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The Ukraine War: Aviation and cyber issues

11 October 2022

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The Russia-Ukraine conflict, as well as causing a tremendous loss of life, stands to hold devastating consequences on a broader human spectrum. For businesses around the world, property may be destroyed, expropriated or abandoned, supply chains interrupted, and commercial activities sanctioned. In May 2022, Swiss Re put its initial estimate of losses at £238 million, whilst Axa confirmed in August it had reserved €30 million from aviation and political risks. Needless to say, at this stage, these are only preliminary estimates.

Aviation

In March 2022, Vladimir Putin signed a new law entitling Russian airlines to retain and operate aircraft rented from foreign lessors that were forced to break ties with their Russian counterparties due to sanctions.

As a result an estimated 400-600 aircrafts were lost, with a total approximate commercial value of $10-$13 billion. Lessors are therefore turning to their insurance policies to indemnify their losses. This situation arose in Aercap v AIG.

In this case, Aercap is seeking indemnity of almost £5.3 million, alleging wrongful deprivation of physical possession.

Insurers assert that the deprivation was not sufficiently permanent to amount to irretrievable deprivation. Further, they allege that cover for the lost aircraft ceased upon the termination of the relevant leases and that any payment of the claim would be prohibited by EU and UK sanctions in any event.

This is a case that explores issues which are likely to be common to many other situations, so is certainly a case to keep under review.

Cyber

The conflict also raises important questions in relation to cyber cover.

The case of Merck v ACE, in January 2022, signifies judicial attitudes to cyber exclusion clauses just shortly before the Ukraine war. In this case, the Superior Court of New Jersey found that the hostile/warlike action exclusion clause in various property policies did not prohibit coverage for the NotPetya cyberattack. Merck was therefore entitled to seek $1.4billion in losses.

Although not an English Law decision, the market as a whole is taking proactive steps to limit cyber risk exposure. Notably this was seen in August 2022, when Lloyd's issued a market bulletin requiring all cyber policies to include a suitable clause excluding liability for losses arising from any state- backed cyber-attack. Indeed, the circular confirms that model clauses issued by Lloyd's Market Association (LMA) in November will be sufficient to meet these requirements.

Establishing whether war was a factual cause off loss, particularly in the case of a cyber-attack, can be difficult due to uncertain identification of factual origins and perpetrators. Whilst the LMA clauses include a mechanism by which state- backed cyber operations are to be identified primarily on the basis of pending attribution by another state, there remains considerable scope for further coverage disputes.

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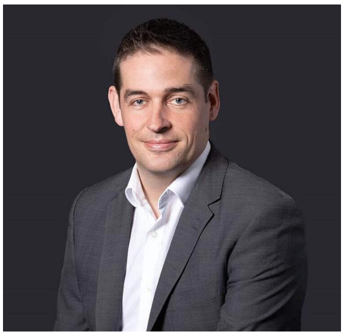

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