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Washington Arbitration Week Recap: the Ukraine Crisis and Post-War Scenarios

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The [Fourth Edition of the Washington Arbitration Week \(WAW\)](#) took place from 27 November to 1 December 2023. This post highlights the panel titled ‘The Ukraine Crisis and Post-War Scenarios’. [Jose Antonio Rivas, SJD](#) (co-founder of WAW/Xstrategy), introduced the panel by remarking that despite the fact that the Russian invasion had already lasted for almost two years, it remains a priority of the WAW to continue reflecting on the conflict.

While many legal discussions focus on the international humanitarian aspects of the war, such as Russia’s violation of international treaties (namely the [UN Genocide Convention](#)), the panel focused on the private rights of action for damages caused by Russia during its invasion of Ukraine, discussing the quantification of losses, and whether Russian funds, which are currently frozen worldwide, can ultimately be used as compensation to the victims. [Marney Cheek](#) (Covington & Burlington LLP) moderated the panel and put forward a dynamic analysis of this timely topic as an introductory remark. She was joined by [Luke Wochensky](#) (Pillsbury Winthrop Shaw Pittman LLP), [Sirshar Qureshi](#) (PricewaterhouseCoopers), and [Gene Burd](#) (Pierson Ferdinand).

The Initial Framework: Identifying Claims and the Steps to Enforce Them

As presented by Mr. Wochensky, there is a legal framework to consider by those seeking compensation for the economic losses caused by the Russian invasion of Ukraine. In May 2023, the [Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine](#), was created under the [Enlarged Partial Agreement](#) of the Council of Europe as a first step towards an international compensation mechanism. 42 countries and the European Union have joined the Register as members or associate members. It provides for the initial framework for the identification and registration for the identification and registration of claims against Russia by individuals, and eventually companies and the government as a result of the invasion of Ukraine. The initial focus, however, will be on the individual claims. The key questions that one might have would be in relation to those claims whether, and if so, how to enforce them. The first and most important step is the process of registering the claim, which must be started as soon as possible.

What Kind of Evidence Should I Gather for an Assessment of Claims?

Mr. Qureshi provided a practical overview of the challenges that companies affected by the war might encounter while gathering evidence to support their damages claims in connection with an ongoing war.

While a lot of procedural issues are still pending and are unclear, it does not defer the important task of the preparation of quantum claims. Damage claims are renowned for their inherent complexity, it is thus imperative to prepare for it preemptively. In order to do so, record keeping of the following types of documents is imperative:

- accounting records, management accounts, financial account, damage property records (in terms of technical constructions), surveillance reports, costs incurred due to the invasion such as employees' relocation costs; and
- business plans (the last before the war started and the ones after) are also of relevance in terms of scenario accuracies since they take into consideration specific issues such as the de-mining costs, the rebuilding costs, or contractual penalties for instance. The main goal is to be prepared, collect, and present a comprehensive set of contemporaneous evidence to support any future damage claim.

Unlikely Enforcement in Russian Courts

While the conventional wisdom would be to avoid seeking redress from the Russian courts for damages suffered in Ukraine, Mr. Wochensky explained that the non-Russian party might not have any alternative route. The lack of an alternative route adds a layer of complexity, especially as it has been observed that since 2014 and the invasion of Crimea, Russian Courts' independence has regressed, at the expense of non-Russian parties.

Currently, in commercial claims, including commercial arbitration, Russian State Commercial (*Arbitrazh*) Courts have consistently “grabbed” jurisdiction on claims in the presence of straightforward “non-Russian” arbitration clauses. Notably, pursuant to a law that was adopted in 2020, if Russian citizens do not have equal rights to defend their cases in commercial arbitrations abroad (i.e. if they are sanctioned or if it is *related* to sanctions – which has been widely interpreted), Russian State Commercial Courts will declare jurisdiction over that dispute.

As a result, on multiple occasions, even in the presence of viable arbitration clauses, parties have decided to pursue a dispute before a Russian State Commercial Court either to (i) stop the arbitration, (ii) prevent enforcement, (iii) go after assets or companies having assets in Russia, or (iv) go after companies located in countries that are signatories of bilateral or multilateral agreements such as the [1993 Minsk Convention](#). Therefore, it seems that a predictable trend would be for the Russian government to likely continue to try and find ways to protect the interests of Russian parties.

Navigating Through Foreign Sovereign Immunities in Order to Enforce Claims Before US Courts

Mr. Burd provided the legal framework of the Foreign Sovereign Immunities Act (FSIA) which would allow a claim by way of enforcement or a direct claim against Russia and/or its sovereigns in the U.S. or through the enforcement of a foreign (for example Ukrainian) court judgment. Knowing that the U.S. government has frozen billions of dollars of Russian assets, one might wonder if such assets could be a good target for recovery. However, the FSIA may protect them by only allowing very narrow exceptions that a claimant could use to obtain the jurisdiction of U.S. courts to access the assets.

Two questions should be considered to pursue an action: (i) sovereign immunity under international law, and (ii) sovereign immunity under the FSIA, which is U.S. law. Under the FSIA, four exceptions are more likely to be invoked for immunity:

1. the arbitration exception, which is the most efficient way to get an award enforced in the U.S. under the *FSIA Act*;
2. the waiver exception, which can be applied in cases involving arbitration awards or judgments against a foreign state;
3. the expropriation exception, i.e., that the expropriation must be a violation of international law (notably U.S. courts have adapted their definition of what categorizes a violation of international law in accordance with the ICJ decision in *Germany v. Italy*, i.e, a state is not deprived of immunity by reason of the fact that it is accused of gross and serious violation of humanitarian law); and
4. the commercial activity exception.

The Prospect of Using Frozen Russian Assets to Satisfy the Enforcement of Claims

As put forward by Mr. Wochensky, one of the key issues that should be taken into consideration relates to the [economic sanctions imposed on Russia, Russian individuals, and Russian entities](#). While the end of the war is not predictable, there may be a point in the future at which Russia wishes to cooperate in removing sanctions. One of the criteria for their removal should be the use of the frozen assets to satisfy economic claims against Russia but also to enforce commercial claims against Russian parties.

As mentioned by Mr. Burd, there is an ongoing discussion taking place in Washington D.C., mostly focused on the effort to obtain funding for Ukraine's compensation and reconstruction. Insofar, the Biden administration and U.S. Congress have considered three different pathways to do so:

1. **the use of proceeds from sanctions evasion**. According to such a scenario, a violation of U.S. sanctions could result in the entity's assets being confiscated and put into funds to compensate the Ukrainian Government or private actor;
2. **the use of the Racketeer Influenced Corrupt Organization Act (RICO)**, originally reserved for civil claims, its expansion is contemplated in order to include the evasion of sanctions that would allow either (i) a private cause of action, or (ii) for the government to confiscate assets that would be distributed to Ukraine;
3. **the REPO Act**, a joined bipartisan bill introduced in June by the Senate and the House of Representatives. The aim of this bill is to give the President the authority to confiscate Russian sovereign assets frozen in the US by creating two Funds: (i) the international "Common Ukraine

Fund” to transfer confiscated or frozen Russian sovereign assets to assist Ukraine, managed by G7 allies and (ii) the domestic “Ukraine Support Fund” consisting of Russian sovereign assets in U.S. financial institutions administered by the Secretary of State in consultation with USAID. As of yet, very little detail is known on this matter.

Solutions Developed by Ukraine

Ukraine has been reported to discuss the possibility in its domestic system for Russia to be stripped of its sovereign immunity in connection with any claims relating to the Russian invasion and Russian aggression in Ukraine. The main issue pending in this regard is the type of notice to be served for these types of claims, as it must also be recognized by different legal regimes and systems.

Conclusion

This discussion carefully highlighted how, even with no one able to predict the outcome of the current Russia-Ukraine war, the post-war phase of the Ukraine crisis is already well thought through. In fact, while it is an extremely active time for the conflict itself, it is undeniable that it is the ‘calm before the storm’ phase for commercial disputes. Because the economies of Russia and Ukraine are highly interconnected, it is expected that both Russian and Ukrainian, as well as foreign entities, will be putting forward commercial claims as a result of the economic impact of the war. As such, a plethora of commercial disputes is to be expected, and they will be, more likely than not, at the forefront of the international dispute scene and international arbitration.

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