

# English Commercial Court rules against Russian exclusive jurisdiction clauses

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

On March 28, in **Zephyrus Capital Aviation Partners 1d Limited & Ors v Fidelis Underwriting Limited & Ors**, the High Court of Justice of England and Wales rejected jurisdiction challenges brought by international reinsurers that had sought to rely on Russian exclusive jurisdiction clauses in their reinsurance contracts with Russian airlines. This decision has wider implications on any disputes where a party is seeking to rely on a jurisdiction clause in a country where it is alleged by the counterparty that it may not receive a fair trial.

## Background

The case involved over 200 aircraft that were leased to various Russian airlines under leases governed by English, Californian and New York law. The Russian airlines were required to insure the aircraft against loss or damage that caused by war (or other similar events), and to obtain reinsurance on the international market containing a cut through clause permitting the aircraft lessors to sue the reinsurers directly in the event of any claims arising. The leases did not require the reinsurance to be subject to any particular law. The reinsurance slips were said to be pursuant to Russian law and contained exclusive jurisdiction clauses, or ECJs, in favour of the Russian courts.

The aircraft lessors did not accept that they knew or ought to have known that the policies included Russian ECJs, though it was accepted that the reinsurers had a good arguable case that the reinsurance policies contained the ECJs on which they were now relying.

Following the invasion of Ukraine by Russia in February 2022, and the sanctions imposed by the EU, US and UK on Russia, the Claimant aircraft lessors cancelled the leases and demanded the return of their aircraft. The Russian airlines refused to return them and many of the aircraft remain in Russia. The aircraft lessors are suing insurers and the case is due to be heard in the Commercial Court in London in October this year.

The Claimant aircraft lessors also sued the Defendant reinsurers under the cut-through clauses. Most of the Defendant reinsurers initially challenged the jurisdiction of the English Court on the basis of the ECJs requiring all disputes to be submitted to the Russian Courts; however, a significant number of those challenges were withdrawn prior to the recent jurisdiction hearing. According to the decision, the claims are worth US\$9.7 billion.

The Court was required to consider whether the Defendant reinsurers were entitled to apply for a stay of the English proceedings to enable the claims to be pursued in Russia pursuant to the ECJs.

## Applicable test

Where there is an ECJ in place, the English court will generally grant a stay unless there are 'strong reasons' not to do so. Mr Justice Henshaw cited numerous cases in which the 'strong reasons' test had been reaffirmed, and he was not persuaded by judicial commentary relied on by the Defendant reinsurers where it was suggested that the Claimants must show 'overwhelming' or 'very strong' reasons. In

any event, Henshaw J considered that a likelihood of an unfair trial due to state interference or lack of judicial independence/impartiality could readily be regarded as a 'very strong' or 'overwhelming' reason.

## Public policy

The Judge also considered whether there were public policy reasons for refusing the stay. The Claimants had argued that granting a stay in favour of proceedings in Russia would be contrary to English public policy because the issues being considered related to and/or gave effect to Western sanctions and there was a real concern that the Russian courts would not give effect to those sanctions.

## Genuine desire for a trial in Russia

The Court was also asked to consider whether the Defendant reinsurers had a genuine desire for a trial to take place in Russia. The Claimants' position was that if there was no discernible reason for the Defendants to want the dispute resolved in Russia, then the court may infer that they were only insisting on the contractual forum to gain a tactical advantage. The Defendants argued that there were a number of reasons to favour a trial in Russia, including the policies being governed by Russian law, the events giving rise to the claim taking place in Russia, and the involvement of Russian companies. They also made the point that where an ECJ in place, it was irrelevant whether the party genuinely desired a trial in the contractual forum or was only seeking a procedural advantage.

In considering the Defendants' arguments, Henshaw J noted that the English court would need to consider important issues of English law that arise under reinsurance policies placed in the international market on standard terms and that the English courts had the required expertise to decide those issues. Henshaw J concluded that a lack of genuine desire for a trial in the agreed forum may be relevant when considering whether or not strong reasons exist to refuse a stay; however, the Defendants had put forward specific reasons for wishing the trial to be in Russia so he was unable to conclude that the Defendants had no genuine wish for the trial to take place in Russia.

## Multiplicity of proceedings

Another argument put forward by the Claimants was that the English courts would still need to decide the other cases where the other reinsurers had already submitted to the jurisdiction of the English court, such that there was a risk of a multiplicity of proceedings. It was argued that trying claims in multiple jurisdictions could lead to inconsistent judgments and potential injustice and there was a real risk of conflicting decisions from the English and Russian courts. The Defendants argued that their right to be sued in the agreed forum was important and substantial, and bringing proceedings in breach of an ECJ was a breach of contract that would inevitably cause prejudice. Henshaw J considered that the prospect of multiplicity of proceedings and the resulting risks of inconsistent findings on key issues were factors that could properly be taken into account.

## Decision

Taking all the above into consideration, Henshaw J concluded that Claimants were unlikely to receive a fair trial in Russia for several reasons, including, substantial Russian State exposure, the Russian courts being unlikely to objectively determine certain issues, Russian State interest in subrogated claims and the Claimants being from what were regarded (by Russia) to be 'Unfriendly Foreign States'. Despite the importance of comity between courts and giving effect to ECJs, Henshaw J concluded that the unlikelihood of a fair trial was a 'strong reason' for declining to stay the proceedings.

## Comment

Although this litigation is significant by reference to its size and the number of parties involved, the consideration of ECJs in cross-border litigation is not uncommon. This decision will have significant implications for the progress of these aviation disputes but can also be applied generally in other litigation where the court considers ECJs relating to Russia, or other foreign states where they are unlikely to obtain a fair trial.

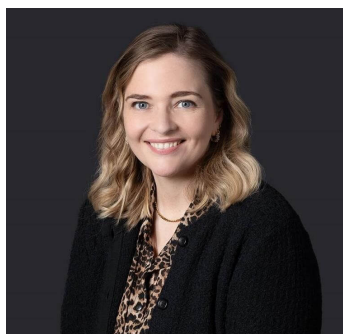
The English courts are known for upholding the terms of agreements reached by commercial parties, though this judgment shows that there are circumstances in which an English court will intervene in upholding an ECJ where there are strong reasons to justify a departure from what was contractually agreed.

Furthermore, the decision may have implications for the aviation leasing industry as a whole. Although the particular facts that led to the aircraft being held in Russia are not a common occurrence, the general issues that have arisen are not unique to this particular dispute,

and similar issues may arise in other leasing arrangements. This decision should remind those that enter into such agreements to review their agreements to consider whether they are robust enough to withstand against potential challenge.

In relation to these particular proceedings, and the proceedings against aviation insurers due to go to trial in October this year, we shall continue to watch the progress through the English Courts over the months ahead.

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