



## Commercial Court upholds jurisdiction agreements in favour of Ukrainian Courts

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In a judgment handed down on 6 June 2024, Mr Justice Henshaw upheld jurisdiction challenges brought by Defendant international reinsurers of aircraft operator insurance policies, premised on Ukrainian exclusive jurisdiction clauses (EJCs) in the reinsurance contracts.

The claims in which these challenges were made form part of a larger group of Operator Policy Claims (“OP Claims”) in which owners, lessors and others with an interest in aircraft leased to Russian and Ukrainian airlines seek to make direct claims against the reinsurers of the airlines’ aircraft operator insurance policies.

While Henshaw J had, in a judgment of 28 March 2024 ([2024] EWHC 734 (Comm)), rejected jurisdiction challenges in OP Claims based on Russian EJCs due to the prospects of an unfair trial in Russia, the Judge in this new decision upheld Ukrainian EJCs, finding that those EJCs were valid and enforceable, and that Russia’s invasion of Ukraine did not amount to “strong reasons” to refuse to enforce them.

### A. Background

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The Claimants are owners and lessors, financing banks or other persons with an interest in aircraft and/or aircraft engines which were leased to Ukrainian airlines. Those airlines insured the aircraft and engines with Ukrainian insurers who reinsured the majority of the risk pursuant to separate “Hull All Risks” and “War Risks” reinsurance policies, underwritten in the London market, which contained Ukrainian EJCs.

As a result of the Russian invasion of Ukraine on 24 February 2022, the Claimants allege that certain of the aircraft subject to the above policies were left stranded and/or were damaged in Ukraine and have become a total loss pursuant to those policies.

The Claimants sued the Defendant reinsurers directly in England on a number of bases, including under “cut-through clauses” contained in the reinsurance policies.

### B. The Judgment

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#### 1. Whether the EJCs were valid and binding

The Defendants were required to show a good arguable case that the EJCs were valid, binding and enforceable. This involved the application of the three-stage test in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80.<sup>1</sup> The Judge accepted the Claimants’ submission that Defendants were required to show that they had “the better of the argument”. Only if no reliable assessment of the evidence could be made would it be sufficient to show a “plausible evidential basis”.

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<sup>1</sup> Judgment, para 86.



### **Ukrainian law**

This analysis was undertaken primarily by reference to Ukrainian law as the putative chosen law of the reinsurance contracts. The principal questions for determination were whether the EJs satisfied formal and substantive requirements of that law, and whether they were capable of binding “third-party beneficiaries” in light of the rule in Article 511 of the Ukrainian Civil Code to the effect that contracts cannot not impose duties on such parties.

The Judge held that the Defendants had the better of the argument that the EJs did satisfy Ukrainian law requirements<sup>2</sup> and that they were best characterised as conditions on the rights of third parties, rather than as duties, in line with the preponderance of Ukrainian case law.<sup>3</sup> In any event, the Judge also held the Claimants consented to the EJs by procuring or requiring the procurement of reinsurance contracts without stipulating any requirement for a particular dispute resolution provision.<sup>4</sup>

### **Collateral contract**

One lessor Claimant, Genesis, submitted that it had a claim against reinsurers pursuant to an English law collateral contract which was not subject to the EJC.<sup>5</sup> The collateral contract was said to have been contained in and/or evidenced by a certificate of reinsurance issued by brokers setting out terms of the reinsurance and was not contained in the reinsurance “slip”. This was said to be consistent with market practice for securing the lessors’ interests as owners of the aircraft, where local Ukrainian (or other foreign) insurance was a “front” for reinsurance by London market participants.

The Judge found that the Defendants had the better of the argument that Genesis was not entitled to claim under a collateral contract excluding the EJC because, among other reasons:<sup>6</sup>

- a. The cut-through clause set out in the reinsurance certificate was expressed to be subject to “*the coverage, terms, conditions, limitations, exclusion, excesses and cancellation provisions of the relative policy(ies)*” which was wide enough to catch provisions qualifying or delimiting terms of the reinsurance including the EJC. The decision in **Prifti v Musini** [2003] EWHC 2796 (Comm) was distinguishable.
- b. If the collateral contract fell to be analysed by reference to English law, it would be construed in accordance with the conditional benefit principle (see e.g. **Airbus SAS v Generali Italia SpA** [2019] EWCA Civ 805 at [85]-[97]) and it would be counterintuitive to think that Genesis could advance claims which in substance are claims to entitlements arising by reason of the reinsurance contracts without reference to the EJs.

## **2. Whether the EJs were enforceable**

The Claimants submitted that the EJs were not enforceable as a matter of Ukrainian law because they failed to specify a particular regional court which had jurisdiction to hear the dispute. Upon analysis of the relevant Ukrainian legislation and case law, the Judge found that there was no requirement for the EJs to identify a specific regional court.<sup>7</sup>

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<sup>2</sup> Judgment, paras 100-116.

<sup>3</sup> Judgment, paras 145-177.

<sup>4</sup> Judgment, para 177.

<sup>5</sup> Judgment, para 185.

<sup>6</sup> Judgment, paras 188-206.

<sup>7</sup> Judgment, para 237.



### 3. Strong reasons for declining to stay proceedings

The Claimants submitted that the impact of war on the Ukrainian court system amounted to “strong reasons” to refuse to stay the claims, relying on the test as set out in *Donohue v Armco Inc* [2001] UKHL 64.<sup>8</sup>

In support of that argument reliance was placed on the impact of Russian air strikes on Ukraine and delays and disruption caused by (1) air raid alerts; (2) power outages; (3) the inability of witnesses to travel to Ukraine; (4) backlogs and understaffing in the court system; and (5) the risk that, during the lifetime of the litigation in Ukraine, there may be setbacks in the war affecting the ability of the relevant court.

The Judge held that these matters did not raise strong reasons for declining to give effect to the EJs. <sup>9</sup> In particular, the nature of the dispute made oral evidence by witnesses unlikely, and in any event such witnesses could probably give evidence remotely.<sup>10</sup> Further, such evidence as there was in relation to the Kyiv City Commercial Court (where the claims would most likely be heard) suggested that disputes were being resolved without any substantial delay and that, whilst there is a risk of the court system being adversely affected if the ground war extended to a wider area, no military or geopolitical evidence had been adduced.

Other matters which were relied on, including inconvenience as a result of the Ukrainian courts’ inexperience in aviation insurance and procedural difficulties in evidence gathering were foreseeable considerations of “convenience” which in principle could not constitute strong reasons.<sup>11</sup>

Three Quadrant counsel were instructed for the jurisdiction hearing:

**Matthew Reeve KC** and **Joseph England** (instructed by Simon Hems, Alice O’Donovan and Katie Stevens at McGuire Woods LLP) represented a claimant leasing company, Genesis GASL Ireland Leasing A-1 Limited.

**Robert Ward** (led by Christopher Hancock KC of Twenty Essex and instructed by Andrew Krausz, Sonia Lopez, Adam Baker, and Lisa Williams at Weightmans LLP) represented certain Hull All Risks Defendant Reinsurers)

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<sup>8</sup> Judgment, para 259.

<sup>9</sup> Judgment, para 327.

<sup>10</sup> Judgment, para 314.

<sup>11</sup> Judgment, para 302.

<sup>12</sup> Judgment, para 340.



**Matthew Reeve KC**

*“Matthew is excellent with clients, on paper and on his feet. He is commercially aware as well as clearly able to handle extremely complex matters with ease and sensitivity.” (Chambers UK 2024)*

Matthew is a highly experienced barrister with a wide-ranging commercial practice, including Shipping, Aviation, Insurance and Reinsurance, Travel, Shipbuilding, Energy, Shipbuilding, financial Professional Negligence and Sports Law.

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## Joseph England

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*‘Joe is extraordinary. He is always available, always makes you feel like the only client, is all over the detail and shows no fear in the face of new areas of law.’ (Chambers UK, 2024)*

Joe is ranked in the latest edition of Chambers & Partners and Legal 500 as leading junior in six categories: Civil Fraud, Insurance, Aviation, International Arbitration, Energy and Insolvency.

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## Robert Ward

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Rob has developed a busy practice spanning the breadth of Chambers' practice areas including shipping, commercial disputes, international arbitration and aviation. He has appeared as sole counsel in the High Court and County Court and as a junior in several high value matters.

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