

# **RECOVERING LOSSES AGAINST RUSSIA:**

# **INVESTMENT TREATY CLAIMS FOR INSURERS AND INSUREDS**

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# The Issue – Russia's actions have caused significant losses

- In addition to untold human suffering, Russia's invasion of Ukraine will give rise to some or all of the following events, which will cause financial losses to owners of assets in Russia and Ukraine and to their insurers (if they are liable to pay out on policies):
  - The expropriation by Russia of foreign owned aircraft that have been leased to airlines in Russia (AerCap has lodged a \$3.5bn insurance claim)
  - The expropriation by Russia of the assets of those foreign owned business that leave Russia because of the conflict in Ukraine
  - The repayment by Russia of its US Dollar denominated bonds in Roubles
  - Unilateral changes in contract terms. For example, insisting that payment for gas is in Roubles not forex
  - A refusal by Russia to recognise and protect the intellectual property of goods and services that can no longer be imported into Russia (because of sanctions)
  - The inability to sell shares in Russian listed companies in a timely fashion and to be able to repatriate out of Russia the proceeds of the sale
  - The destruction of foreign owned business in Ukraine by way of Russia's military action

# The Issue – The usual avenues of redress against Russia are unlikely to apply

- Russia will very likely undertake all of these actions in a manner that is lawful as a matter of Russian Law
- Those who have contracts with Russia and which are breached by Russia by way of the above actions will have an effective remedy if the contract is governed by foreign law and subject to a foreign jurisdiction clause or arbitration clause
- However, the vast majority of business affected by Russia's actions:
  - Will not have contractual relations with Russia
  - If they do have contractual relations with Russia they may not be relevant to the above events
- Therefore, in most instances there are *unlikely* to be contractual rights that can be invoked against Russia to recover losses
- In these circumstances, insureds without policy coverage and insurers who pay out under policies will face significant losses which on their face appear irrecoverable

# The Solution – Investment Treaties

- Russia has entered into over sixty investment treaties that are in force with other states
- These treaties provide a means to recover losses from Russia
- Russia under its investment treaties promises to accord certain protections to businesses (individuals and companies) investing in its territory
- These treaties are governed by public international law, not domestic law
- Therefore, the fact that Russia's actions may comply with its domestic law does not mean that they comply with its obligations under its treaties

# The Solution – Investment Treaties (cont'd)

- The protections to foreign investors provided in Russia's investment treaties typically include some or all of the following rights:
  - Any expropriation must be non-discriminatory, for a public purpose, follow due process, and be subject to fair market value compensation
  - The right to freely transfer funds out of the jurisdiction
  - The right to fair and equitable treatment:
    - The State's conduct must not be arbitrary, grossly unfair, coercive, unjust, discriminatory, amount to harassment or lack due process
    - Representations made by the State and reasonably relied upon by the investor must be honoured
  - The right to be treated not less favourably than nationals of the State hosting the investment (National Treatment)
  - The right to be treated not less favourably than other foreign nationals investing in the host State (Most Favoured Nation Treatment)

## The Solution – Investment Treaties (cont'd)

- The right to damages for any breach of the treaty (the investor is put into the position it would have been in if the breach did not occur)
- The right to submit an investment dispute with the State to binding international arbitration (but check because this is sometimes omitted or at least limited)
- The arbitration claim can be brought by the insured or the insurer in the name of the insured (exercising rights of subrogation)
- The awards/judgments of investment treaty arbitration tribunals are enforceable in more States than judgments of courts

# A Sample of Russia's Investment Treaties

- By way of example, Russia has investment treaties in force with the following States among others:
  - Austria (1/9/91)
  - Canada (27/6/91)
  - Finland (8/2/89)
  - France (17/7/91)
  - Germany (5/8/91)
  - India (14/8/96)
  - Italy (7/7/97)
  - Japan (27/5/00)
  - Korea (10/7/91)
  - Netherlands (20/7/91)
  - Singapore (16/6/2012)
  - Sweden (7/7/96)
  - Switzerland (28/8/91)
  - Turkey (15/5/00)
  - United Kingdom (3/7/91)
  - Ukraine (27/1/2000)

# What to do if there is no applicable treaty

- For example, the United States does not have a treaty in force with Russia
- However, if a US company invested into Russia via a United Kingdom company then the UK company can bring the claim under the UK-Russia Treaty



- Always check the corporate structure to see if a treaty may cover one of the companies in the structure
- A note for the future:
  - Investments should always be made so that the investor ensures it has access to a bilateral investment treaty
  - Protective ownership structures for treaty coverage should be in place before the government measure arises
  - Always consider tax and regulatory issues before rearranging ownership structures



# Not all investment treaties are equal

- Some investment treaties offer better protections than others
- Some of Russia's treaties only permit arbitration in regard to the amount of expropriation due:
  - Therefore, if Russia refuses to accept that it has expropriated assets, arguably there cannot be an arbitration
- Other Russian treaties have no such limitation
- Some treaties have limitation periods, others require an election between local courts and arbitration
- Therefore, where more than one treaty is available, select the treaty that gives the best protection



# Russia's breaches of its investment treaties

- The actions that have been taken by Russia to date in regard to businesses in **Russia**:
  - very likely breach the expropriation and fair and equitable treatment provisions of its investment treaties
  - they are classic investment treaty arbitration cases
- The actions taken by Russia to date in regard to businesses in Ukraine raise particular issues:
  - The key question is whether those parts of Ukraine controlled by Russia is “territory of the Russian Federation” and therefore covered by Russia’s investment treaties
  - In the cases against Russia in regard to Russia’s conduct in the Crimea after it invaded it in 2014, investment treaty tribunals held the Crimea was “territory of the Russian Federation” for the sole purpose of Russia’s investment treaties:
    - Control not legal sovereignty was the test as to whether an area in Ukraine (namely the Crimea) was “territory of the Russian Federation”
- In summary, we expect to see numerous investment treaty arbitration claims against Russia, assuming insurers and insureds are aware of this option

# Actions that should be taken by insureds now

- In order to protect their positions in regard to future arbitrations against Russia under its investment treaties, insureds should:
  - remove any documents from Russia and Ukraine that they would need in an arbitration against Russia (e.g. proof of ownership, accounts, permits, etc.)
  - record when and how destruction to property occurred