

CLIENT UPDATE

BUSINESSES WARY OF IMPACT OF UKRAINIAN SANCTIONS

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On 14 August 2014, the Ukrainian parliament adopted legislation creating a legal framework for the imposition of sanctions on countries, foreign individuals and foreign entities. More than 20 different types of measures are authorised through the legislation, including asset freezes, revocation of licenses, a prohibition on conducting business in Ukraine, restrictions on financial transactions and travel bans.

To be adopted, the sanctions must be approved by Ukraine's National Security Council and implemented by Presidential Decree. Businesses are anxiously waiting for the first Decree to be passed, following the production of a list which has reportedly been drawn up naming 172 Russian citizens and 65 entities, the majority of which are also Russian, as potential targets for the new sanctions.

We have received a number of queries from multinationals with business interests in Ukraine that could in due course be directly or indirectly affected by sanctions introduced under the legislation. Affected entities with Ukrainian-based investments may have some recourse through a number of bilateral or multilateral investment treaties entered into between Ukraine and those investors' home states, including treaties with (among others) Austria, Belgium, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, India, Luxembourg, Morocco, Netherlands, Portugal, Russian Federation, Spain, Sweden, Switzerland, Turkey, United Kingdom and the USA.

In particular, the *Russia-Ukraine Bilateral Investment Treaty* (BIT) permits investors to elect to arbitrate claims of undue expropriation before an international tribunal constituted in accordance with the Arbitration Regulations of the UN Commission for International Trade Law (UNCITRAL) or the Arbitration Institute of the Stockholm Chamber of Commerce. Just weeks ago an UNCITRAL arbitral panel is understood to have issued an award against Ukraine in favour of Russia's Tatneft under the Russia-Ukraine BIT, ordering Ukraine to pay over \$100 million (plus interest) in damages.

A right of action may also be available through the *European Convention on Human Rights* (ECHR) in view of Ukraine's status as a contracting state. Although companies may bring a claim against Ukraine under the ECHR, they are first obliged to exhaust any remedies available domestically in Ukraine. There are other limitations to ECHR claims, including the lack of effective enforcement mechanisms and generally low damages awards. It is noted, however, that in June of this year, the ECHR awarded €1.9 billion to Yukos shareholders in respect of their claims against the Russian Federation.

Few other effective routes to recourse are available, although the rights of businesses subjected to sanctions will vary from case to case and will depend on the exact nature of the measures imposed on them. For example, a claim under the Energy Charter Treaty might be available if assets in the energy sector are implicated. Although Russia has also entered into a number of bilateral treaties with Ukraine (such as, for example, the Agreement on Friendship, Cooperation and Partnership, dated May 1997), Ukraine is not a party to the multilateral CIS Convention on Protection of Investors Rights (Moscow, 1997), so as a general matter investors cannot rely on its protection. Finally, although sanctions may engage rights recognized under the WTO Agreements, such claims can only be advanced by States.

Entities would be well advised to keep a close watch on Ukrainian operations to ensure that all possible protections are put in place to avoid interference with business assets. Planned expropriations may include proposals to transfer assets to third parties, and it would be advisable to discuss with legal counsel experienced in this area whether to take preventative steps in this regard. Early assessment of exposure and careful mitigation of damage can often be more effective than bringing claims after enforcement action has been taken.

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Please do not hesitate to contact us with any questions.

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