Yachts and Airplanes: What Procedures and Legal Theories Are Being Used to Forfeit Russian Assets in the United States?

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ABSTRACT

For the past year – since the Russian invasion of Ukraine – there has been a great deal of interest in the seizure and forfeiture of the assets of the Russian oligarchs who have become subject to international economic sanctions. Different countries have taken different approaches: Some have merely been freezing the assets of sanctioned persons based on statutory authority to restrain their movement. Others have found ways to confiscate – or permanently take title to – these assets, invoking a variety of legal theories and instruments to do so.

In the United States, the approach has been to obtain a seizure warrant based on probable cause to believe that a yacht, airplane, or other asset of a sanctioned Russian individual or entity is subject to forfeiture because of its nexus to a criminal offence; then to seek the assistance of the courts in the jurisdiction where the asset is located to serve the warrant and take custody of the asset; and ultimately to file a civil ("non-conviction-based") forfeiture action against it, with a view to permanently depriving the owner of the property or title to it.

To date, the United States has obtained seizure warrants for several yachts and airplanes. While it has been able to seize two of them with the assistance of foreign governments, it has yet to file a civil forfeiture action against any property. This article describes the procedure that the law enforcement authorities in the United States have been using to obtain seizure warrants and take custody of Russian assets. It also discusses the legal theories that the Government has used to obtain those warrants and is likely to use when it files formal civil forfeiture actions in the federal courts.

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I. What is the Approach behind the Seizure/ Confiscation of Assets?

Law enforcement officials and policymakers in different countries have suggested a number of approaches to underpin the seizure and confiscation of the assets of sanctioned individuals and entities. Some have argued that law enforcement should make use of so-called "unexplained wealth orders;" but this approach is problematic for two reasons: Firstly, most countries (including the United States) do not have legislation authorizing the seizure – never mind the ultimate forfeiture – of an asset based solely on a property owner's inability (or unwillingness) to explain the source of his or her wealth. Secondly and more fundamentally, the wealth of Russian oligarchs is rarely "unexplained." A property owner can easily point to the revenue stream from his or her control of, for example, the oil and gas industry in his or her part of the world as an explanation for being able to purchase and derive pleasure from luxury yachts or airplanes.

Other countries have taken a more direct approach, authorizing not only the seizure but the permanent forfeiture of assets solely on the grounds that they are owned by a sanctioned individual. In Canada, for example, new legislation has been enacted to allow the government "to directly issue an Order seeking permanent asset forfeiture based on individuals who risk a 'grave breach of international security.'"[1]

Yet other commentators have suggested that the only way to confiscate assets permanently in a way that complies with the rule of law, and that recognizes that the source of the assets is likely to be serious criminal conduct -- including embezzlement, public corruption, or other types of kleptocracy – is to return to first principles: *i.e.,* to bring criminal or non-conviction-based asset forfeiture actions based on the nexus between the property and the underlying crime, rather than the sanctioned status of the property owner. It also involves expanding the reach of the statutes that authorize such action, where required, to make them effective.[2]

The United States has taken what amounts to a hybrid approach. It does not use unexplained wealth orders; and while it may freeze assets based solely on the status of the property owner as a sanctioned individual or entity, it may not permanently take title to them for that reason alone. To the contrary, under federal law in the United States, property may only be permanently forfeited if the government – on a balance of the probabilities – can prove that the property was derived from or otherwise involved in a criminal offence.[3]

The crime that gives rise to forfeiture under federal law, however, does not have to be the "original sin" that occurred when a kleptocrat stole or extorted the funds used to purchase his or her fleet of yachts or airplanes. Indeed, those crimes – or in the case of money laundering, the predicate crime – almost always will have occurred in a foreign country, which means that any cases decided on a balance of the probabilities would require the government's being granted full access to foreign evidence, not to mention the cooperation of the foreign state where the crime took place. It is hard to imagine Russia, for example, being particularly forthcoming with the evidence needed to prove that a given oligarch's assets were derived from crimes committed in Russia.

In the cases brought in the United States to date, the alleged crime invoked as the basis for the forfeiture of a sanctioned oligarch's assets was not a crime that occurred in some foreign country where the oligarch obtained his or her wealth. Instead, the cases centred on crimes that occurred in the United States when sanctions imposed under US law were violated. That is, it is the violation *of the sanctions* in the United States that is the crime giving rise to the forfeiture, not the crime that generated the oligarch's wealth in the first place.

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Sidestepping the issues inherent in basing a forfeiture action on conduct that occurred in violation of foreign law, this approach allows cases to proceed on evidence of criminal conduct that is readily available to law enforcement, such as access to bank records, and other indicia of conduct that occurred much closer to home.

II. What is the Procedure?

Before discussing the legal theories that the United States has been employing to establish the nexus between oligarchs' yachts and airplanes and a sanctions-related crime, I will explain the procedure that law enforcement in the United States is required to follow.

Under federal law, the government of the United States is able to forfeit – or permanently take title to – criminally-tainted property in two ways: as part of the defendant's sentence in a criminal case ("criminal forfeiture"), or in a separate civil action against the property ("civil or non-conviction-based forfeiture"). The former requires a conviction in a criminal case, which is hard to obtain when dealing with a foreign person not likely to consent to extradition or being extradited to the United States. Accordingly, most forfeiture actions against oligarchs' assets need to be brought as civil forfeiture actions.[4]

While civil forfeitures do not require the criminal conviction of any person or entity, they do require the government to prove – on a balance of the probabilities – that a crime was committed and that the property in question was derived from or otherwise involved in that crime.

Most civil forfeiture cases begin with the seizure of the property, generally with a warrant issued by a judicial officer. The seizure of the property, however, is not the end of the process; it is only the beginning. It gives the government the ability to take custody of, or immobilize, the property temporarily while a formal forfeiture action is commenced and litigated in a federal court. As discussed in more detail below, the government has thus far obtained seizure warrants for a number of yachts and airplanes in contemplation of commencing formal forfeiture action, the successful outcome of which would be to permanently divest the owner of the property or title to it.

If the property in question is located within the jurisdiction of the United States, taking possession of an asset pursuant to a seizure warrant is a relatively simple matter. If the property is located elsewhere, however, the government must seek the assistance of a foreign court. As we will see later on, the United States invoked this procedure when it sought the assistance of the courts in Fiji to seize the *Amadea,* a yacht that was found in Fijian waters.

Once the property has been seized, the government must file a formal complaint setting forth the facts and legal theories giving rise to the forfeiture, and must send notice of the seizure and its intent to forfeit the property to all persons who appear to have a legal interest in it. Such persons then have a period of time in which to answer the complaint, to file motions challenging the forfeiture action, and to request (and respond to requests) for evidence relating to the forfeiture action. All of this is laid out in detail in the Civil Forfeiture Reform Act (CAFRA) and the case law that has applied it over the last quarter-century.[5]

Ultimately, if the facts of the case are undisputed, the parties may file competing motions for summary judgement, asking for judgement in their favour as a matter of law. Otherwise, where material facts are disputed, the person contesting the forfeiture – known as the "claimant" – has the right to have the case tried to a jury. Finally, even if the jury finds in the government's favor, the claimant is entitled to ask the court to set aside or mitigate the forfeiture on the grounds that it would be "grossly disproportional" to the gravity of the underlying offence.

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Obviously, this is a lengthy process. Indeed, virtually every article written on the seizure of Russian yachts and airplanes over the past year has noted that given all of the due process protections in CAFRA and elsewhere in federal law, the litigation in these cases – once they have been commenced – may take ten years or more.[6] This was certainly the case with respect to other celebrated cases involving the forfeiture of foreign assets in the past.[7] So, commencing a civil forfeiture action against the assets of sanctioned Russian oligarchs is no short term undertaking likely to result in the early disposition of assets that may be used to reimburse Ukraine for military and humanitarian losses caused by the Russian invasion, at least not if an action is contested. Rather, those who commence such actions are aware that they are in for the long haul, which may explain the caution being exercised before initiating formal action, even in cases where seizures have been effected.

Nevertheless, commencing a civil forfeiture action against a seized asset serves to justify the continued, if temporary, deprivation of an owner's property. What is more, it demonstrates that any violation of US-imposed sanctions has consequences, even if the perpetrator eludes the jurisdiction of the criminal courts of the United States.

III. What are the Government's Legal Theories?

1. The *Tango motor yacht* case

Several pending cases illustrate the range of legal theories the United States Department of Justice has employed so far in seeking the seizure – and presumably, the eventual forfeiture – of Russian assets involved in the violation of sanctions. One of the first cases entailed the seizure of a motor yacht called *Tango.*[8]

In 2018, the Office of Foreign Assets Control (OFAC) named *Viktor Vekselberg*, a Russian national, as a person subject to sanctions under the International Emergency Economic Powers Act (IEEPA).[9] Vekselberg is the chairman of the board of a group of asset management companies controlling assets in the energy sector in Russia. He is also a "Specially Designated National" targeted by the sanctions imposed on Russian oligarchs after the 2014 invasion of Crimea. In essence, these sanctions bar the sanctioned individual from using the US financial system to conduct any financial transactions.

Following the invasion of Ukraine in February 2022, the FBI applied for a warrant to seize the yacht *Tango*, which at the time was moored in a marina in Mallorca, Spain. The probable cause affidavit stated that Vekselberg had conspired to evade the 2018 sanctions by concealing his ownership of the yacht. Among other things, he owned the yacht through a shell company established in the British Virgin Islands and registered it in the Cook Islands in the South Pacific.

So, what crimes had Vekselberg committed and how was the yacht connected to those crimes? The US government alleged that to pay for maintenance on the yacht, Vekselberg sent sums of money through correspondent bank accounts in the United States to various entities overseas, always conducting the transactions in the names of the shell companies. In granting the application for the seizure warrant, the court found that if that was true, it constituted three crimes under U.S. law.

First, it constituted bank fraud. How so? Banks in the United States are not allowed to conduct financial transactions on behalf of sanctioned persons. They are also required to file Suspicious Activity Reports (SARs) alerting law enforcement to suspicious transactions. By concealing his role in the transactions, Vekselberg deprived the banks of information they would have needed to comply with the law. In other words, if the banks had known that it was Vekselberg who was conducting the transactions, they would have

found his name on the sanctioned-persons list and would not have conducted the transactions and they would have filed SARs. So, by concealing his identity from the banks, Vekselberg deprived the banks of their ability to determine with whom they were doing business and to comply with the law. In so doing, he committed bank fraud.[10]

Second, by routing – or causing someone to route – money through the US financial system, Vekselberg himself was violating IEEPA provisions, which make it a crime for a sanctioned person to use the US financial system for any purpose.

Third, the Government alleged and the court found that paying for the maintenance constituted an international money laundering offense. Under the federal money laundering statute, sending money – *any* money, clean or dirty – from the United States to a foreign country with the intent to commit a "specified unlawful activity" is a money laundering offense. Violation of IEEPA is one of the 250 or so state, federal, and foreign crimes designated as a "specified unlawful activity."[11] So, sending money from the US to a foreign country with the intent to violate the sanctions constitutes a money laundering offence.[12]

Proving that a crime has occurred, however, is only the first half of the Government's burden in a civil forfeiture case. In addition, it must demonstrate that the property it is attempting to seize and eventually forfeit had the required nexus to that crime. In the case of the bank fraud and IEEPA violations, that meant that the Government had to show that the property – in this case, the *Tango* – was the "proceeds" of the crime giving rise to the forfeiture.[13] And with respect to the money laundering violation, it had to show that it was "property involved" in the money laundering offense.[14]

Proving that the yacht was involved in money laundering was easy: The money laundering offenses were the maintenance payments, and the yacht was the property being maintained; it was the *subject* of the money laundering offense, and the subject of the money laundering offense is obviously "property involved in" that offense.[15]

Showing that the yacht was the "proceeds" of the bank fraud and IEEPA offenses required more of a stretch. The government argued, however, that *but for* the maintenance payments, Vekselberg would not have been able to maintain ownership of the yacht. If you fail to maintain a $90 million yacht, the government reasoned, its worth will soon depreciate; indeed, it may sink and be worth nothing at all.[16]

Property that one would not have but for committing a crime, is one definition of the "proceeds" of a crime.[17] In issuing the seizure warrant, the court agreed with the government that, but for the payments made in the names of shell companies – which constituted bank fraud and IEEPA violations – Vekselberg would not have been able to maintain and enjoy the yacht; consequently, the yacht represented the "proceeds" of the bank fraud and IEEPA violations[18].[19]

2. The *Boeing Dreamliner* case

A later case involving a Boeing Dreamliner and a Gulfstream jet illustrates an entirely different but equally creative argument for the seizure and forfeiture of a Russian asset.

The Export Control Reform Act (hereinafter: "the Act") makes it illegal to export certain things from the United States, or to re-export those things from another country, if they were originally manufactured in the United States. Specifically, the prohibition applies to things that "could make a significant contribution to the military potential of other nations or that could be detrimental to the foreign policy or national security of the United States."[20]

While the items to which the Act applies are described in detail in federal regulations, the underlying premise is that the United States does not want weapons or aircraft manufactured in the United States to be exported either directly from the USA or from another country to a hostile country.

On February 22, 2022, following Russia's invasion of Ukraine, the list of items covered by the Act was amended to prohibit the export or re-export of any US-manufactured aircraft to Russia.

Roman Abramovich, a Russian oligarch, is the owner of two US-manufactured aircraft: a Boeing 787-8 Dreamliner valued at $350 million, and a Gulfstream G650ER valued at $60 million. Both aircraft were purchased before the amendment to the export control regulations took effect, and have been outside of the United States for several years. International flight records show, however, that between March 12 and 15, 2022, the Gulfstream was flown from Istanbul to Moscow, from Moscow to Tel Aviv, from Tel Aviv to Istanbul, and then back to Moscow, where it remains. Similarly, flight records show that the 787 Dreamliner was flown on March 4, 2022, from Dubai to Moscow and back to Dubai, where it remains.[21]

In the government's view, the movement of the two airplanes to Russia after February 22, 2022, constituted an illegal re-export of US-manufactured aircraft in violation of the Act. Having been manufactured in the US, it was illegal to export the planes to Russia, either directly from the United States *or from a third country.* One plane had been flown from Istanbul to Russia, and the other from Dubai to Russia

Accordingly, the FBI applied for a warrant to seize the two aircraft under the civil forfeiture provisions of the Act, which authorize the seizure and forfeiture of property that has been illegally exported,[22] and the court concurred and issued the warrant.[23]

IV. Seizing Property in a Foreign Jurisdiction

Obtaining a warrant to seize property subject to forfeiture is the first step in the civil forfeiture process, but before the Government can move on to the filing of a formal complaint for forfeiture – which commences the litigation phase of the case – it must execute the warrant and take physical or constructive possession of the property. If the property is located in the United States, that is not a problem; but if it is located overseas, the execution of the seizure warrant will generally require the cooperation of a foreign Government, and if the seizure is contested, of its courts.

A good illustration of that process is the seizure of the yacht *Amadea* in Fiji in the summer of 2022 (see also Section II above). In this case, a magistrate judge in the District of Columbia issued a seizure warrant for the *Amadea* based on probable cause to believe that it was the proceeds of a violation of IEEPA and property involved in an international money laundering offense. According to the warrant application, the yacht was owned by a Russian oligarch, Suleiman Kerimov, a sanctioned individual who allegedly financed maintenance payments for the yacht through the U.S. financial system – *viz.,* correspondent bank accounts – without obtaining a licence to do so from OFAC.[24] The Justice Department thereafter requested that the government of Fiji, where the yacht was then located, register, and enforce the seizure warrant and turn the *Amadea* over to U.S. authorities.

The nominal owner of the yacht objected to the enforcement of the seizure warrant, however, arguing that Fiji's obligation to enforce a foreign order of this nature was limited to foreign *restraining orders* and did not extend to foreign *seizure warrants.* The Supreme Court held, however, that a seizure warrant and a restraining order are functionally equivalent for purposes of the United Nations Convention against Transnational Organized Crime (UNTOC), to which Fiji is a party.[25] The court argued:

The Convention was adopted by member States to assist each other in [the] fight against serious organized crimes. Fiji [. . .] is obliged to carry out its obligations under the UNTOC efficiently and expeditiously and without being hampered by mere technicalities in the domestic legislation. […] [N]ot to comply with the provisions of UNTOC due to technicalities would certainly put Fiji's international reputation in dealing with international crimes and its membership of International Conventions at risk.

Accordingly, the court held that the Fiji Attorney General's decision to register the foreign order was all that was required for the court to order its enforcement, that the nominal owner's objections were overruled, and that the United States could take immediate possession of the yacht and sail it out of Fijian waters. Indeed, the court seems to have insisted that this be so because Fiji did not want to risk being held liable for the costs of maintaining the yacht while it was moored in Fijian waters. As a consequence, the yacht was immediately sailed from Fiji to San Diego.

With the assistance of authorities in Spain, the United States has also been able to effect the seizure of the *Tango* in Mallorca in the above-mentioned yacht case. In other cases, however, the US Department of Justice has apparently been less successful in obtaining the cooperation of the government of the country where the property named in a seizure warrant was located. For example, to date, the United States has not obtained the cooperation of the authorities in Dubai, where Mr. Abramovich's Boeing Dreamliner is located.

V. Conclusion

While it is relatively easy to freeze the assets of a sanctioned Russian oligarch, permanently taking title to the property in accordance with the rule of law is more difficult and takes time. That said, the United States has found ways of at least initiating the process of forfeiting such assets as property derived from or involved in a criminal offence.

It remains to be seen, however, how long it will take to complete the forfeiture of the assets that the US has targeted, and what obstacles the beneficial or nominal owners of the assets will attempt to place in the government's way once formal civil forfeiture complaints have been filed and the issues are joined in the federal courts.

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1. Maria Nizzero, "From Freeze to Seize: How the UK Can Break the Deadlock on Asset Recovery," *Royal United Services Institute (RUSI)* <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-how-uk-can-break-deadlock-asset-recovery> accessed 26 December 2022, citing "Canada's Senate passes budget, greenlighting measures on housing, Russian assets," <https://www.reuters.com/world/americas/canadas-senate-passes-budget-greenlighting-measures-housing-russian-assets-2022-06-23/>.↩
2. Nizzero, *op. cit.* (n. 1). See also Maria Nizzero, "From Freeze to Seize: Dealing With Oligarchs' Assets in the UK," *Royal United Services Institute (RUSI)* <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-dealing-oligarchs-assets-uk> accessed 26 December 2022.↩
3. An exception to the rule barring forfeiture based solely on the status of the property owner applies to the assets of person or entities engaged in terrorism. Under 18 U.S.C. § 981(a)(1)(G), all assets of such a person are subject to forfeiture regardless of their connection to any act of terrorism or other criminal offense.↩
4. While criminal cases resulting in the forfeiture of assets are rare, the US has brought criminal charges against some Russian persons and given notice that if the case results in a conviction, the government will be seeking the forfeiture of the assets involved in the offence. See *United States v. Oleg V. Deripaska,* No. 22Cr518 (S.D.N.Y. 9/28/22).↩
5. CAFRA is codified at Title 18, United States Code, Section 983 and in Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. See S. Cassella, *Asset Forfeiture Law in the United States,* 3d ed. 2022, at Ch. 1.↩
6. See, e.g., Janaki Chadha, "Confiscating a Russian Oligarch's Luxury Condo Requires Much More Than Political Bluster;" *Politico,* 3/15/22, <https://www.politico.com/news/2022/03/15/seizing-russian-oligarchs-real-estate-00017158>; Nick Kostov , Alistair MacDonald and Betsy McKay, "A Global Hunt for Russian Oligarchs' Yachts Has Begun," *Wall Street Journal,* 3/3/2022, <https://www.wsj.com/articles/russian-oligarch-igor-sechins-yacht-is-seized-in-france-as-it-prepares-to-depart-11646313685> accessed 26 December 2022.↩
7. See, e.g., *United States v. All Assets Held at Bank Julius Baer & Co.,* 251 F. Supp.3d 82 (D.D.C. 2017) (one of many cases dealing with the decades-long civil forfeiture action to recover the assets of Pavel Lazarenko, former Prime Minister of Ukraine); *In Re: 650 Fifth Avenue Company,* 991 F.3d 74 (2nd Cir. 2021) (one of many cases dealing with the long-running civil forfeiture action against property in New York controlled by Iran in violation of sanctions).↩
8. *In the Matter of the Seizure and Search of the Motor Yacht Tango*, 597 F. Supp.3d 149 (D.D.C. 2022).↩
9. 50 U.S.C. § 1701, et seq.↩

10. See *United States v. Zarrab*, 2016 WL 6820737, at *11-12 (S.D.N.Y. Oct. 17, 2016) (holding that the government sufficiently alleged bank fraud when it submitted that the defendant and co-conspirators deceived US banks into processing transfers on behalf of sanctioned entities by layering transactions through intermediary shell companies in third countries, and by stripping Iran-revealing information from payment instructions that would be provided to US banks). See also *In the Matter of the Search of Multiple Email Accounts,* 585 F. Supp.3d 1 (D.D.C. 2022).↩
11. See 18 U.S.C. § 1956(c)(7) (listing the specified unlawful activities).↩
12. See 18 U.S.C. § 1956(a)(2)(A) (defining international promotional money laundering); *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020) (finding that promoting an IEEPA violation by sending money through US correspondent accounts constituted international promotional money laundering).↩
13. See 18 U.S.C. § 981(a)(1)(C) (authorising the forfeiture of the proceeds of any "specified unlawful activity," including bank fraud and IEEPA offences).↩
14. See 18 U.S.C. § 981(a)(1)(A) (authorising the forfeiture of any "property involved in" a money laundering offence).↩
15. See *United States v. Miller,* 911 F.3d 229 (4th Cir. 2018) (discussing the forfeiture of the subject of the money laundering transaction as "property involved in" the violation). As noted later in the text, the US also relied on the "involved in" money laundering theory, as well as the proceeds of IEEPA theory, to seize the yacht *Amadea* in Fiji.↩
16. *In the Matter of the Seizure and Search of the Motor Yacht Tango*, 597 F. Supp.3d 149 (D.D.C. 2022) (probable cause affidavit appended to the court's opinion).↩
17. *See United States v. Clark,* 2016 WL 361560, *4 (S.D. Fla. Jan. 27, 2016) (in addition to ordering defendant to pay money judgements, court orders forfeiture of specific assets defendant would not have been able to "obtain, maintain or retain" but for the fraud scheme and his obstruction of the investigation).↩
18. *Motor Yacht Tango*, supra.↩
19. The government is also seeking the forfeiture of the property of sanctioned oligarch Oleg Deripaska under the "proceeds of IEEPA" theory in a criminal case. See *United States v. Oleg V. Deripaska,* No. 22cr518 (S.D.N.Y.).↩
20. 50 U.S.C. § 4801, et seq.↩
21. United States v. A Boeing 787-8 Dreamliner, 22 Mag. 4860 (S.D.N.Y. Jun. 6, 2022) (unpublished document available on pacer.gov).↩
22. 50 U.S.C. § 4820(j).↩
23. *Boeing 787-8 Dreamliner,* supra (affidavit in support of seizure warrant *in rem* pursuant to 18 U.S.C. § 981).↩
24. *In the Matter of the Seizure of the Motor Yacht Amadea*, No. 22-sz-9 (D.D.C. Apr. 27, 2022).↩
25. *Millemarin Investments Ltd. v. Director of Public Prosecutions*, Civ. App. No. CBV 06 of 2022 (Supreme Court of Fiji, Jun. 7, 2022).↩

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