings. In a unanimous decision in June 2017, the tribunal decided it had jurisdiction to hear both sets

of claims. The arbitration moved to a liability phase with hearings in February 2018.

Meanwhile, Russia filed a challenge with the Swiss Federal Tribunal, as the supervising court of the seat of the arbitration, objecting to the awards on jurisdiction and requesting a stay of enforcement. The Swiss court issued a public decision in October 2018 rejecting the challenge and upholding the decision of the arbitrators.

The Swiss court agreed with the arbitral tribunal that the BIT covered investments from investors of one contracting state which, due to changes in national borders after the date of the treaty and after the date of the investment, were within the boundary of the other contracting state at the time of the alleged violation of treaty protection.

The arbitral tribunal went on to issue awards in April 2019 upholding the claims and awarding \$44.5 million in damages to Ukrnafta and \$34.5 million to Stabil and its co-claimants, together with interest and costs. In an announcement from its Ministry of Justice on June 4, 2019, Russia stated that it was again challenging these awards before the Swiss court on the grounds that the tribunal had not established that the Crimea was the sovereign territory of Russia, and also on the grounds that the investments had been acquired in an illegal manner by the claimants.[6]

Everest Estate LLC & Others

The final Kolomoisky case, while filed last, has been the first to reach the enforcement stage.

The Everest claim was commenced in 2015 and concerns the alleged expropriation of properties in Crimea, including hotels, apartment complexes, offices and other buildings.

The proceedings followed a familiar pattern. A tribunal composed of Andrés Rigo Sureda, Michael Reisman and Rolf Knieper first issued an award in March 2017 upholding its jurisdiction to hear the claims. Ukraine was again granted permission to make written submissions only.

A hearing on liability took place in October 2017, and the tribunal issued a unanimous award on the merits in May 2018 awarding \$159 million in damages.

This award has been followed by two sets of national court proceedings:

- The investors have brought claims in the Ukrainian courts seeking enforcement of the award. In September 2018, the Kiev Court of Appeal issued a judgment allowing enforcement, which decision was substantially upheld by the Ukrainian Supreme Court in January 2019.
- Meanwhile, Russia has moved to challenge the awards before the Netherlands Court. Proceedings were lodged in August 2018 and remain pending.

Claims by State-Related Companies

LLC Lugzor & Others

The claim by Lugzor and other investors concerns the alleged expropriation of real estate investments in Crimea.

The arbitral tribunal is composed of Donald McRae, Bruno Simma and Eduardo Zuleta. The proceedings have been bifurcated and Ukraine has again been permitted to make written submissions only. A hearing on jurisdiction and admissibility took place in July 2017. In August 2017, the tribunal informed the parties that it intended, in due course, to render a final award in which it will uphold its jurisdiction over the dispute submitted to it and the admissibility of all the claims. In the same final award, the tribunal will also decide all issues of liability and quantum. Separate submissions on liability and quantum have since been made and a hearing held in June 2018. The award is pending.

PJSC State Savings Bank of Ukraine

The Oschadbank case relates to the expropriation of a network of banks in Crimea.

The tribunal was seated in Paris and was composed of David Williams, Charles Brower and Hugo Perezcano Díaz.

The claim was filed in January 2016, eventually leading to an award in November 2018 reported to grant Oschadbank \$1.1 billion in damages, plus interest.

Reflecting the other decisions on jurisdiction by tribunals in the Crimea cases, it is understood that the Oschadbank tribunal accepted that the territory covered by BIT protection included the geographical territory over which the host state had control at the time of the alleged treaty violation and not just the territory as it existed at the time the BIT was signed or the investment was made.

Following its announcement of the November 2018 award, the chair of the management board of Oschadbank, Andriy Pyshny, urged other Ukrainian companies, both state-owned and private, to consider using international arbitration to recoup economic losses in Crimea.

NJSC Naftogaz & Others

Finally, Ukrainian state-owned energy company Naftogaz, and six of its subsidiaries have commenced BIT arbitration proceedings claiming damages in relation to the alleged expropriation of oil and gas assets in Crimea and the transfer of those assets to a Russian state-owned company.

Filed in 2017, the claims are being heard by a tribunal seated in the Netherlands composed of Ian Binnie, Charles Poncet and Maja Stanivuković. A hearing was held in May 2018, and in March 2019, Naftogaz announced that the tribunal had found Russia liable for violation of the BIT. It also announced that the tribunal would proceed to consider its claim for damages valued at some \$5 billion.

What Next?

Notwithstanding the decision of the Swiss court on the challenges to the jurisdictional awards in Ukrnafta and Stabil, the future decision of the Netherlands court on the challenge to the award in Everest will be significant both for that award and the four other Crimea cases with a Netherlands seat.[7]

More claims may yet follow against Russia. Ukraine's largest private power and coal producer, DTEK, has previously announced that it will seek compensation from Russia of an estimated \$500 million for the loss of its Crimea-based assets. While the status of that claim is unclear, DTEK has stated that Russia is engaging with the process.[8] Ukrainian state-owned electricity company, Ukrenergo, has also

announced that it intends to pursue a claim. In the face of these mounting claims, and given the so far consistent decisions on jurisdiction among tribunals hearing Crimea cases, it is perhaps not surprising that Russia has now chosen to reverse its previous policy of nonparticipation in order to deal up front with the admissibility of the claims presented, as well as to fight directly on issues of liability and quantum.

Further fights are in any event likely on enforcement of the future awards. Since all the claims have been brought under ad hoc arbitration, awards will be enforceable through national courts and Russia may yet seek to engage the various grounds to resist enforcement available under the New York Convention.[9]

Enforcement may potentially even give rise to further BIT arbitration claims against Ukraine by those Russian companies affected by the enforcement actions. Already, in the context of enforcement of the Everest award, courts in Ukraine have allowed attachment of the assets of three Russian state-owned banks: Vnesheconombank, Sberbank and VTB Bank, including shares in their Ukrainian subsidiaries and the assets of those subsidiaries. This attachment was modified by the Ukrainian Supreme Court which nonetheless said that assets shown to be owned by Russia in Ukraine may be available for enforcement.

In November 2018, the Ukrainian Central Bank declared VTB's Ukrainian subsidiary to be insolvent, which VTB said was the result of the enforcement freeze on its assets by the Ukrainian courts.

Lastly, what difference might the newly installed president of Ukraine make to the prospect for further arbitration claims? President Volodymyr Zelensky has risen to national prominence through his role as a fictional president in a comedy series aired on Ukrainian TV channel 1+1 owned by Igor Kolomoisky. If the new president needs advice on investment disputes between Ukraine and Russia, he need only ask his former employer.

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[1] <https://www.vedomosti.ru/politics/articles/2019/05/19/801768-rossiya-menyaet-strategiyu>

[2] Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments (Moscow, November 27, 1998).

[3] The United Nations Commission on International Trade Law (UNCITRAL) promulgated arbitration rules in 3 versions: 1976, 2010, and 2013.

[4] Ukrnafta is also a state-owned company, although Mr Kolomoisky is understood to hold a 42% stake and exercise operational control.

[5] Privatbank was nationalized in December 2016 after commencing its claim.

[6] <https://minjust.ru/ru/novosti/rossiyskaya-federaciya-osparivaet-arbitrazhnye-resheniya-po-iskam-kompaniy-ukrnafta-i-stabil>

[7] Aeroport Belbek, Privatbank, Lugzor and Naftogaz.

[8] <https://www.kyivpost.com/ukraine-politics/russia-recognizes-jurisdiction-of-hague-court-in-case-involving-dtek-assets-lost-in-crimea.html>

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).