

ENGLISH COURTS TO HEAR LESSOR CLAIMS AGAINST AIRCRAFT REINSURERS DESPITE RUSSIAN JURISDICTION CLAUSE

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Last week saw a significant development in the ongoing litigation battles between the lessors and insurers of aircraft trapped in Russia following the war in Ukraine and subsequent international sanctions. Aircraft lessors are suing insurers and reinsurers under both the operator policies and their own contingent liability policies for losses resulting from those stranded aircraft. This recent decision relates to proceedings commenced by various lessors in the English High Court against reinsurers under the operator policies, claiming an indemnity under the policies for the loss or deprivation of the aircraft.

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Many of the reinsurer defendants challenged the jurisdiction of the English courts on the basis that there was an enforceable exclusive jurisdiction clause in the reinsurance policies that provided for disputes to be dealt with by the Russian courts. The lessors accepted that it was arguable that the policies contained Russian jurisdiction agreements but that there were strong reasons why such clauses should not be enforced, including that to do so would give rise to a real risk that the lessors would not receive a fair hearing of their claims in Russia. The English High Court ruled in favour of the lessors and declined the insurers' application to stay the English proceedings.

The court found that a fair trial would be very unlikely for a number of reasons, not least due to the Russian state's interest in the outcome of any trials and the potential for judicial self-censorship. Several of the issues that would need to be considered at trial, including as to whether the aircraft have been lost and under which policy any such loss may be covered, would involve a Russian judge deciding matters such as whether Russia is at war, whether President Putin exercises power without constitutional or legal restraint and whether the Russian judicial system is deployed as an instrument for President Putin to govern Russia regardless of legal constraints. The judge said that it could not seriously be suggested that the Russian government would not consider that there is a state interest in such questions.

Furthermore, one of the Russian reinsurers with an exposure in almost every Russian aircraft insurance and reinsurance is state-owned, giving the Russian state a financial interest in avoiding that reinsurer being subject to liability for the lessors' claims. The judge also highlighted that this financial interest of the Russian state in the outcome of the litigation goes even further when, under the principles of subrogation, the airlines or the Russian state itself may be exposed to the subrogated claims brought by the reinsurers, should the lessors be successful in their claims.

In addition, Mr Justice Henshaw considered that lessors would also be unlikely to get a fair trial in respect of matters such as whether or not the leasing of the aircraft had been validly terminated and whether the lessors were entitled to repossess their aircraft. These questions would be fundamental to the issues being tried and as matters relating to the lease, should be governed by the law of the lease (in most cases English law). It is likely, however, that the Russian courts would apply their own mandatory rules to issues of interpretation of the leases and not the agreed governing law, with the result that they would not recognise a termination ground based on Western sanctions as this would be contrary to Russia's own public policy. Likewise, they would consider a repossession to be in violation of the counter-measures implemented by Russia aimed at prohibiting lessors from repossessing their aircraft.

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Prior to the hearing, a number of reinsurers had already submitted to the English jurisdiction and withdrew their challenge to jurisdiction. This will result in a number of these claims proceeding in the English courts after all. The court was concerned that if it were to accept the remaining requests to stay proceedings, this would result in the potential for inconsistent judgments in England and Russia in respect of similar matters. Coupled with the fact that the lessors are also making claims in the English courts in respect of their contingent insurance policies, which require decisions on similar issues to those under the operator policies, the risk of inconsistent judgments was significant. Therefore, the court held that this risk of multiplicity of claims leading to inconsistent judgments was another factor in declining to grant the stay to the reinsurers.

CONCLUSION

This decision is significant, not only for its impact on the progress of these disputes and related litigation, but also for its application generally. The English courts are champions of party autonomy and commercial certainty and will go to great lengths to uphold the terms of agreements reached by commercial parties. Mr Justice Henshaw's judgment gives a detailed illustration of the circumstances in which an English court will intervene where there is an exclusive jurisdiction clause in favour of the courts of another jurisdiction.

The decision also contains food for thought for the aviation leasing industry in relation to the problems that can arise where the different agreements involved in a leasing arrangement are subject to different applicable law and jurisdiction clauses. The scale of this litigation is unique, but the issues are not necessarily so, and consideration may need to be given as to whether such issues can be avoided or the risk reduced in future.

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We were already expecting a lengthy trial of the lessors' claims under their contingent liability insurance policies. This decision now opens the door for further combination of the case management for the contingent policy claims with the operator policy claims. The English courts and the associated legal services industry look like they will be very busy in the months and years to come.

A link to the full judgment in *Zephyrus Capital Aviation Partners 1D Limited and others v Fidelis Underwriting Limited and others* [2024] EWHC 734 (Comm) can be found [here](#). If you would like to discuss the decision further, please get in touch with any of the authors or your usual WFW contact.

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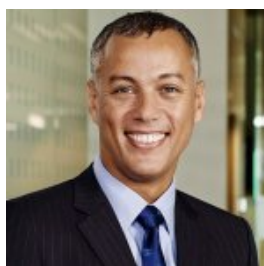
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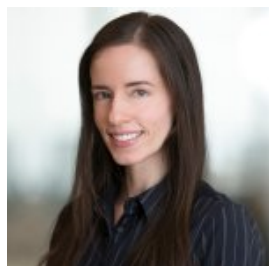
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