

## Aviation

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# English Commercial Court rules in favour of Ukraine exclusive jurisdiction clauses in aviation leasing dispute with international reinsurers

The decision by the Commercial Court in London has implications for the aviation leasing industry and cross-border litigation involving exclusive jurisdiction clauses.

Earlier in the year we reported on the Commercial Court decision rejecting jurisdiction challenges brought by international reinsurers that had sought to rely on Russian exclusive jurisdiction clauses (“**EJC**”) in their [reinsurance contracts with Russian airlines](#).

Separately, in *Aercap Ireland Capital Designated Activity Company & Ors v PJSC Insurance Company Universalna & Ors*, Mr Justice Henshaw was required to consider a similar application but this time in respect of Ukrainian EJs.

Unlike the earlier application, he found that the Ukrainian EJs were binding as the Claimant owners of the aircraft had failed to show that there were ‘strong reasons’ why the EJs should not be enforced.

This decision, particularly when compared with the earlier similar application involving Russian ECJs that was heard by the same judge, highlights that the applicability of an EJC will be decided on the individual facts of the particular case, and that there needs to be very compelling reasons to justify why an EJC should not be followed.

## Background

The case concerned aircraft which were leased to Ukrainian airlines under leases governed by English or Irish law. The lessees were required to maintain insurance providing All Risks and War Risks cover. The leases did not set out any requirements as to the choice of court and/or choice of law agreements in the contracts.

Following the invasion of Ukraine by Russia in February 2022, and the sanctions imposed by the EU, US and UK on Russia, many of the leased aircraft have not been returned to the lessors and remain grounded in Ukraine. The Claimant lessors issued proceedings in the English Commercial Courts against insurers.

The insurer Defendants challenged the jurisdiction of the English Courts to hear the claims and applied to have them set aside and/ or requested a stay of the proceedings, on the basis that the Claimants’ claims had been issued in breach of the EJs stipulating the Ukraine courts.

## Applicable test

Where there is an EJC in place, the English court will generally grant a stay of any proceedings issued in breach of it unless ‘strong reasons’ exist to allow them to continue.

## The Claimants’ position

The Claimants argued that the proceedings should continue in England because the EJC's were unenforceable as they failed to specify a specific Ukrainian court. Further, they submitted that there were strong reasons not to enforce the EJC's. They argued that the ongoing conflict with Russia has led to the Ukrainian courts suspending work, resulting in a backlog of cases. They also pointed to power outages and issues of understaffing as well as the inability of witnesses to give evidence in person. They argued that it would be inconvenient for the claims to be tried in Ukraine. There was also a risk of multiplicity of proceedings and the insurer Defendant had no genuine desire for the cases to be heard in Ukraine.

## The Defendants' position

The insurer Defendants argued that the 'strong reasons' put forward by the Claimants did not come close to surmounting the high bar required to justify overturning the EJC's. They argued that the Claimants were sophisticated airlines and aircraft lessors. They had the opportunity to influence the terms on which the aircraft were insured but did not stipulate the jurisdiction even though (whether they were aware of it or not) reinsurance contracts almost always contain jurisdiction provisions.

## Decision

Mr Justice Henshaw concluded that the EJC's were binding, requiring the dispute to be heard by the Ukrainian courts.

He found that although the Ukrainian Court system had been affected by the ongoing conflict with Russia, outside of conflict zones the court system was functioning almost to the same level as before the war, with the impact of the war being limited to areas close to active warzones. The prioritisation of courts, by the Ukrainian state, as critical infrastructure suggested that power outages were unlikely to cause significant disruption and, while there may be practical difficulties with ensuring that witnesses would be available to give evidence, these issues were unlikely to be insurmountable.

As to the risk of a multiplicity of proceedings, Henshaw J concluded that the mere prospect of overlap of issues was not a strong reason for declining to give effect to the EJC's and he was persuaded that the issues being considered in the claims proceeding in London involved wholly different issues of law.

He was satisfied that the insurer Defendants had cogent reasons for wanting the cases to proceed in Ukraine, including the importance of Ukrainian law to the issues, the location of evidence and witnesses, and the likelihood of lower legal costs in Ukraine. He noted that a lack of genuine desire was most likely to be relevant where the party seeking a stay was acting abusively or in bad faith, which was not the case here.

## Comment

The English courts are known for upholding the terms of agreements reached by commercial parties, and this judgment shows that an English court will only intervene where there are strong reasons to justify a departure from what was contractually agreed.

The two recent decisions in quick succession on similar issues show that this is a fact specific exercise and the arguments for what amounts to 'strong reasons' will be analysed thoroughly by the English courts. Although not insurmountable (as we saw in the case of the Russian ECJ's), it is a very high bar to overcome. A finding that there was a lack of 'genuine desire' for a case to be heard in a particular jurisdiction will only be made in circumstances where it can be shown that the applicant is proceeding in bad faith.

## 'Mega trial' starts in Commercial Court

On 2 October the much anticipated 'mega trial' in the Russian aviation leasing claims started in the Commercial Court in London before Mr Justice Butcher. It is anticipated to last 12 weeks until Christmas.

As previously reported, the dispute involves the concurrent trial of six actions brought by many of the world's leading aviation lessors following the non-return of their leased aircraft by Russian airlines, including AerCap, Dubai Aerospace Enterprise (DAE), Falcon 2019-1 Aircraft, FDAC Aircraft Trading, Global Aerospace, and Merx Aviation, against many leading insurers including the likes of AIG, AXA, Allianz, Chubb, Fidelis, HDI, Liberty, Lloyd's Insurance Co, Swiss Re, and TMK.

The claims are in excess of US\$3 billion and the outcome is likely to have considerable ramifications for both the aviation and insurance/reinsurance sectors.

## Contents

<a href="#">London Market Quarterly: December 2024</a>	→
<a href="#">Aviation</a>	→
<a href="#">COVID-19 BI Litigation</a>	→
<a href="#">Political violence</a>	→
<a href="#">Reinsurance</a>	→

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