

Aviation / War Risks: Ukraine conflict claims to be heard concurrently in a US\$4bn ‘mega trial’

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The Commercial Court has ordered a joint trial of five similar sets of proceedings in which claims are being brought against multiple insurers for the alleged ‘loss’ of aircraft that have not been returned to lessors following the imposition of sanctions against Russia.

After the Russian invasion of Ukraine, the EU and the UK imposed sanctions prohibiting the leasing of aircraft and aircraft parts to Russian airlines. Notices were issued by the lessors terminating the leases and requesting the aircraft be returned. Those requests were mostly declined and many of the aircraft are thought to remain under Russian control. Where the lessors have sought to recover their losses from insurers, and those claims for compensation have been denied, there has been a flurry of claims issued in the Commercial Court.

Claims have been issued against 30-plus insurers and syndicates managed by Lloyd’s Managing Agents and are substantial, ranging from US\$21.5m up to US\$4.6bn.

The first of these claims was **Aercap Ireland Limited (“Aercap”) v AIG and Others**. Aercap issued a claim for US\$3.5bn in respect of more than 140 aircraft and 29 aircraft engines owned by the American-Irish company. The claim was initially commenced against AIG Europe S.A. and Lloyd’s Insurance Company S.A. as representative proceedings. On application, the Commercial Court allowed Fidelis to join as the Third Defendant (see our note on the judgment [here](#)). Swiss Re and Chubb have since been added as Fourth and Fifth Defendants.

At a recent Case Management Conference Mr Justice Butcher ordered that five cases, including Aercap, which are already underway are to be heard concurrently in a 12-week trial commencing on 2 October 2024. Those claims are:

- Aercap Ireland Limited v AIG and Others
- KDAC Aircraft Trading 2 Limited v Chubb and Others
- Falcon 2019-1 Aircraft 3 Limited v Various Insurers
- Dubai Aerospace Enterprise and Others v Fidelis and Others
- Merx Aviation v Chubb and Others

The combined trial was supported by all parties except Aercap which argued that it would be a ‘procedural nightmare’ and preferred to bring the claim to trial as quickly as possible as it was out of pocket by ‘colossal sums of money’. Opposing the ‘mega trial’, counsel for Aercap argued that the claims fell under either War Risks or All Risks and it was ‘inconceivable’ that it would not recover against one.

The coverage issues

Although the issues vary between the claims, the main issue to be decided is whether there is cover under the War Risks (Section Three) or the All Risks (Section One) section of the policy(ies). The Defendants are generally split between Section One and Section Three insurers, although a number of insurers subscribe to both.

All Risks (Section One)

The All Risks section provides cover for physical loss or damage howsoever sustained during the period of insurance subject to the War, Hijacking and Other Perils Exclusion Clause. There is cover for such loss or damage whilst in the course of repossession (“possessed”

cover), and when leased to others by the Claimants ("contingent" cover).

War Risks (Section Three)

The War Risks section covers, likewise on both possessed and contingent bases, loss or damage to the Aircraft against claims excluded from the All Risks Policy as caused by the following War Risk perils,

"(c) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional. ...

(e) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government (whether civil, military or de facto) or public or local authority."

The Claimants' position

After sanctions were imposed prohibiting the supply of aviation goods to Russia, notices were issued terminating the leasing of various aircraft and engines and requiring their return. Where the aircraft were not returned, their certificates of airworthiness were revoked by the relevant aviation authority. Russia subsequently issued a legislative decree permitting the Russian authorities to issue their own certificates and the aircraft were purportedly re-registered in Russia where they remain in use.

The Claimants allege that they have sustained physical loss of the aircraft by deprivation of physical possession. They say that recovery is uncertain or unlikely and this amounts to irretrievable deprivation. They rely on, inter alia, the following,

- The lessee's failure to return the aircraft.
- The lessee's continued use of the aircraft contrary to the revocation of the certificates of airworthiness.
- The purported re-registration in Russia.
- The inability to carry out approved maintenance work and the lack of spare parts available in Russia.

Insurers' position

Insurers deny there is coverage where the aircraft have not become lost or damaged and have at all times remained in the possession of the lessees. Insurers argue that a constructive total loss only applies where there is damage of more than 75% of the value and it does not apply to deprivation of possession. They argue that the proximate cause of the loss is the lessee's decision not to return the aircraft and the Claimants are put to proof as to whether they have taken all reasonable steps to recover the aircraft and whether they may still be recovered. Insurers also deny coverage as a result of sanctions.

In addition to the above, the court is being asked to consider the Claimants' insurable interest in the aircraft, the applicability of the War, Hijacking and Other Perils Exclusion under the All Risks Section, whether the Claimants should be indemnified under the principal insurance, the geographical scope of the policies and the impact of the steps taken by Russia to 're-register' the aircraft.

Other claims

There are a number of other similar proceedings where claims have been issued against the insurers/reinsurers that provided cover to the lessees, i.e. the airline operators, as opposed to the legal owners. These cases raise slightly different issues to the 'contingent' and 'possessed' claims and are, so far, to be considered separately.

Comment

The recent case management conference had been anticipated and parties that wished to be involved in the proceedings were set a date of 24 February 2023 to issue proceedings, leading to around 20 claims being issued in the week leading up to the deadline.

The October 2024 trial is likely to be one of the most eagerly anticipated and significant cases to be heard in the Commercial Court next year, the outcome of which could have major implications for the Aviation and/or War Risks market.

We shall continue to monitor developments.

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