Neutral Citation Number: [2024] EWHC 734 (Comm)

Case No: CL-2022-000637
and the cases listed in Annex A

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 28/03/2024

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

IN THE MATTER OF THE RUSSIAN AIRCRAFT OPERATOR POLICY CLAIMS (JURISDICTION APPLICATIONS)

Between :

ZEPHYRUS CAPITAL AVIATION PARTNERS 1D LIMITED and others	**Claimants**
- and -	
FIDELIS UNDERWRITING LIMITED and others	**Defendants**

- -
- -

Tom Weitzman KC, Michael Holmes KC, Josephine Higgs KC, Philip Hinks, Kate Holderness, Sarah Martin, Stephen Du, Henry Moore, and Douglas Grant(for all the MLB Claimants), Stephen Hofmeyr KC (for the Aircastle and Carlyle MLB Claimants), Harry Matovu KC and Kyle Lawson (for the Avenue MLB Claimants), Alex Milner KC (for the Voyager MLB Claimants), Robert- Jan Temmink KC and Tom Nixon (for the Merx MLB Claimants), Chirag Karia KC, Peter Stevenson and Benjamin Joseph (for the GTLK MLB Claimants) (all instructed by **Morgan, Lewis & Bockius UK LLP**)
Stephen Midwinter KC, Charlotte Tan and Edward Ho (instructed by **Herbert Smith Freehills LLP**) for the **AerCap Claimants**
Alistair Schaff KC, Alexander MacDonald and Frederick Alliott (instructed by **Clifford Chance**) for the **Clifford Chance Claimants**

Matthew Reeve KC and Joseph England (instructed by **McGuireWoods London LLP**) for Genesis GASL Ireland Leasing A-1 Limited
Christopher Loxton (instructed by **Fieldfisher LLP**) for the **Fieldfisher Claimants**
David Quest KC (instructed by **Wordley Partnership**) for Shannon Engine Support Limited
Guy Blackwood KC, Aidan Christie KC, John Bignall, James Hatt, Tom Bird and Robert Ward (instructed by **Weightmans LLP, DAC Beachcroft LLP, DLA Piper UK LLP and The Air Law Firm**) for the **Hull All Risks Defendants**
Bankim Thanki KC, Andrew Neish KC, Akhil Shah KC, Susannah Jones, Kate Livesey, Rangan Chatterjee, Nick Daly and Max Kasriel (instructed by **Holman Fenwick Willan LLP, CMS LLP and Shoosmiths LLP (local agent of Kennedys Legal Solutions Pte Ltd)**) for the **Hull War Risks Defendants**

Hearing dates: 7, 8, 12 and 13 February 2024
Draft judgment circulated to parties: 18 March 2024

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

.....

Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment concerns challenges to the jurisdiction of the English court to hear claims under Operator Policies in respect of aircraft which have remained in Russia following its February 2022 invasion of Ukraine.

2. The Claimants are owners and lessors, financing banks (or their assignees) or managers of certain aircraft and/or aircraft engines which were leased to Russian airlines under leases governed by English, Californian or New York law (the "***Leases***").

3. The Leases generally required the lessee airlines to insure the aircraft in respect of hull all risks and war risks. Unless the insurer was itself part of the London and international market, the Leases also generally required the lessees to ensure that reinsurance was obtained, for the vast majority of the insured risk, under contracts of reinsurance on the same terms as the underlying insurance and containing a cut through clause ("***CTC***").

4. Following the February 2022 invasion of Ukraine, the Claimants issued default and termination notices under Leases, relying on various grounds for termination, which differed from case to case but which included the imposition of sanctions on Russia by the EU and/or the UK and/or the USA ("***Western Sanctions***"), material adverse change, failure to maintain insurance/reinsurance required under Leases and/or failure to pay sums due under Leases.

5. Following the issue of such termination notices, the Russian airlines failed to return the aircraft to the Claimants, and they remain in Russia some two years later. That has led to market-wide litigation, relating originally to 306 aircraft together with 40 engines, and now (after some settlements) to 208 aircraft together with 31 engines. The sums claimed in the present proceedings were originally around US$13.5 billion and are now, after settlements, around US$9.7 billion.

6. The Russian airlines insured the aircraft, against hull all risks and war risks, with Russian insurance companies, who reinsured the vast majority of their risk with various London and international market reinsurers, including the Defendants and Russian reinsurers. I refer to the Defendants as the "***All Risks Defendants***" and the "***War Risks Defendants***", according to the categories of cover they have reinsured in the present cases.

7. The Claimants say they were provided with the certificates of insurance and certificates of reinsurance, as required under the Leases, which are said by the Claimants to evidence the terms of the insurance taken out by Russian airlines with Russian insurers and the reinsurances taken out by Russian insurers with reinsurers including the Defendants. The certificates of insurance refer to insurance contracts incorporating AVN67B or similar wording, under which the Claimants' interests as "*Contract Parties*" were noted and the Claimants were included as "*Additional Insureds*". The certificates of reinsurance also refer to and/or set out and/or summarise the terms of the CTCs said to be contained in the reinsurance contracts.

8. The Claimants bring claims against the Defendants (relying *inter alia* on CTCs in or said to be in the reinsurance policies) in respect of the loss of the aircraft, under the all risks cover and/or the war risks cover.

9. The Defendants have disclosed reinsurance slips which they say contain and/or evidence the reinsurance policies. Each such slip identifies the Russian airline as the Original Insured and its Russian Insurer as the Reinsured, and contains Russian governing law and Russian exclusive jurisdiction clauses ("***EJCs***") on which the Defendants rely. These slips also include a summary of some of the terms of the underlying insurance purchased by Russian airlines, and, in most cases, a CTC.

10. The Claimants say they did not receive copies of the reinsurance slips at the time the reinsurances were placed, and note that the certificates of reinsurance do not refer to the jurisdiction clauses contained in the reinsurance contracts. However, save as noted below, the Claimants accept for the purpose of the present applications that the Defendants have a good arguable case that:

    i) the reinsurance policies in relation to which the Claimants bring their claims contain the Russian law and jurisdiction agreements on which the Defendants rely;

    ii) the underlying insurance policies placed by the Russian airlines contain Russian law and jurisdiction agreements;

    iii) as a matter of Russian law, the Russian law and jurisdiction agreements are valid; and

    iv) as a matter of Russian law, the Claimants' claims referred to above would fall within the scope of the Russian law and jurisdiction clauses.

    The AerCap Claimants have confirmed that, for the purposes of the present applications (a) they accept that the Defendants have shown a good arguable case that there are Russian law and jurisdiction clauses in the reinsurances and those of the insurance policies where AerCap has seen relevant wordings for the relevant policy year containing Russian law and jurisdiction clauses; and (b) in relation to those insurances where AerCap has not seen relevant wordings, the AerCap Claimants are nonetheless prepared to proceed on the basis that it is an assumed fact that the insurances contain Russian law and jurisdiction clauses. The GASL Ireland Leasing A-1 Limited ("***Genesis***") Claimant does not accept that the Defendants have an arguable case in relation to point (ii) above. In addition, as noted later, Genesis and Shannon Engine Support ("***Shannon***") also claim to be entitled to sue under collateral contracts not containing law or jurisdiction clauses.

11. The Claimants are incorporated in states which, as part of its counter-measures taken in response to the above sanctions, the Russian State categorises as unfriendly. Some of the ultimate beneficial owners of certain Claimants are incorporated in states which are not so categorised.

12. It is common ground that (a) there are no formal legal (i.e. legislative or procedural) restrictions on the Claimants bringing their claims in Russia (leaving aside for now certain additional obstacles said to relate to the GTLK Claimants, due to be considered at a later hearing), and (b) the Russian jurisdiction agreements are to be enforced unless the Claimants satisfy their burden of proving that "*strong reasons*" exist for not doing so. The essential issue on these applications is whether or not the Claimants have done so.

13. The Claimants say there are strong reasons because, in outline, (i) they would not receive (or there is at least a real risk they would not receive) a fair hearing of their claims in Russia, (ii) to require them to pursue their claims in Russia would be contrary to public policy, as it would undermine the sanctions imposed on Russia by the UK, EU and Bermuda following its invasion of Ukraine and

give effect to the retaliatory counter-measures taken by the Russian State in response to those sanctions, and (iii) to require them to pursue their claims in Russia would give rise to an undesirable multiplicity of proceedings and the risk of inconsistent judgments, where the matters in dispute affect the aviation insurance and reinsurance market of which the Defendants form a significant part as a whole and which are best case managed and resolved by the English court. All of these points are disputed by both the All Risks and the War Risks Defendants.

14. The applications related to a total of 78 claims, and were the subject of Case Management Conferences before me on 7 July 2023 and 17 November 2023. Groups of Claimants and groups of Defendants have to a very significant degree coalesced in terms of sharing of evidence and legal representation, making the process more manageable. By the time of the jurisdiction hearing, the Claimants represented by Morgan, Lewis & Bockius UK LLP **("*MLB*")** acted in effect as lead Claimants, represented by a counsel team led by Mr Weitzman KC; and shorter skeleton arguments and oral submissions were provided by other claimant groups as listed in the heading to this judgment. Submissions on behalf of the various All Risks Defendants were made by a counsel team led by Mr Blackwood KC and Mr Christie KC; and submissions on behalf of the various War Risk Defendants were made by a counsel team led by Mr Thanki KC, Mr Neish KC and Mr Shah KC. I am most grateful to all counsel for their excellent written and oral submissions.

15. In the months, weeks and days leading up to the hearing, a large number of Defendants, particularly All Risks Defendants, either submitted to the jurisdiction or indicated that they intended to do so. I provide more details in § 84 below.

16. To the extent that this judgment reaches, or might be construed as reaching, conclusions on factual matters, particularly any of relevance or potential relevance to the underlying merits of the claims, all such findings are provisional only and are made solely for the purposes of the present applications (cf *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514 § 79).

17. For the reasons set out below, I have concluded that the Claimants have succeeded in demonstrating strong reasons why these proceedings should not be stayed, and will therefore decline to stay them.

(B) FACTUAL BACKGROUND

(1) Ownership and leasing of aircraft

18. The Claimants primarily comprise the owners and lessors of the affected aircraft and/or aircraft engines (the "***Aircraft***"), variously incorporated (or "*organised*" in the case of US companies) under the laws of the Republic of Ireland, states in the USA or Bermuda. The Claimants also include banks who financed the purchase and/or operation of the Aircraft (or the latter's assignees, security trustees or collateral agents) and managers or servicers of the Aircraft.

19. The lessors leased the Aircraft to various Russian airlines (the "***Airlines***", "***Operators***" or "***Lessees***") pursuant to the Leases, there being a separate lease for each Aircraft. The Leases are expressly governed by English law, the law of California or New York law.

20. The Leases made provision, either in the body of the agreement or in an appendix, for the insurance (and, frequently, the reinsurance) cover required to be effected and maintained by the Airline. In general terms, the Leases required the Airline:

    i) to procure hull all risks and war risks insurance subject to the provisions of Airline Finance/Lease Contract Endorsement AVN 67B or AVN 67C (which in broad summary designate any "*Contract Parties*" as "*Additional Insureds*" and extend cover under the relevant insurance to them) and for it to be endorsed accordingly, or to procure insurance that includes the owner, lessor and/or lender as additional insureds for their respective rights and interests and/or a loss payable clause that provides that all insurance proceeds in respect of a total loss be payable to the lessor or its assignee; and

    ii) if the Aircraft was insured outside of the United States, London or European markets, to procure reinsurance with reinsurers of recognised standing in the United States or London/European markets (or other leading international insurance markets approved by the lessor), with such reinsurance to include a CTC (or a cut-through and assignment clause) either in the terms set out in the lease or as reasonably satisfactory to the lessor.

21. As an example, a Lease dated 23 December 2011 between RBS Aerospace Limited (lessor) and JSC Ural Airlines (lessee) concerning an Airbus A320 with manufacturer's serial number 2998 included the following clause relating to insurance and reinsurance:

> "**16. INSURANCE**
>
> **Insurances**
>
> 16.l (a) Lessee shall, at its own expense, obtain and maintain the Insurances in full force during the Term and thereafter and, in each case, as required by this Agreement which shall have such deductibles and be subject to such exclusions as may (in each case) be approved by Lessor and with such insurers, brokers and underwriters complying with clause 16.l(b).
>
> (b) The Insurances shall be effected either:
>
> (i) on a direct basis with insurers of recognised standing who normally participate in aviation insurances in the leading international insurance markets and led by reputable underwriter(s) and through brokers of recognised standing, in each case approved by Lessor; or

(ii) with a single insurer or group of insurers approved by Lessor who does not fully retain the risk but effects substantial reinsurance with reinsurers who normally participate in aviation insurances in the leading international insurance markets and through brokers each of recognised standing and acceptable to Lessor for a percentage acceptable to Lessor of all risks insured.

Requirements

16.2 Lessor's current requirements as to the Insurances are as specified in this clause 16 (Insurance) and in Schedule 4 (Insurance Requirements). Lessor may from time to time amend the requirements in Schedule 4 so that (a) the scope and level of cover are maintained in line with best industry practice; and (b) the interests of Lessor and the other Indemnitees are prudently protected.

Change

16.3 If at any time Lessor wishes to revoke its approval of any insurer, reinsurer, insurance or reinsurance, Lessor and/or its brokers shall consult with Lessee and Lessee's insurers or, if applicable, brokers (as for the time being approved by Lessor) regarding whether that approval should be revoked to protect the interests of the parties insured. If, following the consultation, Lessor considers acting reasonably that any change should be made, Lessee shall then promptly arrange or procure the arrangement of alternative cover satisfactory to Lessor.

Insurance Covenants

16.4 Lessee shall:

(a) comply with the terms and conditions of each policy of the Insurances [and] not do, consent or agree to any act or omission which:

(i) invalidates or may invalidate the Insurances; or

(ii) renders or may render void or voidable the whole or any part of any of the Insurances; or

(iii) brings any particular insured liability within the scope of an exclusion or exception to the Insurances;

(b) not without the prior written approval of Lessor take out any insurance or procure any reinsurance in respect of the Aircraft other than those required under this Agreement unless relating solely to liability insurances, hull total loss, business interruption, profit commission and deductible risk;

(c) on request, provide to Lessor copies of documents or other information evidencing the Insurances and payment of Insurance premiums;

(d) if at any time insurance clause AVN 2000A or its successor is endorsed on the policies of Insurance, ensure that the insurance write back clauses AVN 2001A and AVN 2002A as applicable (or any equivalent clauses) are endorsed on the policies of Insurance required to be maintained under this Agreement and give and comply with all representations, warranties and undertakings required by the insurers or reinsurers in connection with such clauses; and

(e) provide any other information and assistance in respect of the Insurances which Lessor may from time to time reasonably require.

…"

22. Schedule 4 to the Lease included these provisions:

"**INSURANCE REQUIREMENTS**

Types of Insurance

1. The Insurances required to be maintained are as follows:

…

Terms of Hull and Spares Insurance

2. All required hull and spares insurance, so far as it relates to the Aircraft, will:

(a) **Additional Assureds**: name Lessor, Owner, the Security Trustee (if any) and the Financing Parties (if any) and their respective successors and assigns as additional assureds for their respective rights and interests;

(b) **Settlement of Losses**: name Lessor as (sole) Loss Payee in respect of any Total Loss of the Aircraft or Airframe and provide that any such Total Loss up to the Agreed Value will be settled with Lessor and will be payable in Dollars directly to Lessor as (sole) Loss Payee or as Lessor may direct, for the account of all interests provided that where proceeds do not relate to a Total Loss of the Aircraft or Airframe and Lessor has not notified the insurers to the contrary following an Event of Default, in which case, any loss below the Damage Notification Threshold will be settled with and paid to Lessee and any loss in excess of Damage Notification Threshold shall be paid to the repair facility in accordance with paragraph 6(b) below;

(c) **50/50 Provision**: if separate hull "all risks" and "war risks" insurances arc arranged, include a 50/50 provision in accordance with market practice (AVS. l 03 is the current market language); and

(d) **No option to Replace**: confirm that the insurers are not entitled to replace the Aircraft in the event of an insured Total Loss.

(e) **Engines**: …

Terms of Liability Insurance

3. …

Terms of All Insurances

4. All Insurances will:

(a) **Industry Practice**: be in accordance with prudent industry practice for comparable operators with the same or similar sized fleet as Lessee and operating similar aircraft in similar circumstances;

(b) **Dollars**: provide cover denominated in dollars and any other currencies which Lessor may reasonably require in relation to liability insurance;

(c) **Worldwide**: operate on a worldwide basis subject to such limitations and exclusions as are standard at the date hereof in the London aviation market or as Lessor may agree;

(d) **Acknowledgement**: acknowledge the insurer is aware (and has seen a copy) of this Agreement and that the Aircraft is owned by Lessor;

(e) **Breach of Warranty**: …

(f) **Subrogation**: …

(g) **Premiums**: …

(h) **Cancellation/Change**: …

(i) **Reinsurance**: any reinsurance will:

(i) be for not less than 97% of the amounts covered by the original third party liability insurances and 95% of the amounts covered by the original hull insurances,

(ii) be on the same terms as the original insurances and will include the provisions of this Schedule,

(iii) provide that notwithstanding any bankruptcy, insolvency, liquidation, dissolution or similar proceedings of or affecting the reinsured that the reinsurers' liability will be to make such payments as would have fallen due under the relevant policy of reinsurance if the reinsured had (immediately before such bankruptcy. insolvency, liquidation, dissolution or similar proceedings) discharged its obligations in full under the original insurance policies in respect of which the then relevant policy of reinsurance has been effected; and

(iv) contain a 'cut-through" clause in the following form (or otherwise satisfactory to Lessor):

"The Reinsurers and the Reinsured hereby mutually agree that, in the event of any claim arising under the reinsurances in respect of a total loss or other claim, as provided by the Aircraft Lease Agreement dated [ ] and made between Lessor and Lessee, such claim is to be paid to the Person named as sole loss payee under the primary insurances, the Reinsurers will in lieu of payment to the Reinsured, its successors in interest and assigns pay to the Person named as sole loss payee under the primary insurances effected by the Reinsured that portion of any loss due for which the Reinsurers would otherwise be liable to pay the Reinsured (subject to proof of loss), it being understood and agreed that any such payment by the Reinsurers will (to the extent of such payment) fully discharge and release the Reinsurers from any and all further liability in connection therewith; subject to such provisions not contravening any Law of the State of Incorporation;"

(j) **Initiating Claims**: contain a provision entitling Lessor or any insured party to initiate a claim under any policy in the event of the refusal or failure of Lessee to do so; and

(k) **Indemnities**: ...

Deductibles

5. …

Application of Insurance Proceeds

6. …"

23. The Defendants highlight the following points in relation to the Leases:

i) While it is true that aircraft were valuable assets often worth tens of millions of US dollars, the rents charged by lessors were correspondingly high and themselves typically ran to millions of dollars per annum (e.g. the "*Basic Rent*" charged for the aircraft which is the subject of the Zephyrus/Yamal action was USD255,000 per month or USD3,060,000 per annum), making leasing aircraft to Russian operators a lucrative and attractive business.

ii) Although it would appear that none availed themselves of such rights, leases sometimes permitted lessors to call for copies of the (re)insurance policies. For example, Zephyrus was entitled to procure Yamal to obtain copies of the insurance policies taken out by the Operator pursuant to Article 27.15 of the Lease (under which the Lessee was obliged to *"do and perform such other and further acts and execute and deliver any and all such further instruments as may be … reasonably requested in writing by the Lessor to establish, maintain and protect the rights and remedies of the Lessor and to carry out and effect the intent and purposes of this Lease…"*). Even in the absence of such contractual rights, the Defendants suggest that it is improbable that lessors would not have been able to obtain copies of insurance policies purchased by their lessees if they had wished to see them at the time they were placed.

iii) Reinsurance policies were required by Leases to be on back-to-back terms with such insurance policies. For example, pursuant to Article 19.5(a) of the Zephyrus lease mentioned above, any reinsurance policies were to be *"on the same terms as the primary insurance required hereunder".* (I refer later to the Defendants' underwriting evidence that it was almost invariably the case that the proper law of aviation insurance presented for reinsurance was to be that of the airline's domicile; and that reinsurers had to follow suit if they wanted to reinsure foreign insurers used by airlines.)

iv) The relevant leases did not stipulate that (re)insurance should be subject to any particular law, but left (re)insurance arrangements to the Russian airlines; and the Certificates provided to lessors by the Russian insurers' brokers were silent on the point.

(2) The insurance and reinsurance contracts

24. Pursuant to the Leases:

i) each Airline arranged an insurance policy or policies (the "***Insurance Policies***") in respect of the Aircraft with a Russian-registered insurance company, such as AlfaStrakhovanie Plc, Sogaz Insurance Company,

Ingosstrakh Insurance Company, Sberbank Insurance LLC or Rosgosstrakh Insurance Company PJSC; and

ii) the insurers reinsured their risk under reinsurance policies (the "***Reinsurance Policies***"), primarily with London and international market reinsurers together with, in each case, one or more Russian reinsurers, usually the Russian National Reinsurance Company ("***RNRC***").

25. The insurance and reinsurance were typically arranged by operator and fleet. The operator – for instance Aeroflot, Ural, Yamal, I-Fly, Rossiya or Yakutia – would be identified as the insured in the Insurance Policy and as the *"Original Insured"* in the reinsurance slips. The slips incorporated or attached schedules of aircraft, each with an agreed insured value. In some cases, the insurance and reinsurance arrangements covered whole corporate groups including multiple operators.

26. There is no indication that Claimants were directly involved in the placing of the Insurance or Reinsurance Policies. Instead, they were provided with Certificates of Insurance and Reinsurance. These were said to evidence the terms of the Insurance and Reinsurance Policies and made reference to various London market clauses. The cover provided was recorded as being in respect of aircraft hull, spares, and equipment all risks cover ("***All Risks Cover***") and in respect of war and allied perils (in separate sections), the latter incorporating London market clause LSW 555D ("***War Risks Cover***").

27. As an example, a *"Certificate of Reinsurance"* dated 3 November 2021 relating to the Airbus A320 leased to Ural Airlines mentioned above is on the letterhead of brokers McGill and Partners. It begins with the statement:

> "**TO WHOM IT MAY CONCERN**
>
> THIS IS TO CERTIFY that insurance has been placed in the name of the Insured (as defined below) with the Reinsured (as defined below) and that we, McGill and Partners Ltd, in our capacity as reinsurance broker to the Reinsured have placed reinsurance in the London and international insurance markets in the name of the Reinsured, in respect of the Insured's aviation operations for their fleet of aircraft including all new aircraft from the moment that they become the insurance responsibility of the Insured, against the following risks and up to the limits stated:-"

The Certificate then states the Insured (Ural Airlines and subsidiaries), Reinsured (Alfastrakhovanie PLC, i.e. the Russian insurer), Policy Period, and Equipment (the Aircraft and its agreed value), followed by these entries:

> "**GEOGRAPHICAL LIMITS**:

Worldwide but in respect of hull war (including spares) war and allied risks subject to LSW617G (amended writing back Georgia, North Caucasian Federal District and Mauritania).

REINSURED AMOUNT:

95% in respect of hull (including spares) all risks and aviation legal liability; 95% in respect of hull (including spares) war and allied risks; 100% in respect of excess third party war and allied risks legal liability; 90% in respect of hull deductible

COVERAGE:

1) HULL (including spares) ALL RISKS covering loss or damage whilst flying and / or on the ground for an agreed value each aircraft. This coverage is subject to the following deductibles: …

2) HULL (including spares) WAR AND ALLIED RISKS covering loss or damage in accordance with LSW 555D for an agreed value as set out above. Cover includes confiscation and other perils detailed in Section 1(e) of LSW 555D by the government of registration. Coverage under Section 1(a) of LSW 555D in respect of spares is restricted to air and sea transits in accordance with the applicable transit clause(s). Subject to an overall annual aggregate policy limit of not less than USD 500,000,000.

The coverage in respect of spares (as detailed above) is subject to a limit of USD 40,000,000 any one occurrence.

The coverage detailed above includes a 50/50 clause in accordance with AVS 103 and the following cut-through clause:

"The Reinsurers hereby agree (at the request and with the agreement of the Reinsured) that in the event of any valid claim arising hereunder the Reinsurers shall in lieu of payment to the Reinsured its successors in interest and assigns pay to the person(s) named as loss payee(s) under the original insurance effected by the Insured that portion of any loss for which the Reinsurers would otherwise be liable to pay the Reinsured (subject to proof of loss) it being understood and agreed that any such payment shall fully discharge and release Reinsurers from any and all further liability in connection with such claim.

The Reinsurers reserve the right to set off against any claim payable hereunder in accordance with this clause any outstanding premiums due on the reinsurance in respect of the Equipment.

> *Payment shall be made under this reinsurance notwithstanding (i) any bankruptcy, insolvency, liquidation or dissolution of the Reinsured, and/or (ii) that the Reinsured has made no payment under the original insurance policies.*
>
> *It is a condition that the provisions of this clause shall not operate in contravention of the laws, statutes or decrees of the country of domicile of the Reinsured".*
>
> 3) AVIATION LEGAL LIABILITY …
>
> 4) HULL DEDUCTIBLE …
>
> **AVN 67B**:
>
> It is hereby certified that the following insurance provisions apply under the original policy:
>
> The attachment of the Equipment is hereby certified in accordance with the provisions of AVN67B Airline Finance / Lease Contract Endorsement and AVN67B (Hull War) Airline Finance Lease Contract Endorsement (Hull War) providing coverage to the following Contract Party(ies) in relation to the following Contract(s):
>
> …
>
> SEVERAL LIABILITY NOTICE –..
>
> ."

28. At the same time as providing the Certificates of Insurance and Reinsurance, the brokers issued Letters of Undertaking by which the brokers confirmed that they had placed appropriate reinsurances and undertook to hold the benefit of the reinsurances to the Claimants' order. The Letters of Undertaking provided that they were governed by English law and subject to the exclusive jurisdiction of the courts of England. For example, the Letter of Undertaking attached to the Certificate quoted above was dated 3 November 2021 and on McGill and Partners letterhead. It was addressed to the lessor and stated:-

> "Dear Sirs,
>
> **Equipment: As stated in the above referenced certificate**
>
> **Manufacturer's serial number: As stated in the above referenced certificate**
>
> **Registration marks: As stated in the above referenced certificate**

Insured: As stated in the above referenced certificate

Reinsured: As stated in the above referenced certificate

We, McGill and Partners Ltd (t/a McGill and Partners), confirm that in our capacity as reinsurance broker to the Reinsured, we have placed reinsurances for the account of the Reinsured for the risks detailed within the certificate of Reinsurance referenced above (the "Reinsurances").

Pursuant to instructions from the Reinsured, we hereby undertake the following in relation to your interests in the Equipment:

1. In relation to the hull (including hull war risks) Reinsurances, to hold the benefit of those Reinsurances to your order in accordance with the loss payable provisions as contained with the Contracts, but subject always to the requirements to manage the policy(ies) as they relate to any other aircraft insured as part of the fleet.

2. To advise you as soon as reasonably practicable at the e-mail address included within the Schedule of Addressees:

2.1 of receipt by us of any notice of cancellation or adverse material change in the Reinsurances;

2.2 upon written request from you, of the premium payment status relating to the Reinsurances; and

2.3 if we cease to be reinsurance broker to the Reinsured during the policy period.

The above undertakings are given in our capacity as reinsurance broker in respect of the Reinsurance and are subject to:

a. our continuing appointment as reinsurance broker to the Reinsured (following termination of which we shall be immediately released from all obligations under this letter); and

b. all claims and return premiums being collected through ourselves as reinsurance broker; and

c. our lien, if applicable, on the Reinsurances for premiums due in respect of the Equipment.

3. The undertakings herein apply to the Reinsurance only and no other (re)insurance contract. Nothing in this letter should be taken as providing any undertakings or confirmations in relation to any (re)insurance that ought to have been placed or may at some future date be placed by other brokers.

> 4. This letter is given by us on the instructions of the Reinsured and with the Reinsured's full knowledge and consent as to its terms.
>
> 5. No person shall have any rights hereunder pursuant to the Contracts (Rights of Third Parties) Act 1999.
>
> 6. This letter shall be governed by the Law of England and Wales and the parties agree to submit to the exclusive jurisdiction of the courts of England and Wales in respect of any dispute arising out of, related to or otherwise connected with this letter.
>
> Yours faithfully,
>
> [signature]
>
> Authorised signatory"

29. According to the Defendants' evidence, the placement of these programmes was reinsurance-led, and London market brokers such as McGill, Willis, Gallagher and UIB would present the underlying operator risk to potential reinsurer leads in the London market on the basis that the underlying insurance would be written locally in Russia in accordance with Russian regulatory requirements (and/or local preference).

30. The Defendants have provided copies of reinsurance slips said to correspond to the All Risks or War Risks Cover. The MLB Claimants have been told by the Defendants that there are no full reinsurance policy wordings in existence and that the slips are the relevant Reinsurance Policies; that position is consistent with the language of the slips themselves. In respect of the underlying Insurance Policies, some Defendants have identified wordings (in some cases from prior policy years) that they say were applicable, but the Policies themselves have not been provided.

31. The Claimants contend that they are insureds under the Insurance Policies pursuant to market clauses AVN 67B or AVN 67C. The Certificates of Insurance typically identify the Claimants as "*Additional Insureds*" and "*Contract Parties*", while the reinsurance slips typically recognise the inclusion of AVN 67B or AVN 67C in the underlying insurance under the heading "*Original Conditions*". In general, the Claimants also rely on the CTCs referred to in the Certificates of Reinsurance and reinsurance slips, an example of which is quoted in § 22 above.

32. Further, for the limited purpose of the present jurisdiction challenges, and subject to the qualifications noted earlier relating to AerCap and Genesis, the Claimants accept that the Defendants have good arguable cases that the Reinsurance Policies in relation to which the Claimants bring their claims contain the Russian law and jurisdiction clauses on which the Defendants rely, that the underlying Insurance Policies contain Russian law and jurisdiction clauses, that the clauses are or would be valid as a matter of Russian law and that they would apply to the claims made under those contracts.

33. The Claimants do not, though, accept that they in fact knew or ought to have known that the policies included Russian law and jurisdiction clauses. They point out that (a) none of the Certificates provided to the Claimants indicated that the contracts of reinsurance would be governed by Russian law, or would be subject to the jurisdiction of the Russian courts; (b) there is no evidence that the Claimants were specifically informed that the contracts contained such terms; (c) whilst the last sentence of the CTC quoted in the sample Certificate quoted above contains a condition that the CTC shall not operate in contravention of the laws of the Reinsured's domicile (in practice, Russia), that is not a pointer towards the policy as a whole being governed by Russian law, and in any event does not imply exclusive Russian jurisdiction; (d) the attached letters of undertaking were expressly subject to English law and jurisdiction; and (e) whilst the Leases include a right to call for further information about the insurance and reinsurance policies, there is evidence in correspondence of brokers refusing, on confidentiality grounds, to provide such information when it was requested after the dispute arose. The particular instance cited was Willis Limited's claims handler's refusal, on 7 October 2022, to provide copies of the reinsurance and insurance policies to MLB on the ground that their client, to whom they owed duties including a duty of confidence, was AlfaStrakhovanie, which had not (after being requested) given instructions for the documents to be provided.

34. In addition, there is witness evidence on behalf of some Claimants that they did not in fact know that the Reinsurance Policies contained Russian law and jurisdiction clauses. For example, the witness statement of David Waldron of MLB dated 26 May 2023 in the Carlyle Izhavia claim stated:

> "My client does not accept that this is a common feature of the market. It did not, in fact, expect that the reinsurance arrangements would be subject to Russian law or jurisdiction. On the contrary, my client reasonably anticipated that – like the Lease Agreement – the Reinsurance Policies would be subject to English law and jurisdiction." (§ 37)

Mr Waldron provides evidence to the same effect in his witness statement dated 7 September 2023 in the Aircastle Ural claim (§ 29).

35. That evidence was given in response to evidence from Mr Hifzi of Holman Fenwick Willan LLP, a solicitor acting for some of the War Risks Defendants. For example, in a statement dated 23 May 2023 in the Vx Atran claim, Mr Hifzi said:

> "31. I am instructed by the Second Defendant [Cathedral Capital (1998) Limited, a Lloyd's war risk reinsurer], and it is my understanding as a solicitor practising in the aviation insurance market, that the incorporation of provisions selecting as the governing law and exclusive jurisdiction for dispute determination the law and the Courts of the Insured's state of domicile is a common feature of aviation insurance and aviation reinsurance arrangements.[FN] The First Claimant [VX Freighter Investment (Ireland) Limited], as a lessor, would be expected to

> have known or expected that the policies would contain such choice of law and jurisdiction clauses with the result that the insurance obtained by Atran and the reinsurance obtained by the Russian Insurer would be governed by Russian law and subject to the exclusive jurisdiction of the Courts of the Russian Federation."
>
> [footnote] "The application of local law and the incorporation of jurisdiction agreements in favour of the courts of the states where lessees are resident, are, in my experience, common features of aviation insurance policies put in place by lessees the world over (it is not just Russian aircraft lessees that are required to place the required insurance locally). It is equally commonplace, in my experience, for aircraft lessors to obtain their own separate insurance cover in respect of all risks and war risks to aircraft owned and/or leased by them under what are called "contingent policies" (and/or "contingent and possessed policies") which would not be subject to the governing law and jurisdiction of the state where the lessee is based – as I expect the First Claimant has done in respect of the Aircraft."
>
> "34. My firm has consulted on the Second Defendant's behalf Mr Sergey Seliverstov, a partner in a firm of lawyers qualified in Russian law and litigation practice and based in Moscow, Sokolov, Maslov and Partners. As a result, I understand that from a Russian Law perspective:
>
> (1) The provision of insurance services in Russia requires a license. The position in July 2021, when the insurance and reinsurance relevant to these proceedings was placed, was that such licenses could only be granted to Russian corporate entities. As a result, Russian airlines, including Atran, had to place aviation insurance with local (Russian) insurers. In any event, Atran placed the Insurance Contract commencing 1 July 2021 with a local (Russian) insurer, NIC.
>
> (2) My own experience is that insurance policies taken out by a Russian airline and underwritten by Russian insurers invariably incorporate Russian choice of law and exclusive jurisdiction clauses nominating the courts of the Russian Federation as the agreed forum for the resolution of disputes. …"

36. Ms Alaina Wadsworth, a solicitor for some of the War Risk Defendants, states that *"[i]t is common practice for the chosen law and jurisdiction … in the market generally, to reflect the insured's domicile"*.

37. Some of the Defendants' own personnel provide evidence of their own understanding of the position. For example, Mr Anthony Corlett, a senior underwriter in the airline team at AXA XL Insurance Company, states:

"13. From my market experience, I am aware that in Russia there is a local regulatory requirement and/or local market preference, for the local (Russian) airline to arrange for its insurance cover to be issued by a local (Russian) insurer. The local insurer then reinsures the vast majority of the risk on a back-to-back basis in the recognised London and/or other international aviation insurance markets. I believe the requirement to arrange insurance and reinsurance in this way is typically a requirement under the airline's lease agreement.

14. In addition, my understanding from writing these Russian risks is that, in recent years, 10% (or thereabouts) of the underlying risk has to be, or in practice is, reinsured with the Russian National Reinsurance Company. The remainder of the reinsurance is placed in the London and/or other international aviation insurance markets, as I have described above.

…

24. I was aware, at the time of transacting the 2021 Siberia Airlines/S7 Airlines hull war reinsurance contract, that it contained a Russian law and exclusive jurisdiction clause in the reinsurance slip. I expected the same for the Nordstar reinsurance contract (as was indeed the case).

25. In my experience of writing a wide range of aviation war reinsurances over many years, the reinsurance slip prepared and produced by the broker at presentation would invariably include a law and jurisdiction clause which matched the local territory of the underlying insured airline and the local insurer. The Siberia Airlines/S7 Airlines and Nordstar reinsurance contracts were no exception – the law and jurisdiction clauses in these contracts were completely in line with what I expected and had experienced as the general rule in the market.

26. This was, to me, an entirely expected and logical outcome. My understanding was that the airline and the local insurer would want to provide for local law and jurisdiction (in this case, Russian law and jurisdiction) in the underlying insurance contract. If the reinsurance contract did not contain the same law and jurisdiction, there might be the possibility of running into difficulties on account of the insurance and reinsurance not being fully back-to-back – a possibility which the local insurer (and airline) would likely be keen to avoid. Given all of this, it would have jumped out at me at the time had these AXA XL-led reinsurances not been presented with a Russian governing law and exclusive jurisdiction clause.

27. I add that in so far as Russian risks are concerned, I do not recall an occasion when a broker put forward slip reinsurance wording that required a governing law and jurisdiction provision

> other than Russia. The brokers, who I understand also advised the claimant lessors on their own insurance and reinsurance requirements and needs, will have had their reasons for this.
>
> 28. I am aware that the judicial and court system in Russia may not be regarded as being as predictable and as free from imperfections as, for example, most Western legal systems. Nevertheless, at the time these reinsurance contracts were written in 2021, Russia continued to be a big growth area for aviation insurance business, as it was a significant growth area for financiers and lessors of western-built aircraft. There was a lot of appetite in the market for the business and, in my view, it was important for AXA XL to continue to be involved in that since if we did not agree to provide reinsurance cover then it would be difficult to do so later as we would need to poach the business back off a different reinsurer. The Siberia Airlines/S7 Airlines and Nordstar accounts met AXA XL's 'adequacy' requirements (discussed above) and we had internal sign off on these Russian risks from AXA XL's sanctions team. So, there was no issue in principle with writing the business. In the light of that, the simple fact was that if we (AXA XL) wanted to write this reinsurance business – which we did, for the reasons I have explained – we had to accept the Russian law and exclusive jurisdiction clause as part of the overall package of the risk.
>
> 29. I think it is important to be aware that there were, at around this time, other jurisdictions which were considered by AXA XL to be higher risk territories than Russia (but still within AXA XL's overall risk/financial parameters), for which AXA XL continued to write airline hull war reinsurances. These jurisdictions included, for example, Nigeria, Tanzania, Ethiopia, Iraq and Libya.
>
> 30. I would not myself have complete trust in the legal systems of these countries (i.e., Nigeria, Tanzania, Ethiopia, Iraq and Libya) – and I would regard them as considerably more problematic in that regard than Russia. In particular, I would have concerns about bribery and corruption should there be a coverage dispute in the courts of these countries. Nevertheless, we continued and continue within AXA XL to write hull war risks reinsurance in respect of airlines based in these countries (after carrying out appropriate due diligence on the overall country risks). AXA XL does not necessarily lead all of these risks, but I can confirm that AXA XL does participate on each. These reinsurance contracts are, as expected (as I have explained above), subject to the law and exclusive jurisdiction of the courts of the domicile of the original insured airline (i.e., Nigeria, Tanzania, Ethiopia, Iraq and Libya, respectively)."

38. Similarly, Mr Matthew Thomas, active underwriter of the Lancashire Syndicate 3010 and Head of Aviation War and Lancashire Insurance Group, whose

syndicate leads a consortium who underwrote War Risks policies relevant to the present claims, states:

> "22. … I had … personally transacted … earlier year renewals of seven of these accounts for Lancashire.
>
> 23. … I was well aware at the time of placement, and indeed I fully expected, that each of these reinsurance contracts contained a Russian law and exclusive jurisdiction clause. Such a clause was entirely in line with what, in my underwriting experience, is commonplace in airline hull war risk reinsurances – namely, that the law and jurisdiction of the reinsurance contract matches the country of domicile of the underlying insured airline(s) (and the local insurer(s)).
>
> 24. The broker (Willis or McGill in each case) was responsible for producing the draft reinsurance slips that were sent to Lancashire at the time of presentation. These included the Russian law and exclusive jurisdiction clause in each case. My understanding at the time, given the inclusion of this clause in the draft reinsurance slips at presentation, was that the underlying hull war insurance policies (issued by the Russian insurer(s) to the Russian airline in question) would also have contained Russian law and exclusive jurisdiction clauses. That is what I would expect, since the intention and design of the reinsurance contracts was to mirror the underlying insurance policies on a 'back to back' basis.
>
> 25. In practical terms – given the business requirement for the reinsurances to be back-to-back with the underlying insurances – if Lancashire wanted to write this Russian reinsurance business (which we did), we had to accept the Russian law and exclusive jurisdiction clause included by the brokers (on behalf of the Russian insurer(s)) at the time of placement. It is fair to say that we (Lancashire) went into these reinsurance contracts with our 'eyes open' about the law and jurisdiction that would apply to them (i.e., Russian), as did the brokers who I understand – in many cases – also advised the claimant lessors on their own insurance and reinsurance requirements and needs.
>
> 26. The Russian law and exclusive jurisdiction clause did not result in any specific premium allocation or rating in the reinsurance contracts by Lancashire. But at a wider level, the fact that these reinsurances related to Russian business (Russian domiciled airlines/insurers) was a factor in Lancashire' s overall underwriting considerations when quoting for the business. In relation to this:
>
> (1) As I have explained above, Lancashire writes a global book of airline hull war risks which includes many and varied

jurisdictions, some of which, clearly, are more politically and/or economically complicated and challenging than others.

…

(3) There are only a limited number of territories worldwide that automatically fall outside of the Lancashire group's risk tolerances, such that business directly involving these territories must automatically be declined. These territories are Iran, Syria, North Korea, and Crimea/Sevastopol. Otherwise, as long as the economic/political risk of any particular territory is aligned with the Lancashire group's legal and compliance guidelines, it is for the Lancashire underwriters to make a judgement on whether a particular risk is acceptable, what is charged for the risk, and what level of cover is provided.

…

27. I am conscious that Lancashire has written airline hull war reinsurance contracts in relation to airlines from a number of jurisdictions where we do not necessarily have full confidence that the local legal system is as well-functioning or predictable as, say, the English court system. Examples would include Iraq, Pakistan and Nigeria.

28. Prior to Russia's most recent invasion of Ukraine in February 2022 after which sanctions precluded the continuance of reinsuring aviation risks there, the aviation risk score for Russia, from a Lancashire hull war perils perspective, remained in line with the Lancashire group's legal and compliance tolerances for underwriting this class of business. At the time of the reinsurance contracts in question, I did not believe that the risk of reinsuring Russian insurers of Russian airlines was elevated beyond a point where the risk was unacceptable to Lancashire (including with the Russian law and exclusive jurisdiction clause in the reinsurance contracts).

29. Indeed, around the time when Lancashire was writing the reinsurance contracts in question:

(1) Russia was far from having the highest (that is to say, the worst) aviation risk score in the reports we had from our third-party security experts. For example, Iraq, Pakistan and Nigeria (which I mentioned above in paragraph 27) all had higher (worse) aviation risk scores than Russia (albeit still within the Lancashire group's legal and compliance tolerances for writing business).

(2) Nevertheless, Lancashire continued to write hull war risks reinsurance in respect of airlines based in these countries (Iraq, Pakistan and Nigeria) and I understand that financiers and

> leasing companies continue to finance and/or lease aircraft in those jurisdictions. These reinsurance contracts were, like the reinsurances of Russian insurers that I have been describing in this statement, subject to local law and the exclusive jurisdiction of the local courts (of Iraq, Pakistan and Nigeria, respectively). …"

39. Ms Meghan Walker, Head of Aviation of the London Market Specialty Division of Liberty Specialty Markets, refers to aircraft lessors' typical level of involvement with the required insurances and reinsurances:

> "22. Throughout my time in the aviation market, where a policy is placed in the local market (i.e. where the operator places the risk with a local insurer), the law and jurisdiction clauses in the insurance and reinsurance contracts have always matched the domicile of operator. That applies globally and specifically in relation to Russian operators. It has always been that way since I have been in the market. That is the commercial preference of the insureds and is the market standard, so the practice continues.
>
> 23. In my experience, the lessors dictate what insurance is required. Lessors advise the lessees in their lease contracts the insurance provisions required. The Agreed Value and Limits of Liability are prescribed. Lessors will also require confirmation of the list of co-insurers supporting the placement and their ratings. The lessors are very prescriptive about security and won't give their assets into the control of the operator without a very extensive due diligence process and the coverage requirements being agreed. For example, I have had instances where the lessors have required the operator to change some of the reinsurance companies on the proposed panel because they have had some objection to them.
>
> 24. In my experience, the lessors are very disciplined in knowing not just who the reinsurance is placed with but also what the detailed terms are. For example, they dictate points even down to small coverage triggers such as a 30 day payment clause on timing of claims for confiscation.
>
> 25. I do not recall any client, additional insured or loss payee ever asking for a change to a law and jurisdiction clause in aviation insurance or reinsurance where the law and jurisdiction clause reflected the domicile of the operator. As a potential reinsurer, I once suggested a law and jurisdiction change from Israel to England and Wales, as a result of which I was replaced as leader on the slip. As I said, it is accepted market practice that the law and jurisdiction follows the domicile of the operator."

40. In my view, the evidence summarised above does not support the conclusion that the Claimants actually knew that the insurances and reinsurances on which they rely contained exclusive Russian law and jurisdiction clauses. Moreover,

so far as concerns market practice, the Claimants point out the statement in Arnould, *"Law of Marine Insurance and Average"* (20th ed.) § 33-13 that:

> "Dispute resolution clauses are generally regarded as separate undertakings, distinct from the main contract to which they relate. Any provision which purports to incorporate the terms and conditions of another contract will in general not bring in dispute resolution[] clauses, because they are not terms and conditions as such, but separate agreements. This principle is not confined to reinsurance, but applies also to other cases of incorporation, in particular from charterparty to bill of lading and from head construction contract to sub-contract. The authorities thus decide that the words "as original" or their equivalent are ineffective to incorporate from a direct policy into a reinsurance agreement any arbitration clause, exclusive jurisdiction clause or choice of law clause." (footnotes omitted)

As regards EJCs, Arnould cites *inter alia Prifti v Musini Sociedad Anonima De Seguros Y Reaseguros* [2003] EWHC 2796 (Comm), where a reinsured alleged that its reinsurance contained the same EJC as the original insurance, by reason of a 'full reinsurance' clause in the reinsurance slip stating *"Being a reinsurance of and warranted subject to the same terms and conditions (excluding limits and rates) as and to follow the settlements of the Reassured"*. Andrew Smith J rejected that argument, saying:

> "More importantly, the fact that there was a warranty in the reinsurance contract that terms would be the same as those of the insurance does not assist an argument that the parties intended to incorporate not only terms germane to the subject matter of the insurance but also ancillary provisions." (§ 17)

> "Finally it is argued that, because the subject matter of the reinsurance was a Spanish risk, the commercial context of the 2000/2001 reinsurance suggests, in the absence of an express jurisdiction agreement, that the parties intended the Spanish courts to have jurisdiction over any disputes. I do not agree. Indeed, it seems to me, if anything, more natural to suppose that parties to reinsurance underwritten in the London market would more probably expect litigation to be in the English courts. In any event, I do not consider that the commercial background can properly be deployed in this way." (§ 20)

41. At the same time:

i) the Claimants as lessors were in a position (both at the time of contracting and subsequently prior to renewals) to stipulate matters which the policies could contain, and at least in principle had a contractual right to call for further details of the policies in place;

ii) the Leases required the lessee to procure that each insurance policy was subject to Airline Finance/Lease Contract Endorsement AVN67B (or

AVN67C). Those endorsements provided for specified provisions to be specifically endorsed to the insurance policy. The provisions included the statement that, save as otherwise provided, the Contract Parties (Lessors) *"are covered by the policy subject to all terms, conditions, limitations, warranties, exclusions and cancellation provisions thereof"*;

iii) whilst the Claimants were not in the aviation underwriting market and cannot be assumed to have the same level of knowledge as the persons whose evidence I have quoted above, they were sophisticated entities with significant experience of doing business in Russia, very regular users of aviation insurance, sophisticated enough to buy their own Lessor Policy ("***LP***") insurance on top of the Operator Policy ("***OP***") cover, and in the Leases had prescribed in considerable detail what the OP terms should be (albeit it is said the Leases were in standard aviation market terms);

iv) it is notable that, as the Defendants point out, there is no evidence from AerCap similar to that set out in Mr Waldron's witness statement on behalf of the MLB Claimants (though in submissions AerCap denies that it knew that the reinsurance policies contained EJCs);

v) the certificates which the Claimants received, unlike the brokers' letters of undertaking, did not specify the law and jurisdiction clauses set out in the underlying policies, and therefore left open the risk that they did provide for Russian law and jurisdiction;

vi) if only as a matter of common sense, it was foreseeable that insurances placed by Russian airlines with Russian insurers would be subject to Russian law and jurisdiction, possibly (though not necessarily) exclusive jurisdiction;

vii) it was foreseeable that reinsurances would, at least in terms of policy coverage, be placed on back to back terms with the underlying insurances, that that might also apply to the governing law clause, and that it was possible that it would also apply to the jurisdiction clause (though, in light of the matters mentioned in §40 above, I would not go so far as to conclude that back to back reinsurance necessarily implies the same jurisdiction clause as in the original insurance, nor that even a sophisticated user of insurance services would so assume); and

viii) it is reasonable to infer that the Claimants were willing to take a risk as to the nature of the governing law and jurisdiction provisions in the insurance and reinsurance policies, by allowing the Lessees to procure those policies subject to restrictions set out in the Lease that contained no stipulations about law and jurisdiction clauses.

42. War Risks Defendants make the further point that as the Claimants are purporting to piggy-back on reinsurance policies to which they were not parties as the basis for bringing the present direct claims against reinsurers, it is "*not open to them to seek to make a virtue of and/or to take advantage of the fact that (inevitably) they were not involved in the agreement of EJCs*", and that the

matter is properly to be considered from the point of view of those who did agree them, i.e. the underwriters (to whose evidence I have already referred). Similarly, the All Risks Defendants submit that, in the circumstances, the Claimants' position should be given no weight. I consider that those submissions overstate the position. The Claimants' lack of specific knowledge about the EJCs in the reinsurance policies remains a relevant consideration, since it means the court would have to have regard to a double level of foreseeability – foreseeability that Russian law and jurisdiction would apply, and alleged foreseeability of an unfair trial; but I would accept that the significance of any lack of actual knowledge is attenuated by the considerations to which I refer in paragraph 41 above.

(3) Events following (further) Russian invasion of Ukraine

43. On 21 February 2022, Russia declared its intent to recognise two eastern Ukrainian regions as separate and independent territories. The Russian Parliament adopted this decision the next day. On 24 February 2022, Russia further invaded Ukraine. I say 'further invaded' because, as the Defendants highlight, Russia had already invaded part of Ukraine when it took over Crimea in 2014, leading to the Western Sanctions and Russian counter-sanctions (see, e.g., Resolution No 778 of 7 August 2014 implementing Decree No 560 of 6 August 2014 (a Russian import ban on EU products); U.S. Executive Order 13660 6/3/14 authorising sanctions on certain individuals and entities; and Council Regulation (EU) No 269/2014 of 17 March 2014).

(a) Western Sanctions

44. On 25 February 2022, by EU Regulation No. 2022/238 (the "***EU Regulation***") (amending EU Regulation No. 833/2014), the Council of the European Union introduced a broad package of sanctions in response to "*further military aggression by Russia against Ukraine*" (recitals (3)-(5)). Those sanctions included, by new Article 3c.1, a prohibition on the sale, supply, transfer or export, directly or indirectly, of goods suited for use in the aviation or the space industry (as listed in Annex XI) to any natural or legal person, entity or body in Russia or for use in Russia. For contracts concluded before 26 February 2022, the prohibition was effective from 28 March 2022. Thereafter the EU Regulation prevented the execution of contracts falling within the sanctions regime, as well as ancillary contracts necessary for their execution (Article 3c.5).

45. Article 3c.2. of the EU Regulation provided:

> "*It shall be prohibited to provide insurance and reinsurance, directly or indirectly, in relation to goods and technology listed in Annex XI to any person, entity or body in Russia or for use in Russia*."

46. Article 3c.4(b) of the EU Regulation prohibited the provision of financing or financial assistance related to the sale, supply, transfer or export of goods suited for use in the aviation industry to any natural or legal person, entity or body in Russia or for use in Russia. Article 1(o) defined "*financing or financial assistance*" to include the provision of insurance and reinsurance.

47. The prohibitions set out in the EU Regulation applied (i) within the territory of the EU; (ii) to any person inside or outside the territory of the EU who is a national of a Member State; (iii) to any legal person, entity or body, inside or outside the territory of the EU, which is incorporated or constituted under the law of a Member State; and (iv) to any legal person, entity or body in respect of any business done in whole or in part within the EU (Article 13).

48. The UK issued materially similar sanctions on 1 March 2022. By the Russia (Sanctions) (EU Exit) Regulations 2019 (the "***UK Regulation***") as amended by the Russia (Sanctions) (EU Exit) (Amendment) (No.3) Regulations 2022, it was made an offence, directly or indirectly:

    i) to supply or deliver restricted goods or restricted technology from a third country to a place in Russia (reg. 24(1)(a)); or

    ii) to make restricted goods available to a person connected with Russia or for use in Russia (reg. 25(1)).

49. On 8 March 2022, the Russia (Sanctions) (EU Exit) (Amendment) (No.6) Regulations 2022 amended the UK Regulation to insert regulation 29A. That regulation provided that a person must not directly or indirectly provide insurance or reinsurance services relating to aviation goods or technology to a person connected with Russia or for use in Russia.

50. On the same day, the Department for International Trade issued a General Trade Licence that effectively suspended the commencement of the prohibitions relating to insurance and reinsurance in the Russia (Sanctions) (EU Exit) (Amendment) (No.6) Regulations 2022 until after 28 March 2022.

51. The UK Regulation applied (i) to UK nationals as well as any body incorporated or constituted under the law of any part of the United Kingdom (see the definition of "*UK person*" in section 21 of the Sanctions and Anti-Money Laundering Act 2018); and (ii) to conduct of non-UK persons in the UK or the territorial sea.

52. The EU and UK sanctions had the effect of prohibiting (i) the leasing of aircraft and (ii) the provision of insurance or reinsurance in respect of such aircraft, to a person connected with Russia or for use in Russia.

53. In the United States, effective from 24 February 2022, the US Department of Commerce's Bureau of Industry and Security ("***BIS***") introduced a regulation that substantially expanded export controls targeting Russia, requiring a license for exports, re-exports, and transfers (in-country) of specified aircraft or aircraft parts subject to the Export Administration Regulations ("***EAR***"), when destined for Russia, unless a license exception applied (EAR § 746.8(a)(1) read with Part 746 covering 'Embargoes and Other Special Controls'). As a result, any aircraft manufactured in the US or in a foreign country but incorporating more than 25% controlled US content were subject to the new license requirement if destined for Russia (a requirement which was expanded in April 2022 to include all items on the EAR Commerce Control List).

54. Since 2 March 2022, aircraft subject to the EAR that are registered in, owned or controlled by, or under charter or lease by Russia or a national of Russia are excluded from being eligible for License Exception Aircraft, Vessels and Spacecraft (AVS) for flights to Russia (EAR § 746.8(c)(5)). The BIS maintains, and periodically publishes, a list of aircraft that have flown into Russia in apparent violation of the EAR (i.e. were exported or re-exported to Russia without a required license), and has issued Temporary Denial Orders against a number of major Russian airlines for operating aircraft in violation of the EAR, including Aeroflot, Azur Air, UTair, Rossiya Airlines, Nord Wind Airlines, Pobeda Airlines and Siberian Airlines.

55. The Claimants say the Western Sanctions were part of a common and co-ordinated response by the EU, UK and US to Russia's breach of international law, whose purpose was to punish Russia for the (further) invasion of Ukraine and to put pressure on Russia to withdraw.

(b) Russian Counter-Measures

56. Russia initiated various retaliatory counter-measures in response to Western Sanctions ("***Russian Counter-Measures***").

57. In addition to, and prior to, various legal/regulatory measures, the authorities in Russia are said by some parties to have taken the following steps. It is alleged by the MLB Claimants, for example, that:

    i) On 26 February 2022, an emergency meeting was held at the Ministry of Transport, attended by (among others) Vitaly Savelyev, Alexander Neradko and representatives of Russian airlines. The airlines were told that Aeroflot and/or its subsidiaries would not return foreign aircraft to their lessors, and that the other airlines should likewise not return their aircraft for the time being.

    ii) A further meeting was held at the Ministry of Transport on 28 February 2022, attended by Igor Chalik – Deputy Minister of Transport – and by representatives of certain Russian airlines (including Aeroflot, Pobeda, Rossiya, the S7 Group, Ural Airlines and UTair), at which participants discussed options for keeping aircraft leased by foreign lessors in Russia and continuing to operate them. One of the solutions to the problem discussed was nationalisation of such aircraft.

    iii) On 4 March 2022, in one or more telegrams, Rosaviatsiya – a federal government agency also known as the Federal Air Transport Agency or "*FATA*", which operates under the supervision of the Russian Ministry of Transport – advised airlines that should they receive notices from the lessors asserting that the leasing of aircraft had been terminated, then rather than returning the aircraft they should enter into negotiations with their lessors, and in the event that they failed to reach a mutually beneficial agreement, the airlines were invited to re-register the aircraft in Russia.

iv) On 5 March 2022, President Putin indicated at a public appearance that it was the Russian government's policy that foreign-leased aircraft would not be returned to their foreign lessors.

These matters, and/or their effect (if any), are not common ground. As I discuss later, they are of potential significance to the substantive dispute between the parties.

58. Turning to legal/regulatory measures, Presidential Decree No.79, dated 28 February 2022, was issued in response to "*unfriendly and contrary to international law"* actions of the US and other foreign states. The decree prohibited, amongst other things, extending loans to non-residents in foreign currency.

59. On 5 March 2022, the Russian government issued Order No. 430-r attaching a list of "*Foreign States and Territories Involved in Committing Unfriendly Actions Against the Russian Federation, Russian Legal Entities and Natural Persons*" ("***Unfriendly Foreign States***" or "***UFSs***"), which included the UK, EU Member States (including the Republic of Ireland), and the USA. It was later supplemented to include Bermuda.

60. Also on 5 March 2022, Rosaviatsiya issued a statement "*recommending*" that Russian airlines that have foreign-registered aircraft under a lease with a foreign organisation temporarily suspend the transportation of passengers and goods to and from Russia "*due to the high risk of detention or seizure of Russian airlines' aircraft abroad*", which had the effect of preventing both the return of foreign-leased aircraft to foreign lessors and their recovery from an intermediate location.

61. On 8 March 2022, the Russian President issued Presidential Order No. 100, introducing special economic measures to ensure the national security of the Russian Federation. These included a 'temporary' ban on the export from Russia of certain goods and materials until 31 December 2022 (later extended until 31 December 2023 and then to 31 December 2025), as well as restrictions on the export of other goods and materials.

62. On 9 March 2022, the Russian government adopted Resolution No. 311 ("*On Measures to Implement Decree No. 100 of the President of the Russian Federation of 8 March 2022*"), introducing a list of goods/materials prohibited from being exported from Russia until 31 December 2022 (later extended to 31 December 2023 and then to 31 December 2025), which included aircraft and aircraft machinery. The export ban did not apply to exports to member states of the Eurasian Economic Union (which was the subject of Resolution 312, addressed in §63 below), or to export of transport vehicles of international carriage. The Resolution was amended, on 11 May 2022, to provide that the latter exception did not apply to "*aircraft exported for the purpose of [their] return to the lessors, leasing companies under financial lease agreements, leases entered into with lessors and leasing companies of foreign countries included in the list of [Unfriendly Foreign States] … as approved by Order No. 430-r …*".

63. Also on 9 March 2022, the Russian government adopted Resolution No. 312 (*"On the Introduction on a Temporary Basis of a Permit Procedure for the Export of Certain Types of Goods from the Territory of the Russian Federation"*), implementing the restrictions envisaged in Presidential Order No. 100 and introducing a permit procedure for the export of certain types of machinery (including aircraft and aircraft engine parts) from Russia to member states of the Eurasian Economic Union until 31 December 2022 (later extended to 31 December 2023 and then to 31 December 2025). The export permit requirement did not apply to transport vehicles of international carriage.

64. On 9 March 2022, the Russian government published draft-form regulations to apply to the leasing of aircraft prior to 24 February 2022 and which would override any contractual provisions between the parties if one of the parties was from an UFS, which regulations were given the force of law in governmental Resolution No. 412.

65. On 14 March 2022, the President signed into law Federal Law No. 56-FZ ("*On Amendments to the Air Code of the Russian Federation and Certain Legislative Acts of the Russian Federation*"), which amended certain provisions of the Russian Air Code as well as Federal Law No. 164-FZ. The amendments to Federal Law No. 164-FZ provided that existing aircraft lease agreements with nationals of UFSs could not deviate from mandatory rules adopted by the Russian government, including rules relating to the return of property of foreign parties under such contracts.

66. Also on 14 March 2022, Federal Law No.55-FZ prohibited Russian insurers from entering into transactions with insurers, reinsurers and insurance brokers that are persons of UFSs (including transferring funds under existing contracts).

67. On 19 March 2022, the Russian government adopted Resolution No. 411, which provided for dual registration in the Russian state Register of Civil Aircraft of aircraft leased by a Russian lessee if the lessor was established in an UFS, without evidence of de-registration from its previous register.

68. Also on 19 March 2022, the Russian government adopted Resolution No. 412, which applied to aircraft lease agreements entered into before 24 February 2022 in respect of aircraft legally possessed by lessors of UFSs under Order No. 430-r. The Resolution provided (*inter alia*) that the export of any foreign aircraft and/or engines from Russia by lessees was to be in accordance with Presidential Order No. 100. It also provided that the airlines must (i) secure the operation of foreign aircraft and engines according to the provisions of the federal aviation rules approved according to Article 35 of the Russian Air Code, (ii) secure the maintenance and repair of foreign aircraft and engines by the entities which have the documents confirming their compliance with the federal aviation rules approved in accordance with paragraph 3 of Article 8 of the Russian Air Code (which requires compulsory certification and testing to be carried out by specially authorised bodies), and (iii) insure the foreign aircraft and engines with Russian insurers and reinsurers.

69. Ministry of Transport Order No. 99 dated 24 March 2022 established the procedure for the issue of an export permit for the export of goods to the EEU under Resolution No. 312 and was in force until 31 December 2022.

70. Presidential Decree No. 252, dated 3 May 2022, provided for the creation of a list of sanctioned persons with whom no Russian person could enter into a transaction (including the execution of existing obligations in favour of sanctioned persons).

71. Presidential Decree No. 618, dated 8 September 2022, banned persons from UFSs from undertaking any transactions that lead to the creation or termination of rights to shares in Russian LLCs without the prior consent of a Government commission.

72. Presidential Decree No. 302, dated 25 April 2023, created a legal framework for the imposition of *"…temporary external administration with respect to assets of persons from 'unfriendly' states within Russian territory"*.

73. The effects of these Russian Counter-Measures included, in summary: (i) designating the states of incorporation of most Claimants (including Ireland, the US and Bermuda) as UFSs; and (ii) preventing the export of the Aircraft from Russia unless such export was to a member of the Eurasian Economic Union and a permit was obtained.

(4) Notices of Cancellation of reinsurance

74. In early March 2022:-

i) All Risks reinsurers issued Notices of Cancellation. In the examples I have seen, these were said to take effect in 30 days and, typically, referred to AVN 111(R) Sanctions and Embargo Clause (Reinsurance), which (in summary) entitles a reinsurer to cancel its participation on 30 days' notice, in the event of a law or regulation becoming applicable that makes the provision of cover unlawful because it breaches an embargo or sanction. (The MLB Claimants submit that even where the Cancellation Notice did not expressly refer to AVN 111(R), the 30 days' notice period was consistent with paragraph 3 of AVN 111(R) and suggests that the notice was being given pursuant to that clause. That appears to me a logical inference in the absence of any suggestion that another basis existed for reinsurers to cancel on 30 days' notice.)

ii) War Risks reinsurers issued notices seeking to exclude Russia and Ukraine (and, in certain instances, Belarus and Crimea) from the cover provided, failing agreement to which the reinsurance would be cancelled in seven days. The notices are not uniform in the provisions to which they refer, but a right to review premium and geographical limits with seven days' notice is conferred by LSW555D section 5, paragraph 1(a).

(5) Notices of Termination of Leasing

75. In March 2022 the Claimants sent Notices of Termination to the Russian airlines which, they say, terminated the leasing of the relevant Aircraft with immediate effect and required each airline to cease operating the Aircraft and return them in the manner stipulated in the Notice: in each case, to a location outside Russia and the Eurasian Economic Union (Belarus, Kazakhstan, Armenia and Kyrgyzstan) or a location to be specified (for example, in the Carlyle claims most notices stipulated that the Lessee was required immediately to return the Aircraft "*at such location as we may separately instruct*"). The Notices did not terminate the Leases (i.e. the leasing agreements) themselves.

76. The Events of Default referred to in the Notices of Termination fell into four main categories:

i) Events of Default that were expressly stated to relate to and be based upon sanctions. Where a specific sanctions regime was identified, most commonly it was the EU sanctions regime, though some notices referred to the UK regime. In two instances, the Notices referred to the US sanctions regime.

ii) Events of Default that were implicitly related to sanctions. For example, the Notice of Default and Termination of Leasing in the Carlyle Rossiya claim stated:

> "2) (a) We hereby notify you that one or more Events of Default have occurred and are continuing under the Lease, including, without limitation, pursuant to:
>
> (i) Article 25.2(c), as a result of your failure to maintain or cause to be maintained the insurance or reinsurance required by Article 18 of the Lease;
>
> (ii) Article 25.2(t), as a result of it becoming unlawful for you to perform your material obligations under the Lease; and
>
> (iii) Article 25.2(u), as a result of the operation, use or employment of the Aircraft in violation of the requirements of Article 10.2 of the Lease.
>
> (b) In view of recent geopolitical events and Trade Laws, Lessor has determined that there has been a material adverse effect in the financial condition, prospects or operations of the Lessee or on the ability of the Lessee to perform all of its obligations under, or otherwise comply with the terms of the Lease, and, as a result, an Event of Default under Article 25.2(j) of the Lease has occurred and is continuing. …"

iii) Events of Default consisting of a failure to maintain insurance and/or reinsurance in accordance with the requirements of the Lease. Reliance on such Events of Default followed or anticipated the formal issuing of

> Notices of Cancellation of the reinsurance (see above). For example, one of the Events of Default alleged in the notice served in the Carlisle/I-Fly claim was expressed to be under *"Section 17(c)(ii), as a result of your failure to maintain the insurance required under Section 12 of the Lease".* An example making an explicit link between sanctions and failure to maintain insurance is the notice served by Genesis on JSC NordStar Airlines (formerly known as OJSC Taimyr Airlines, a Russian domestic passenger airline) dated 28 February 2022 stating: *"By this Notice, the Lessor hereby formally notifies you that an Event of Default has occurred under Clause 20.1(b) of the Lease Agreement as the insurances required to be maintained in respect of the Lease Agreement have been cancelled pursuant to the recent imposition of sanctions by the European Union"*.

iv) Events of Default consisting of a failure to pay sums due under the relevant Lease.

77. Which of these grounds was relied on varies from claimant to claimant. For example, the MLB Claimants have provided a table indicating that their notices relied on numerous permutations of the above grounds (including a group of claims where only ground (iv), failure to pay, was relied on). AerCap and Shannon relied on a number of grounds of termination including (1) "*material adverse change*"; (2) failure to maintain insurance as required by the terms of the leases; and/or (3) non-payment of rent. The Clifford Chance Claimants summarised the termination grounds relied on in a letter by way of further information:

> " … we confirm that each of the relevant notices terminated the right to possession and terminated the leasing under the leases as the consequence of the introduction of the EU and/or the UK sanctions. As to the specific grounds ("event(s) of default"), the individual termination notices relied on a variety of different events of default (all of which would be viewed by the Russian Courts as related to sanctions and/or to the Russian counter-measures thereto), including: the relevant lessee's failure to maintain the required (re)insurances; a failure to pay rent; the fact that – in light of EU and/or UK sanctions – it would be unlawful for the lessor to perform its obligations under the lease; a material adverse change; and/or a change in the law. In the case of every lease, the individual notices relied on the relevant lessee's failure to maintain the required (re)insurances (in circumstances where the EU and/or the UK sanctions specifically addressed the provision of such aviation insurance cover) and/or on the fact that in light of EU and/or UK sanctions, it would be unlawful for the lessor to perform its obligations under the lease." (Clifford Chance letter of 5 February 2024)

In every Clifford Chance case, a ground was relied on that was either expressly based on sanctions or expressly based on failure to maintain insurance and reinsurance (which the sanctions prohibited). There was no Clifford Chance case in which only failure to pay rent was relied on.

78. Genesis served the following notices referring specifically to EU sanctions:

    i) A "Notice of Event of Default and Grounding Notice" dated 28 February 2022 referring to EU Sanctions:

    > *"By this Notice, the Lessor hereby formally notifies you that an Event of Default has occurred under Clause 20.1(b) of the Lease Agreement as the insurances required to be maintained in respect of the Lease Agreement have been cancelled pursuant to the recent imposition of sanctions by the European Union."*

    ii) A "Notice of Event of Default and Demand for Return of Aircraft" dated 16 March 2022:

    > *"By this Notice, the Lessor hereby formally notifies you that (1) an Event of Default has occurred under Clause 20(c) of the Lease Agreement, (2) a Lessee Illegality Event has occurred resulting in an Event of Default under Clause 20(u) of the Lease Agreement and (3) a Lessor Illegality Event has occurred. Consequently, you are in breach of your obligations under the Lease Agreement."*

79. There were also regulatory steps taken in response to these events. For example, on 7 March 2022, AerCap received notices from the Irish Aviation Authority ("***IAA***") advising that it was taking steps to revoke the Certificates of Airworthiness of Irish registered aircraft that were leased to Russian operators. On 12 March 2022, the Bermuda Civil Aviation Authority ("***BCAA***") suspended all Certificates of Airworthiness of aircraft operating in the Russian Federation.

80. Following the issue of the Notices of Termination (and, in some cases, follow-up Notices), the Russian airlines did not return the Aircraft. The Claimants allege that this has resulted in the Lessors being (wrongfully) deprived of the Aircraft, such that (i) the Aircraft are a total loss, (ii) falling within either the All Risks Cover or the War Risks Cover in the Insurance and Reinsurance Policies; and (iii) that they are entitled to an indemnity, or payment of an indemnity, for the same directly from the relevant reinsurers under the Reinsurance Policies pursuant, *inter alia*, to the relevant CTC. In some cases, it is alleged in the alternative that the CTCs evidence a legal and/or equitable assignment of the insurers' rights, or that the Claimants are entitled to claim as beneficiaries of a trust, and/or pursuant to section 1(1) of the Contracts (Rights of Third Parties) Act 1999. (In a few cases, there has been an express assignment of the reinsurance policies, and the claim is brought pursuant to that assignment.) In addition, as discussed in section (P) below, some Claimants allege that they are entitled to recover from the relevant Defendants pursuant to a collateral contract.

(6) Basis of insurance claims

81. In their insurance claims under the Operator Policies, and/or under the Lessor Policies referred to in section (B)(9) below, some Claimants (for example, AerCap and Genesis) advance a primary case that the loss fell within the All Risks Cover, with an alternative case that it fell within the War Risks Cover.

Other Claimants (for example, the Clifford Chance Claimants) advance a primary case that the loss fell within the War Risks Cover, with an alternative case that it fell within the All Risks Cover.

82. The War Risks claims are typically advanced (whether as primary claims or in the alternative to All Risks claims) under market clause LSW 555D, Section 1 of which provides cover against the following perils:

> "(a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
>
> (b) Strikes, riots, civil commotions or labour disturbances.
>
> (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.
>
> (d) Any malicious act or act of sabotage.
>
> (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.
>
> (f) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Assured…".

83. Different Claimants rely on different provisions. For example, the MLB Claimants rely on peril (a) and/or peril (c) and/or peril (e). AerCap rely on peril (c) and/or peril (e). The Clifford Chance Claimants rely on perils (c) and (e), and (in the case of six Claimants) peril (a). The Genesis Claimant relies on peril (c) and/or peril (e) and/or peril (a) (and in its Amended Particulars of Claim specifically pleads that, in invading Ukraine, Russia started a "*war*").

(7) The jurisdiction challenges

84. The present claims, the Operator Policy Claims *("**OP Claims***"), were commenced from late 2022 onwards and throughout 2023. Initially, every reinsurer challenged the jurisdiction of the court. A significant number have since altered their position. Chubb European Group SE ("***Chubb***") was the first to do so, writing on 14 November 2023, followed by Swiss Re International SE ("***Swiss Re***"), at the CMC before Butcher J in the Lessor Policy Claims ("***LP Claims***") on 19 January 2024. The court at that CMC was informed that some (but not all) of the All Risks reinsurers represented by Weightmans LLP were in the process of negotiating withdrawals of their challenges. On the same day, many of the All Risks reinsurers represented by DLA Piper, DWF and DACB

wrote to withdraw their challenges. The Liberty Defendants represented by Kennedys (who include both All Risks and War Risks reinsurers) indicated their intention to withdraw their challenges on 23 January 2024.

85. By the time of the hearing before me, 36 of the Defendants to the MLB Claimants' claims had submitted to English jurisdiction, and 22 maintained their jurisdiction challenges. Almost all the non-submitting Defendants to those claims were War Risks reinsurers, or All Risks reinsurers who also have a War Risks exposure. At least one All Risks Defendant had submitted to the jurisdiction in respect of each of the MLB Claimants' claims (each of those figures includes some Defendants acting as representatives for a number of other Defendants.). In AerCap's cases, 121 out of 186 Defendants had submitted to the jurisdiction, including some War Risks and some All Risks Defendants in every claim. All but one of the Fieldfisher Claimants' All Risks Reinsurers have indicated that they will be withdrawing their jurisdiction challenges. Their War Risks Reinsurers contest English jurisdiction.

(8) Settlements

86. Since September 2023, several OP Claims have been discontinued following settlements between certain Claimants, Operators and Russian insurers, pursuant to which Claimants have received compensation. In summary:

    i) On 15 March 2023, the Russian Government announced that it had allocated 300 billion rubles to a sovereign wealth fund, to fund the purchase of aircraft leased by Russian airlines from foreign lessors.

    ii) On 6 September 2023, AerCap discontinued its claims against reinsurers in two claims concerning aircraft operated by Aeroflot or its subsidiaries, having received a payment of approximately USD645 million from a Russian entity called Insurance Company NSK LLC (which is not a Russian Operator Policy insurer). Overall, AerCap has reached settlements resulting in the discontinuance of four and partial discontinuance of two of its 15 OP Claims.

    iii) Between October 2023 and January 2024, further settlements were announced in relation to aircraft leased to the Aeroflot group, leading to the discontinuance of four claims (and partial discontinuance of two claims) by the Clifford Chance OP Claimants.

    iv) From December 2023 onwards, eight further OP Claims have been discontinued or partially discontinued following settlements with Operators outside of the Aeroflot group. War Risks Defendants' evidence refers to publicly available information suggesting that such settlements were likely to have been funded by the Russian Ministry of Transport.

87. The only available evidence about the terms of any of these settlements is from Mr Mesquitta, a solicitor acting for the MLB Claimants, who states his understanding that the sums paid by the Russian entities are less than the agreed value of the aircraft as insured/reinsured by the relevant Defendants.

(9) The LP Claims pending in the Commercial Court

88. In addition to the OP Claims, i.e. the present claims, claims have also been brought in the Commercial Court by owners and lessors of aircraft under insurance contracts (the "***Lessor Policies***") which in many cases cover certain of the same Aircraft as are the subjectmatter of the OP Claims, on a contingent and possessed basis (the LP Claims, defined in §84 above). The Lessor Policies contain separate all risks and war risks sections, separately underwritten by insurers. The gist of the LP Claims is that the aircraft and engines of the insureds that were on lease to Russian airlines at the commencement of the February 2022 invasion of Ukraine have (wrongfully) not been returned, despite repeated lawful demands for them following the termination of the leasing, and as a result are total losses.

89. The LP Claims are being case-managed by Butcher J, and are listed for trial in the Michaelmas term of 2024 with a trial estimate of 11.5 weeks. Witness statements and some expert evidence have to date been exchanged.

90. More than 20 Defendant reinsurers in the OP Claims are also defendants in the LP Claims. There are also common claimants: the Merx Claimants (represented by MLB) have issued OP Claims and LP Claims in the Commercial Court, and a significant number of entities are represented by Herbert Smith Freehills LLP, Clifford Chance LLP and McGuireWoods London LLP as Claimants in both the LP and OP Claims.

91. The LP and OP Claims arise out of the same circumstances and (at least so the Claimants submit) raise very similar issues of fact and law. In addition, some of the defendant insurers in the LP Claims rely upon the availability of cover under the Operator Policies as part of their defence to the LP Claims. As a result, whether the corresponding Claimants have cover under the Operator Policies is an issue that this court will be asked to determine in the LP Claims.

92. Butcher J has permitted certain of the MLB Claimants who are not Claimants in the LP Claims to attend and make submissions in case management hearings in the LP Claims. Butcher J has deferred the final decision on whether to case manage the LP Claims and OP Claims together and, if so, how best to do so, until after the present jurisdiction challenges have been determined by this court.

93. LP Claims are brought against both all risks insurers and war risks insurers. The issues in the LP Claims include:

    i) questions of construction, including the relationship between cover under the Operator Policies and cover under the Lessor Policies;

    ii) whether the aircraft were lost in the relevant sense;

    iii) if so, the cause of the loss; and

    iv) whether Western Sanctions prohibit payment under the Lessor Policies.

94. Typically, claimants in the LP Claims set out their case under the all risks and/or war risks cover. All Risks insurers plead, in substance, that any loss was caused by a war risk, and claimants adopt and plead that case against war risks insurers; and *vice versa*. For example, AerCap Ireland Limited brings LP Claims against all risks and war risks insurers in case CL-2022-000294. The lead all risks insurer is the First Defendant, AIG Europe SA ("***AIG***"). (AIG also participates as a War Risks Insurer in the LP Claims, and is separately represented in that capacity).

95. The MLB Claimants' skeleton argument includes a short summary of averments made in AIG's Re-Amended Defence dated 22 March 2023, *qua* all risks defendant to the LP Claims, which it is convenient to quote here and to which I shall return later:

> "51. Having regard to one of the central issues raised in these jurisdictional challenges, it is to be noted that, in the LP Claims, AIG Europe S.A. ("*AIG*") sets out at length in its Amended Defence to AerCap's claim a description of the authoritarian nature of President Putin's regime. AIG pleads that the President is de facto and de jure the ultimate head of government who asserts and exercises the central authority of the state. In practice, the formal constitutional limits to the President's powers do not, in fact, limit the scope of his authority; "*President Putin exercises power without constitutional or legal or meaningful practical restraint.*"
>
> 52. AIG then sets out the organisations, individuals and mechanisms by which President Putin exercises his power in governing the Russian Federation. Among the governmental tools identified by AIG are:
>
> (1) *"[S]ignificant commercial enterprises wholly or partly owned by the state"*; and
>
> (2) Most importantly, for present purposes, *"[t]he Judicial system and judges"*.
>
> 53. The judicial system as a means of achieving governmental goals without regard to the rule of law is a theme to which AIG returns later in the same section of its Amended Defence. At paragraph 42, it pleads:
>
> > *"In addition to making formal decrees or passing laws, some or all of the following methods were at all material times, and are, often used by the President (whether through unidentifiable individuals acting on his behalf or through formal office-holders, ministries or agencies) and/or by the government and/or by other public authorities or agencies as means of (i) giving governmental orders (express, implied or tacit) to private individuals and corporate entities, and (ii) influencing and/or controlling decision making so as to*

> *ensure action consistent with the governmental orders which have been given: …*
>
> *42.3 The use of regulatory and governmental institutions (including the judicial system) as instruments of encouragement, coercion, oppression and/or punishment of any who fail to comply (or exhibit reluctance to comply) with orders, howsoever given."*
>
> 54. While AIG is not a defendant to any OP Claim, at least ten of the Defendants to OP Claims have served Defences, or have had Defences served on their behalf, in the LP Claims which incorporate or adopt the above sections of AIG's Amended Defence, or which plead that those sections are "*materially correct*" and, in some cases build on and amplify AIG's pleas."
>
> (citing, in quoted § 54 above, DAE, Defence of the Global AR Insurers, §§ 24.4 and 28 to 33; KDAC, Defence of the AR Insurers, § 30.4; Merx, Defence of the AR Insurers, §§ 77-81.)

(10) Ultimate ownership of the Claimants

96. The list of Unfriendly Foreign States pursuant to the Russian Counter-Measures includes the UK, EU Member States, the USA and Bermuda. The Claimants are all incorporated in UFSs, but their ultimate beneficial ownership varies.

97. For example, AerCap is the Claimant in a number of these actions. It is the largest lessor of airliners in the world, and, as at 25 February 2022, 141 aircraft and 29 aircraft engines owned by AerCap were on lease or sublease to various Russian airlines. There are 50 leases which are the subject of AerCap's claims in these proceedings (all governed by English law apart from one governed by Californian law). All of the AerCap claimants are domiciled in either Ireland or the USA, and all of their ultimate beneficial owners are domiciled in either Ireland, the USA, Bermuda or the Netherlands.

98. Similarly, Genesis is incorporated and headquartered in Ireland. Barings, LLC, a global investment management firm ultimately owned by Massachusetts Mutual Life Insurance Company ("***MassMutual***"), headquartered in Charlotte, North Carolina, USA, is the investment manager for the investors who ultimately own Genesis. Genesis's main shareholders are MassMutual, US State Pension Funds, and other strategic investment partners based in the United States, in addition to The Ireland Strategic Investment Fund which is a sovereign development fund managed and controlled by the Irish National Treasury Management Agency.

99. Shannon is incorporated in the Republic of Ireland. It is a joint venture between AerCap Aero Engines Limited, incorporated in Ireland, and Safran Aircraft Engines, incorporated in France.

100. Some Claimants have ultimate beneficial owners, or are said to have financial backers, who are not from countries designated as Unfriendly Foreign States in the Russian Counter-Measures, but instead from (for example) Dubai or China.

101. For instance, one of the MLB Claimants, Zephyrus Capital Aviation Partners 1D Limited is incorporated in Ireland, and has an Irish parent company, itself owned by a Cayman Islands company. The Cayman company is 95% owned by Maples FS Limited, a bankruptcy remote vehicle that has issued investment grade bonds, none of which are currently owned by entities from 'unfriendly' jurisdictions. The UAE sovereign wealth fund has a small (less than 5%) interest in the Cayman company via a Maltese company.

102. Clifford Chance act for nine groups of claimants in 25 actions relating to 62 planes and one engine (claiming losses in excess of USD3 billion after settlements). The ultimate beneficial ownership point arises in relation to 24 of the Clifford Chance Claimants, being members of what I shall for convenience refer to as the Avolon, BOCA, CDBA and DAE claimant groups (together, "***ABCD***"). The parties to their claims agreed a "*Beneficial Ownership Schedule*" setting out, *inter alia*, the place of incorporation for each lessor, as well as additional information about its the ownership structure. The information set out includes the following:

i) Avolon: The Avolon entities themselves are either Irish or Bermudan. There is then in each case a chain of Irish and Cayman entities, followed by a parent company in the Cayman Islands, and then (at the second 'tier' so far as parent companies are concerned) two parent companies: one in China, Bohai Leasing Co Ltd (70%), and one in Japan, Orix Corporation, a publicly listed company (30%). Japan is an UFS from the Russian perspective. Bohai Leasing Co. Ltd. is listed on the Shenzhen Stock Exchange with 51.97% owned by the public, 8.52% indirectly owned by Liaoning Fangda Group Industry Co., and the rest owned by subsidiaries of the HNA Group, a Chinese based group. Each of those shareholders has their own chain of ownership but, for the purposes of the Jurisdiction Challenge, the Avolon Claimants accept that none of those owners is based in an UFS.

ii) BOCA: The BOCA entities are Singaporean or Irish companies. They have parent companies in the Cayman Islands, Singapore or Hong Kong. At the third tier or the fourth tier of ownership, Bank of China Limited is the parent company.

iii) CDBA: Each of the CDBA entities is Irish. Their parent company is CDB Aviation Lease Finance Designated Activity Company, also incorporated in Ireland. The second-tier parent company is China Development Bank Financial Leasing Co., LTD which is incorporated in China. The shares in China Development Bank Financial Leasing Co., LTD are listed on the Hong Kong Stock Exchange and are majority owned by a number of private companies domiciled in China that are either wholly or majority owned by Chinese state-owned enterprises or parts of the Chinese government (including a 64.4% ownership by China Development Bank).

iv) DAE: Each of the claimants in the Dubai Aerospace Enterprise (DAE) group of claims is Irish. They have parent companies in Ireland. Their third-tier parents are incorporated in Hungary. In some cases, at the fourth tier, there is a parent company in Dubai; in other cases there is a further Hungarian parent at the fourth tier and a Dubai parent at the fifth ownership tier. The DAE entities are ultimately owned by the Government of Dubai via the Investment Corporation of Dubai.

103. I deal later with the significance of these matters to the question of fair trial.

(C) ISSUES

104. The List of Issues formulates the issues arising on these applications as follows. I indicate in square brackets where, broadly, in this judgment I consider each group of issues.

i) [Section (D)(3)] What is the relevant test to be applied when considering whether the Claimants would receive a fair trial in Russia as a potential ground for refusing a stay? For example (but without prejudice to the generality of the foregoing question), is it sufficient for the Claimants to show that there is "*a real risk*" that justice will not be done in the Russian Courts or do they need to show that, on a balance of probabilities, they "*will not get*" or that they "*are unlikely to get*" a fair trial in the Russian Courts?

ii) [Section (D)(5)] Is it necessary for the court to resolve the conflicts in the expert evidence and, if so, how?

iii) [Section (D)(2)] In relation to proving the existence of the strong reasons relied on, to what extent (if any) is it relevant that facts or matters are unchanged since, and/or were known or foreseeable, at the time the reinsurance contracts were agreed, if and insofar as that was the case?

iv) [Sections (F) to (H)] What, if any, is the risk/probability/likelihood (depending on the correct test) that the Claimants would not receive a fair trial if they sued the Defendants in the Russian courts? In particular:

a) [Section (F)] What, if any, is the risk/probability/likelihood of the Russian state's interests being sufficiently engaged by and/or the Russian state being sufficiently interested in the outcome of the claims to lead to the hearing of the Claimants' claims brought in Russia being influenced by those interests (it being common ground that the Russian state might be prepared to interfere in cases where its interests are sufficiently involved)?

b) [Section (H)] What, if any, is the risk/probability/likelihood of the Claimants not receiving a fair hearing in Russia by reason of their being companies incorporated in 'unfriendly' states?

c) What, if any, is the risk/probability/likelihood that the Russian courts would not adjudicate fairly, impartially and properly the following issues:

[1] [Section (G)(1)] whether the leasing of aircraft has been lawfully terminated (including by reference to the imposition of Western Sanctions as a ground for termination);

[2] [Section (G)(2)] whether the lessees were/are obliged to redeliver/return the aircraft to the Claimants (including by reference to the counter-measures imposed by Russia); and

[3] [Section (F)] whether the aircraft have been lost and if so the cause of loss, in particular whether the loss has been caused by a peril falling within either the All Risks Cover or the War Risks Cover?

v) [Section (L)] To the extent it is relevant to the existence of a strong reason for not enforcing Russian jurisdiction agreements relied on by the Claimants, would it be contrary to English public policy for the court to enforce those agreements if and in so far as the Russian courts:

a) would not treat as valid any termination notice if and to the extent that it relied on an event of default arising out of the imposition of Western Sanctions, irrespective of whether the leases are governed by Russian law; and/or

b) would give effect to and treat as valid and enforceable the counter-measures taken by Russia?

vi) [Section (I)] To what extent were the reasons, facts and matters relied on by the Claimants to establish the existence of the strong reasons relied on, known and/or foreseeable at the time the relevant reinsurance contracts were agreed?

vii) [Section (P)] Whether:

a) it is open to the Defendants to say that they have a good arguable case that the Genesis and any Shannon collateral contract claims fall within the scope of the exclusive jurisdiction clauses on which the Defendants rely and, if so;

b) the Defendants have established a good arguable case, and, if not, should these claims otherwise be stayed?

viii) [Section (K)] In circumstances where:

a) as at the date of the List of Issues, at least one Defendant has submitted to the jurisdiction of the court;

b) these proceedings will proceed in respect of the Claimants' claims against that Defendant, and any other Defendants whose Jurisdiction Challenges fail;

c) the Genesis and Shannon Claimants also make claims pursuant to collateral contracts allegedly made directly between them and the relevant Defendants, which might proceed in this court;

d) the claims brought against the Defendants by the GTLK Claimants may also proceed before this court if the GTLK Claimants successfully defeat the Defendants' jurisdiction challenge based on the additional GTLK-specific grounds to be determined at the GTLK-Specific Issues Hearing;

e) similar claims brought by owners and lessors of aircraft who have been deprived of aircraft leased to Russian lessees against insurers who insured those aircraft on a "contingent and possessed" basis raise certain issues which are the same as or similar to issues which arise in these proceedings, and are the subject of ongoing proceedings before the court;

is there a resulting multiplicity of proceedings and risk of inconsistent judgments which would result from the Russian jurisdiction agreements being enforced? As noted earlier, since the List of Issues was agreed, more Defendants have submitted to the jurisdiction of the English courts.

ix) [Section (K)] If so, would any such multiplicity and risk be relevant to the question of whether there are "strong reasons" for not enforcing exclusive jurisdiction agreements which requires all such claims to be brought in Russia and which would be breached if those claims continue in the English Court?

x) [Sections (M) and (N)] To what extent are there other relevant factors in favour of or against a stay, including:

a) the location of the evidence;

b) the governing law of the relevant contracts;

c) the countries with which the parties are connected, and how closely;

d) the extent to which the parties, witnesses and representatives are able to travel to Russia to participate in any Russian court proceedings; and

e) whether the Defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages?

xi) [Sections (J) and (Q)] In all the circumstances, and having regard to the court's answers to the foregoing issues, have the Claimants proved the

existence of "strong reasons" for not enforcing the Russian jurisdiction agreements?

xii) [Sections (J) and (Q)] In light of the answers to the issues above, should the Court exercise its discretion to stay all, some or any of the proceedings brought by the Claimants against the Defendants?

(D) PRINCIPLES: STAYS AND FAIR TRIALS

105. The Defendants ask the court to exercise its discretion to stay these proceedings in order to give effect to the jurisdiction clauses, the alternative being to leave them to pursue claims, should they so choose, for damages for breach of the jurisdiction clauses.

(1) The test

106. The court will grant a stay in such circumstances unless the counterparty to the jurisdiction clause can point to strong reasons for the court not to do so. That reflects the strong policy reasons – relating to party autonomy, the enforcement of bargains and commercial certainty – in favour of upholding agreements as to the forum in which disputes are to be resolved. Thus in the leading case *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, Lord Bingham (with whose speech the other members of the House of Lords agreed in all material respects) said:

> "[24] If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the Agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual form abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual form (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. …
>
> [25] Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause…".

107. The same is applied whether the contractual forum is England or a foreign jurisdiction: see, e.g., *Import Export Metro Ltd v Compania Sud Americana de Vapores S.A.* [2003] EWHC 11 (Comm), [2003] 1 Lloyd's Rep 405 § 14(i).

108. The policy reasons underlying the 'strong reasons' test have been underlined in a number of cases, including *Konkola Copper Mines plc v Coromin* [2006] EWHC 1093 (Comm) § 31; *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Co)* [2020] EWHC 2483 (Comm) § 85; *Catlin Syndicate Ltd v Amec Foster Wheeler USA Corp* [2020] EWHC 2530 (Comm) § 26; and the decision of the Singapore Court of Appeal in *Vinmar Overseas v PTT International* [2018] SGCA 65 § 72. Lord Bingham in *Donohue* referred to it as "*an important and substantial, and not a formal and technical, right*" (§ 29).

109. As to when strong reasons might exist, Lord Bingham in *Donohue* made the following observations:

> "[24] … Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria* [1970] P 94, 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see *Aérospatiale* at p 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case)."

110. The factors listed in *The Eleftheria*, to which Lord Bingham referred in the above passage, appear in the following passage from Brandon J's judgment:

> "The principles established by the authorities can, I think, be summarised as follows:
>
> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
>
> (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
>
> (3) The burden of proving such strong cause is on the plaintiffs.

> (4) In exercising its discretion the court should take into account all the circumstances of the particular case.
>
> (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:-
>
> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
>
> (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
>
> (c) With what country either party is connected, and how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
>
> (i) be deprived of security for their claim;
>
> (ii) be unable to enforce any judgment obtained;
>
> (iii) be faced with a time-bar not applicable in England; or
>
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."
>
> ([1970] P 94, 99–100, paragraph breaks interpolated)

Brandon J went on to say that:

> "… as to the prima facie case for a stay arising from the Greek jurisdiction clause, I think that it is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement. In this connection I think that the court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience." (p.103G)

Brandon J also regarded it as important that Greek law governed the dispute, which differed from English law in respects that might be material; and that there were advantages of questions of Greek law being decided by the Greek court (including the point that any appeal would be treated as involving a question of law rather than fact).

111. It is well established that to satisfy the 'strong reasons' test requires much more than the type of evaluation involved in a *forum non conveniens* assessment, particularly where the jurisdiction clause is exclusive: see, e.g., *JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep. 41 § 51; *Bas Capital Funding Corp v Medfinco Ltd* [2003] EWHC 1798 (Ch) § 192; *Antec International Limited v Biosafety USA Inc* [2006] EWHC 47 (Comm) § 7(iii). See also *Skype Technologies SA v Joltid Ltd* [2009] EWHC 2783 (Ch) § 33 per Lewison J:

> "It follows, in my judgment, that what one might call the standard considerations that arise in arguments about forum non conveniens should be given little weight in the face of an exclusive jurisdiction clause where the parties have chosen the courts of a neutral territory in the context of an agreement with world-wide application. Otherwise the exclusive jurisdiction clause would be deprived of its intended effect. Indeed, the more "neutral" the chosen forum was the less the importance the parties must have placed on the convenience of the forum for any particular dispute. If the standard considerations that arise in arguments about forum non conveniens were to be given full weight, they would almost always trump the parties' deliberate selection of a neutral forum. …"

112. It has been held in *forum non conveniens* cases that a 'real risk' of the denial of substantial justice can exist where requiring a claimant to proceed abroad would result in the claimant's arguable claim, under what the English court would consider the proper law, being likely or bound to fail because the foreign court would apply a different governing law to that claim. For example:

i) In *The Britannia Steamship Insurance Association Ltd & Ors. v Ausonia Assicurazioni S.P.A.* [1984] 2 Lloyd's Rep. 98, the proper law of the claimants' claims was English law (as the law governing their contracts of reinsurance with the defendants). The defendants challenged the English court's jurisdiction and sought a stay of the claims in favour of Italy. The claimant resisted the stay on the basis that the Italian courts would apply Italian law to certain questions of ostensible authority and ratification that were in dispute, and which, under Italian law, the claimant was likely to lose, thereby causing its entire claim to fail. At first instance, Hobhouse J said:

> "Therefore the situation is that if I set aside service, the Plaintiffs will be deprived of rights which exist under English law and will only be able to avail themselves of rights which almost certainly are not the same and are critically different under Italian law. This difference is likely on a balance of probabilities to lead to the failure of the Plaintiffs' case.
>
> Therefore there are strong reasons why the court should allow the English proceedings to go ahead because under English law which is the proper law of the contracts the Plaintiffs are entitled to those rights and to accede to the application would deprive the

> Plaintiffs of rights to which they are prima facie entitled. That is the cardinal point" (quoted at p.100 rhc)
>
> Hobhouse J. accordingly declined to stay the English proceedings. On appeal, his reasoning was endorsed by the Court of Appeal and the appeal dismissed (p.102 lhc).

ii) In *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, the proper law of the claimant's claim was Spanish law. The defendant sought a stay of the English proceedings in favour of the courts of the UAE, which would apply the law of the UAE, under which the claimant's claim was bound to fail. The Court of Appeal declined to grant a stay, Bingham LJ stating:

> "…I could not for my part regard it as conducive to justice to require Banco, as a party with an arguable claim under what we would hold to be the proper law…to litigate, if at all, in a jurisdiction where it would be bound on the evidence to face summary rejection of its claims. Had the discretion been mine, I would not have granted a stay." (p509 lhc)

iii) In *Golden Ocean v. Salgocar* [2011] 1 WLR 2575, the claimants sued under a guarantee the proper law of which, in English eyes, was English law. The defendants sought a stay of the English proceedings in favour of the Indian courts, where there was at least a very real risk that the guarantee would be deemed void and unenforceable (§142). Christopher Clarke J stated:

> "…the fact that an arguable claim under a contract governed (in English eyes) by English law will fail if it is adjudicated on in the only realistically alternative foreign court, because that court will apply some provision of its own law which invalidates a contract on the grounds of statutory prohibition or public policy, is a powerful indicator that England is the place where the claim can most suitably be tried for the interests of all the parties (which are that their disputes be determined in accordance with the law applicable to the contract between the parties) and the ends of justice (which are that the legitimate expectations of the parties, derived from the contract, are not confounded)…" (§143).

iv) In *Lungowe v. Vedanta Resources* [2020] AC 1045 Lord Briggs observed that: "*If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice.*" (§ 88)

Subject only to the foreseeability point, there is no logical reason why similar considerations should not be relevant in cases where an EJC exists but where the dispute involves the court making decisions about the effect of a separate

contract (here, the Leases) that is subject to a different law from the contract under which the claim is brought.

113. There are *dicta* in *Mercury Communications* and *Antec,* which I cite in the following section, suggesting that the claimant must show 'overwhelming' or 'very strong' reasons. The All Risks Defendants, though not the War Risks Defendants, relied on them. In my view, those *dicta* depart from the 'strong reasons' test authoritatively stated in *Donohue,* and followed in most of the later cases, and I consider them to overstate the matter. I would add that a likelihood (if established) of an unfair trial due to state interference or lack of judicial independence/impartiality would fall at or near the top end of the range of factors to which the court may properly have regard when contemplating declining a stay, and could readily be regarded as a 'very strong' or 'overwhelming' reason to do so.

(2) Relevance of foreseeability

114. It has been held in a series of cases that foreseeable factors of convenience, including the location of documents or witnesses and the likely speed of litigation, should not be regarded as strong reasons for declining to grant a stay.

i) In *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368 the court dismissed an application to set aside service out in light of the English exclusive jurisdiction clause in the parties' agreement. Waller J stated that in order to justify not enforcing the jurisdiction clause it was necessary to "*point to some factor which could not have been foreseen on which they rely in order to displace the bargain which they made*" (p.376). He continued:

> "where the factors relied on would have been eminently foreseeable at the time that they entered into the contract…Surely they [i.e. DHC] must point to some factor which they could not have foreseen on which they can rely for displacing the bargain which they made i.e. that they would not object to the jurisdiction of the English Court. Adopting that approach it seems to me that the inconvenience for witnesses, the location of documents, the timing of a trial, and all such like matters, are aspects which they are simply precluded from raising." (p.376, my emphasis)

DHC had sought a stay of English proceedings in favour of Texan proceedings in the face of an English exclusive jurisdiction clause.

ii) In *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All E.R. (Comm) 33, the court refused a stay of English proceedings where the parties' agreement contained a non-exclusive English jurisdiction clause. The stay had been sought on the grounds of *forum non conveniens*, relying particularly on the existence of the Californian proceedings which raised the same issues as the English proceedings. Moore-Bick J said:

> "As Waller J. subsequently made clear [in *British Aerospace*], he

> considered that the inclusion in the contract of a non-exclusive jurisdiction clause made it appropriate to approach the issue of forum conveniens as if the plaintiff had founded jurisdiction here as of right. To that extent his comments relate directly to the position in the present case. In principle I would respectfully agree with that approach. Although I think that the court is entitled to have regard to all the circumstances of the case, particular weight should in my view attach to the fact that the defendant has freely agreed as part of his bargain to submit to the jurisdiction. In principle he should be held to that bargain unless there are overwhelming reasons to the contrary. I would not go so far as to say that the court will never grant a stay unless circumstances have arisen which could not have been foreseen at the time the contract was made, but the cases in which it will do so are likely to be rare…" (p.41)

iii) *Konkola Copper Mines Plc v Coromin Ltd* [2006] 2 Lloyd's Rep 446 involved a claim against (i) local insurers in Zambia who argued that there was an EJC in favour of Zambian Courts in the relevant policy; and (ii) Bermudan based insurers whose contract contained an English law and jurisdiction clause. In setting aside service against the local Zambian insurers, Colman J stated:

> "31. The concept that it is not normally open to an overseas defendant seeking to set aside service in the face of a non-exclusive English jurisdiction clause which had been freely negotiated to rely in support of a *forum non conveniens* argument on factors of inconvenience which he ought reasonably to have appreciated might arise when he entered into the jurisdiction agreement presents itself to me as entirely correct in principle. Were it otherwise, it would be open to a defendant to invite the court to exercise a discretion to enable him to escape from his contract for reasons of which he ran the risk of occurrence from the outset. In such circumstances procedural inconvenience clearly has to yield to the public policy of holding him to his contract.
>
> 32. I have no doubt that if, as I am sure, that approach should be applicable in the case of the *forum non conveniens* analysis required in the case of a non-exclusive jurisdiction clause, it must in principle also be applicable to the 'strong cause/strong reasons' analysis required in the case of an exclusive jurisdiction clause. Thus, for example, it should not be open to a party seeking to justify service outside the jurisdiction in contravention of a foreign jurisdiction to rely as grounds for strong cause or reasons the risk of inconsistent decisions of different courts when he ought to have appreciated the existence of that risk at the time when he entered into the exclusive jurisdiction clause."

iv) In *Euromark v Smash Enterprises* [2013] EWHC 1627 (QB) an Australian exclusive jurisdiction clause was enforced and English proceedings brought in breach of that clause stayed. Coulson J explained that:

> "[14] Where there is an exclusive jurisdiction clause, particularly if it selects the 'home' court of one of the contracting parties, foreseeable questions of convenience are irrelevant (see *Beazley (on behalf of Lloyd's Marine Towage Insurance) v Horizon Offshore Contractors Inc* [2004] EWHC 2555 (Comm). This principle was summarised by Gloster J, as she then was, in *Antec International Limited v Biosafety USA Inc* [2006] EWHC 47 (Comm) where she said:
>
> > 'Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain…'
>
> [15] In essence, the party seeking to invoke the jurisdiction of the English court in the face of an exclusive jurisdiction clause, which provides for disputes to be determined in a foreign court, must point to a factor which could not have been foreseen when the contract was made. Moreover, what matters is whether it ought to have been foreseen, not whether it actually was (see by way of example the judgment of Moore-Bick J, as he then was, in *Mercury Communications Ltd v Communications Telesystems International* [1992] All ER (Comm) 33))."

115. There are similar statements in numerous other authorities in this area, in relation to both English and foreign jurisdiction clauses: see, e.g., *Ace Insurance SA-NV v Zürich Insurance Co* [2001] EWCA Civ 173 § 62 (foreign exclusive jurisdiction clause, stay of English proceedings upheld on appeal); *Import Export Metro Ltd* § 15 (English exclusive jurisdiction clause, stay application in favour of parallel Chilean proceedings refused); *Clifford Chance LLP v Societe Generale SA* [2023] EWHC 2682 (Comm) § 81.

116. As noted above, one of the factors in *The Eleftheria* list, approved in *Donohue* § 24 as setting out "*some of the matters which might properly be regarded by the court when exercising its discretion*" (and noted as having been repeatedly cited and applied in other cases), is:

> "Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would … for political, racial,

> religious or other reasons be unlikely to get a fair trial." ([1970] P. 94, 100)

117. A series of judicial statements touch on the relevance or otherwise of foreseeability when assessing whether a matter concerning the interests of justice provides a strong reason for declining to exercise the court's discretion to grant a stay.

118. In *Sinochem v Mobil Sales* [2000] 1 Lloyd's Rep 670, Rix J said:

> "… of fundamental importance, it is in my judgment a principle of the Court's residual discretion to stay even proceedings commenced in the consensual forum of an exclusive jurisdiction clause that the strong cause which needs to be shown if that discretion is to be exercised must go beyond matters of mere convenience and must enter into the interests of justice itself. After all, when the parties agree to an exclusive forum for their disputes, they are or must be treated as being mindful both that they have chosen for themselves where such considerations of convenience take them and also that their choice may override pure matters of convenience… As Mr Justice Waller put it… in *British Aerospace v Dee Howard…* it is necessary to point to some factor which could not have been foreseen in order to displace the bargain which has been agreed. He was there talking about matters of convenience. <u>It is or may be different, however, where the quality of the consideration is different and goes to a matter of justice, although even in such a case it might be said that the factor in question should be regarded as having been foreseen and encompassed in the bargain struck.</u>" (emphasis added) (§ 53, my emphasis)

119. Insofar as Rix J in that passage was willing to contemplate foreseeability being relevant to a "*matter of justice*", it is relevant to contemplate which types of matter that term might encompass. For example, the *Eleftheria* factors include:

> "Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
>
> (i) be deprived of security for their claim;
>
> (ii) be unable to enforce any judgment obtained;
>
> (iii) be faced with a time-bar not applicable in England;
> …"

Such matters might be classified as going beyond mere convenience and amounting to matters of justice. The same could perhaps also be said of rules about availability of disclosure, witness evidence, cross-examination or appeals, or the extreme length of proceedings in some jurisdictions. It is one thing to say that a party to an exclusive jurisdiction clause will or could have foreseen (and cannot complain) that proceedings in the chosen court would not allow

witnesses to be heard, would not permit cross-examination of witnesses, would take a very long time, or would not result in an enforceable judgment. It is inherent in the bargain reflected by an EJC that the chosen overseas court may do justice in different ways from an English court, or in ways that an English court might consider less than perfect. It is a qualitatively different thing to argue that the party cannot ask the court to decline a stay on the ground that it could have foreseen that the chosen court would not provide a fair trial by reason of state interference or lack of judicial impartiality or independence.

120. I would not therefore read Rix J's observations in *Sinochem* as implying that the court should refuse to take into account the prospect of the chosen court failing, for such reasons, to provide a fair trial on the grounds that it was foreseeable. Indeed, were that the position, one might have expected the discussion of fairness of trial in the *Eleftheria* and other cases to have been expressed significantly differently (for example, by stating that 'strong reason' to refuse a stay may exist if a fair trial is unlikely in the chosen court 'by reason of some unforeseeable development that has occurred since the contract was made').

121. In *Ace v Zurich Insurance Co Ltd* [2001] EWCA Civ 173 1 Lloyd's Rep 618, Rix LJ contemplated that "*some matter which lies beyond considerations of convenience and goes to a matter of justice*" (§ 62) could constitute a good reason for disapplying an exclusive jurisdiction clause.

122. Similarly, Gross J in *Import Export Metro Ltd* said:

> "I respectfully adopt the approach of Waller, J [in *British Aerospace v Dee Howard*] to foreseeable matters of convenience, as explained or qualified in a number of subsequent authorities. While all the circumstances are to be taken into account and it cannot be said that the court will never release a party from a bargain contained in an EJC unless circumstances have arisen which could not have been foreseen at the time the contract was entered into, releases on the ground only of foreseeable matters of convenience are likely to be rare; the approach adopted by Waller, J. may be said to provide the general benchmark. <u>In the nature of things, for the court to exercise its jurisdiction so as not to give effect to an EJC, the "strong reasons" relied on must ordinarily go beyond a mere matter of foreseeable convenience and extend either to some unforeseeable matter of convenience or enter into the interests of justice itself</u>". (§ 15, my emphasis)

The last sentence quoted above implies that, unlike for matters of convenience, unforeseeability need not be shown in respect of matters pertaining to the interests of justice itself.

123. In *Antec International* Gloster J (having stated the test in terms of a requirement for *"overwhelming, or at least very strong, reasons"*) said:

> "Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the

> contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded." (§ 7(iii), my emphasis)

Antec was not a case about fairness of trial. However, it is notable that Gloster J did not appear to treat unforeseeability as a requirement as regards "*exceptional circumstances involving the interests of justice*". It is not entirely clear whether, in the underlined passage, Gloster J meant that reasons involving interests of justice were of themselves exceptional, or that only exceptional justice-related circumstances would suffice. If the latter, then the question would arise of how to reconcile that with the way the factor is expressed in *Eleftheria* and in other cases mentioning fairness of trial. In any event, it seems to me that a situation where a party would be unlikely to receive a fair trial due to state interference or lack of judicial independence/impartiality would be an exceptional circumstance involving the interests of justice.

124. *CH Offshore v PDV Marina* [2015] EWHC 595 (Comm) involved an application to set aside service of English proceedings against PDVSA (a Venezuelan state-owned oil company) where there was an exclusive Venezuelan jurisdiction clause. Carr J found that the evidence did not show that the Venezuelan courts would be biased in favour of PDVSA; adding that *"[f]inally and in any event, the alleged bias was foreseeable at the time of the Services Contract."* (§ 87). There was, though, no further discussion of that additional point or of how it fitted with the authorities mentioned above. I would not regard *CH Offshore* as authority for the proposition that foreseeability of an unfair trial precludes that being a strong reason for declining a stay. Moreover, *CH Offshore* could reasonably be regarded as a case where – had the claimant been correct about bias in favour of PDVSA – then bias would have been foreseeable in any dispute arising under the contract. Such reasoning could not be extended to situations where a dispute under a contract might or might not engage state interests or create a risk of bias (or state intervention) depending on the nature of the dispute arising.

125. The authorities summarised in §§ 106-124 above, taken as a whole, support the following propositions relevant to whether the prospect of an unfair trial in the court chosen in an exclusive jurisdiction clause is a strong reason to decline a stay of English proceedings (or, *mutatis mutandis*, to decline to restrain proceedings abroad in breach of an exclusive jurisdiction agreement):

i) The court is not bound to grant a stay but has discretion to do so (*Eleftheria* factor (1), *Donohue* § 24).

ii) There can be no absolute or inflexible rule governing the exercise of the discretion (*Donohue* § 24).

iii) However, the English court will ordinarily exercise its discretion by granting a stay of proceedings unless the claimant can show strong reasons for suing in England (*Donohue* § 24).

iv) What constitutes a strong reason *"will depend on all the facts and circumstances of the particular case"* (*Donohue* § 24; see also *Eleftheria* factor (4)).

v) The burden of showing strong reason is on the claimant (*Eleftheria* factor (4), *Donohue* § 24).

vi) Strong reasons are not shown merely by establishing factors that would make England the appropriate forum on a *forum non conveniens* analysis.

vii) Foreseeable factors of (mere) convenience should not be regarded as strong reasons to decline a stay (see the cases referred to in §§ 114-115 above).

viii) Regard can properly be had to whether the claimant would be prejudiced by having to sue in the foreign court because they would, for political, racial, religious or other reasons, be unlikely to get a fair trial (*Eleftheria* factor (5)(e)(iv), approved in *Donohue* § 24).

ix) There are some judicial statements suggesting that even a matter pertaining to the interests of justice might not amount to a 'strong reason' if it was foreseeable and could be regarded as encompassed within the parties' bargain in agreeing to the jurisdiction clause. However, the preponderance of the cases treat the interests of justice differently in that regard from factors of mere convenience.

126. The War Risks Reinsurers submit that, in principle, no distinction should be drawn between foreseeable "*convenience*" or "*interests of justice*" factors: in either case, where they are foreseeable, they should be taken to have been 'priced in' to the parties' bargain from which they should not be permitted to resile on the basis that it is now perceived to be a bad or unfair bargain. They submit that the cases which refer to such a potential distinction do so in equivocal terms, or at least make clear that the circumstances in which foreseeable matters can override the jurisdiction agreement are "*exceptional*" and that even where the interests of justice are engaged it is by no means inevitable that a jurisdiction clause will not be enforced. Accordingly, they say, in the circumstances of this case the Claimants ought to be permitted to invoke 'justice' factors such as alleged risk in relation to their obtaining a fair trial in Russia only to the extent that such factors were not objectively foreseeable when jurisdiction was agreed. On any view, even if there is a distinction to be drawn, the significance of 'justice' factors is substantially reduced where they were foreseeable at the time of contracting.

127. The All Risks Reinsurers accept that the interests of justice engaged by the risk of an unfair trial involve different considerations from those applicable to factors of mere convenience. Nonetheless, they say, the test still requires, as Gloster J put it in *Antec*, "*exceptional circumstances involving the interests of justice*". They submit that a party must be taken to have assumed such risk as was present or reasonably foreseeable at the time of contracting, including a risk of an unfair trial: that is a risk that commercial parties can assess, just as they

can assess the other potential risks and rewards of carrying on business in unusual locations. Hence, All Risks Reinsurers say, parties who contract into a particular legal system should be held to their bargain unless the nature of that risk has become qualitatively different and materially greater than that at the time of contracting. In all but the most exceptional cases, the parties' freedom of contract should prevail.

128. Insofar as the Defendants' submissions, as summarised above, propose something approaching a hard-edged test based on foreseeability of an unfair trial, I consider them to go further than can properly be supported by the authorities or principle. As I have already summarised, the leading case, *Donohue*, states the test as being that *"strong reasons"* will *"ordinarily"* be required, and indicates that what constitutes *"strong reasons"* is to be decided having regard to all the circumstances of the case. The later authorities in general distinguish between factors of convenience and considerations of justice when discussing foreseeability. In principle, an unfair trial is, as I have already noted, qualitatively different both from disadvantages relating to pure convenience (such as location of witnesses and documents, and perhaps governing law) and from justice-related matters such as availability of appeals, disclosure and cross-examination.

129. I see more logical force in War Risks Reinsurers' alternative submission that the significance of 'justice' factors is *reduced* where they were foreseeable at the time of contracting. As noted earlier, a cogent argument can be made that, having agreed to a particular forum, a party should not normally be allowed to avoid it on grounds relating to (for example) its approach to appeals, disclosure or the admission or testing of evidence. However, a case where a party is unlikely to receive a fair trial in the agreed forum, due to state intervention and/or lack of judicial independence/impartiality, is high on the spectrum of cases engaging the 'interests of justice'. Particularly in those circumstances, the highest the matter can in my view be put is that, if and to the extent that a risk of an unfair trial was foreseeable, that is a factor the court should bear in mind in deciding whether 'strong reasons' have been shown and whether to exercise its discretion to grant a stay.

130. Even on the footing that foreseeability of a risk of an unfair trial may be a relevant consideration, it is likely to carry weight only to the extent that the parties could foresee a risk of an unfair trial in respect of the kind of dispute likely to arise under their contract. Mere foreseeability in the abstract is likely to be of little relevance. For example, if it was not foreseeable that a dispute under the contract in question would be likely to engage state or other interests such as to give rise to a material risk of an unfair trial, then the argument that unfairness has been 'priced into the bargain' will have little force. That will remain the case even if, as matters turn out, a series of events occur whose effect is that the state does take an interest in the dispute.

131. To take a simplistic example, a foreign motor insurer doing business in a country whose courts are susceptible to state interference might have no particular grounds on which to expect an unfair trial in the event of a dispute with a policyholder. However, if the particular claimant in a dispute turned out to be a high-ranking member of the government, then the position might be very

different. Of course, the foreseeability argument might be framed at a higher level of generality by saying that it was foreseeable that *if* there happened to be a dispute with a high-ranking member of the government, then a fair trial would be unlikely. However, that would be a *reductio ad absurdum* argument, and, in any event, not one that would preclude the court from regarding the likelihood of an unfair trial of that particular case as a strong reason not to grant a stay (assuming, of course, that the defendant was otherwise subject to the English court's jurisdiction).

(3) Degree of likelihood or risk of an unfair trial

132. The Claimants submit that it is sufficient for them to show a real risk that they would not receive a fair trial in Russia. That is, they say, because (i) the test is whether there are 'strong reasons' not to grant a stay, and (ii) self-evidently, a real risk of injustice constitutes a strong (indeed, compelling) reason why a party should not be required to litigate in the contractual forum. It cannot be right that the English court could form the view that there is a real risk of injustice and nevertheless require a party to run that risk, merely because it is unable to establish that this necessarily hypothetical scenario will in fact arise.

133. The standard of a "*real risk*" of injustice has been adopted in the context of applications for permission to serve out and for stays on *forum non conveniens* grounds. The rationale for adopting that test (as opposed to the balance of probabilities) is that the court cannot, at an interlocutory hearing without cross-examination, make a finding on the balance of probabilities as to whether a future risk will eventuate. That rationale, the Claimants say, applies equally in the present case.

134. No authority has expressly considered the standard of proof applicable where a jurisdiction agreement is engaged. Although there are *dicta* which might be said to use language consistent with the balance of probabilities (including criterion (5)(e)(iv) in the *Eleftheria*), the same is true in the *forum non conveniens* context (e.g. *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, where Lord Goff referred at 478 to "*the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction"*), where it is nonetheless well-established that the test is a "*real risk*" of injustice. Conversely, in *Euromark* (an EJC case), Coulson J stated, *a propos* the reference in *Import Export* to the *"interests of justice"*:

> "In my view, this phrase, in the context of an exclusive jurisdiction clause, does not require a broad consideration of the merits of the parties' competing positions, but is instead designed to deal with those rare cases where, although there is an exclusive jurisdiction clause, the courts to which such jurisdiction has been given may not afford a fair trial, or may, in some other way, be potentially unreliable or unjust." (§ 19, my emphasis)

135. The test in the *forum non conveniens* context was considered by the Privy Council in *AK Investment CJSC v Kyrgyz Mobil* [2011] UKPC 7, [2012] 1 WLR

1804. Rejecting the submission that it was necessary to establish that the claimant would not obtain justice in the foreign court, Lord Collins said:

> "*The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice 'will not' be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances*." (§ 95)

136. Lord Collins referred at § 94 to two decisions of the Court of Appeal. The first was *Cherney v Deripaska* [2009] EWCA Civ 849, where Waller LJ said:

> "I should make clear again, having regard to points made by Mr Malek, that the judge is not conducting a trial. It is not a situation in which he has to be satisfied on the balance of probabilities that facts have been established. He is in many instances seeking to assess risks of what might occur in the future. In so doing he must have evidence that the risk exists, but it is not and cannot be a requirement that he should find on the balance of probabilities that the risks will eventuate, e.g. as in this case that assassination will occur. He has only statements and experts' reports on which he is not going to hear cross examination. He is able, of course, to take a view as to the cogency of the evidence at that stage." (§ 29, my emphasis)

Similarly, Moore-Bick LJ said:

> "[Mr Malek] submitted that before taking any individual factor into account the judge had to be satisfied by cogent evidence that the event in question would in fact occur, but a little reflection is sufficient to make one realise that that cannot be the right test. All one can ever do when considering what will happen in the future is to assess the degree of likelihood that the event in question will occur; and the degree of likelihood required to justify taking the risk seriously will depend on the nature of that event. In most ordinary cases a person cannot reasonably be expected to accept more than a slight degree of increase in the risk of assassination, but a greater degree of risk of government interference in the judicial process might be thought acceptable. These are very much matters for the judge hearing the application." (§ 59, my emphasis)

137. The second case was *Pacific International Sports Club Ltd v Surkis* [2010] EWCA Civ 753. Blackburne J held at first instance ([2009] EWHC 1839 (Ch)) that there was insufficient evidence "*to justify a finding that Pacific will be denied justice in Ukraine if it is compelled to litigate its claims in the courts of that country*" (§ 91). It was argued on appeal that the judge had wrongly required Pacific to prove as a fact that it would not receive a fair trial in Ukraine (§§ 32-33)). Mummery LJ held:

> "On this issue I am quite satisfied that this very experienced judge was not under any misunderstanding as to what case Pacific had to make out and that there was no self-misdirection on his part. He was fully aware that he was assessing the risk of injustice to Pacific in the courts of Ukraine and that he was not required to make a finding of future fact on the balance of probabilities. The references to "unavailability", to "will" rather than "may" and to "cogency of evidence" do not indicate that the judge misunderstood what he was doing or supposed to be doing. The judge was reflecting the language in which the opinions in the leading cases are expressed: see, for example, *The Abidin Daver* [1984] 1 AC 398 at 411 per Lord Diplock and the *Spiliada* at 478D-F per Lord Goff. In assessing a present risk of a future event it is meaningful to use expressions like "cogent evidence" or "insufficiently cogent evidence" to describe the evidence that relates to assessing the degree of risk. It does not mean that the judge took an unreasonably strict view of what evidence Pacific was required to produce to establish the risk." (§ 34, my emphasis)

and:

> "It is valid to refer to whether an event "will" occur or whether something such as justice "will be unavailable" as long as one is clear that the exercise undertaken is one of assessing the likelihood of the risk that something, like an unfair trial of Pacific's claims, will happen rather than proof of the fact that an event will probably happen in the future." (§ 35)

138. In *BB v Al Khayat* [2021] EWHC 1499 (QB), the claimants applied for permission to cross-examine three witnesses whose statements had been served in advance of a hearing of an application for a stay on grounds of *forum non conveniens*. Chamberlain J referred to Waller LJ's judgment in *Cherney* and stated at that the "*task of the court on a stay application is not to make findings of fact applying a standard of proof, but rather to consider in a more open-textured way the risks if the trial were to take place in another forum…*" (§ 46).

139. In *Popoviciu v Curtea De Apel Bucharest* [2023] UKSC 39; [2023] 1 WLR 4256 Lord Lloyd-Jones endorsed the view that *"[t]he concept of real risk was generally used in a forward-looking sense to refer to the probability that an adverse event which had not yet occurred would occur in the future, whereas different concepts such as proof on the balance of probabilities were generally used for establishing how likely it was that something had happened in the past"* (§ 70).

140. Thus, the Claimants say, the rationale for the test being that of a "*real risk*" of injustice in the context of *forum non conveniens* is that a judge cannot make a finding on the balance of probabilities, because (i) the inquiry is by its nature hypothetical and speculative; and (ii) at the interlocutory stage without the benefit of cross-examination, the judge cannot reach a concluded finding of fact. They submit that that rationale applies equally in the present context, and that it

follows that the same test should also apply (citing, by way of further support, the view expressed in *Joseph ("Jurisdiction and Arbitration Agreements and their Enforcement",* 3rd ed., § 10.29) that the test articulated in *AK Investment* also applies where a jurisdiction agreement is engaged).

141. I do not think it follows from the fact that the test is necessarily prospective that 'real risk' is necessarily the appropriate criterion. Moreover, I see force in the Defendants' submission that a higher standard may be appropriate where there is an exclusive jurisdiction clause because:

i) it is supported by authority, to the extent that the *Eleftheria* formulation, forming part of the list of factors approved in *Donohue*, is *"unlikely to get a fair trial"*;

ii) a more stringent test than 'real risk' is appropriate when relied on as a ground to decline to give effect to a contractual agreement as to forum, in order to respect party autonomy and give proper weight to the principle of English law that parties should be held to their bargains;

iii) following on from (ii), in the specific context of jurisdiction agreements, a higher standard than 'real risk' is appropriate in order to reflect the 'strong reasons' criterion, and the courts' acceptance that an EJC is "*the most 'stringent' form of jurisdiction clause*" (*Deutsche Bank AG v. Sebastian Holdings Inc.* [2009] EWHC 3069 (Comm) §§ 15-17);

iv) the relevant enquiry is fundamentally different from the balancing exercise called for by the second stage of the *Spiliada* test, where no question of contractual entitlement arises;

v) an EJC case involves the same policy considerations as lie behind the mandatory stay imposed by Section 9 of the Arbitration Act 1996 and the very high bar in Article 6(c) of the Hague Convention of 30 June 2005 on Choice of Court Agreements. Article 6(c) requires enforcement of EJCs unless (inter alia) the court seised is satisfied that giving effect to the EJC "*would lead to manifest injustice*", a test which Twomey J in the Irish case *Compagnie de Bauxite v. GTLK* [2023] IEHC 234 §§ 39-40 stated requires a party to show that there is very little or no doubt that a very obvious injustice will arise if the EJC is applied; and

vi) the courts use a higher standard than 'real risk' when assessing, in other interlocutory contexts involving departure from a party's *prima facie* entitlements, whether a future event will occur; for example:

a) where it is alleged that a defendant, who is otherwise entitled to security for costs, is to be deprived of such an order on the basis that it would be "*likely*" to stifle the claim or appeal and deprive the claimant of its right to a fair trial, the claimant must show on a balance of probabilities that its claim will be stifled (*Responsible Development for Abaco Ltd v. Christie* [2023] UKPC 2 § 67);

b) where a party applies for an order restraining freedom of expression *"... the general approach should be that the courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at trial"* (*Cream Holdings v. Banerjee* [2004] UKHL 44 § 22; and

c) An applicant for an anti-suit injunction seeking to restrain proceedings brought in breach of an EJC or arbitration agreement must show a '*high probability of success'* both that the agreement exists and that the foreign proceedings fall within its scope, because, if the order is granted, it will interfere with the workings of a foreign court and is likely to end the foreign proceedings (*LCC Eurochem North-West-2 v Tecnimont SpA* [2023] EWCA Civ 688 § 113 *per* Nugee LJ; *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 §§ 89-91).

142. The All Risks Defendants accordingly submit that the Claimants must show that *"it is likely that justice will not be obtained in the agreed forum"*. Similarly, the War Risks Defendants submit that the requirement is for the court to be satisfied, on the balance of probabilities, that the claimant will receive an unfair trial in the agreed forum. Although used in *Responsible Development for Abaco* in a prospective sense, the terminology of 'balance of probabilities' is more familiarly applied to past events, as noted in the passage from *Popoviciu* quoted above. The War Risks Defendants use it here in the sense of the claimant having to show that it is more likely than not that it will get an unfair trial (or, in other words, less likely than not that it will get a fair trial). Subject to that clarification, it comports in my view with the ordinary meaning of the expression *"unlikely to get a fair trial"* used in *Eleftheria*.

143. Bearing in mind that the court ultimately has to exercise a discretion, having regard to the normal 'strong reasons' criterion, and is required to have regard to all the relevant circumstances, it is perhaps inappropriate to search for a uniquely applicable test for the degree of risk of an unfair trial. However, having regard to the considerations outlined in § 141 above, I consider that it will generally be unlikely to be sufficient merely to show a 'real risk' of an unfair trial, if that means no more than something akin to a plausible or arguable case. Rather, I consider that it will generally be necessary to show that the preponderance (in terms of weight and cogency) of the evidence indicates that it is likely that the agreed forum will not provide a fair trial. I would not, however, express the test in terms of having to prove the matter on the balance of probabilities. As Christopher Clarke J pointed out in *Cherney v Deripaska* (in the context of a *forum non conveniens* assessment), proof on the balance of probabilities would imply a finding of fact, rather than a decision about the strength of arguments, and would probably require the availability of oral evidence and discovery. That is not the process which the court undertakes, or should have to undertake, when deciding whether strong reasons exist to decline to exercise its discretion to grant a stay in order to give effect to a jurisdiction clause.

144. I mention one further point for completeness. In oral submissions, counsel for the MLB Claimants made reference to Article 6 of the ECHR, to which counsel for the All Risks Defendants responded by reference to the Supreme Court's decision in *Popoviciu*, an extradition case. The Supreme Court among other things considered (*obiter*, since the extradition request had been withdrawn) the ECHR case law about the circumstances in which a state should decline to grant an extradition request on the ground that the applicant's trial in the requesting state had been flagrantly unfair such that, by extraditing, the requested state would itself breach the applicant's rights. At § 51, the Supreme Court said:

> "Two matters call for comment at this point. First, the Strasbourg court is not addressing any procedural unfairness contrary to Convention standards; rather, it contemplates that a flagrant denial of the standards of a fair trial might give rise to the responsibility of the extraditing Contracting State. In *Othman v United Kingdom* (2012) 55 EHRR 1 the Strasbourg B court considered it noteworthy that, in the 22 years since the *Soering* judgment, the court had never found that an expulsion would be in violation of article 6, a matter which served to underline its view that "*flagrant denial of justice*" is a stringent test of unfairness.
>
> > "A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article." (Para 260.) (See also Ahorugeze v Sweden (2011) 55 EHRR 2 at paras 115, 116.)"

145. All Risks Defendants submitted that, insofar as the MLB Claimants might be submitting that the English court could be in breach of Article 6 by granting a stay in favour of proceedings in Russia, that could be the case only in the most exceptional circumstances involving a prospective flagrant denial of the right to a fair trial. All Risks Defendants did not suggest, and there is no authority for the view, that the English court should decline a stay, on the grounds of a prospective unfair trial in the chosen court, only if the grant of a stay would place the English court in breach of the claimant's Convention rights. Nor is there any logical reason why that should be the test: the considerations that apply in the present context, when exercising a discretion in a context involving private rights, are markedly different from those which arise in the extradition context, with its backdrop of international mutual assistance obligations. The test in the present context is settled by *Donohue*. I did not in fact understand the MLB Claimants to be suggesting that Article 6 was directly engaged: merely that it underlines the fundamental nature of the right to a fair trial.

(4) Relevance of whether jurisdiction clause freely adopted

146. The quotations above from *Mercury Communications* and *Konkola* include reference to the jurisdiction clause having been freely adopted.

147. Waller J in *British Aerospace plc v Dee Howard Co,* in finding that the defendant should not be permitted to complain of foreseeable differences between the merits of litigation in Texas and in London, highlighted the fact that the jurisdiction clause there was not a standard term incorporated by reference, or a term similar to that placed in standard form on the front of an insurance document, but had been freely negotiated (p.376).

148. In *The Bergen* [1997] 2 Lloyd's Rep 710, Clarke J said:

> "I recognize that there is a spectrum of cases from the case where the parties have negotiated the jurisdiction clause at one end to the case of a one-off standard term contract at the other and that the Court is perhaps less likely to find the necessary strong cause established in the former case than in the latter." (p.715)

149. HHJ Chambers QC in *JP Morgan* referred to Waller J's comments in *British Aerospace* and stated:

> "Later at p. 376 of the report, Mr. Justice Waller places emphasis upon the fact that the clause was freely negotiated, as against being part of a standard form contract. This is an aspect upon which MNI places some weight. But, at least in this case, I do not think that it goes any distance… It is not suggested that the clause was imposed upon MNI against its wishes nor can it be the case that MNI was unaware of the clause. I do not understand the expression "freely negotiated" to mean that the parties must have subjected the clause to some sort of bargaining process. All it means is that the party that was subject to the obligation acted freely in adopting it." (§ 46)

150. For my part, however, I consider it clear that Waller J in *British Aerospace* was drawing a distinction between bespoke jurisdiction clauses and those set out in standard terms or incorporated by reference. That also appears to be the sense in which Gross J, in *Import Export*, understood Waller J's comments. However, Gross J stated that it did not matter that a clause had not been specifically or individually negotiated, provided it was freely adopted:

> "(iii) In *BAe* (sup.), Mr. Justice Waller (at p. 376) underlined the fact that the EJC there had been "freely negotiated" and was not a standard term. No doubt, where an EJC has been specifically or individually negotiated, that is all the more reason for holding the parties to the bargain thereby struck. However, the force of the "general rule" as stated by Lord Bingham is not in any sense weakened where that is not the case, at least provided it can be said that the party subject to the obligation contained in the EJC

> acted freely in adopting it: see *Mercury* …, at p. 41 and *[JP Morgan Securities Asia Private Ltd]* …, at p. 45." (§ 14(iii))

151. Despite that statement, Toulson LJ in the later case *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725 stated that *"[a]nother possibly relevant factor (to which Waller J drew attention in the British Aerospace case) may be whether the choice of non-exclusive jurisdiction was specially negotiated or was contained in a standard form of contract.*" (§ 64).

152. The Claimants submit that, though the authorities thus do not speak with one voice on the matter, it is logical that a party who did not negotiate and/or was unaware of a jurisdiction agreement should not be precluded from relying on matters that would have been a foreseeable consequence of an EJC. They do not dispute that the party may in such circumstances still be bound by the clause: and, indeed, that is no doubt the basis on which the Claimants by and large accept that the Defendants have a good arguable case that the EJCs here apply. However, the Claimants submit that lack of negotiation and/or awareness remains relevant when applying the 'strong reason' test.

153. The Claimants also refer to *Joseph ("Jurisdiction and Arbitration Agreements and their Enforcement",* 3rd ed.) § 10.13:

> "In approaching this question, the courts recognise that there is something of a difference between a freely negotiated neutral court jurisdiction clause and an agreement contained within a set of standard terms. The weight to be attached to this, however, will depend on all the circumstances. The courts recognise that there is a spectrum of possible circumstances ranging from a fully negotiated jurisdiction clause to a standard term included as one of a number of provisions in the parties' bargain. [Fn1] Where, however, the jurisdiction agreement is contained within a well-known industry-standard form which had been used by the parties previously, little weight will be attached to this distinction. [Fn 2] …"

citing *The Bergen* [1997] 2 Lloyd's Rep. 710, 715; *OT Africa Line v Magic Sportswear* [2005] 2 Lloyd's Rep. 170 and *The Hornbay* [2006] 2 Lloyd's Rep. 44. The qualification relating to well-known and previously used standard terms has some relevance to the present case, in light of my conclusions in § 40 above.

154. I consider the better view to be that the fact (if it be the fact) that an EJC was not specifically or individually negotiated has no freestanding significance, whether the court is considering the prior issue of whether the party is bound by the clause, or considering whether to exercise its discretion to grant a stay, provided that it was freely adopted in the sense that the party had a choice whether or not to contract on the terms which in fact included the EJC. It does not follow, though, that a party's lack of actual awareness of an EJC is irrelevant: I consider that topic below.

155. The Defendants submit that the Claimants' status as third parties to the reinsurance policies is also irrelevant when considering foreseeability, because:

i) A third party generally cannot take on another's contractual rights without accepting the agreed framework for the contract's enforcement: see, e.g., *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805 esp. at §§ 85-97; *The Jay Bola* [1997] 2 Lloyd's Rep 279, 286 (per Hobhouse LJ), approved in *Aspen Underwriting Ltd and others v Credit Europe Bank NV* [2020] UKSC 11, §§ 26-27 (per Lord Hodge); and *Briggs, Civil Jurisdiction and Judgments* (7th ed., 2021), at §23.12:

> "Where there is a simple assignment of the benefit of a contract, or where the claimant is subrogated to the rights of a contracting party, it is pretty clear that, as a matter of English law at least, the rights may be exercised only within the terms of the jurisdiction, or litigation, or arbitration agreement which was originally agreed to. The legal basis for the conclusion is debatable, but the better view may be that it is inequitable or unconscionable to take up, take over or take on another's contractual right without accepting the agreed framework for its enforcement."

ii) This is true where the claimant sues as assignee (as noted in the passage in *Briggs* cited above), and *a fortiori* when the third party is seeking to enforce the contract directly (as the Claimants seek to do via the cut-through clauses in this case), or pursuant to the Contracts (Rights of Third Parties) Act 1999: see, by analogy, *Axis Corporate Capital UK Ltd and others v Absa Group Ltd and others* [2021] EWHC 225 (Comm) §§ 62-63 (a case, like the present, involving claims against reinsurers by non-parties to the Reinsurance Policies):

> "[62] The last point in this respect that I should mention is that ABSA Group, ABSA Bank and ABSA Nominees' claims in the South African proceedings are brought as contractual claims under the 2009/2010 reinsurances, alternatively the 2008/2009 reinsurances, and then alternatively under section 1 of the Contracts (Rights of Third Parties) Act 1999. On each of these bases, they are effectively seeking to exercise the rights of the reinsured, ABSA Manx. On any of these bases, the jurisdiction agreements are enforceable against the defendants. They cannot take the benefit of those contracts without also subjecting themselves to the exclusive jurisdiction clauses.
>
> [63] Similarly, if the defendants have rights as third parties to the Reinsurance Policies derived from the 1999 Act, they are bound by the jurisdiction clauses within the Reinsurance Policies when they assert rights under those contracts, which they have done by commencing suit in South Africa."

iii) There is no relevant distinction in this regard (as the Claimants have suggested) between the enforceability of the jurisdiction agreement

(which is not disputed for present purposes) and its "*contractual effect*" (i.e. where the Court is exercising a discretion as on these applications). No such distinction was suggested in *Axis Corporate*, an analogous case which also involved the exercise of a discretion (in granting an anti-suit injunction). In principle, it should be irrelevant for these purposes whether the party suing under the contract containing the jurisdiction clause themselves negotiated it, or whether it was originally negotiated by a different party, at least in circumstances where all parties acted freely.

156. I would accept the general proposition that the Claimants' third-party status is, for the reasons given above, of no freestanding relevance to the exercise of the court's discretion. Nonetheless, it is in my view relevant, when considering whether it was foreseeable that the agreed forum would provide an unfair trial, to have regard to the fact (if it be the fact) that a claimant did not have actual knowledge that the relevant contract would contain an EJC in favour of the jurisdiction in question. There is a difference between actual foresight and foreseeability, and, as I have indicated earlier, a lack of specific knowledge about the EJCs in the reinsurance policies means the court would have to have regard to a double level of foreseeability – foreseeability that (in this case) Russian law and jurisdiction would apply, and alleged foreseeability of an unfair trial. The significance of that difference may, though, be limited by considerations of the kind to which I refer in § 41 above.

(5) Approach to evidence

157. In order to establish a real risk of injustice, the claimant must adduce "*positive and cogent evidence*": *The Abidin Daver* [1984] AC 398, 411B-D; *Cherney v Deripaska* (Court of Appeal) § 60; *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 §§ 89-102; *Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq* [2022] QB 246 §§ 173-178; *Bazhanov & Anr v Fosman & Ors* [2017] EWHC 3404 (Comm) §§ 96-105. It is not sufficient for a claimant to make "*broad and conclusory allegations*" about the judicial system in the contractual forum, but the claimant may be able to identify specific features of the claim which give rise to a real risk of injustice: *Cherney v Deripaska* (Christopher Clarke J) at §§ 238-248.

158. The Defendants submit that any differences between the experts should be approached as follows:

i) The default evidential standard applied to disputed facts in interlocutory applications such as this is that the applicant needs to establish a 'good arguable case'. It is common ground that that is the test to be applied to determine whether the Reinsurance Policies contain the alleged EJC and whether the claims fall within the scope of them (cf *Clifford Chance LLP v Societe Generale SA* [2023] EWHC 2682 (Comm) § 79).

ii) In *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 § 7, Lord Sumption explained that, in the context of an application to set aside permission to serve out, "*good arguable case*" means that:

a) there must be a "*plausible evidential basis*" for the application of a relevant jurisdictional gateway (or, as in this case, for the stay of the proceedings in favour of the Russian courts);

b) if there is an issue of fact, or some other reason for doubting whether it applies, the court must "*take a view on the material available if it can reliably do so*"; but

c) "*the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it*".

iii) In *Carvalho v Hull Blyth (Angola) Ltd* [1979] 1 WLR 1228 an application was made for a stay of English proceedings in favour of the Angolan courts where there was an exclusive Angolan jurisdiction clause on which the defendants relied. Geoffrey Lane LJ said:

> "This court, as indeed was the judge, has been faced by the difficulty that the two sets of affidavits — those sworn on behalf of the plaintiff and those sworn on behalf of the defendants — are almost totally contradictory in every possible respect. Consequently, it seems to me that, in so far as we have to decide any matters of fact on those totally contradictory affidavits, the only way in which we can do it is either to take the lowest common denominator of the affidavits, namely, the very few points where they do agree, or else to accept, for the purposes of argument, the statements contained in the defendants' affidavit. Of course, the burden of proof lies on the plaintiff. Accordingly, it seems to me that, in so far as we have to choose one set of affidavits rather than the other, those must be the defendants'". (p.1239)

(Those observations were *obiter dicta*, since on the facts a stay was refused, and were not referred to by the other member of the court.)

iv) In the present applications, the court cannot reasonably be expected, given the sheer volume and complexity of the disputed evidence (in particular, the expert evidence), to make a reliable assessment absent extensive cross-examination of the witnesses on the many areas of dispute. The burden of proof lies on the Claimants to justify not enforcing the exclusive jurisdiction clauses, and so where there are conflicts in the evidence and the Defendants have put forward plausible – albeit contested – evidence in support of their position, those matters should be resolved in favour of the Defendants. This is especially the case in relation to contested issues of expert evidence in relation to which the Defendants' experts have had no right of reply (especially where new cases or legal theories are put forward by the Claimants' experts for the first time in rejoinder reports).

v) Such an approach is consistent with English courts' repeated emphasis that "*cogent evidence*" is required to show that there is a risk that justice will not be done in a foreign jurisdiction, and that the court must be extremely cautious before reaching that conclusion.

159. Conversely, the Claimants submit that, provided the court is satisfied that the evidence of the claimant's expert is cogent, it is unnecessary, in the context of an interim application, for the court to determine that the claimant's evidence is to be preferred.

160. The Claimants cite, first, Butcher J's observation in *PJSC Tatneft v Bogolyubov* [2019] EWHC 1400 (Comm), where there was competing expert evidence about whether there was a real risk that a judgment of the English court would not be enforced in Russia:

> "(3) The issues are largely ones of Russian law and practice, where the evidence is given by experts who have not been cross-examined. In the circumstances, save in clear cases in which it can be plainly seen that one or the other expert lacks qualifications or reliability, or that there is no room for serious argument, it is unlikely to be possible to prefer one expert's view on a disputed point to the other's.
>
> (4) If the court is unable to decide between the evidence of two experts as to whether there is a real risk of substantial obstacles to enforcement, that may itself lead the court to conclude that there is a risk, because there is the possibility that the views of the expert who says that there is such a risk are correct." (§ 19)

Those observations are not directly on point, on the basis that, as I have concluded, it is generally unlikely to be sufficient for the claimant to show merely a 'real risk' in the present context.

161. Secondly, however, the Claimants point out that *Brownlie* and the other cases on the jurisdictional gateways consider the meaning of 'good arguable case' in a context where the applicant bears the burden of establishing that a gateway applies: concluding in that context that, if the court cannot reliably assess conflicting or doubtful matters, it is sufficient for the applicant to have a plausible (albeit contested) basis for the gateway to apply. In the present case, the Claimants have the burden of showing strong reasons to decline a stay. Thus, insofar as the 'gateway' cases provided any analogy, they would suggest that it is sufficient for the Claimants, not the Defendants, to have plausible evidence.

162. I would observe, first, that *Carvalho* pre-dates *Donohue* and most of the other relevant cases. In any event, the 'lowest common denominator' approach espoused in the *dicta* quoted above would, if taken to their logical conclusion, mean that, so long as the respondent had some evidence to the contrary, the court could never conclude that a party was likely to face an unfair trial in the agreed forum. That would plainly be an incorrect and unprincipled result.

163. So far as the 'gateway' cases are concerned, the approach to conflicting evidence reflects a pragmatic solution that is apt when the court is considering whether or not to accept jurisdiction, and reflects the nature of the 'good arguable case' test, giving the benefit of the doubt to the applicant in certain circumstances. I am not sure the same approach can necessarily be followed – either in the manner proposed by the Claimants or in the manner proposed by the Defendants – when the court has to determine whether the claimant is likely to face an unfair trial in the agreed forum. In particular, I would be very reluctant to accept the proposition that the claimant is bound to fail so long as the defendant produces some plausible evidence. It seems to me that, particularly when interests so fundamental as fairness of the trial are concerned, the court should resort to the burden of proof only if it finds itself unable properly to form a view on the evidence before it. Although the court is addressing a different question from that which it addresses on a *forum non conveniens* analysis, it is, as in that context, concerned with the relative plausibility of the rival contentions and evidence (cf *Cherney v Deripaska* at first instance, § 44).

(6) General approach

164. Christopher Clarke J at first instance in *Cherney v Deripaska* said:

> "237. An English court will approach with considerable circumspection any contention that a potential claimant cannot obtain justice or a fair hearing in a foreign court and will require "positive and cogent" evidence to persuade it to the contrary: *The Abidin Daver* [1984] AC 398, 411C. Assertions to that effect are relatively easily made by generalised statements and may be difficult comprehensively to refute. I further accept that research on Russian law may suffer from what Professor Stephan describes as an "echo chamber effect" where one commentator states an impression which is swapped with the impression of another commentator, each citing the other as authority supporting their own thesis without any systematic study of data. It is, however, right to have some regard to any consensus of academic opinion, based on research and personal familiarity, particularly when backed by specific instances (such as the Yukos and Guzinsky affairs) or determinations of the ECHR or other courts.
>
> 238. In the absence of cogent evidence to the contrary the Court will start with the working assumption, for which comity calls, that courts in other judicial systems will seek to do justice in accordance with applicable laws, and will be free from improper interference or restriction. As this case indicates, where there is evidence to the contrary it may be hotly in dispute and difficult to evaluate. Such evidence is likely, insofar as it derives from reports and articles, to consist of "broad and conclusory allegations, founded on multiple levels of hearsay" and, if so, to be unacceptable as an indictment of a legal system or part of it.

> Evidence relied on by Professor Burger, whom Professor Bowring cites, was so characterised by Judge Koeltl in the Base Metal case and regarded by him as "insufficient to condemn the entire Russian judiciary as an inadequate alternative forum". But the Court is not blind to the fact that unfairness or partiality may arise from that which occurs behind the scenes rather than centre stage."

165. Similarly, Waller LJ on appeal in the same case said:

> "60. … allegations of a kind that impugn the integrity of the institutions of a friendly foreign state should neither be made nor entertained lightly, but must be distinctly alleged and supported by positive and cogent evidence. Lord Diplock made that plain in relation to ideological or political obstructions to justice in *The Abidin Daver* [1984] AC 398 at page 411 and in my view the same principles apply in cases where, as here, it is alleged that a foreign government will be unable or unwilling to protect the claimant's personal safety or will manipulate its criminal justice system to bring false charges against him. These too are serious charges that are not to be made lightly or accepted without the support of positive and cogent evidence. However, I do not think that the court is precluded on the grounds of comity from considering them in a proper case." (§ 60)

166. The Defendants cite, again to similar effect, the observations of Mr Daniel Toledano KC, sitting as a Deputy High Court Judge, in *Bazhanov v. Fosman*:

> "[97] The authorities establish that the English court should show particular restraint before reaching the conclusion that a claimant would not receive substantial justice in a foreign country in view of the requirements of comity. The authorities indicate that the claimant must make good its argument based on 'positive and cogent evidence'… Whilst there are rare cases where a claimant has been able to satisfy this standard [Cherney v Deripaska] such cases are the exception.
>
> [98] It is fair to say that the Claimants' arguments before me were very largely based on similar arguments which had been advanced successfully in the Cherney v Deripaska case. However, the Cherney v Deripaska case was an 'extreme one' as Flaux J concluded in Erste Group Bank AG v JSC 'Red October' [2013] EWHC 2926 (Comm), at paragraph 201…
>
> [99] Mr Lord Q.C. relied in particular on the fact that the two experts agreed that … the Russian judicial system is not without its problems including that there has been alignment of Russian courts to state interests or external influence in some high-profile cases. However, the real issue is whether and, if so, to what extent these factors would be likely to operate in the present case so as to jeopardise the prospect of a fair trial…"

167. Christopher Clarke J in *Cherney* went on to make certain observations of potential relevance when considering the potential extent of a lack of fairness, if established by cogent evidence in the first place:

> "238. … the Court is not blind to the fact that unfairness or partiality may arise from that which occurs behind the scenes rather than centre stage.
>
> 239. In the present case what is of concern is that it appears to be common ground between the experts that, in certain cases, the arbitrazh courts cannot necessarily be expected to perform their task fairly and impartially. Professor Stephan characterizes that as only applicable in a case whose outcome will affect the direct and material strategic interest of the Russian state.
>
> 240. The problem with that is fourfold. Firstly, respect for the rule of law and the separation of powers requires that the freedom of the courts from interference by the executive (or anyone else) in their decision making should be without exception.
>
> 241. Secondly, once it is apparent that such freedom is not without exception, it is difficult to describe what is the limit which the Russian State would in practice observe or to be satisfied that that limit will not change."

168. All Risks Reinsurers point out that only two cases can be found where the claimant submitted that he would not receive a fair trial in the agreed forum and where the court declined to grant a stay.

i) In *Ellinger v Guinness, Mahon & Co* [1939] 4 All ER 16 it was the uncontradicted evidence of the Jewish plaintiff that he would not get a fair trial of his claim in Nazi Germany. The plaintiff, who had left Germany for England in 1936, sought a declaration that he was entitled to be registered as the holder of an interest in bonds purchased through one of the defendants, a German company called Metall. As between the plaintiff and Metall, it was assumed that the matter was governed by German law and subject to the exclusive jurisdiction of the German courts. The second of the two grounds for Morton J's conclusion that the English court should permit service of the writ outside the jurisdiction was the "*evidence as to the probable fate of the plaintiff if he pursues his claim in Germany*". It was also relevant that the plaintiff's primary claim was against an English firm which was not a party to the jurisdiction agreement. The judgment was given on 6 October 1939 when the UK was at war with Nazi Germany.

ii) In *Carvalho v Hull, Blyth (Angola) Ltd* [1979] 1 WLR 1228 a stay was refused in favour of the Angolan courts following a *coup*, which took place after the contract had been agreed. At first instance, Donaldson J held that "*at the time the contract was made, the courts in Angola operated under a colonial judicial system whereas now there is an*

> *entirely different system, a post-revolution court under a post-revolution constitution*". He found strong grounds for refusing a stay "*either as a matter of construction of the clause, or because it would be just and proper to allow the plaintiff to continue*". The Court of Appeal upheld the decision. The ratio of the case was therefore not that the plaintiff would not get a fair trial in Angola: Geoffrey Lane LJ specifically abjured reliance on the point and said that it did not arise (at 1241H-1242A; see also Browne LJ to similar effect at 1238E-G).

169. It follows, the All Risks Defendants say, that the only case in which inability to obtain a fair trial in the contractual court was expressly relied on by the court as a ground (albeit secondary) for refusing to enforce an EJC was a judgment given at a time when the UK was at war with Nazi Germany, where a German EJC was not enforced against an emigré Jewish plaintiff, on the basis of (*inter alia*) uncontroverted affidavit evidence that the plaintiff was in grave danger of being sent to a concentration camp. By contrast, at the height of the Cold War, an EJC in favour of the courts of the USSR was considered by the High Court and the Court of Appeal, but no similar finding was made (*The Fehrmarn* [1957] 1 WLR 815). In recent years, the English court has declined to make such a finding in the case of the courts of the UAE (*Middle Eastern Oil v National Bank of Abu Dhabi* [2008] EWHC 2895 (Comm)), and the Singapore High Court has declined to make such a finding in the case of the courts of Saudi Arabia (*Kioumji & Eslim Law Firm v Rotary Engineering Ltd* [2016] SGHC 218, and on appeal [2017] SGCA 24). The decision which the court is invited to make in this case is therefore, they say, one that may fairly be described as exceptional; and an exceptional finding requires exceptional evidence.

170. I do not accept those submissions. There are a number of reasons why authorities in this area may be few and far between, and it does not follow from the extreme facts of *Ellinger* that it in some way illustrates the relevant threshold. The test is clearly set out in the case law to which I have already referred.

(E) LIKELY SUBSTANTIVE ISSUES

171. When considering the rival contentions on these applications, it is obviously necessary to consider the substantive issues likely to arise and which, therefore, will need to be tried either in Russia or in England.

172. Although, due to the jurisdiction applications, the cases have not been fully pleaded out, information about the likely substantive issues can be found in the Particulars of Claim that exist in some cases, the evidence of fact and the parties' submissions.

173. Mr Hifzi, in his first witness statement in the *VX Freighter Investment* case (CL-2022-000663, one of the MLB claims), says:

> "22. Secondly, the Claimants' claim is premised on the Claimants establishing in these proceedings that they have a valid claim pursuant to the Insurance Contract/s on the terms of either the All Risks or War Risks cover ... To resolve that issue

> will require consideration of the interpretation and application of the terms of cover as a matter of Russian law. The question whether there has been an insured loss indemnifiable under the terms of the Insurance Contract/s cannot be determined without evidence of what has happened to the Aircraft since March 2022 and will require consideration of Russian law.
>
> 23. Bearing in mind the facts and matters relied upon by the Claimants at paragraphs 40 to 50 of the Particulars of Claim as giving rise to a relevant loss of the Aircraft covered by the Insurance Contract/s, the Court will need to determine the terms, status and effect of the various statements and measures announced by Russian state entities during March 2022, including those relied upon at paragraphs 45 of the Particulars of Claim. The Claimants propose at paragraph 45(g) of the Particulars of Claim to address unspecified expert evidence to the issue of the "precise date on which it first became impossible to remove the Aircraft from Russia: [sic] I assume that the Claimants have in mind to call expert evidence of Russian law or other expert evidence of the practical position 'on the ground' in Russia at the material time. Both because the War Risks reinsurance is governed by Russian law and because the facts and matters relied upon include Russian legislation, these are matters which necessarily will require consideration of Russian law."

174. Mr Hifzi in that passage makes particular reference to §§ 40-50 of the Particulars of Claim in case CL-2022-000663. Those paragraphs plead the lessee's failure to redeliver the aircraft, following VX's service of a notice of event of default, and, further, that the aircraft has been detained in Russia and/or restrained from leaving Russia since 6 March 2022 at the latest, alternatively 8 March 2022. Reference is made to the Western Sanctions and certain of the Russian Counter-Measures, and to communications in which the lessee asserted its alleged inability to return the aircraft. The Particulars allege that the lessor has been wrongfully deprived of physical possession of the aircraft, being an insured peril within the All Risks section of the insurance and reinsurance policies; alternatively, it is alleged that the Russian government's actions in restraining the aircraft from leaving Russia and/or detaining it within Russia constituted an insured peril within the War Risks section of the policies.

175. AerCap in its skeleton argument states that its primary case on the merits is that the export regulations did *not* prevent return of the Aircraft (until they were subsequently amended to do so). The question as to who is right about that may have an impact on the question of whether the loss falls within the All Risks Cover or the War Risks Cover, which is one of the central points in dispute between the parties on the merits. AerCap explains that the reason why it does not rely on the reports of Dr Gould-Davies is that, whilst AerCap agrees with many of the conclusions reached by Dr Gould-Davies regarding the lack of independence and impartiality of the judiciary in Russia, it does not fully agree with some of his evidence as to the role of President Putin and the exercise of

power generally within the state. That is, it says, a contentious topic which will arise on the merits (again going to whether the loss was a War Risks or All Risks loss).

176. AerCap states that its claims give rise to two key issues. The first is whether the aircraft have been 'lost', which will involve consideration of:

i) whether AerCap had the right to terminate the leasing of the Aircraft, on the grounds of (in AerCap's case) (1) "*material adverse change*"; (2) failure to maintain insurance as required by the terms of the leases; and/or (3) non-payment of rent;

ii) whether AerCap had the right to repossess the Aircraft; and

iii) (a point that has been put in issue by insurers in the LP Claims, and which is to be addressed by the politics experts) what has been described as the 'geopolitical' question as to how long the war in Ukraine and related Western sanctions would have appeared likely to last in late February/early March 2022. That question has potential relevance to whether the return of the aircraft was 'uncertain' (which the Claimants contend to be the test for loss) or whether the lessors had been 'irretrievably deprived' of them (which insurers contend to be the test).

177. The second issue, which AerCap submits is likely to dominate the evidence and the argument, is the question of causation, i.e. whether the loss falls within the scope of either the All Risks Cover or the War Risks Cover. It should be noted that this will not merely be an issue as between Defendants: it will also be an issue between Claimants and Defendants, where the Claimants in question seek to recover under the two types of cover on a primary or a secondary basis. AerCap submits that the likely nature of the debate is clear from the LP Claims, where the issue has been well ventilated and is the subject of extensive pleadings and argument; and based on experience from the LP Claims, it is likely that this will be the central issue in dispute. AerCap explains that, in broad terms, there are two competing potential causes of the loss:

i) that airlines decided to retain possession of the Aircraft for their own commercial purposes and/or consistently with their own economic interests, and enlisted the assistance of the Russian Government to help them in that cause, with the Russian state having brought into effect certain measures (such as export restrictions) for the purpose of supporting and at the behest of the airlines rather than being unilaterally imposed on them by the state (indicating, it is said, a loss within the All Risks Cover); or

ii) that the airlines retained possession of the Aircraft due to actions of the Russian State, or for political purposes, falling in either case within one or more of the war risks perils. The essential argument here is that the Aircraft were not returned because the airlines were acting under the formal or informal orders of President Putin or government officials; and that the loss falls within the War Risks cover.

178. AerCap summarises the position taken by reinsurers in the LP Claims, which it says it is reasonable to expect will be the same as the positions to be adopted in the present claims, as follows. All Risks Reinsurers say the cause was a war risks peril, such that it is excluded from the All Risks policy pursuant to the standard AVN 48B War, Hi-jacking and Other Perils Exclusion Clause. The War Risks Reinsurers say that the cause was retention of the Aircraft by the airlines for their own commercial purposes, such that it does not fall within any of the LSW 555D war risks perils.

179. Other Claimants too submit that the essential substantial issues will be to the effect summarised above. For example, the Fieldfisher Claimants formulate key issues in these cases (on which they fear they would not receive a fair trial in Russia) as follows:

> "(a) Whether the leasing of aircraft has been lawfully terminated (including by reference to the imposition of Western Sanctions as a ground for termination);
>
> (b) Whether the lessees were/are obliged to redeliver/return the aircraft to the Claimants (including by reference to the counter-measures imposed by Russia);
>
> (c) Whether the aircraft have been lost and if so the cause(s) of loss, in particular whether the losses were caused by a peril falling within either the All Risks Cover or the War Risks Cover."

180. Person X, giving expert evidence at the request of the Claimants, and whose name is anonymised in this judgment, confirms that the Russian court would equally need to consider these issues:

> "283. I have reviewed the Particulars of Claim in the Proceedings. I am of the view that a Russian arbitrazh court would consider the following issues, among others, in the course of adjudicating upon the Claimants' claims for indemnity:
>
> 283.1. The claims each allege that the foreign lessor was entitled to possession of the aircraft in question following the termination of the leasing of the aircraft pursuant to the terms of the relevant lease agreement. In those circumstances, it would be relevant for the Russian court to consider whether the claimants, in particular the lessor in each case, had established a proper basis for the termination of the leasing of the aircraft by the Russian airline under the lease agreements:
>
> 283.1.1. By reference to provisions in the relevant lease agreement permitting termination of leasing in circumstances where sanctions are imposed affecting the leasing arrangements; and/or

> 283.1.2. By reference to provisions in the relevant lease agreement permitting termination of leasing as a consequence of the failure by the Russian airline to make payment under the lease in accordance with its terms;
>
> 283.2. If the lessor was entitled to terminate the leasing of the aircraft under the lease agreements for one of the reasons, or any other reason, whether the lessor was entitled to the return of or possession of the aircraft from the Russian airline in those circumstances; and
>
> 283.3. Whether there had been a loss of the aircraft caused by the one of the perils insured against. In particular, the court would have to consider whether the claimants have been deprived of the aircraft as a consequence of the perils covered by the War Risks cover."

181. Mr Pirov, giving evidence at the request of certain of the Defendants, does not appear to dispute that the above questions will need to be resolved, though he states that they would form only a part of the questions that an Arbitrazh Court will potentially consider, and would not (in his view) be among the most high-priority questions. He considers that the "priority" questions will include the following:

> "261.2. … If there are no provisions in the insurance / reinsurance contracts covering the risk of "non-return" ("deprivation of possession") the Claimants will need to prove that the case of "non-return" ("deprivation of possession") may somehow be qualified as a total physical loss of the aircraft or engine. In particular, the Claimants will need to explain to the Arbitrazh Court why they claim the total loss of an aircraft/engine in the situation when this property is not damaged and most of it is being operated. In other words, an Arbitrazh Court will need to consider whether it is possible that under the same insurance / reinsurance contract and in respect of the same property, the Claimants (lessors) suffered losses linked to the total loss of the property, and the Russian lessees while the Russian lessees (parties to the insurance contracts) did not.
>
> 261.3. The Arbitrazh Court may need to resolve the issue of whether a Russian airline could have insured the business risk of the Claimants related not to the physical destruction of the aircraft/engine but to the failure of their counterparty Russian airlines to fulfil their contractual obligations. In particular, the Arbitrazh Court will need to analyse the provisions of Article 933 of the RCC. These should, in my opinion, be interpreted as follows: a party to a business risk insurance contract should be a person whose business risks are to be insured; besides such risks may be insured only in favour of such person. In other words, the Claimants could under Russian law have validly insured their business risks only themselves.

261.4. The Arbitrazh Court will need to address another important issue: whether the alleged insured event has been caused by the wilful acts of the insured Russian airlines themselves (parties to the insurance contract). The Court will need to analyse the provisions of Article 963 of the Russian Civil Code stating that an insurer shall be released from payment of insurance compensation if the insured event has occurred as a result of the intent of the insured (party to the insurance contract) or beneficiary.

261.5. If the Claimants pursue their claims against the reinsurers, the Russian Court will have to ascertain whether such claims are valid in light of Article 967 of the RCC, effectively providing that reinsurance is "insurance for the insurer" …: this Article does not provide for the possibility for the insured (beneficiary) to apply directly to the reinsurer and bypassing an insurer because the insurer shall remain responsible for payment indemnity under the principal insurance.

263. A Russian Judge will then have to resolve whether the factual circumstances of the case have been proven or not: has a "deprivation of possession" taken place in fact? … the Arbitrazh Court will need to conclude what criteria allow to say that the "deprivation of possession" is final and that the Claimants will never again get their property back?

264. I believe that an Arbitrazh Court would first of all check whether there are criteria for "deprivation of possession" (for example, for how long such "deprivation" should have been present) in the contractual documentation (lease agreements, insurance / reinsurance contracts)? If there are no such criteria, an Arbitrazh Court should establish what actions have been taken by the Claimants to recover their property and what opportunities are still available to them:

264.1. Have the Claimants filed claims against the Russian airlines in court or commercial arbitration on the basis of the lease agreements and have they sought the recognition of the rendered awards in Russia and their enforcement?

264.2. Have the Claimants utilised the mechanisms of the 2001 Convention to which the Russian Federation is a party (if applicable)?

264.3. Have the Claimants applied to the Russian law enforcement authorities to initiate criminal proceedings on the grounds that there was no return of property owned by the Claimants by the lessees?

…

> 266. … The complexity of these issues lies in the fact that they are indeed linked to factors that emerged after 24 February 2022 (such as, for example, the consequences of the introduction of the Western sanctions and Russian counter-sanctions). Resolving these issues will also entail a complex analysis of lease agreements subjected to foreign law."

There is a notable similarity between the questions identified in quoted §§ 261.3 and 261.4 above and the causation issue identified by the Claimants.

182. AerCap goes on to expand on the causation issue in § 46 of its skeleton argument, which I quote in full because (as appears below) the existence and nature of the causation issue appears in principle not to be disputed:

> "46. The nature of the inquiry that the court will have to embark on in deciding this debate is well illustrated by the List of Expert Fields and Issues which has been ordered by Butcher J and the Defences that have been served by the insurers in the LP Claims. The Court is invited to read in full paragraphs 1-3 of the List of Expert Fields and Issues, paragraphs 27-83 of the Defence of AIG Europe SA ("**AIG**", the lead All Risks insurer), paragraphs 28-97 of the Defence of Lloyd's Insurance Company SA ("**LIC**", lead War Risks insurer) and paragraphs 26-53 of the Defence of Fidelis Insurance Ireland DAC ("**Fidelis**", a War Risks insurer). These passages show that a (and perhaps the) central element of the trial of these claims will involve evidence and argument on, and the court determining, issues such as:
>
> 46.1 **The balance and exercise of power within the Russian State:** The argument advanced by All Risks insurers, for example, is that subject to limited factors, "*President Putin exercises power without constitutional or legal or meaningful practical restraint*", that the government and private parties operate "*under and in subjection to the President*", that the state operates in "*manual steering*" mode i.e. President Putin/his subordinates "*personally control all significant economic, business and social activity in the pursuit of what President Putin determines are Russia's interests and objectives*", that all resources including those belonging to ostensibly private enterprises are regarded by him as being at his disposal and that he exercises his power through numerous informal means including e.g. the use of security services as "*instruments of influence, persuasion, coercion, oppression and/or punishment*" and even "*attack or threats of attack on the physical well-being and/or property*" of those who refuse to comply with his express or implied orders. All Risks insurers say that this all supports the conclusion that the Aircraft were lost due to the wishes of President Putin as expressed through formal or informal statements made to the airlines.

46.2 The War Risks insurers challenge this description of the Russian system instead contending, for example, that the portrayal of unfettered power of Putin and the Russian state is an:

"*oversimplified and inaccurate caricature of the Russian political system…The powers of the Russian President were at all material times constrained by formal constitutional or legal limitations, by meaningful political and/or informal and/or practical constraints and de facto limitations arising from, inter alia, Russian law and/or practice, the nature of the Russian Federation including ineffective regulation and bureaucracy, endemic corruption, the weakness of the rule of law, the geographic expanse of the Russian Federation, the influence and power of Russian elites and the need for the Russian government to maintain some degree of popular support*"

[A footnote to this passage, taken from the Lloyd's Insurance Company Defence, refers in addition to the pleas in Fidelis' Defence that *"... the making and/or implementation of Government policy in Russia is not controlled and determined by the President alone. The exercise of power, and the determination of policy, is in practice substantially more diffuse than is alleged in [AR Insurers' Defence]"* (§ 27) and *"…Government policy is not determined and directed solely from within central government. In practice, the making of Government policy is often the result of a fiercely contested struggle between different stakeholders, many of whom are located from outside central government"* (§ 28).]

46.3 Thus, as set out at paragraph 1 of the List of Expert Issues, whichever court determines the claim is going to have to grapple with questions about the constitutional powers and responsibilities of the President and how different branches of the state interact. There will be questions about how President Putin and senior officials wield power over other parts of the government as well as whether there are any legal and practical constraints on the power of the Russian government and whether there are means of challenging its decisions.

46.4 **The relationship between the Russian State and private Russian interests**. As set out at paragraph 1(c) of the List of Expert Issues, the court will also need to consider the way that President Putin and the government exercises power over commercial enterprises (particularly the aviation sector) including whether the President and senior officials used informal methods to give orders or control or influence commercial enterprises, the extent to which private interests can act independently of the actions and wishes of the President and government and the extent to which private interests can procure state assistance and influence the state to act to support their

> commercial interests. These are all core issues: War Risks insurers say that the airlines could and did enlist the state's support; All Risks insurers say the state was imposing its political wishes on the airlines.
>
> 46.5 **The exercise of power and actions of senior state officials in the early weeks and months of the war in Ukraine**. As illustrated by paragraphs 56A to 83 of AIG's Defence (much or all of which is challenged by War Risks insurers), determination of the cause of loss will require examination of a detailed history of what exactly transpired in the weeks and months following the invasion of Ukraine including the actions and statements of senior state officials (including many statements of President Putin himself) and the dealings between airline representatives and those officials so as to determine whether these demonstrate that the state was imposing its will on the airlines or the airlines were the principal motivators behind the decision to retain the Aircraft, enlisting organs of the state to make statements and pass measures to support them in that position, including permitting the airlines to purport to re-register Aircraft in Russia. Evidence and debate on this issue will involve examining closely not only the interactions between senior Russian Government officials amongst themselves and between them and the airlines, but also the Russian Government's response to Western sanctions and its messaging and motivations in relation to the measures that it has passed and in relation to the Ukraine war in general."
>
> (footnotes omitted save as indicated)

183. Genesis in its skeleton argument states:

> "… Defences have not been served in the OP Claims but the pleadings in the LP Claims (served by or on many of the same London Market Defendants) are a clear indication. The Claimants and the All Risks Defendants make the central allegation that it was the actions of the Russian Government which led to the loss of the aircraft. For example, AIG (as the All Risks Defendant in the AerCap LP Claim, represented by HFW) has pleaded, in its draft Re-Amended Defence, 30 pages of allegations as to the role of the Russian Government in the detention of the AerCap aircraft (paragraphs 30-83). There are over 60 references to the involvement of President Putin, and 13 references to the role of the FSB, including *"…President Putin exercises power without constitutional or legal or meaningful practical restraint*" (paragraph 31). Almost every allegation is challenged by the War Risks Defendants in one way or another (see, for example, the draft Re-Re-Amended Defence of LIC, represented by Kennedys, paragraphs 30, 36-97; 25 pages). There is every reason to believe that the same points will be advanced in broadly the same way in the OP Claims" (§ 45(3))

184. Referring to both AerCap and Genesis's submissions on this point, the War Risks Defendants (in the context of inviting the court to avoid expressing concluded views about the merits of the underlying claims at that stage) say:

> "… the MLB Claimants have included in their skeleton (at paras 51-54) a description of the position taken by AIG Europe S.A. (in its capacity as an AR insurer) in the AerCap LP Claim. That position is likely to be disputed by the War Risks Defendants in these proceedings, for the same reasons as it is disputed by WR insurers in the LP Claims.[FN]"
>
> [Footnote] As explained in AerCap's skeleton at para 46 and in Genesis's skeleton at §45(3).

I have quoted the referenced passages from the MLB, AerCap and Genesis skeleton arguments in §§ 95, 182 and 183 above respectively.

185. Similarly, reflecting one facet of the causation argument, the War Risks Defendants refer (in § 87.2(2) footnote 108 to their skeleton) to a point made by Mr Pirov to the effect that *"there was nothing to prevent airlines returning aircraft in accordance with the foreign law terms of leases between the further invasion of Ukraine on 24 February 2022 and the coming into effect of export restrictions on 10 March 2022"*.

186. Accordingly, based on War Risks Defendants' written submissions, it appears to be accepted that the substantive issues involved in these cases will include causation issues essentially to the effect summarised in §§ 182 and 183 above.

187. In oral submission on behalf of the War Risks Defendants, however, counsel (Mr Neish KC) suggested that the court should not proceed on the basis that the factual issues between the parties would include those referred to above, because that would require evidence about *"what would be done in an Arbitrazh Court"*. The court should not, it was submitted, assume that exactly the same evidence or exactly the same issues would arise. For example, the Russian court would be very unlikely to hear any oral evidence: the case would be determined on the documents. Asked whether that would somehow restrict the range of issues that could be looked at, counsel indicated that it would not. At the same time, however, counsel submitted that one should not speculate about "*what Russian lawyers would advise in Arbitrazh Courts*", citing a statement in *Bazhanov* (§ 105, in turn citing *Cherney*) that *"[t]he fact that the claimant may face difficulties or obstacles in proceeding in what is, prima facie, the natural forum does not necessarily entitle him to trial in England"*, which would apply *a fortiori* where an EJC existed.

188. Thus, counsel submitted, *"if you are in Russia and your Russian lawyers feel they have to put the case differently than your English lawyers are able to in England, that is something that goes with the EJC"*. Asked why the same logic that has led to an issue in the LP proceedings about the conduct of matters in Russia, what was said at certain meetings, whether they amounted to an order, and so on, would not apply equally in Operator Policy proceedings in Russia, counsel replied that *"it might and it might not, but it may be that Russian*

lawyers in Arbitrazh Courts would feel that they weren't able to advance such a claim …", adding that there was no evidence about that.

189. Insofar as counsel appeared to be suggesting that the factual issues for determination might be different in the sense that a Russian lawyer might feel unable to advance part of the case, counsel did not suggest any legal or procedural reason why a Russian lawyer might take that position. If, on the other hand, the implicit suggestion may have been that a Russian lawyer might advise that a Russian court would be unwilling to listen to them or adjudicate objectively on some of the contentions to which I refer in §§ 182 and 183 above (or, in the worst case, might feel nervous or unsafe in some way in advancing them), then that would if anything tend to support the view that the Claimants could not have a fair hearing of all the issues that logically arise from their claims. That would be a radically different situation from the ordinary case where proceedings in the chosen court might reduce the scope of available causes of action or involve other legal/procedural features flowing from the chosen forum's substantive or procedural rules.

190. The apparent suggestion that the issues to be resolved would or might not include some or all of the causation points mentioned above is also hard to reconcile with Professor Antonov's evidence that the Russian court would among other things need to resolve the question of "*whether the alleged insured event has been caused by the wilful acts of the insured Russian airlines themselves*". That is in substance one way of stating the (or a) key question around which the causation issue revolves. It is difficult to see how the issue could fairly be determined unless there can be a fair hearing of the factual questions referred to in §§ 182 and 183 above. Similarly, Mr Hifzi accepts in his evidence quoted above that the court will need to determine, among other things, *"the terms, status and effect of the various statements and measures announced by Russian state entities during March 2022"*.

191. The All Risks Defendants say relatively little in their skeleton argument about the substantive issues likely to arise in these cases. They note that *"[t]he primary case set out in [AerCap's] Skeleton Argument as regards the prospect of a fair trial sets out the issues that arise for determination of their claims and identifies why, in AerCap's submission, these involve issues on which the Russian court will be unwilling or unable to reach a fair, impartial and proper determination"*, but do not seek to take issue with AerCap's account of the questions that will arise for determination. In oral submissions, I asked counsel for the All Risks Defendants (Mr Blackwood KC) whether his clients would accept that issues of the kind raised in the defences of the all risks insurers in the LP Claims would also be likely to arise in the present case. Counsel responded that *"without attempting to envisage what may actually happen, it would be right to say that issues of causation are certainly reasonably likely to arise, yes"*.

192. In addition to the matters discussed above, in §§ 163 and 164 of their skeleton argument, the War Risks Defendants highlight certain further issues:

> "163. … the MLB Claimants argue that the Russian court will apply regulations prohibiting the removal of the Aircraft from Russia.
>
> 164. Notably, this is contrary to the case of the AerCap, Clifford Chance and Shannon Claimants (see paragraph 151 above). They are right:
>
> 164.1 The scope of the regulations was not such as to prohibit the lessees from returning the aircraft to lessors.
>
> 164.2 The relevant regulations post-dated the demands for the return of the aircraft (such that the lessees remained obliged to return the aircraft).
>
> 164.3 A complex issue arises as to whether the regulations were in any event incompatible with (and were trumped by) the Cape Town Convention and Protocol (to which Russia remains a signatory)." (footnote omitted)

193. In oral submissions I asked counsel for the All Risks Defendants (Mr Blackwood KC) about his clients' position on those matters. He responded that it was certainly possible that those issues will arise: they may be issues at the substantive trial. Counsel added, in relation to §164.2, that it was likely that the All Risks Defendants would want to say that *"there was some sort of informal decree, or understanding handed down by President Putin prior to the date of the decrees, i.e. that this was a war risk at all times".*

194. In the light of the factual and expert evidence, and the submissions, summarised above, I consider it highly probable that the adjudication of these claims will require the court to address all of the issues discussed in this section. They pertain to fundamental questions likely to be in issue between the parties about the existence or otherwise of a loss, and whether or not any such loss falls within one of the perils set out in the War Risks Cover or is within the All Risks Cover.

(F) STATE INTERFERENCE/SELF CENSORSHIP

(1) The expert evidence

195. The MLB Claimants served and rely on:

i) the expert reports of Person X on Russian law, who produced three reports, dated 26 May 2023 ("***X 1***"), 20 June 2023 ("***X 2***") and 22 December 2023 ("***X 3***"). Person X is a partner in a Russian law firm. Person X is a Russian-qualified lawyer specialising in Russian civil and commercial law, and has been in legal practice for more than 17 years. Person X has extensive litigation experience in Russian Arbitrazh Courts, the Supreme Arbitrazh Court of the Russian Federation and the Supreme Court of the Russian Federation in high-profile commercial, corporate and bankruptcy disputes. Person X represents Russian

companies and foreign companies. Person X is the author of a number of publications in Russian legal periodicals; and

ii) the expert reports of Dr Nigel Gould-Davies on Russian politics, court practice and the Russian judiciary. Dr Gould-Davies is a Senior Fellow for Russia and Eurasia at the International Institute for Strategic Studies, and he formerly acted as head of the Economic Section in the British Embassy in Moscow and as British Ambassador to Belarus. He produced two reports dated 26 May 2023 ("***Gould-Davies 1***") and 22 December 2023 ("***Gould-Davies 2***").

196. The other Claimants generally adopt the MLB Claimants' expert evidence, save that AerCap and Shannon do not rely on certain paragraphs of X 1 and X 3, or the evidence of Dr Gould-Davies.

197. The War Risks Defendants served and rely on the following expert evidence:

i) the expert report of Mr Kamran Pirov dated 3 November 2023 on Russian law ("***Pirov 1***"). Mr Pirov graduated in 1996 from the Faculty of Law of Lomonosov Moscow State University, specialising in jurisprudence, and has almost thirty years of experience in jurisprudence. He has been a Partner at the Russian law firm Sokolov, Maslov & Partners (city of Moscow) since 2000. In 2002 he also obtained the status of attorney and became a member of the Inter-Regional Panel of Attorneys for Assistance to Entrepreneurs and Individuals. Since 2003 Mr Pirov has been the chairman of the Moscow Panel of Attorneys Vneshyurconsulting. His main area of expertise is transport law (maritime law, aviation law) and related issues, for example, insurance. Many of his projects involve the representation of clients (including foreign clients) in Arbitrazh Courts and in commercial arbitration. Mr Pirov also practises as an arbitrator; and

ii) the expert report of Professor Mikhail Antonov dated 6 November 2023 ("***Antonov 1***") on Russian law and politics. Professor Antonov is a Professor at the Department of Theory and History of State and Law in the St. Petersburg Campus of the National Research University "Higher School of Economics", a position which he has held since 2010. His main research interest is the connection between law and politics in Russia, something about which he has written extensively. Since 2009, he has also practised as an advocate at the St. Petersburg Bar Association. Professor Antonov qualified as a specialist in tertiary education in "Economic Regulation" at the Presidential Academy of the National Economy and State Administration (1999) and as the same specialist but in "Law" at the St. Petersburg State University (2000). Prior to his current roles, Professor Antonov was a lecturer at the Law Faculty of the St. Petersburg State University (2007-2010) and has practised law since 2000 in various roles in both the public and private sector since qualifying as a lawyer in June 2000.

198. Some of the All Risks Defendants rely on parts of the expert report of Leonid Zubarev dated 10 February 2023 ("***Zubarev 1***") or the expert report of Leonid

Zubarev dated 11 June 2023 ("***Zubarev 2***"). Mr Zubarev is Senior Partner of a law firm, SEAMLESS Legal, in Moscow, formerly part of the international law firm CMS and since June 2022 an independent law firm in Russia. He has held the position of Senior Partner since 2012 and specialises in Russian civil and insurance law, as well as in domestic and international dispute resolution. Mr Zubarev has over 27 years of practice in advising and representing domestic and foreign clients on various matters of Russian law and litigating in Russian state courts of all levels. He has extensive experience in acting as a foreign or local advisor in multi-jurisdictional disputes involving insurance matters, including those concerning aviation claims. Mr Zubarev has a diploma in law received in 1995 at the Moscow State Institute of International Relationships (MGIMO), and since 2020 has been a Certified expert for insurance disputes at the Russian Arbitration Centre. He also actively participates in insurance or business law associations and in legal publishing.

199. Other All Risks Defendants do not rely upon any expert evidence.

200. I am satisfied that each of the experts had the expertise and qualifications necessary to give the evidence set out in their report(s).

201. The Defendants suggested that Dr Gould-Davies's experience was largely historic, given that he left Russia in 2007, where he was Head of the Economic Department at the British Embassy in Moscow from 2003 to 2007. However, Dr Gould-Davies's CV makes clear that he has remained very close to events in Russia ever since. He was British Ambassador to Belarus from 2007 to 2009, Project Director in the Strategy Unit at the Foreign and Commonwealth Office from 2009 to 2010, and Vice President in the Policy and Corporate Affairs (Central Asia and South East Asia) at BG Group from 2010 to 2014. Since then Dr Gould-Davies has held academic roles, including being an Associate Fellow on the Russia & Eurasia Programme at Chatham House, London from 2016 to 2020, and has written extensively about current events in Russia. His CV lists more than 40 publications over the last few years (including articles, chapters, working papers, analytical or opinion pieces, conferences, lectures and presentations) relating directly to Russia. In 2021-2022 Dr Gould-Davies was an expert witness to the House of Commons Foreign Affairs Committee on Russia and Belarus, and to the Treasury Committee.

202. The Defendants also suggest parts of Person X's reports stray beyond Person X's expertise by commenting on political rather than legal matters. Again I disagree. As a lawyer and author who has been in legal practice for more than 17 years, with extensive litigation experience in Russian Arbitrazh Courts, the Supreme Arbitrazh Court and the Supreme Court of the Russian Federation, Person X is well placed to opine on the influences and constraints under which Russian judges work, including those arising from state interest or intervention in cases or from judges' perceptions of state interests. Person X takes care in their reports to distinguish between points on which they can and cannot properly express an opinion.

203. I deal in more detail in section (O) below with the question of which parties relied on which evidence, and the implications of that for these applications.

(2) Influences on the judicial process in Russia

204. There are significant areas of common ground between the experts.

205. It is agreed, first, that there are no formal legal or procedural obstacles to the Claimants bringing the OP Claims in Russia. On the contrary, Article 62(3) of the Russian Constitution provides that foreign persons shall enjoy the same rights and bear the same responsibilities as Russian persons. Although Article 254(4) of the Arbitrazh Procedural Code provides for the possibility of restricting foreign persons' procedural rights (including the right to a fair hearing), the Russian government is yet to impose any such restrictions. (I note for completeness that this point is not common ground as regards the additional obstacles relied on by the GTLK Claimants in their opposition to these jurisdiction challenges to their OP Claims, which are due to be determined at a GTLK-Specific Issues hearing in June/July 2024.)

206. Secondly, however, it is common ground that in cases which are of sufficient interest to it, the Russian state is both willing and able to interfere in and affect the outcome of judicial decisions. I discuss the evidence in more detail below, but note at this stage that Professor Antonov does not contend that Russian judges, including those of the Arbitrazh Courts, are "*never subject to political pressure or that they are always independent in performing their judicial duties*" (report § 23), and confirms that "*I do not deny that political interference in court proceedings in Russia does occur*…" (report § 186).

207. The following points are also common ground:

    i) The aviation industry is one of the most important sectors for Russia. This reflects the geographical size of Russia and the fact that a large proportion of internal travel is by aircraft. As Professor Antonov acknowledges, the present dispute (at least) indirectly concerns "*aircraft which may represent a large portion of the Russian civil aviation fleet*." (report § 107).

    ii) The Russian state has an interest in the maintenance of necessary aviation insurance capacity.

    iii) If the Claimants proceeded to bring the OP Claims in the Russian Courts, it is "*highly likely*" that the Russian insurers would be joined as third parties to those claims (X 1 § 163, Pirov 1 § 148).

    iv) The sanctions imposed on Russia by the EU and UK would not be recognised as legally binding in Russia.

    v) As a consequence, the termination of an agreement based solely or exclusively on Western Sanctions would not be recognised as a valid termination by the Russian courts.

208. I now give a summary of the experts' evidence on certain influences operating in general on judicial decision-making in Russia.

(a) Dr Gould-Davies's evidence

209. Dr Gould-Davies sets out the essence of his views, in the Executive Summary forming part of his first report, as follows:

> "5. The Russian State views the judiciary as a means of achieving state objectives, including its national security and economic objectives. The judiciary understands that it is expected to deliver rulings that advance state objectives, regardless of the technical legal merits, and can be punished if they do not do so. This tendency only increased in the course of the 2010s, as President Putin's regime became more authoritarian in nature.
>
> 6. Prior to the war in Ukraine, it was conceivable that foreign companies could obtain a fair trial in Russia, where the substance of the dispute did not directly implicate important state interests.
>
> 7. Since February 2022, the setbacks Russia has faced in its war against Ukraine have created deep and growing concern in the state about the security of both Russia and the Putin regime. The latter views itself as locked in an existential battle with the West, which is supporting Ukraine with military and other aid and is imposing severe economic sanctions on Russia. Winning the war in Ukraine is Russia's overriding priority. The designation of Western countries that support Ukraine as Unfriendly States reflects this.
>
> 8. Since these claims pertain to matters relating to major Russian State interests in a period of extreme hostility between Russia and the West, in my view, it is very likely that the judicial determination of these claims in Russia would be subject to state interference."

I focus for now on points 5-7 above, and return later to the question of state interest in these particular disputes.

210. Dr Gould-Davies states that it is widely accepted that there is no strong tradition of the rule of law, or of a free, impartial and independent judicial system, in Russia. This, he says, remains true today. This, and the weakness and instability of both civil rights and property rights that follow from it, are fundamental features of Russia past and present. That is the consensus view among independent scholars and experts on Russia, and he knows of no recognised expert who would dissent from it. Dr Gould-Davies notes that other sources share that view, referring to (a) the 2022 World Justice Project's annual Rule of Law Index (ranking Russia 107th out of 140 countries), and (b) the 2022 Freedom in the World report, published by Freedom House (giving Russia a score of 1 (on a scale of 0-4) for the independence of its judiciary), which noted that:

> "The judiciary lacks independence from the executive branch, and judges' career advancement is effectively tied to compliance with Kremlin preferences. The Presidential Personnel Commission and court chairpersons control the appointment of the country's judges, who tend to be promoted from inside the judicial system rather than gaining independent experience as lawyers. The 2020 constitutional amendments empowered the president to remove judges from the Constitutional Court and the Supreme Court, with the support of the Federation Council, further damaging the judiciary's already negligible autonomy."

211. Dr Gould-Davies states that several international organisations, including the Council of Europe, have expressed concern about judicial independence in Russia, including the OECD which in 2004 drew attention to *"[i]nterference in judicial process by state institutions"* and mentioned, among other cases, one in which "*officials in the presidential administration met representatives of the Supreme Arbitration Court to underscore the importance of the case for 'state interests'*". Dr Gould-Davies notes that this was "*long before the state achieved the degree of dominance over all institutions that it now exercises (as discussed below)*".

212. Dr Gould-Davies notes that senior Russian officials have publicly acknowledged the lack of judicial independence, for example Alexei Kudrin, then head of the Russian Audit Chamber, who in 2019 told the St Petersburg International Economic Forum (Russia's leading business conference) that: "*There are no stable rules, there's no impartiality in … the arbitration of problematic disputes …*". Kudrin is, Dr Gould-Davies says, an internationally respected figure whose long career in government includes over a decade (2000-11) as Finance Minister.

213. Dr Gould-Davies states that:

> "28. In cases that involve powerful interests or large stakes, judicial decisions are typically shaped by the state's preferences or by vested interests. We may call the first source of influence "political direction" and the second "corruption".
>
> 29. Both political direction and corruption play a major role in the way Russian political institutions, including the judicial system, operates today. … Where political direction and corruption are not engaged, for example in low-level cases, such as petty crime or minor commercial disputes, the court system arguably provides a satisfactory remedy for ordinary citizens.
>
> 30. The role of the state in Russia's judicial system today must be understood in the context of the state's wider role and direction of travel. Having lived and worked in Russia and followed the development of the country and its institutions, it is my view – and, I am confident, the consensus opinion of independent analysts and observers of Russia – that over the past two decades the state has comprehensively weakened and

> subordinated all independent institutions with the potential to restrain state power or to act in ways unwelcome to the state. These include civil society, political opposition, the media and elections."

214. Dr Gould-Davies says state influence over the economy has also grown significantly through various formal and informal means. Against this background, control over the judicial system is doubly important to the state. Not only must courts not be permitted to rule against state interests, but court verdicts are themselves a key instrument for enforcing state control over other institutions – for example, by disbanding NGOs, imprisoning activists and closing independent media outlets. Major decisions, such as the closing down of International Memorial, one of Russia's oldest human rights organisations, in 2021-22, have been taken by the Supreme Court, which also has ultimate oversight of the Arbitrazh Courts that govern commercial cases.

215. Dr Gould-Davies notes that Russians have coined the term "*telephone law*" (telefonnoye pravo) for the political direction of judicial decisions, a term that he says has been in use for decades. Dr Gould-Davies explains that he led the British Embassy's reporting of the Yukos case, which ultimately led to the 18 July 2014 Judgment of the Permanent Court of Arbitration (upheld by the Hague Court of Appeal in 18 February 2020) finding that "*Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State controlled company, and incarcerate a man who gave signs of becoming a political competitor*" (judgment § 1583).

216. Dr Gould-Davies refers to *"the wide gulf in Russia between institutional appearances and the reality of the informal understandings, relationships and practices that pervasively determine outcomes"* (citing Alena Ledeneva, Telephone Justice in Russia, Post-Soviet Affairs, Routledge, 16 May 2013), adding that there are few accessible records of such informal direction of courts. He refers to the risks judges run by failing to comply with, or speaking about, political direction, citing:

    i) the 2003 case of Olga Kudeshkina, a judge in the Moscow city court, who was subject to politically-related pressure while presiding over the trial of a Ministry of Internal Affairs official charged with abuse of office, and subsequently removed from the case. When she later disclosed this publicly, she was dismissed from the judiciary. She took the Russian State to the European Court of Human Rights ("***ECtHR***") and won her case in 2009 (Judgment of the ECtHR, *Kudeshkina v. Russia* (no. 29492/05) (29 February 2009));

    ii) the reference in 2006 by the then-head of the Supreme Arbitrazh Court, Anton Ivanov, to pressure on the court from the Federal Tax Service (FTS) at a meeting of the council of judges. This included securing the resignations of several judges who were considering tax claims against TNK-BP, a major UK-Russian company; and

    iii) the testimony in 2008 of the first deputy chairman of the Supreme Arbitrazh Court, Elena Valyavina, that a senior official in the

> Presidential Administration had issued instructions to her in a high-profile commercial case and had made threats about her career prospects if she defied him.

217. Dr Gould-Davies states that the revelations above were made in the mid-late 2000s, before Russia's political and media environment became too repressive for such disclosures to be made and reported. He notes that during that period, there were still hopes that judicial reform could move Russia further towards a country where rule-of-law prevailed, and the court system sometimes ruled in favour of Russian businesses in significant disputes with state bodies. However, there were, he says, clear signs of deterioration. One of these was the forced resignation in 2009 of two Constitutional Court judges, Vladimir Yaroslavtsev and Anatoly Kononov, after criticising the Kremlin's interference with court decisions, with Kononov having said that "*one cannot speak of complete independence. None of the judges at any level has it.*" Another is the rulings of the ECtHR in a number of cases that Russian citizens were denied justice against the Russian State on account of the lack of judicial independence (*Baturlova v Russia* (no.33188/08) (19 April 2011) and *Khrykin v Russia* (no.33186/08) (19 April 2011)).

218. Dr Gould-Davies concludes, in this section of his first report:

> 47. Since then, in my opinion, at an accelerating rate the Russian State has become comprehensively authoritarian. The role of the legal system is today more clearly than ever to serve as an instrument of state power, not a body of rules that regulates all actors (including the state) in an impartial and independent way. This " dictatorship of law ", as President Putin has long described it, is the antithesis of the rule of law as understood in law-governed states.
>
> 48. Physical and legal repression have become the dominant method, rather than one of several co-existing methods, of state control. The Russian State dominates all other domestic institutions. There is no independent media, no genuine political opposition and almost no permitted public dissent. Even minor acts of protest are met with long jail sentences. For example, referring to Russia's invasion of Ukraine as a "war" is a crime that carries a prison sentence of up to 15 years. It is widely accepted, and also my opinion, that President Putin wields executive power unconstrained by legal, political or other checks and balances.
>
> 49. The emergence of full-blown authoritarian rule had largely been completed by the end of 2021. Russia's invasion of Ukraine in February 2022 has marked a new level of intensity in these trends.
>
> 50. The state's absolute priority is now to avoid losing a disastrous war, an outcome that would put the future of Putin's regime in doubt. This task demands the complete subordination

> of all institutions to the state as well as the gradual mobilisation of national resources.
>
> 51. In my opinion, it is impossible to imagine that in these conditions a Russian court would rule against a preference expressed by the state. In any legal case in which the state considers itself to have an important interest, the key question is not: "are the Russian courts impartial"? In important matters they are not, and cannot be, in present circumstances. The question is rather: "how does the state assess its interests, and what decision will it direct the Russian court to make?" Based on my experience, my expectation is that even if there is no explicit political direction, the court is likely to issue a verdict on the basis of what it anticipates the state's preference to be."
>
> (footnotes omitted)

I note that the last sentence quoted above refers to what Person X refers to as judicial self-censorship: see below.

(b) Person X's evidence

219. Person X begins their consideration of this topic by noting that the appointment of almost all judges is, to a greater or lesser extent, within the competence of the President of Russia, citing Articles 6(3) and 6.1(2) of Law №3132-1 of 26.06.1992 "*On the status of judges in the Russian Federation*", which confer the relevant powers on the President on the recommendation of the Chairman of the Supreme Court of the Russian Federation, who is in turn appointed by the Federation Council (the upper house of parliament of the Russian Federation) on the recommendation of the President.

220. Person X states that on March 14, 2020, the Russian Constitutional Amendment Act №1-FKZ modified the Constitution of the Russian Federation to, inter alia, give the President new powers to initiate the removal of the chairmen of the Supreme and Constitutional Courts (i.e. the highest courts in Russia) as well as the chairmen and judges of the courts of appeal and cassation, thus increasing the President's ability to influence the court system by giving him the power to initiate the removal of a significant part of the judges in Russia.

221. They refer to a 2018 study by the Institute of Law Enforcement Problems and the European University in St. Petersburg, "*Sources of Judicial Staff in the Russian Federation and the Role of the Courts' Staff"*, which noted that 65.5% of judges before appointment worked exclusively or mainly in the court administration (as assistants or clerks of judges), 17.2% of judges had previously worked in law enforcement bodies and only 11% of judges had previously worked as university professors or practised law in the private non-public sector.

222. Person X explains that court chairmen, who are appointed directly by the President, have an important influence on judges by the exercise of powers including the sharing of workload and the allocation of cases.

223. In §§ 109 to 111 of their first report, Person X says:

> 109. The problems of insufficient independence of judges in Russia were discussed in the Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, dated 30.04.2014 which noted in particular the following:
>
> > "The Special Rapporteur is concerned about the many reported attempts by State authorities and private actors alike to exercise control over the judicial system — interference often referred to as "telephone justice". While she was occasionally told that "telephone justice" does not happen anymore, many interlocutors said that interference with the judiciary from the executive or other powerful stakeholders is still entrenched in the system".
>
> 110. The lack of judicial independence in Russia has also been highlighted by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, who noted the following [in 2016]:
>
> > "What is certain, though, is that unless the Russian judiciary becomes more independent, concerns will not be assuaged. The current procedures and criteria to appoint, dismiss and sanction judges still provide insufficient guarantees for objective and fair proceedings and judges remain exposed to pressure from powerful political and economic interests ".
>
> 111. Based on the above research and my professional experience, I believe that there is a substantial risk of Russian courts being improperly influenced by executive authorities and being affected by "self-censorship". As regards "self-censorship ", in my experience, Russian judges are often guided not by legal norms but by their own ideas about the expectations of the Russian state as to how the dispute should be resolved in the interests of the Russian state. This is especially so in areas that are particularly important for Russia's national security."
>
> (footnotes omitted)

224. Person X cites the Kudeshkina case as an example of the problem of the influence of court chairmen and representatives of state authorities on judges (the pressure to decide the case a certain way having come from the chairman of the court). They refer also to the Yukos saga, which included reports of state pressure being applied to Judge Natalia Cheburashkina, the dismissal of Judge Vlada Blizents and the conferral of an award on a judge who ruled in the state's favour. Person X refers to a case in 2008 where Elena Valyavina, a judge of the Supreme Arbitrazh Court (which was abolished in 2014) gave evidence that a state official had come to her with instructions in a case about shares in a state-owned company. They also cite a series of cases where the Russian courts dealt with claims for recovery of industrial enterprises or high-value assets for alleged violations during the privatisation process in the 1980s. These related to the

Kuchuksulfat JSC, Bashkir Soda Company and Solikamsk Magnesium Plant. Those cases, Person X states, were heard in Arbitrazh Courts at several levels, and included the Arbitrazh Court of Cassation in substance ruling that the importance of the enterprises for the state and society itself provided a legitimate basis for the alienation of shares from private owners to the state. Moreover, the cases were decided within surprisingly short periods of time, such as five months in the Kuchuksulfat case and three months in the Bashkir Soda case, and with no analysis of legally fundamental issues such as time bar, the rights of shareholders who acquired their shares in the free market in good faith and without having participated in the original privatisation, or the entitlement to compensation.

225. Person X's conclusion is that *"in cases where the state has an interest, it is in my view likely that the Russian courts will not show the independence and impartiality required of them"* (X 1 § 141).

(c) Professor Antonov's evidence

226. Professor Antonov states that (as Mr. Pirov also explains), a fair trial and equal treatment are fundamental rights protected by the Russian Constitution and subordinate legislation; mandatory for all Russian Arbitrazh judges. They are obligated to ensure "*just and public court proceedings within a reasonable period of time conducted by an independent and impartial court*" (para.3, Art.2, Arbitration Procedure Code ("***APC***"). He notes that the 1992 Law on Judges requires judges on assuming office to swear an oath:

> "I do solemnly swear honestly and in good faith to fulfil my duties, to render justice, and in doing so to be subordinated only to the law and to be impartial and just as my undertaking as a judge and as my conscience compel me to do".

227. Professor Antonov says the analysis of Person X and Dr. Gould-Davies over-states the significance – to the position in which these Claimants would find themselves – of historic features of the judicial system in Russia and the Soviet Union. Professor Antonov continues:

> "17. I do not disagree that, in cases which are of sufficient interest to the Russian State, it is capable of affecting the outcome of judicial decisions. However, this phenomenon is in my view less likely in the Arbitrazh Courts, before which this dispute would be litigated. In my opinion, that primarily reflects the fact that the types of disputes coming before those courts – i.e., commercial disputes – rarely contain features which would motivate the Government to seek to influence the outcome, as well as the fact of relatively greater transparency at the Arbitrazh Courts (as compared with the courts of general jurisdiction). This dispute seems to me to be one of the many cases that is likely to be determined by the Arbitrazh Courts without a significant risk of political interference."

I observe that this portion of Professor Antonov's analysis appears to turn on the relative rarity of Arbitrazh Courts dealing with matters likely to be of interest to the state.

228. Professor Antonov states that he is unaware of any judicial decisions in civil-law (commercial) cases rendered by Arbitrazh Court judges – in disputes between private parties – which are suspected of being rendered under the State's political pressure in order to relieve litigants from their contractual obligations. He says Dr. Gould-Davies' and Person X' views do not give due weight to the features of these claims that distinguish them from the historical cases and the actual court practice to which Person X and Dr. Gould-Davies refer in support of their views.

229. Professor Antonov accepts that in the Soviet era, a number of fundamental issues cast doubts on the integrity of the Russian court system, and political influence among the judiciary manifested itself by way of 'telephone justice'. However, an important change since then is the open, public access to all court decisions in Russia (in full-text form) which has been mandated by Russian legislation for almost a decade. Professor Antonov goes on to say:

> "23. I repeat that it is not my contention that Russian judges today – even Arbitrazh-Court judges – are never subject to political pressure or that they are always independent in performing their judicial duties. Yet, I do not believe it methodologically correct to contend that the Russian Arbitrazh judges are – by virtue of the manner of their appointment – structurally susceptible to political interference. Such a broad-brush approach chooses to ignore the millions of cases annually decided by Russian Arbitrazh Courts in which there are no rumours or suspicions of political interference behind the coulisses."

He disagrees that the President's role in appointing and removing judges proves subordination to political power, saying that the President is *"only the last instance in the appointment and dismissal processes, the official who signs the final document"*.

230. Professor Antonov says that it is no longer appropriate to analyse the Russian judicial system in the 2020s, in particular the Arbitrazh Courts, from a Soviet-era perspective. Whilst the system in the 2020s is by no means perfect, it is substantially more transparent and independent than the system which existed previously. Further:

> "The transparency reforms which have been strengthened over the past years and the procedural guarantees – to which I refer below – mean that, in my opinion, there is no significant risk of an unfair trial in any Arbitrazh proceedings between Russian and/or foreign private entities or individuals brought in Russia other than in those very rare cases involving features which – in my view and on the basis of my understanding – are not present in this dispute." (§ 24)

231. Professor Antonov states that, unlike Soviet law – which unambiguously and ubiquitously favoured public over private interests – the law of the Russian Federation is based on liberal principles contained in the Constitution, the APC, and in other Russian legislation. These normative propositions – in and of themselves – are not a guarantee of either water-tight judicial independence in each-and-every case or of the universal satisfaction of litigants with the result of the adjudication in their dispute. However, they do allow practitioners, scholars, and others (those in Russia and, also, those abroad) to help safeguard a litigant's right to a fair trial by putting them in a position to uncover those instances where a judicial decision manifestly contradicts the law in force and/or ignores any meaningful part of the admissible evidence. Also, unlike in the Soviet era, there are no institutions in present-day Russia which are expected to monitor judges, to influence their judgments, or to prompt judges to decide in favour of the State's interests as used to occur. Any official who sought to influence a judge's decision would be liable to criminal penalties.

232. Professor Antonov cites, in a footnote, a 2009 article by Professor Kathryn Hendley, Professor of Law and Political Science at the University of Wisconsin-Madison, in which she stated *inter alia "contrary to the prevailing stereotype, fears of 'telephone law' did not dominate the conversations. […] Although the literature (both mass media and scholarly) has concluded that Russian courts are unappealing due to 'telephone law', I found few respondents who shared that view."* In an Appendix to his report, Professor Antonov also cites statements by Professor Hendley that politicised cases are a tiny minority of cases in Russia, whose courts hear well over sixteen million cases per year *"the vast majority of which are of little interest to anyone not directly involved"*, that demand for the use of the Arbitrazh Courts remains high, and that ordinary Russians have confidence in their courts. Professor Antonov nonetheless accepts that he *"well can imagine that the political leadership also seeks to keep some 'wiggle room' open in the system of the Arbitrazh Courts …"*, says he is not arguing that everything is now in order, and believes that more remains to be done (Appendix 2 §§ 20 and 22).

233. Professor Antonov says that, in particular, the reforms in Russian electronic justice have strengthened the principle of open justice and the oversight of Russian judicial decision-making including by providing a wide avenue for exposing wrongful judicial decisions. He refers to the entry into force in January 2009 of Federal Law No. 262, bringing with it a level of transparency to the judicial system previously unknown in Russia, including public access to the full-texts of judicial decisions rendered in Russian Arbitrazh Courts; and the fact that, pursuant to legislation dating from mid-2010, the majority of Arbitrazh Court proceedings are now tape-recorded (the recordings being retained in the case file and accessible to the parties). Since July 2017, persons attending court hearings – upon consent of the court and, also, upon condition that they do not disturb order in the courtroom – are able to record the proceedings in electronic media and, also, disseminate them electronically; and Arbitrazh Court judges are required to post, online, the complete texts of their rulings and decisions very promptly. Professor Antonov adds:

> "30. The level of transparency achieved by Law No.262 makes it imperative, in my opinion, to discard what is, now, an obsolete perception: relying only on generalities and suspicions in assessing allegations of judicial impropriety in a Russian Arbitrazh Court.
>
> 31. … Of course, transparency does not guarantee that a judge will not be subject to political or other influences (most particularly in disputes where legal texts require a judge to make a determination, e.g., to gauge the seriousness of alleged contractual violations as possible grounds for the lawful repudiation of a contract). Yet, the now-transparent Arbitrazh-Court system means that the possibility to corrupt a judge is more restricted; that it fosters a judicial culture where corruption is viewed as unacceptable.
>
> 32. I am not suggesting that attempts to influence a Russian Arbitrazh-Court judge are now relegated to the history books, that corruption has been eradicated from the Russian judiciary, or that the government is unable to affect the outcome of proceedings in an Arbitrazh Court in one of the rare cases where it was motivated to do so. However, as noted above, any such interference is significantly less likely because of the transparency reforms and the procedural guarantees to which I have referred above."

234. Professor Antonov states that during Putin's first presidency, there was a risk of violation of the statutory fair-trial guarantees in cases in which strategic assets were at stake or mighty political interests were involved in the sense discussed below. But also, in that period of time (in the early 2000s), the fact that a party to Arbitrazh Court proceedings may be owned (in part) by the State – or that the amount at issue in the dispute might be substantial – was an insufficient basis for characterising those proceedings as a possible target for State interference. That unlikely possibility is even more remote, nowadays, after the Kremlin imposed its 'rules of the game' on Russian oligarchs in the 2000s. In Professor Antonov's opinion, it is of vital interest for the Kremlin to maintain the correct (i.e., in accordance with existing law) functioning of the courts to ensure its political control throughout the country's vast territory where separatist tendencies can clearly be seen in a number of regions. This control throughout Russia is exercised by imposing federal laws and bye-laws which are common and uniform for the entire country.

235. Professor Antonov goes on to say that the examples which Dr Gould-Davies and Person X cite have no legal affinity with the present case, and fail to demonstrate any pattern of state interference relevant to the present dispute. He notes, for example, that Ms Kudeshkina was removed from office not because she disobeyed the court president or handed down a judgment contrary to any 'instructions', but because she publicly criticised the Russian judiciary and the judicial system, winning her case in the ECtHR on freedom of expression grounds. He suggests that Judge Kononov's remark about judges not having

independence at any one level was merely the philosophical point that no judge anywhere in the world has complete freedom.

236. He accepts that there are well-grounded suspicions of political pressure in the *Yukos* case, but says it is appropriate to be cautious about extrapolating too much from one case. The case was, he says, not about commercial law matters but tax liabilities and Mr Khodorkovskiy's political activities. As to the deprivatisation cases, Professor Antonov says:

> "52. I can see how one might reach a view that the outcome of those cases is unfair. However, whether or not these decisions unfairly penalize the current owners is not an easy question to answer. Such a determination is more within the realms of ethics, economics, or political science, and, I agree: it is quite controversial.
>
> 53. In my opinion, the court decisions in JSC Kuchuksulfat, JSC Bashkir Soda Company, and JSC Solikamsk Magnesium Plant – even though they raise questions among lawyers and economists, and provide room for discussions among political-science scholars – were formally rendered without violating the letter of the law. I cannot see any convincing evidence that the Russian State interfered in those disputes, thereby determining their outcome in favour of the RF Prosecutor General's Office."

237. Professor Antonov expresses the view that the present disputes involve no significant risk of state interest, because (1) they do not touch on any of the most important assets of the Russian economy, (2) they do not affect the ownership or control of such assets, (3) they do not involve political activities in Russia by any of the parties, (4) the question of who receives insurance indemnification does not affect Russia's interests, (5) he sees no evidence of any publicity campaigns being waged in order improperly to influence a decision in these cases and (6) in recent years there have not been "*any documented cases*" in which Russian authorities have attempted to apply political influence in commercial law disputes in Arbitrazh Courts so as to compel judges to 'play by the Kremlin's rules' and allow state-owned entities to evade contractual payments.

238. On the subject of corruption, Professor Antonov states that he is aware of reports of corruption in Russia, including in Russian Arbitrazh Courts, but disagrees with any suggestion that Russian judges are predisposed to being corrupted or that there is significant corruption in Russian Arbitrazh Courts. Having met scores of Russian judges and other lawyers, his opinion is that the work of most of them is characterised by integrity and honesty. In summary, Professor Antonov says, it is difficult to say to what extent corruption is present in the Arbitrazh Courts. Although he believes that it does exist, he would disagree with an assumption that it was ubiquitous or even necessarily very common.

239. On the subject of judges deciding, without actual state intervention, to make decisions favouring the state, Professor Antonov considers this unlikely. He states:

"90. Such self-censorship would go against the 'survival instinct' which, undoubtedly, is shared by most Russian judges (and by most Russians in general), preventing them from engaging in political 'dice-rolling' on their own initiative. Unless judges are required by their superiors or by the political authorities to venture into the realm of political reasoning – attempting to leap ahead of official policies as embodied in legislative and other decisions promulgated (or publicly proclaimed) by the Russian authorities – it is highly unlikely that Russian judges would otherwise do so. They surely appreciate that the province of political decision-making is – by default – reserved exclusively for the Russian political elite. It is evident to everyone with a basic knowledge of Russian politics that any attempt to diverge from the official political line – be it to step to the left or to the right – will not be welcomed by the authorities. This would especially be the case when such attempts are made by State servants – such as judges – whom the Government uniformly expects to refrain from guessing what might be politically expedient albeit not yet legally fixed in the letter of the law by the authorities.

…

92. …Should a judge engage in any kind of hard-line political thinking – in the style of the Club of Angry Patriots – and attempt to implement it in her judicial decisions, it could easily be seen as an expression of disagreement with the Kremlin's political line. This would be at odds not only with what is normally expected from judges but, also, with what [Person X] labels as 'self-censorship'. It should steer a judge away from risky political activities; not towards them which could quickly bring an end to her career.

93. In his 2019 Interview, Professor Vadim Volkov, head of the Institute of Law-Enforcement Problems at the European Institute in St. Petersburg … agreed that while there is statist bias in administrative and criminal cases, "there is no general statist bias at Arbitrazh Courts" although he recognized that private parties might experience difficulties in economic litigation against the State.

…

100. If [Person X] means the truism that judges whose salary is paid from the State budget – in addition to the other costs of administration of justice (clerks, premises, utilities, etc.) borne by the Ministry of Justice – cannot extricate themselves from thinking about the State which they represent and in the name of which they render their judgments, [they are] quite right about it. But it is, naturally, not a specifically Russian feature. It is also

> common to other jurisdictions in continental Europe for example."
>
> (footnotes omitted)

240. Professor Antonov summarises his views on the question of state interest in the present disputes as follows:

> "139. In my opinion, nothing in the Reports of [Person X] or Dr. Gould-Davies establishes that there is any significant risk that: (A) any of the Russian litigants would attempt to interfere with judicial independence in the present dispute without getting a 'green light' from the Kremlin; and/or that (B) the Kremlin would authorize it even if any of the Russian litigants dared to ask for it. In my view, there would be no such risk. Such interference would be at odds with official narratives and publicly proclaimed goals and policies of the Russian State and, also, with the policies of the Russian Government which is seeking to resolve the matter of the leased Western aircraft via settlement negotiations.
>
> 140. In my opinion, there is no significant risk that the Russian State – or that the RNRC as a de facto state agency – would attempt to exert influence on Russian Arbitrazh Courts in their determination of the present dispute. The sums at issue are not large enough to prompt the State to risk losing face by showing that it instrumentalises its judicial system to evade contractual liability.[FN] It would run afoul of the official ideology and, also, with what seem to be the Russian Government's strategic, long-run plans for economic development (see paras.87-90 of my Report). As mentioned above, that ideology and those plans are reflected in the Government's settlement of claims and negotiations to settle further claims concerning retained aircraft, inclusive of insurance payments. I see no reasons why the State would adopt another strategy in the present dispute.
>
> 141. In summary, my opinion is that there is no direct State interest in the outcome of the present dispute, certainly not of sufficient weight to outweigh its interest in letting the courts deal fairly and impartially with the claims and to motivate it to seek to interfere (or to permit interference) with the outcome of the claims."
>
> [FN] "I note that there is a multitude of publications – both in Russia and abroad – dealing with the retained aircraft. Thus, there is little chance that – were the Russian State to undertake 'dirty tricks' at the Arbitrazh Court – it would go unnoticed by the public. For the same reasons, there is little chance that illegal actions would be played out behind the scenes; that any unfair play of the Russian litigants at the court in the present dispute –

> and their attempts of unlawful influence Arbitrazh judges – would not be observed by the Kremlin."

241. Later in his report, Professor Antonov says, *"While I do not deny that political interference in court proceedings in Russia does occur, in my opinion, any assertion that Arbitrazh-Court judges will, by default, relinquish their independence and impartiality in disputes in which the State has an interest grossly misrepresents the facts"* (§ 186).

242. I have difficulty with parts of Professor Antonov's reasoning. He suggests that things have moved on since the Soviet era of 'telephone justice'. However, as noted earlier, Dr Gould-Davies expresses the opinion that the Russian regime has become increasingly authoritarian in recent years. Professor Antonov himself says it may be that the political system of Putin's Russia has not changed meaningfully in past years. He argues, though, that the judicial system has continued to undergo significant changes since before 1991. However, the specific respects in which Professor Antonov says the judicial system has changed appear to focus on the transparency measures mentioned in the evidence I summarise above, and legal or procedural developments. Thus, he states:

> "… for the inside observer and actor, changes in Russian law and in the courts (such as the 2014 overhaul of the Russian Civil Code or the 2015 introduction of the Russian Code of Administrative Procedure) represent important milestones in the continuing reforms although these reforms do not specifically address the question of external influence." (Appendix 2 § 19)

243. As to that last caveat, Dr Gould-Davies points out in his second report that measures such as transparency do not provide realistic safeguards against pressure from the state or other vested interests, which is applied outside the courtroom and would not be evident from any transcript or recording of the proceedings or the judgment. Nor could there be any reason to believe that such measures would provide effective protection from judges deciding cases, whilst ostensibly based on the law, in accordance with what they consider to be the state's preferences in the way Dr Gould-Davies and Person X state. Person X explains that:

> "unlike the texts of judicial decisions, the case file and the procedural positions of the parties are not available to persons not participating in the case. Therefore, even in the course of publishing of the texts of judicial decisions, it is impossible to check whether the court took into account all the factual circumstances of the case, whether it correctly interpreted them, and whether it analysed all the arguments and statements of the parties in the final decision. In this sense, the arbitrazh court system still remains non-transparent, which largely prevents all the guarantees Professor Antonov points out in his Report from being enforced. The real motives behind a court's decision still remain unidentified." (X 3 § 410)

244. In addition, as Dr Gould-Davies says, it is unclear why, logically, judicial independence might be expected to have increased in circumstances where the State has become increasingly authoritarian. Dr Gould-Davies cites *inter alia* Professor Barnes (a source also cited by Professor Antonov) who has written:

> "President Vladimir Putin has increased the role of the federal security service in governing Russia and arbitrarily wielded the power of state institutions such as the courts, the tax inspectors and the police for political ends." (*"Dictatorship or Reform? The Rule of Law in Russia"*) (emphasis added)

245. As to the distinction between Arbitrazh and other courts, Dr Gould-Davies points out that the Supreme Court has ultimate oversight of the Arbitrazh Courts, and Dr William Pomeranz (a source whom Professor Antonov esteems) has written that the Supreme Court was given this oversight by President Putin in order to "*stamp out*" the "*assertion of judicial independence*" by Arbitrazh Courts (Gould-Davies 2 § 41).

246. Although Professor Antonov relies on views expressed by Professor Hendley, it is notable that she draws a stark distinction between the majority of ordinary cases on the one hand and more sensitive cases on the other. In passages referenced by Dr Gould-Davies in his second report, Professor Hendley writes:

> "Also troubling is the fact that judges who, with one breath, resolve mundane cases according to the law, can with their next breath bend to the political or financial winds. The arbitrariness brings the integrity of the entire legal system into question."
>
> "At one end we find the multitude of ordinary disputes that are resolved by the written law. At the other end we find the much smaller number but no less important set of cases that touch on sensitive political issues or involve economically powerful actors, for which the outcome is preordained, and written law is largely irrelevant." ("*Everyday Law in Russia*" (2017, Cornell University Press).)

That view is consistent with the opinion expressed by Dr Gould-Davies in § 29 of his first report, which I quote earlier. (I note in passing that Professor Hendley is an author whose opinions were also cited by Christopher Clarke J at first instance in *Cherney* at § 248.)

247. Dr Gould-Davies also points out that on a fair reading of Judge Kononov's remarks about judicial independence, they were clearly directed specifically towards Russia, where, he agreed, justice was *"in ruins"*. Further, the dismissal of Judge Kudeshinka followed public statements about the courts being used *"as an instrument of commercial, political or personal manipulation"*, and the ECtHR's judgment stated in § 92 that her *"allegations of pressure have not been convincingly dispelled in the domestic proceedings"*.

248. More generally, Dr Gould-Davies in his second report says:

> "51. The view that judicial practice in Russia today is less politicised and more impartial than ten or twenty years ago is not one that I have heard offered in the expert community. Professor Hendley does not share it. Speaking of the contemporary situation, she stated in an April 2023 interview that "*We are back to this old Soviet trick of finding an eternally elastic law that can just catch anybody*". William Pomeranz, whom Professor Antonov praises as first among a number of other "*scrupulous authors*" (§3), and whose "*brilliant 2018 book*" entitled Law and the Russian State he cites as an exemplar of good scholarship (§12), is clear in that book that President Putin has steadily sought to undermine the independence of every aspect of the judicial system. For example, he notes that in the previous decade:
>
> > "[…] the state regularly lost cases in the commercial courts, particularly in tax-related matters. To stamp out this assertion of judicial independence, Putin took the drastic step of abolishing the Higher Commercial Court, the most pro-reform judicial institution in Russia, and placing the lower commercial courts under the supervision of least progressive court, the Supreme Court". [William E. Pomeranz, Law and the Russian State: Russia's Legal Evolution from Peter the Great to Vladimir Putin (Bloomsbury Academic, 2019), p. 159.]
>
> 52. Dr. Pomeranz argues this was also a "not-too-subtle message that the Constitutional Court could suffer a similar fate if it asserted its independence". This is just one example that Dr Pomeranz gives of the opposite trend to that which Professor Antonov suggests." (footnote omitted)

249. It is also an unsatisfactory feature of Professor Antonov's evidence that he places reliance on the World Bank's "*Doing Business Index*", which ranked Russia favourably in the context of enforcement of contracts (albeit below average for the quality of its judicial process), in circumstances where (a) the index does not purport to measure or assess the integrity or independence of the legal system or the judiciary in Russia, only the processes by which contracts are enforced, and (b) Professor Antonov failed to mention the fact that this index was cancelled by the World Bank once an investigation revealed that the index was being manipulated.

250. Further, particularly in the context of the present cases, I do not find persuasive Professor Antonov's reason for disputing Person X's evidence about judicial self-censorship. I have already noted that it is the evidence of both Person X and Dr Gould-Davies that, even in the absence of State direction, Russian judges in sensitive cases are likely to reach decisions based on what they anticipate the State's preference will be. Professor Antonov's reasoning quoted in § 239 above, proceeds on the basis that judges can decide cases by a more or less mechanical process of applying the *"letter of the law"*. However, it ignores the need to find and evaluate the facts, particularly in sensitive cases. The issues

likely to arise in the present cases, discussed in section (E) above and (F)(4) to (6) below, include examination of events in the political sphere, at the highest levels, and on which there is very likely to be an "*official political line*". Decisions on those issues are inherently likely to involve what may be regarded as *"risky political activities … which could quickly bring an end to her career"*. Particularly in those circumstances, Professor Antonov's view fails in my view to provide a plausible answer to the points made by Person X and Dr Gould-Davies.

(d) Mr Pirov's evidence

251. Mr Pirov summarises the legislation, rules and codes relevant to the work of judges and their independence, including provisions of the Constitution of the Russian Federation, Federal Constitutional laws on the judicial system including the Arbitrazh Court system, the Law on the Status of Judges of 1991, the Arbitrazh Procedure Code and the Code of Judicial Ethics. He summarises the procedure for appointment and removal of judges, indicating that self-governing bodies put forward candidates, and the President rejects only about 20% of candidates. As to removal of judges, Mr Pirov accepts that since a 2020 constitutional reform many categories of judges' powers can be terminated by the Federation Council on the recommendation of the President, but says he is unaware of any cases where those powers have been exercised.

252. As regards judges' professional experience, Mr Pirov notes that the 2018 study cited by Person X suggests that:

> "Russian Judges with the experience in the Court's Staff attach greater importance to discipline and knowledge of laws among the qualities important for a Judge; the protection of human rights is mentioned as the most important goals of a Judge.
>
> For Judges who came from the Prosecutor's Office, the skills of "not being afraid to take responsibility" and "fairness" come first."

253. Mr Pirov also sets out the formal rules regarding the appointment and role of court chairmen.

254. As to his personal experience, Mr Pirov states:

> "126. … In those cases in which I have participated personally, I have not been aware of such phenomena as "self-censorship"; I have no grounds for assuming that judges were guided not by the law but by their own ideas of what the state might expect from them ...
>
> 127. My own personal experience has been different. I have virtually never had any problems in accessing fair justice when there were legitimate grounds for doing so. If judgments of the Russian Courts were rendered (in my opinion) with violations of procedural and/or substantive laws, I have always had the

> opportunity to appeal to a higher Court and outline those violations in corresponding complaints. And quite often the violations and/or errors committed by the lower Courts were successfully corrected by the higher Courts. During my near 30-year practice as a lawyer in Russia, I have not encountered any cases of pressure or other undue influence on Judges exerted by the representatives of the state authorities.
>
> 128. In my practice, I myself have personally participated as a lawyer in numerous judicial cases in which the decisions and actions of the Russian state authorities were challenged. In these cases, I represented the interests of Russian or foreign private persons. It should be noted that in those cases where violations of the requirements of the Russian law were actually committed by the state authorities, the courts have satisfied the claims of my clients (claimants) and recognised the actions / decisions of the state authorities as invalid or unlawful regardless of whether the claimant was a Russian or a foreign person / company."

255. Mr Pirov cites as an example a case in 2017 in which he represented a Norwegian company in a dispute with the Border Guard Department of the Federal Security Service of Russia ("*FSB*"), in which a large fine for illegal fishing in the Russian waters was reduced. In that case, the court pointed out violations committed by FSB and accepted the arguments of the Norwegian company regarding the incorrect assessment of the value of the illegal catch, resulting in a fivefold reduction of the fine. In addition, the court refrained from exercising a power to confiscate the vessel. Mr Pirov also refers to a more recent case in which he defended the airline of a state that was included after 24 February 2022 in the list of states "unfriendly" to Russia, against the Federal Customs Service, which was supported by the FSB, succeeding in reducing a fine.

256. Against those points, Person X points out *inter alia* that:

i) a 20% level of judicial candidates rejected by the President (despite their having already passed a multi-stage selection process) is a strong indication that his role is not merely symbolic;

ii) the 2018 study of judges' backgrounds, to which Person X and Mr Pirov both refer, also notes that the judicial appointment process in Russia very much favours characteristics which indicate *"the candidate's ability to be a disciplined subordinate"* rather than *"the candidate's independence or impartiality"*; and

iii) the formal rules about court chairmen do not eliminate their influence on judges, and *"Court Chairmen continue to have effective instruments at their disposal to influence both the appointment of judges and to influence their professional activities"* (X 3 § 98).

(e) Mr Zubarev's evidence

257. Mr Zubarev's reports, which were served prior to the service of Person X's and Dr Gould-Davies' reports, deal only with the undisputed formal position that there are no formal legal or procedural barriers to the Claimants bringing the OP Claims in Russia.

(f) (Provisional) conclusions from this evidence

258. A number of provisional (see § 16 above) conclusions can be drawn from this evidence, considered as a whole.

259. First, it is common ground, at least between Person X, Dr Gould-Davies and Professor Antonov, that in cases which are of sufficient interest to the Russian State, it is capable of affecting the outcome of judicial decisions.

260. Secondly, Professor Antonov's view that that is less likely in Arbitrazh Courts is partly based on the view that the disputes before those courts rarely involve features that would motivate the State to seek to influence the outcome. However, that point does not address the position if a case before the Arbitrazh Courts does contain such features.

261. Thirdly, insofar as Professor Antonov's view is that State influence is less likely in Arbitrazh Courts, or less likely than in previous years, due to increased transparency, I do not find it plausible. That is because, as both Dr Gould-Davies and Person X point out, transparency in terms of accessibility to what is said in court and what is written in the judgment does not prevent, or allow scrutiny of, State influence exerted privately, whether a decision in fact addresses the arguments raised, or the real motivations for a decision.

262. Fourthly Professor Antonov in any event does not contend that Russian judges today – even Arbitrazh Court judges – are never subject to political pressure or that they are always independent in performing their judicial duties.

263. Fifthly, it appears to be common ground that in a large number of run of the mill cases, Russian judges act independently and impartially. That does not, however, assist where out of the ordinary cases arise, as noted in the work of Professor Hendley to which both Person X and Professor Antonov refer.

(3) Financial interest: Russian reinsurers

264. As noted earlier, it is common ground between the experts that if the claims proceeded in Russia, then it is *"highly likely"* that the Russian insurers would be joined as parties to them. In that event, it is also likely that those of the reinsurers who are Russian entities would be joined as parties to the action, whether sued by the Claimants or joined by the Russian insurers who comprise their reinsureds. Mr Pirov in his report assumed that Russian reinsurers may be joined as third parties if they were not sued as defendants (§ 148).

265. Some of the insurers are indirectly state-owned. Dr Gould-Davies notes that Sberbank Insurance is 100% owned by Sberbank of Russia, which is itself

majority owned by the Russian state. Rosgosstrakh is 99.64% owned by Otkritie Financial Corporation, which is 100% owned by VTB Bank, an entity 92.23% owned by the Russian state. In addition, JSC Alfa Group (which owns the insurer Alfa Strakhovanie) and Sogaz have been sanctioned by Western states due to their close links with the Russian State.

266. One of the reinsurers, RNRC, is State-owned and, moreover, was sanctioned by the EU in February 2023. All Russian insurance companies are required by law to seek to reinsure a portion of their risk with RNRC, so it is likely to be involved in every airline's insurance and reinsurance programme for every aircraft the subject of these claims (as reflected in the size of its exposure).

267. Dr Gould-Davies notes that a decision against RNRC would be likely to be a pure financial loss to Russia. On that basis, he says, it seems likely that the insurance and reinsurance companies would be motivated to use state influence to render a favourable judgment to themselves on financial grounds, and that the state would not have a countervailing motive on economic, influence or reputational grounds to restrain the use of the courts in this way. To the extent that RNRC or another Russian insurer or reinsurer were exposed to liability, he considers it very likely that a Russian court would be implicitly or explicitly directed by the state to decide in their favour. Dr Gould-Davies goes on to say:

> "104. As noted above, major state and state-linked interests dominate official decision-making of all kinds, including those of the judicial system. In the case of aircraft lessees and Russian insurers, the financial sums at stake create a compelling interest to use their ties to the state to seek verdicts that favour them.
>
> 105. Several airline companies, such as JSC Rossiya Airlines, and insurance companies have clear links to the state. The possibility that Russian courts would rule against, or against the interests of, sanctioned state-linked companies in favour of companies from the states that sanction them appears to me remote.
>
> 106. As also noted earlier, it was possible in the past to imagine that courts might issue judgments that favour non-Russian companies in disputes with Russian ones because the Russian State had a specific interest in treating foreign companies leniently. As also noted, the comprehensive sanctioning of Russia since February 2022 makes it less likely than ever that such constraints would still apply in respect of companies from "unfriendly states", especially where a verdict favouring such companies would result in a pure financial loss to the Russian State or state-linked interests, without any mitigating economic, influence, or reputational benefits.
>
> …
>
> 109. It is virtually impossible for me to imagine that a Russian court would rule against Russian interests in cases that have

> arisen as a consequence of actions decreed or encouraged by the Russian State, including President Putin, and that have been driven by its economic and security imperatives – and that, moreover, pit Russian interests against those of companies from "unfriendly states" that are waging what Russia views as an "economic war" against it."

268. Professor Antonov states that he has been asked to assume that the exposure of Russian insurers and reinsurers could be in the order of US$ 2 billion. However, he states, whilst this represents a considerable amount, *"it is not one which brings with it any existential threat to the Russian reinsurance market"*, noting that according to the Russian Federation Central Bank data, the aggregate volume of the insurance premia received by Russian insurers in 2022, amounts to 1.8 trillion rubles; their aggregate capital is around 1.1 trillion rubles; and the aggregated insurance reserve is of 2.9 trillion rubles (around US$30 billion). However, it is unclear why Professor Antonov treats *"existential threat"* as the only basis on which Russian State interest might arise.

269. Professor Antonov suggests that the Russian reinsurers are likely to have their own retrocession arrangements "*which may well substantially diminish the actual exposure of these companies in the event of a judgement against them*", but accepts that he has no information as to the exact nature and scope of those arrangements.

270. In relation to RNRC, Mr Mark Franklin, a solicitor acting for some of the Defendants, states that he is aware from information in the public domain that since at least 2018 there has been an Obligatory Retrocession Programme in Russia, by reference to which RNRC has retroceded its reinsurance risk to the General Insurance Company (GIC) headquartered in India, and others based in China, Korea, Asia, Middle East and Africa, Thailand and CIS via the insurance broker Aon. Mr Nicholson, another solicitor acting for some of the Defendants, cites a statement on 4 August 2020 by GIC's General Director indicating that it continued to support the programme. The source Mr Franklin (along with Mr Nicholson and Mr Hifzi) cites is a press release dated 19 December 2018 which includes the statement that:

> "The retrocession program will enable Russian National Reinsurance Company to increase its capacity in risk reinsurance from 2.5 to 10 billion rubles, which, in turn, will provide us an opportunity to increase our market share. At the same time, the amount of the Company's own retention will remain high (2.5 billion rubles) and, therefore, reduce the cost of reinsurance coverage. Thus, acquiring coverage for its portfolio our Company will not only insure itself against catastrophic losses and accumulation risks but also retain funds in Russia's economy (Russian cedents will get an opportunity to reinsure their risks in Russia)."

On that basis, it is evident that despite the retrocession programme, RNRC retained a substantial exposure to the risks it underwrote. (I note, for completeness, that AerCap's solicitor, Ms Pegden, states her understanding,

based on Russian legal advice, that the retrocession was a private matter for that company, and that under Russian insurance law it is RNRC itself that provides obligatory reinsurance for risks insured by Russian insurers.)

271. Professor Antonov says this about RNRC:

> "120. The Russian National Reinsurance Company JSC ("RNRC") was founded in 2016 by the Central Bank which remains its 100-percent owner. The RNRC was established pursuant to Federal Law No.363-FZ (03.07.2016) amending Federal Law No.4015-1 (27.11.1992, as amended) "On the Organization of the Insurance Industry in Russia". Law No.363-FZ added three new articles to Law No.4015-1 – 13.1-13.3 – relating to the status and competence of the RNRC. In accordance with para.1, Art.13.1, Law No.4015-1, the RNRC is mandated to provide additional protection for the interests of persons insured by Russian insurers and to ensure the financial stability of those insurers. Although the RNRC was formed as a joint-stock company, it is a governmental agency. In particular, from 2022 on, it reinsures all space and aviation risks connected with Russian companies. The RNRC's total exposure (which I am asked to assume could be of the order of 1,28 billion USD) is the biggest among the Russian reinsurers (potentially) involved in the present dispute. However, even paying this amount would not bring the RNRC to the brink of financial collapse, while it may in any event be substantially reduced by RNRC's own retrocession arrangements. According to its 2022 audited financial statements, the capital of the RNRC in December 2022 amounted to 143,4 billion RUR. From the open sources, one also knows that the guaranteed capital of this company amounts to 750 billion RUR (around 8 billion USD). The RNRC is the biggest player in the Russian insurance market, with its rating confirmed in 2023 at the level AAA(RU) by ACRA (one of the leading Russian ranking agencies). The problem with the leased aircraft, the (re)insurance, and other disputes with Western lessors, insurers, financiers are well known, and I do not believe the ACRA would give RNRC its highest ranking without considering its possible exposure in these disputes." (footnotes omitted)

272. Once again, it is unclear why Professor Antonov in this passage appears to regard the relevant question as being whether liability under the reinsurances would *"bring RNRC to the brink of financial collapse"*.

273. Significantly, however, Professor Antonov does not suggest that the Russian State would not have an interest in securing a decision in RNRC's favour. To the contrary, after expressing the view that there is no substantial risk of State interference in favour of Alfa Insurance or Ingostrakh Insurance (because "*the oligarchs who own these entities are not, now, considered to be Kremlin-friendly*"), Professor Antonov says:

> "125. The cases of SOGAZ and RNRC, also as noted above, are more complicated: the former owned largely by persons reputedly having close connections with the Kremlin; the latter a de facto part of the State. Therefore, one can contemplate the possible engagement of the RNRC in the present dispute from the same perspective as that of the Russian State itself (see paras. 60-62 of my Report). Sber-Insurance and Rosgosstrakh are State-owned, but the amounts of their possible exposure make it highly improbable that their management or parent shareholders (Sberbank and VTB) would risk using unlawful channels to influence judges." (my emphasis)

The cross-reference to §§ 60-62 of Professor Antonov's report should, I think, be to §§ 59-61, where he sets out his general conclusions on State interest including the point that the present dispute *"prima facie"* concerns only private-sector interests not affecting any public interest.

274. Professor Antonov goes on to express the view that there is no significant risk of SOGAZ or RNRC using their networks of political connections to interfere in the dispute. Some of his reasons are expressed to relate to SOGAZ, but he also refers generally to the reputational risk of relying on close political connections to *"violate the rules of the game and act unfairly at the courts",* and uncertainty about whether they would obtain the result they wanted *("Being near Putin does not necessarily mean obtaining from Putin whatever one wants"* (report § 126.4)). Dr Gould-Davies responds to that evidence as follows:

> "83. I note that Professor Antonov argues that reputational considerations disincentivise Russian insurance companies from influencing Arbitrazh court decisions in their favour. ...
>
> 84. In my view, such reputational considerations would only disincentivise attempts to influence court decisions if there was the prospect that such interference would discourage Western companies from working with Russian companies engaging in it. Professor Antonov mentions in this regard Sberbank, VTB, SOGAZ and RNRC. All four companies are subject to severe Western sanctions. The prospect that they could attract future Western business appears remote. It follows that reputational constraints are unlikely to apply.
>
> 85. Professor Antonov suggests that the low level of possible exposure of the Russian insurance companies (in financial terms) make it "highly improbable" that their management or parent shareholders would risk using unlawful channels to influence judges (§125). As per my answers above, I judge the financial sums at stake to be sufficiently large to incentivise efforts to secure favourable judicial outcomes. Conversely, the disincentivising effect of reputational considerations appears to me, in present circumstances, very weak.

> 86. As regards Professor Antonov's statement that "[b]eing near Putin does not necessarily mean obtaining from Putin whatever one wants" (§126.4), I believe that this statement is, in its own terms, correct. As with any court politics, those who are close to the leader jockey and compete for access and influence, but there is no guarantee that their requests and entreaties will enjoy favour. The leader alone ultimately decides whose personal interests to advance and whose to frustrate.
>
> 87. The question is what this does, and does not, mean, especially in present circumstances. Putin's major economic decisions, including in respect of the treatment of foreign investors, are now guided by his understanding of Russia's economic and other needs in its war against Ukraine. This priority very likely overrides all others except for the survival of his regime at home. It follows that those close to Putin are only likely to get what they want if Putin perceives their requests to be consistent with his own view of Russia's war needs.
>
> 88. As noted earlier, the Russian state has taken control of assets owned by four major Western companies and has created a legal framework for doing so more on a broader scale. As also noted earlier, for geopolitical reasons there appears to be no near-term prospect of Russia attracting significant Western investment. It is instead seeking investment from friendly non-Western countries, as Professor Antonov notes in paragraph 128." (footnotes omitted)

275. Those observations appear to me cogent, and indicate that there would be a strong likelihood of RNRC seeking to procure state influence to avoid a decision under which it would have liabilities. Moreover, given that, Dr Gould-Davies points out, a loss to RNRC would amount to a loss to the Russian state, there would be a substantial state interest in acceding to such a request: see his evidence quoted in § 267 above.

276. Based on the totality of this evidence, I consider it likely that the Russian court would be directed, explicitly or implicitly, not to make a decision adverse to RNRC in any of these cases, and (whether or not as a result of such direction) a Russian court would not do so: particularly in a context where (as Dr Gould-Davies points out) that would mean ruling against Russian interest in cases that have arisen as a consequence of actions decreed or encouraged by the Russian State, including President Putin, driven by its economic and security imperatives, and which pit Russian interests against those of companies (largely) from 'unfriendly states' who are waging what Russia views as an economic war against it.

277. Professor Antonov later makes reference to the Russian state having funded a number of settlements with the aviation industry, pursuant to which the foreign aircraft which had been leased by Russian airlines have been purchased with funding from a Russian sovereign wealth fund, arguing that this demonstrates that the Russian state would not interfere in the administration of justice so as

to "*pursue the objective of evading insurance payments and, more generally, of retaining aircraft without compensating their owners from 'unfriendly states' for the loss thereof*" (report § 137). However, I see force in the view that these settlements underline these claims' strategic importance to the Russian state (which, Mr Mesquitta states, has in effect set aside c. 300 billion rubles to fund such settlements). As Person X points out, ongoing negotiation of such settlements may incentivise the Russian state to restrict "*the availability of reinsurance recoveries so as to increase the pressure on foreign lessors to negotiate similar insurance settlements with Russian insurers*" (X 3 § 453). It is significant in that context that, based on the understanding of Mr Mesquitta as set out in his witness statement (which was not disputed before me), the settlements are for sums less than the agreed insured/reinsured values of the Aircraft. Accordingly, I do not consider this development likely to reduce the Russian State's interest in the prospect of a substantial liability for RNRC.

(4) War risks perils: war, invasion and hostilities

278. Some of the Claimants rely in their War Risks claims on peril (a):

> "(a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power."

279. Person X expresses the view that a Russian judge addressing these perils would be subject to informal influence and pressure from the Russian state and "*would not be prepared to issue a judgment which suggests that Russia has declared war*" (X 1 § 354), because the Russian state considers that "*it is not involved in a war and has not invaded Ukraine*" (X 1 § 355). Indeed, Person X takes the view that the MLB Claimants and their lawyers would face a "*very real risk*" of being subject to criminal or administrative penalties simply for arguing in a Russian Court that there has been a "*war*" or "*invasion*" (X 1 §§ 354-355 and 378).

280. Person X refers in particular to the following pronouncements about Russia's actions in Ukraine.

281. On 26 February 2022, the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) published a press release as follows:

> " In accordance with the requirement of the Prosecutor General's Office of the Russian Federation, Roskomnadzor sent notifications about the need to restrict access to false information to the resources of Ekho Moskvy, InoSMI, Mediazona, New Times, Dozhd, Svobodnaya Pressa, Krym. Realii", "Novaya Gazeta", "Journalist", "Lenizdat".
>
> On these resources, under the guise of reliable messages, publicly significant untrue information about the shelling of Ukrainian cities and the death of civilians in Ukraine as a result

> of the actions of the Russian Army, as well as materials in which the ongoing operation is called an attack, invasion, or a declaration of war, is posted.
>
> In case of non-deletion of the mentioned inaccurate information, access to these resources will be limited in accordance with Art. 15.3 of Federal Law No. 149-FZ "On Information, Information Technologies and Information Protection". Roskomnadzor also launched administrative investigations into the dissemination of unreliable publicly significant information by the listed media. This offense entails liability under Article 13.15 of the Code of Administrative Offenses of the Russian Federation in the form of an administrative fine of up to 5 million rubles.
>
> Roskomnadzor strongly recommends that the editorial offices of the media, prior to the publication (broadcast) of materials in accordance with Article 49 of the Mass Media Law, establish their authenticity.
>
> We emphasize that it is Russian official information sources that have reliable and up-to-date information." (my emphasis)

282. Article 15.3 of Federal Law 149-FZ, referred to in the above press release, prohibits the dissemination of *inter alia*:

> "… information aimed at discrediting the use of the Armed Forces of the Russian Federation to protect the interests of the Russian Federation and its citizens, to maintain international peace and security, including calls to prevent the use of the Armed Forces of the Russian Federation for the mentioned purposes, as well as information aimed at discrediting the performance by state bodies of the Russian Federation of their powers outside the territory of the Russian Federation for the mentioned purposes"

283. Roskomnadzor's announcement was published by several news outlets, including Russian ones, who seem to have understood it to prohibit referring to Russia's actions in Ukraine as a 'war'. On 26 February 2022, The Moscow Times published an article entitled *"Russia Bans Media Outlets From Using Words ' War,' 'Invasion'"*. On 26 February 2022, The Observer published an article entitled *"'Don't call it a war' – propaganda filters the truth about Ukraine on Russian media"*. On 1 March 2022, Reporters Without Borders published an article stating that *"The words "war", "attack" and "invasion" are now banned from the media."* Perhaps most significantly, on 24 February 2022, TASS (a major Russian state-owned news agency) published an article entitled *"Ukraine events can't be called war, this is special military operation – Russia's UN envoy"*. The Russian envoy's statement was reported by Interfax on 26 February 2022 as follows: "*We are not waging war on the Ukrainian people, and we are conducting a special military operation … ".*

284. On 4 March 2022, Federal Law no. 31-FZ was enacted, which supplemented the Code of the Russian Federation on Administrative Offences. A new article 20.3.3 prohibited public actions aimed at discrediting the use of Russian armed forces, in order to protect the interests of the Russian Federation and its citizens, and the maintenance of international peace and security.

285. On the same day, Federal Law no. 32-FZ was enacted, which supplemented the Criminal Code of the Russian Federation. A new Article 207.3 prohibited public dissemination of deliberately false information about the use of Russian armed forces. A new Article 280.3 prohibited public actions aimed at discrediting the use of Russian armed forces, in order to protect the interests of the Russian Federation and its citizens and the maintenance of international peace and security.

286. These enactments were further amended on 25 March 2022 by Federal Law nos. 62-FZ and 63-FZ, which expanded them to apply not just to the Russian armed forces but Russian state bodies.

287. Western sources have understood these measures too to prohibit use of the term 'war'. The New York Times, in an article published on 4 March 2022 and updated on 18 May 2022, reported that *"Contradicting the Kremlin on the war in Ukraine – even calling it a war – is now a crime, prompting independent media to close, and Russia cut off access to Facebook, the BBC and other news sources"*. On 28 March 2022, The Intercept published an article titled "*Google Ordered Russian Translators Not To Call War In Ukraine A War*".

288. In these circumstances, Person X, whilst accepting that the Directive does not extend to courts' decisions or similar judicial acts, states:

> "I should make clear that the judge would not be subject to administrative or criminal action, but, as explained in Section VI above, judges are undoubtedly subject to informal forms of pressure and influence. In my view, in the current climate in Russia, a Russian judge would be extremely unlikely to issue a judgment which is in any way inconsistent with the very clear position articulated by the Russian state that it is not involved in a war and has not invaded Ukraine, and also unlikely to conclude that the Russian state had been involved in " hostilities ", given the term has negative connotations." (report § 355)
>
> and:
>
> "I have explained in my answer to Issue 7 above, the reasons why a Russian court would be unwilling and unlikely to conclude that there was a "war" or "invasion" or even "hostilities" ..." (report § 377)

289. Dr Gould-Davies supports Person X's view that referring to Russia's invasion of Ukraine as a "*war*" would be treated as a crime in Russia. He also opines that, as a result of the invasion of Ukraine, the widening use of the 'unfriendly' states designation and restrictions, and the media's rhetoric, it is "*even less likely*

that any Russian institution, including the courts, would take a decision that does not reflect the preferences of the Russian State." (report § 86).

290. In response, Professor Antonov accepts that the Roskomnadzor Directive provides that the mass media must avoid the use of terms such as "*attack*" (assault), "*invasion*" (which, it will be noted, is one of the specified events within war peril (a)) and "*declaration of war*", but states that it was addressed to only ten media outlets, does not apply to the courts or the legal profession, and does not prohibit the term *"war"* as distinct from declaration of war.

291. However, the Directive by its terms is addressed to the editorial offices of "*the media*", which, as Person X explains, reflects Roskomnadzor's statutory role of *"control and supervision in the sphere of mass media"*, i.e. in general; with the ten outlets mentioned being merely examples of those said to have disseminated misleading information. Further, Person X provides examples indicating that it is the position of Roskomnadzor, prosecutors and Russian courts that it is impermissible to refer to Russia's actions in Ukraine as a 'war' (a term which Person X says is in any event closely related to the prohibited terms 'attack' and 'invasion'). These include the following:

i) In March 2022 Roskomnadzor, at the request of the Prosecutor General's office, blocked the Krasnoyarsk news portal pursuant to Article 15.3 (quoted above). A journalist applied for a declaration that the blocking was illegal. It was reported that the Prosecutor General's representative's objections to the application included the fact that *"the publication's website "systematically posted publications containing inaccurate information of public importance " and " universally" used the word "war "".* The Tverskoy District Court of Moscow rejected the journalist's application.

ii) An article in Sibir.Realii entitled *"Novosibirsk newspaper Taiga.Info blocked because of the word "war""*" reported that Roskomnadzor blocked Novosibirsk newspaper Taiga.Info for using the word "war", and that the Tomsk newspaper TV2 received a letter demanding the removal of material in which the events in Ukraine were called a war.

iii) In a Resolution of the Leninsky District Court of Sevastopol of 12.10.2023 in case No. 5-248/2023, commenting on the grounds for imposing liability, the court recorded one of the particulars of the alleged offence as being that, in one of his social media posts, *"Zhukov N.N. expressed that he is an opponent of the conduct of hostilities and believes that Russian servicemen are waging war on the territory of Ukraine, not conducting a special military operation"*. The Defendants point out that the court's decision imposing administrative liability did not turn specifically and/or solely on the use by the accused of the word "*war*". The defendant had made a series of five inflammatory social media posts, attacking the Russian armed forces variously as *"drunks and drug addicts", "losers", "sucker[s]"* and *"drunken and stoned"*, and one of which included the phrase "*for peace no war*"". It was on the collective basis of all of these social media posts that the accused was found guilty of the administrative offence of discrediting the Russian armed forces.

It is nonetheless significant that (a) the use of the word 'war' formed not only one of the particulars of the alleged offence but also part of the court's reasoning, one of its stated grounds for finding the defendant liable being that:

> "In this comment, N.N. Zhukov stated that he was an opponent of fighting and believed that the Russian military were waging war on the territory of Ukraine, and were not conducting a special military operation";

and (b) in its judgment, the court avoided using the term war, referring instead to Russia's actions in Ukraine as *"a special military operation in the Donetsk People's Republic and the Lugansk People's Republic in connection with the appeal of the heads of these republics for assistance"* (reflecting the official Russian State narrative).

iv) In the Resolution of the Kyiv District Court of Simferopol of the Republic of Crimea of 21.04.2023 in case No. 5-269/2023, the court set out the following reasoning in support of a decision to impose administrative liability where the defendant had:

> "expressed his disagreement with the actions of the Armed Forces of the Russian Federation to conduct a special military operation on the territory of Ukraine and considers these actions equivalent to war, i.e. performed public actions aimed at discrediting the use of the Armed Forces of the Russian Federation in order to protect the interests of the Russian Federation and nationals, maintaining international peace and security as part of the demilitarization and denazification of Ukraine."

The Defendants point out that the court's decision imposing administrative liability did not turn specifically and/or solely on the use by the accused of the word "*war*". The defendant had posted on a Russian social media website of an image of a Ukrainian flag with the caption "*No war we stand with Ukraine*" and comments including "*Nikita, I am at home. You should leave the occupied territories*", "*Crimea is Ukraine*" and *"…many Russians are not responsible for Putin's crimes"*. The court found that these postings collectively discredited the Russian armed forces because they expressed the accused's "*disagreement with the actions of the Armed Forces*…" and his opinion that their actions were "*equivalent to war*". Nonetheless, it is plain from the court's reasoning that the defendant's suggestions that Russia's actions in Ukraine were equivalent to war (a point mentioned twice in the judgment) formed part of the reasons for its conclusion that the defendant had committed the administrative offence.

v) The Volodarsk District Court of the Nizhny Novgorod Region imposed an administrative fine, under Article 20.3.3, on a defendant who had parked his car in a public place with the inscription "No War" stencilled on the car door. The court's reasoning included the following:

"In order to protect the interests of the Russian Federation and its nationals, to maintain international peace and security, units of the Armed Forces of the Russian Federation may be promptly used outside the territory of the Russian Federation in accordance with generally recognised principles and rules of international law, international treaties of the Russian Federation and this Federal Law to solve the following tasks: (1) repelling an armed attack on units of the Armed Forces of the Russian Federation, other troops or bodies stationed outside the territory of the Russian Federation; (2) repelling or preventing an armed attack on another State that has applied to the Russian Federation with a corresponding request; (3) protecting nationals of the Russian Federation outside the territory of the Russian Federation from an armed attack on them.

In accordance with Executive Orders of the President of the Russian Federation No. 71 and No. 72 dated 21 February 2022, the Lugansk and Donetsk People's Republics were recognised as sovereign and independent states and the Ministry of Defence of the Russian Federation is entrusted with providing peacekeeping functions on the territory of these states.

By Resolution No. 35-SF on the use of the Armed Forces of the Russian Federation outside the territory of the Russian Federation dated 22 February 2022, the Federation Council of the Federal Assembly of the Russian Federation gave consent to the President of the Russian Federation to use the Armed Forces of the Russian Federation outside the territory of the Russian Federation based on generally recognised principles and rules of international law. The total number of units of the Armed Forces of the Russian Federation, their areas of operation, their tasks, and the duration of their stay outside the Russian Federation are determined by the President of the Russian Federation in accordance with the Constitution of the Russian Federation.

On 24 February 2022, based on Resolution of the Federation Council No. 35-SF dated 22 February 2022, the President of the Russian Federation decided to conduct a special military operation on the Donetsk People's Republic and the Lugansk People's Republic in connection with the appeal of the heads of these republics for assistance.

According to the administrative offence case file, on or about 23 June 2023 at 07:05 a.m., A.N. Gorelov, in a public place near <data withdrawn> village Reshetikha, Volodarsky Municipal District of the Nizhny Novgorod Region, parked his car (owned by him) of Lada Kalina make, state registration plate number, in the immediate vicinity of the roadway. The said car had the inscription "NO WAR" stencilled on the front left door of this car. Thereby, A.N. Gorelov expresses his opinion and forms the opinion of others about the participation of the Armed Forces of

> the Russian Federation in a war, rather than in a special military operation, that is, he committed public actions aimed at discrediting the use of the Armed Forces of the Russian Federation in order to protect the interests of the Russian Federation and its nationals, unless these actions constitute a criminal offence.
>
> …
>
> Discrediting is understood as deliberate actions aimed at depriving confidence in something, undermining authority, and image.
>
> In the subject case, contrary to the arguments by A.N. Gorelov and his counsel K.O. Tyurina, the inscription "NO WAR" on the left front door of the car belonging to A.N. Gorelov is aimed at undermining confidence in the Armed Forces of the Russian Federation, since it distorts the true goals and objectives of using the Armed Forces of the Russian Federation during a special military operation. In such circumstances, the judgments by A.N. Gorelov and his counsel K.O. Tyurina on the absence in the actions of A.N. Gorelov of elements of an administrative offence provided for in Part 1 of Article 20.3.3 of the Code of Administrative Offences of the Russian Federation, are untenable."
>
> (my emphasis)
>
> It is clear from this reasoning that the court regarded the reference to 'war' as an infringement of the laws because it discredited the use of Russia's armed forces by distorting its true goals and objectives (namely, according to the official line set out earlier in the judgment, a special military operation conducted at the request of the heads of the Donetsk and Lugansk People's Republics).

292. Person X expresses the view that *"[t]he legal reasoning of the courts cited in cases on administrative liability unambiguously demonstrates the position of the courts: any identification of the special military operation with war amounts to discrediting the Armed Forces of the Russian Federation"* (X 3 § 511).

293. I have to bear in mind that Professor Antonov has not had the opportunity to respond to these cases (save indirectly via submissions for the Defendants). However, on their face they do not support any distinction between the use of the term 'war' and references to declaration of war; and they tend to indicate that prosecutors and courts view the Russian State as having proscribed both. In those circumstances it is appropriate to give weight to Person X's evidence that the Russian courts would be very reluctant to make a finding to the effect that Russia's actions in Ukraine constitute a war (whether declared or not).

294. Professor Antonov considers it "*far-fetched speculation*" to say that the use of the word "*war*" in a Russian courtroom would, moreover, amount to the offence

of discrediting the Russian armed forces (report §§ 151 and 154). Aside from the disagreement discussed above about the term 'war', Professor Antonov says:

> "154.1. The new offences are defined in terms (e.g., "*public actions aimed at discrediting the use of Russian Armed Forces*" and "*public dissemination of deliberately false information*") which do not seem, to me, to encompass a description of the activities of lawyers in bringing claims involving consideration of the meaning of the insured perils in para.(a) of LSW 555D under Russian law.
>
> 154.2. Speeches in court rooms are not considered to be a form of public dissemination of information [citing § 7 of the Ruling of the RF Supreme Court Plenum No.3 (24.02.2005) *"On case law about issues concerning the defense of honor and dignity of citizens, as well as of the business goodwill of citizens and legal persons"*]. Moreover, it is quite clear that lawyers advancing or defending the case of their clients and mentioning the war risks upon which a party may rely – as having led to the alleged loss of aircraft – do not purport to discredit the Russian Army or disseminate false information about it.
>
> 154.3. The concept of war risks is described both in Art.964, Russian Civil Code, and in LSW 555D (the latter referring to "*war, invasion, acts of foreign enemies, hostilities*" (see para.341 of [Person X]'s Report)) in terms much wider than only "war". In my view, it would mean that lawyers presenting war-risks claims could use the phrase "*Special Military Operation*" or other synonyms instead of "*war*" if they wished to."

295. Person X responds, first, that the passage of the Supreme Court decision cited in Antonov § 154.2 is not relevant. It was made in the context of disputes about the protection of honour, dignity and business reputation, and stated:

> "Information contained in court decisions and judgements, resolutions of preliminary investigation bodies and other procedural or other official documents, for appeal and contestation of which another judicial procedure established by the laws may not be considered as not corresponding to reality"

That statement makes no reference to lawyers' submissions, and in any event cannot be regarded as excluding them from the scope of the recent legislation referred to above. Moreover, Person X explains that § 7(2) of the court's Resolution refers to the sources of dissemination of information defaming the honour and dignity of citizens or business reputation as including *"... articulating in job descriptions, public speeches, statements addressed to officials, or communicating in some form, including orally, to at least one person"*. Proceedings in Arbitrazh Courts are usually open, and persons are permitted to record, film and broadcast the proceedings with the permission of the presiding judge.

296. Person X refers to two cases involving lawyers, one regarding statements in court and the other concerning statements in conference.

297. In the first, the Resolution of the Third Cassation Court of General Jurisdiction of 11.05.2023 No. 16-1274/2023 considered the issue of the legality of imposing administrative liability on an advocate in connection with the exercise of her professional activities in a court session. The court considered that there were grounds for imposing administrative liability in the following circumstances:

> "As follows from the case files and established by the court instances, on 21 March 2022, during the period of time from 16h. 15 min. to 16h. 47 min. Bonzler M.V., realising the nature of her actions, deliberately, publicly, in relation to an unlimited circle of persons, during an open court session on the fact of bringing *** to administrative responsibility under article 20.3.3 (1) of the Code of Administrative Offences of the Russian Federation in room 212 of the Central District Court of the city of Kaliningrad, located at the address: ***, carried out public actions aimed at discrediting the use of the Armed Forces of the Russian Federation in the Donetsk People's Republic and the Lugansk People's Republic in order to protect the interests of the Russian Federation."

298. It was reported in an article on Russian legal news website Advokatskaya Ulitsa entitled *"Censorship got to the Lawyer's Speech"*, to which both Person X and the Defendants make reference, that the prosecution had occurred because:

> "On 22 May the defender received a phone call from Valentina Romanets, an inspector of the Administrative Law Enforcement Group (ALEG). She said: the police had received material that Bonzler had said the word "war" at two sittings. Therefore, Romanets asked the lawyer to come to the OMVD in the Central district of Kaliningrad. Bonzler explained to "Ulitsa" that she decided to go to the station alone, without a defence lawyer, because she herself specialises in such cases".

That tends to suggest (as Person X says) that it was the use of the word 'war' that led to the pursuit of a prosecution.

299. As the Defendants point out, the appeal court report of the case does not set out what Ms Bonzler said in court. However, the article on Russian legal news website Advokatskaya Ulitsa, states that *"The following phrases were given [in the prosecution protocol] as examples of "subjective opinion": "Such a reason for a public event is especially relevant in connection with the military operation in the south-eastern regions of Ukraine", "As for the protocol, a lot has changed since 06 March 2022. It is not clear what our government is doing; it attacked 16 regions of Ukraine. For what? Russia has already been banned from using Art. 51 of the UN Charter. It's unclear what they are trying to achieve," and "Because of these actions, everyone will soon come to an end."*

300. The appeal court report of the case refers to the lower courts' finding (upheld on appeal) that, when making these statements, Ms Bonzler was not expressing her client's views but, rather, that she "*acted on her own behalf*". The reasons for that conclusion are not apparent. It appears from the Advokatskaya Ulitsa report that Ms Bonzler made the relevant statements while defending two girls who had protested against Russia's actions in Ukraine, and claimed to have made the statements as part of her clients' defence. The report also quotes an extract from the one of the earlier legal proceedings from which the case arose:

> "- "Are you saying that Russia attacked Ukraine?" the judge asked.
>
> - "Yes, Russia attacked Ukraine and started a war," the lawyer answered.
>
> - "I remind the defender that she is a special subject, and also that audio recording is being conducted."

301. The appeal court judgment contains no analysis of the boundary between expression of personal views and submissions in defence of a client, stating merely that: "*The allegations that M.V. Bonzler, being a lawyer, expressed the opinion of her client (FULL NAME 4) in accordance with her powers and did not discredit the Armed Forces of the Russian Federation, were critically assessed by the courts, the objectivity of which is beyond doubt.*" The court also does not, as Person X points out, consider Article 18(2) of the Federal Law No. 63-FZ of 31.05.2002 "*On Advocate's Activity and Advocacy in the Russian Federation*", according to which:

> "An advocate cannot be held liable in any way (including after suspension or termination of the advocate's status) for an opinion expressed by him/her while practising as an advocate, unless a court verdict which has entered into legal force establishes that the advocate is guilty of a criminal act (omission)"

The defendant was not accused of a criminal, as opposed to administrative, offence, so this Article would appear to have been highly pertinent.

302. It is notable that, in this case too, the court made reference to Russia's actions in Ukraine in terms reflecting the official State narrative and eschewing any reference to 'war' or any cognate term:

> "In order to protect the interests of the Russian Federation and its nationals, to maintain international peace and security, units of the Armed Forces of the Russian Federation may be promptly used outside the Russian Federation in accordance with generally recognised principles and rules of international law, international treaties of the Russian Federation and this Federal Law to solve the following tasks: (1) repelling an armed attack on units of the Armed Forces of the Russian Federation, other troops or bodies stationed outside the Russian Federation; (2) repelling or preventing an armed attack on another State that has

> applied to the Russian Federation with a corresponding request; (3) protecting nationals of the Russian Federation outside the Russian Federation from an armed attack on them.
>
> In accordance with Executive Orders of the President of the Russian Federation No. 71 and No. 72 dated 21 February 2022, the Lugansk and Donetsk People's Republics were recognised as sovereign and independent states and the Ministry of Defence of the Russian Federation is entrusted with providing peacekeeping functions on the territory of these states.
>
> By Resolution No. 35-SF on the use of the Armed Forces of the Russian Federation outside the Russian Federation dated 22 February 2022, the Federation Council of the Federal Assembly of the Russian Federation gave consent to the President of the Russian Federation to use the Armed Forces of the Russian Federation outside the Russian Federation based on generally recognised principles and rules of international law. The total number of units of the Armed Forces of the Russian Federation, their areas of operation, their tasks, and the duration of their stay outside the Russian Federation are determined by the President of the Russian Federation in accordance with the Constitution of the Russian Federation.
>
> On 24 February 2022, based on Resolution of the Federation Council No. 35-SF dated 22 February 2022, the President of the Russian Federation decided to conduct a special military operation on the Donetsk People's Republic and the Lugansk People's Republic in connection with the appeal of the heads of these republics for assistance."

There is a strong similarity between the above paragraphs and the formulation used in the (later) case referred to in § 291.v) above.

303. I agree with the Defendants that this case is not a clear example of a prosecution succeeding on the basis of the mere use of the term 'war'. On the other hand, it does appear that such references played a material part in leading to the initiation of the prosecution. Further, the case suggests that even statements made in court by an advocate, relating to the war in Ukraine and referring to it as an attack, are potentially unsafe, since they may be construed by the court as expressions of personal opinion and lead to prosecution. The likely chilling effect is not difficult to imagine.

304. The second case Person X refers to in this context is the Resolution of the Industrial District Court of Izhevsk, Udmurt Republic, dated 16.03.2023 in case No. 5-99/2023, which was also covered in an article in Advokatskaya Ulitsa. A lawyer was prosecuted for using certain phrases uttered to two women during a free legal consultation. During the trial, the lawyer (according to her statements to the publication) denied making the statements and at the same time argued that "if she had "made any statements", they were not public," because the

premises are not accessible to the free passage of citizens ". The decision records the lawyer as having said:

> " In addition, to get into the office one has to open the front door, go through the vestibule, open another front door, so if the door is opened, one cannot hear what is going on in the office. It is not a public place and there is no free access there, there is no possibility to suddenly open the door and overhear a conversation.

305. The court concluded that the dissemination of information was public because the statements were made:

> "… while conducting consulting work in a place accessible to an indefinite circle of persons, with open access to the office (lawyer's office) in the presence of two citizens, which indicates the publicity of actions aimed at discrediting the use of the Armed Forces of the Russian Federation to protect the interests of the Russian Federation and its citizens, to maintain international peace and security, as well as those aimed at discrediting the performance by state bodies of the Russian Federation of their powers outside the territory of the Russian Federation."

The statements made in this case were clearly disparaging of the war, and the case did not turn simply on the use of the term 'war'. Person X cites it, though, as an example of the extremely broad interpretation the court chose to give to the term "public". It is again notable that the court's decision deals with the description of the war in the same way as the *Bonzler* decision, using the same formulation as set out in the first, third and fourth paragraphs quoted in § 302 above.

306. As quoted earlier, Professor Antonov suggests that, in any event, "*lawyers presenting war-risks claims could use the phrase "Special Military Operation" or other synonyms instead of "war" if they wished to"* and still succeed in a War Risks claim. Person X disagrees, noting that even language which is not expressly prohibited may carry negative connotations for the Russian state and that a Russian Court will be very unwilling to reach such conclusions. In any event, I agree with the Claimants that a restriction of the grounds on which they could advance their claims would in itself be an instance of unfairness that may be a strong reason to decline a stay. The suggestion that lawyers could use the term 'special military operation', a term not used in the insurance policies, is clearly of no avail to the Claimants who would need to allege and prove that the cause of the loss fell within one of the terms that the policies actually do use.

307. Professor Antonov refers to some cases said to show that the Russian courts could deal fairly with disputes relating to the situation in Ukraine.

308. The first is case No. A08-1464/2023, where the Belgorod Arbitrazh Court considered insurance claims for warehouses destroyed by shelling (Ukrainian shelling, according to Professor Antonov, though Person X says that is not

apparent from the report) in the Belgorod region, Politotdelsky settlement, an area of Russia bordering Ukraine. The Claimant (SM-Agro LLC) demanded that SOGAZ indemnify it for around 4 million RUR of damages. SOGAZ argued that liability was excluded by Article 964(1) of the Russian Civil Code ("***RCC***"), which provides that:

> "1. Unless the law or the insurance contract provides for otherwise, the insurer shall be exempt from payment of the insurance indemnity and insurance amount when the insured event occurred due to:
>
> the impact of a nuclear blast, radiation or radioactive contamination;
>
> military actions, as well as manoeuvres or other military activities;
>
> a civil war, any popular unrest or strikes."

309. The court rejected that defence, stating:

> "The court did not accept the Defendant's objection with reference to Article 964 (1) of the CC RF, as no evidence of military operations, manoeuvres or other military activities in the territory of Belgorod region, Politotdelsky settlement at the time of occurrence of the insured event was submitted by the Defendant in the case file."

The court also referred to the fact that prosecutors, after having investigated the shelling, opened a criminal case under Art.167, RF Criminal Code (Intentional Destruction of or Damage to Property), which was an insured event. The court noted that Article 167 did not itself refer to war risks. Professor Antonov continues: *"[f]ollowing this formalistic line, the judge did not go further into the nature and circumstances of the shelling and granted the Claimant's claim".*

310. Person X responds that this reasoning in substance refused to recognise the existence of military actions/activities in Ukraine (from where, at least on Professor Antonov's analysis, the shelling originated) by (a) focussing solely on the lack of evidence of military actions/activities on Russian territory and (b) relying on the absence of reference to war risks in Article 167 despite the clear exemption for military actions/activities provided for in Article 167. I find Person X's evidence about this case entirely plausible: rather than illustrating the Russian courts' ability to deal objectively with cases arising from the war in Ukraine, it is suggestive of a tendency to seek to deny or avoid such issues.

311. The second case Professor Antonov mentions in this context is case No. A40-277183/2022, where the Moscow City Arbitrazh Court considered the claims of Mechel-Trans LLC against Titan JSC to amend certain lease contracts. Mechel-Trans asked for the contracts to be altered because wagons it had rented from Titan were now in the area of military actions (*voennye deistvia*) in Ukraine. Mechel asked the court to deem the military actions as unforeseeable

circumstances under RCC Article 451, and to alter the contracts. In a judgment of 10.02.2023, the Moscow Arbitrazh Court dismissed the lawsuit. It reasoned that under the terms and conditions of the contracts, the parties had provided that Mechel (lessee of the wagons) would not take the leased wagons into "*zones of military actions*" (*zony boevykh deistvii*). (The contract used the expression "*excluding the territory of the zone of hostilities, manoeuvres and/or military enterprises officially declared*"). Therefore, the circumstances were not unforeseeable: to the contrary, they had been anticipated *a priori* by the parties and were set forth in the contracts. The court further found that under para.1.1 of the contracts, the question of "*who and with which legal qualification declared and began such military actions (Special Military Operation, Anti-Terrorist Operation, war, military exercises, manoeuvres, military undertakings, other military actions)"* was irrelevant for defining such zones. That decision was upheld in a Ruling of 08.06.2023 by the Ninth Arbitrazh Appeal Court. The appeal court agreed with the trial court's findings, but went further. It said:

> "From the literal interpretation of para.1.1. of the sublease contract, it follows that from the zone of commercial exploitation of the leased wagons shall be excluded not any territories where military actions, manoeuvres, and/or military undertakings are occurring but only the territories on which such actions have been declared in an official way."

The appeal court also found that the wagons were seized by the order of a Ukrainian court, and concluded that – under these circumstances – both parties to the contracts were unable to perform their contractual obligations. Its decision was upheld in a Ruling of 25.09.2023 of the Arbitrazh Court of the Moscow Circuit. The decision is, however, of little significance given that (as Person X points out) it did not concern the notion of 'war' or any cognate concept, as opposed to a contractual term referring to officially declared military action.

312. Professor Antonov makes the linguistic points that in the term *"special military operation",* the Russian word for "*military*" is "*voennaia*", an adjectival form of the Russia noun *"voina"*, meaning war; and that the expression *"voennye deistviia"*, meaning military actions, carries no negative connotations. Person X responds, however, that:

> "In the formulation "special military operation" the term "military" is perceived as neutral and in any case does not have a negative connotation. At the same time, the practice in the administrative liability cases which I have cited above … demonstrates that, in isolation from the word "special", the Courts may perceive the wording "military operation" as discrediting the Russian army." (report § 553)

313. Professor Antonov makes the further point that Russian state officials at the highest level (and their "*propaganda machinery*") have referred to the conflict in Ukraine as a "*holy or patriotic war*" in which Russia defends itself from the 'collective West', reasoning that it cannot therefore be improper from their

perspective to describe it as a "*war*". That conclusion is, however, not easy to reconcile with the cases and instances referred to in § 291 above. Dr Gould-Davies accepts that the Putin government sometimes compares the war in Ukraine to Russia's role in the Second World War, and has occasionally used the term 'war' to describe the conflict in Ukraine. However, he says, the official term remains 'special military operation', and he notes that in October 2023 President Putin said: *"Our special military operation was not the start of the war, but an attempt to stop it",* indicating that when President Putin refers to 'war' he is explicitly not referring to Russia's actions in Ukraine. The Defendants suggest that that in turn shows that there can in fact be no problem with using the 'term' war, on the basis that the Russian government does not dispute that Ukraine is waging war on Russia. Again, that argument is hard to reconcile with the cases and instances to which I have referred. It would also involve treading (at best) a perilous tightrope in circumstances where the alleged chain of events underlying the present claims is, realistically, based not on aggression by Ukraine against Russia, but on Russia's attack on Ukraine and the Western sanctions and Russian Counter-Measures to which it gave rise.

314. Turning to the evidence of Mr Pirov, he expresses the views that:

i) it is "*very difficult to predict*" how the Russian courts would treat the war risks issue;

ii) Russian judges would consider the MLB Claimants' claims "*independently and within the law*" (report § 251) for the reasons given by Mr Pirov earlier in his report;

iii) Person X is addressing political, not legal, issues when they express views about influence on judges; and

iv) a Russian court may not need to decide the war risks issue because "*the judge will first of all consider those questions which are easier for him to understand and resolve*".

315. Points (i) and (ii) do not directly engage with the evidence of Person X and Dr Gould-Davies about how a Russian court would deal with the question of whether there has been a war peril within the policy terms. Mr Pirov does not state that the Russian court could – notwithstanding the State's position on the issue – find that there has been a "*war*" or "*invasion*".

316. As to point (iii), as noted earlier, I do not accept that Person X has strayed beyond their expertise. The factors which a Russian judge would take into account in resolving the present claims are properly matters for the opinion of a Russian legal expert.

317. As to point (iv), Mr Pirov says:

> "260. The above list of all compulsory elements of a claim to be proved (see paragraph 258 above) does not mean that these elements will necessarily be considered in the sequence described above, although by the moment when a decision will

> be passed they should all in one way or another be resolved by the Russian Court. Based on my experience I could assume that most likely a Russian Arbitrazh Court Judge will adhere to the "simple to complex" principle, based on his wish to "adjudicate the case correctly, but in the simplest way", and following the logical order of reasoning. Thus, in my view, the judge will first of all consider those questions which are easier for him to understand and resolve." (report § 260, footnotes omitted)

318. I have quoted in § 181 above Mr Pirov's evidence as to what he considers will be the "*priority issues*". However, it is clear from quoted § 260 above that Mr Pirov accepts that all the issues will ultimately need to be decided, including the existence of an insured event and a causal link between that event and the loss (report § 258). As the Claimants say, a Russian court would need to decide the war peril issues both under their War Risks claims and under their All Risks claims, given that the All Risks Cover excludes War Risks.

319. The Defendants make a number of further points about any claim based on the concepts of 'war' or 'invasion' in war peril (a). It is suggested that those MLB Claimants who have alleged loss caused by 'war' have done so in order to make the points now made by Person X. That is based on the suggestion that, conceptually, it is hard to see how the alleged loss of Aircraft said to be the result of the Operators' failure to return them under leasing terms, could be said to have been caused by the war or hostilities occurring in parts of Ukraine. The Defendants note that some MLB Claimants do not even allege that their loss of the Aircraft was caused by "war" (or "hostilities") and have, instead, only alleged loss caused by alleged "restraint" or "detention". Those claims that allege loss of aircraft was caused by "war" (and/or "invasion" and/or "hostilities") do not explain how or why it is said any of the (alleged) factual events in Russia mean the airlines' failure to comply with the requirements in Leases to return Aircraft was caused by "war". The Defendants further note that MLB's early response to being advised that any proceedings would be met with applications for a stay based on their agreement to exclusive Russian jurisdiction was to seek confirmation that: "*Reinsurers consider that it will be possible for our client, domiciled in an 'unfriendly state', to obtain substantial justice in a claim under a Hull War Reinsurance Policy in the Courts of Russia, where it would be a crime to allege, let alone to hold, that there is a state of war in Ukraine*".

320. There might be more force in those contentions if reliance on the 'war' or 'invasion' perils were obviously hopeless. However, the Defendants made no real attempt to persuade me of that, and (certainly at this stage of the proceedings) I am unable to form that view. There is, on the face of it, a nexus between the war in and invasion of Ukraine and the fate of the insured Aircraft. I also note that DAE's claim in the LP Proceedings, quoted more fully in the Annex to this judgment, includes the allegation that

> "18. On 24 February 2022, Russia invaded other territories of Ukraine, giving rise to a full-scale armed conflict between Ukrainian and Russian armed forces. At all material times since that date, the conflict in Ukraine continues. There was at all

> material times thereafter (and is) no apparent prospect of it ending within a reasonable period of time."

That plea of an invasion strikes me as a perfectly proper plea, and pertinent *inter alia* to the question of how long the conflict would reasonably have been foreseen as lasting, and hence whether the Aircraft could be expected to be recovered in a reasonable time: that being a likely or certain issue in both the LP Claims and the present claims. I have to proceed on the basis that consideration of those perils would form part of the issues in the cases of those Claimants who have alleged them.

321. The Defendants also make the point that war peril (a) applies to war "*whether declared or not*", and to *"hostilities"*. That is correct. However, the points made by Person X and Dr Gould-Davies are not confined to references to declared war, and nor do the cases and instances referred to in §291 make any such distinction. I deal later with the term 'hostilities'.

322. The Defendants say Person X has not been able to identify the mechanism by which they believe informal pressure and influence would be brought to bear by the Russian government on Arbitrazh judges hearing the Claimants' war risks claims. The Defendants also refer to the seriousness of the allegation that judges would contravene their judicial oaths and legal obligations. Those are, regrettably, not compelling points in circumstances where it is common ground between Person X, Dr Gould-Davies and Professor Antonov that the Russian State can exert influence where it considers its interests to be sufficiently engaged (and, moreover, that an element of corruption remains). The exact forms in which that occurs are inevitably very difficult for any outsider to prove. These are issues on which it is clear that a strong State preference exists, leading to likelihood of State intervention and/or judicial self-censorship. There is also evidence, as summarised above, of Russian courts and prosecutors giving a broad interpretation to the measures about 'discrediting' Russia's armed forces, applying them *inter alia* to lawyers, and expressing reasoning in ways that avoid reference to 'war' and abide by the official State narrative.

323. For all of the above reasons, I consider that those Claimants who either allege a loss caused by 'war' or 'invasion' within the war perils, or who allege war or invasion as a logical component of their factual case (as in DAE's case: see § 320 above) would be unlikely to receive a fair determination of those issues in Russia. I find Person X's and Dr Gould-Davies's evidence to that effect plausible, and indeed compelling, and the contrary arguments unpersuasive.

(5) War risks perils: confiscation, seizure etc. and political action

324. The Claimants submit that they would also be unlikely to receive a fair trial insofar as their claims raise the question of whether the loss resulted from other war perils, in particular hostilities, confiscation, seizure, restraint, detention, appropriation or acts of any one or more persons for political purposes. The question arises as to whether claims on any of these bases would engage the Russian State's interest.

325. Dr Gould-Davies makes the general point that the present claims *"pertain to matters relating to major Russian State interests in a period of extreme hostility between Russia and the West",* making it very likely in his view that their judicial determination in Russia would be subject to state interference (Gould-Davies 1 § 8). He also expresses the point in terms of State preferences and anticipated preferences:

> "In my opinion, it is impossible to imagine that in these conditions a Russian court would rule against a preference expressed by the state. In any legal case in which the state considers itself to have an important interest, the key question is not: "are the Russian courts impartial"? In important matters they are not, and cannot be, in present circumstances. The question is rather: " how does the state assess its interests, and what decision will it direct the Russian court to make? " Based on my experience, my expectation is that even if there is no explicit political direction, the court is likely to issue a verdict on the basis of what it anticipates the state's preference to be." (Gould-Davies 1 § 51)

326. As noted earlier, Dr Gould-Davies describes these cases as arising *"as a consequence of actions decreed or encouraged by the Russian State, including President Putin, and that have been driven by its economic and security imperatives – and that, moreover, pit Russian interests against those of companies from "unfriendly states" that are waging what Russia views as an "economic war" against it"*; and he states that *"Fighting this war, and mitigating the impact of sanctions, have become the overriding priority of the Russian State"* (Gould-Davies 1 § 94). Dr Gould-Davies also cites statements by President Putin in February 2023 and the then Deputy Prime Minister Yuri Borisov in March 2022 showing the critical strategic importance they attributed to the civil aviation sector in Russia. At § 97 he continues:

> "… Russia is ruled by a full-blown authoritarian system that subordinates all institutions to state interests. This includes the judicial system. All decisions, including judicial ones, of any importance are extremely likely to be directed by state interests. This is even more emphatically true of issues that are of strategic importance to the state. The fact that the state is now waging a war that the President sees as existentially significant for Russia, and in which Russia faces setbacks and even potential defeat, only reinforces this imperative. In present circumstances, judicial decision-making can be presumed to be fully subordinated to state interests."

327. Person X's evidence is that the Russian courts would be unwilling to recognise the existence of other war perils in these cases given their negative connotations for the Russian regime and ideology. In their first report, they say this:

> "30.7. It is very likely that Russian courts will, in the current circumstances, refuse to recognise that the loss of the Aircraft was caused by the realisation of a risk under the War Risks

Reinsurance Policies on formal grounds, in particular with reference to the absence of a state of war and hence the inapplicability of the War Risks Reinsurance Policies in this case. Furthermore, Russian courts would similarly be unwilling to recognise the existence of other perils in the present case under the War Risks Reinsurance Policies because acknowledging the existence of such perils would mean that the Russian state had somehow limited the Lessors' ownership, which is contrary to the official Russian ideology regarding the regulatory response to the sanctions imposed on Russia.

30.8. The present claims fall within the category of claims which the Russian courts would be unable to resolve impartially as a result of events in February-March 2022. The claims relate to the fields of insurance and reinsurance and aviation, which are both very important fields for the Russian Federation. The claims involve Russian insurers, including (i) an insurer directly owned and controlled by the Russian Federation (i.e., a state body of the Russian Federation), and (ii) other Russian insurers in which the Russian Federation has indirect ownership interests. The aviation sector is also one of the most important strategic sectors for the Russian Federation."

(X 1 § 30.7 and 30.8, part of the Executive Summary)

"355. I should make clear that the judge would not be subject to administrative or criminal action, but, as explained in Section VI above, judges are undoubtedly subject to informal forms of pressure and influence. In my view, in the current climate in Russia, a Russian judge would be extremely unlikely to issue a judgment which is in any way inconsistent with the very clear position articulated by the Russian state that it is not involved in a war and has not invaded Ukraine, and also unlikely to conclude that the Russian state had been involved in "hostilities", given the term has negative connotations.

356. Aside from the above, I believe that Russian courts are also unlikely in the current circumstances to recognise the existence of other perils listed in LSW 555D which are not directly related to war (or more broadly hostilities) in their literal meaning, such as confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use. That is because such expressions nevertheless have negative connotations for the state and imply that state authorities (notably the President and the Government) have restricted foreign lessors in their rights as owners of aircraft.

357. Further, all regulations that provide for the Russian Federation's response to the sanctions imposed against it emphasise that their purpose is to protect the security of the state, its citizens and legal entities. For instance, Article 1 of Federal

Law No. 127-FZ of 04.06.2018 "On Countermeasures (Counteraction) to Unfriendly Actions by the United States of America and Other Foreign States" explicitly states the following as the purpose of the law:

> "The purpose of this Federal Law is to protect the interests and security of the Russian Federation, its sovereignty and territorial integrity, the rights and freedoms of citizens of the Russian Federation against unfriendly actions by the United States of America and other foreign states, including those manifested in the imposition of political or economic sanctions against the Russian Federation, citizens of the Russian Federation or Russian legal entities, in the commission of other actions threatening the territorial integrity of the Russian Federation".

358. The Russian state's responses are thus described as ways to ensure that the status quo is maintained in response to the negative effects of the sanctions that have been imposed against the Russian Federation.

359. In my view, a Russian court is likely in the current circumstances and political climate in Russia, to follow the official line that the Russian state is simply taking steps to maintain the status quo, and unlikely to express the view that what the Russian state has done amounts to confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use. Russian judges, given the pressures and influences to which they are subject, will be disinclined and unwilling to characterise the Russian state response as amounting to any of these perils, as all of the terms " confiscation " etc. have negative connotations and contradict the Russian state " narrative " of the nature of Russian state response, as promulgated in governmental and presidential bylaws, and in the Russian media and publications of official Kremlin sources.

360. In my view, a Russian judge will be very unwilling to reach a conclusion which might have negative connotations for the Russian state and will therefore be very unlikely to conclude that the Russian presidential /governmental decrees amount to " restraint " (or any of the other similar perils in sub-paragraph (e) of Section 1 of LSW 555D).

361. Thus, based on my professional opinion, I consider that if the claims are brought in Russia, the Claimants face the significant risk that the Russian courts will not be willing to find that the regulatory measures taken by the Russian state constitute a "restraint", "detention", or " seizure " (or any of the other perils in sub-paragraph (e) of Section 1 of LSW 555D) within the meaning of the section on "War and Allied Risks" of the insurance contracts."

328. Person X goes on to add the broader contextual points that both the insurance sector and the aviation sector are regarded as closely linked to Russia's state interests and highly sensitive, as reflected for example in the inclusion of the aviation sector in Presidential Decree no. 400 of 02.07.2021 "*On the National Security Strategy of the Russian Federation*", and the fact that Federal Law no. 55-FZ of 14.03.2022 expressly included provisions prohibiting Russian insurance companies and reinsurers from fulfilling their obligations (including those under existing contracts) in favour of foreign persons from UFS. Thus, Person X says, the present dispute is closely linked to the interests of the Russian Federation in several ways and, as such, there is a heightened significant risk that the Claimants will find that the courts do not address their claims against the reinsurers in an independent manner.

329. Professor Antonov responds, first of all, that:

> "As regards the negative connotations, this might be true for the English term "hostilities" (although it is wholly irrelevant as Russian judges will not discuss its meanings in English or other foreign languages)." (§ 178)

It is not clear how the point in parentheses assists, given that the policies use the English word, absent any suggestion that the Russian translation of the same word would somehow lack the same connotations.

330. As to other war risks perils, Professor Antonov responds as follows:

> "180. The Russian equivalent of terms such as "confiscation", "nationalization", "seizure", "restraint", "detention", "appropriation", and "requisition by order of any government" form a part of Russian law and are embedded in Russian legalese. The relevant terms are discussed in the following provisions of the Civil Code: Art.209 (Restraint), Art.238 (Seizure), Art.242 (Requisition), Art.243 (Confiscation), para.2, Art.325 (Nationalization), and Art.359 (Detention).
>
> 181. Here too, my opinion is that such a court decision is unlikely to be influenced by any political or ideological pressure such as those suggested by [Person X] (paras.359-361). <u>It is purely a matter of legal technique to compare the facts of the present dispute and the relevant provisions of Russian law in order to determine whether or not the acts in question contain elements of nationalization, requisition, or other material circumstances under Russian law</u>.
>
> 182. Furthermore, [Person X]'s contention that the courts will not make a fair determination about the existence of material facts such as nationalization, requisition, confiscation, etc. – because those instances may have negative connotations for the Russian State (para.260) – is, in my opinion, misconceived. <u>Given that the actions relied on by the Claimants are acts taken in response to what the Russian Government considers to be</u>

> illegitimate Western sanctions, they can be easily harmonized with the ideological narrative about Russia lawfully and legitimately defending itself from the West.
>
> 183. On the basis of my analyses, my opinion is that: Russian law, currently in force, contains the necessary norms, terms, definitions, and legal mechanisms for deciding the present dispute about aircraft and their (re)insurance in the event that it should be transferred to the jurisdiction of the Russian Arbitrazh Courts. There are no ideological or other factors to suppose political interference would be involved in judicial decision-making in the present dispute."
>
> (footnote omitted; my emphasis)

331. Person X does not agree. As they point out, perils other than "*war*" still carry negative connotations (e.g., as to wrongful interference with private property by the Russian state in the case of Section 1(e) of LSW 555D), and a Russian judge cannot be expected to be willing to attach those connotations to the state's conduct in public. Person X says that the result urged by the Claimants necessarily entails, for the reasons given in their first report, negative connotations as regards the Russian state (X 3 § 544), and points out that:

> "584. … even if these concepts ["confiscation", "nationalization", "seizure", "restraint", "detention", "appropriation", and "requisition by order of any government".] were considered from the perspective of the provisions of the Civil Code, their recognition would in each case likely presuppose the recognition of an actual restriction of the Claimants' property right as a result of the state's actions.
>
> 585. My assumption is conditioned by the fact that practically all the norms cited by Professor Antonov presuppose the execution by the state of certain actions that lead to the restriction or deprivation of the owner's rights in respect of property. For example, (1) restriction of rights and nationalisation are possible in case of adoption of a relevant law, (2) requisition is made on the basis of a decision of a state body, etc.
>
> 586. The establishment of the correlation between the actions of the state and the deprivation of owners' rights in respect of property (restriction of owners' rights) can hardly be recognised as a positive circumstance in a state proclaimed to be the state protecting private property (Article 35(1) of the Constitution of the Russian Federation).
>
> 587. In this sense, if the court finds that the state nationalized or requisitioned the Claimants' property or took any other measures to restrict the Claimants' private property, especially in the context of a special military operation, I doubt that such an assessment can be recognized as a positive evaluation of the

> state's actions. In such circumstances, I do not find Professor Antonov's arguments persuasive as a response to the points made in my Report of May 26 regarding LSW 555D."
>
> (footnotes omitted)

332. I find that evidence entirely plausible and cogent.

333. Moreover, as a description of the nature of the factual issues likely to be involved in these claims, I consider Professor Antonov's comments as quoted in § 330 above to be wide of the mark. I have already summarised in section (E) above the types of factual question which are highly likely to arise in determining whether the losses arose from one of the insured perils (such as confiscation or detention) or from the lessees' voluntary acts; and made the point that factual issues arising in the LP Claims are also likely to be relevant to the present cases, particularly on questions of causation relevant to the applicability of the insured perils. I set out, for reference, in the Annex to this judgment fuller extracts of the parties' statements of case in the LP Claims bearing on those issues. As can be seen from those extracts, the All Risks Defendants in, for example, the AerCap LP Claim led by AIG plead *inter alia* the following propositions:

i) Subject to limited political and/or informal constraints, reflecting the need to cultivate and/or maintain support from Russian elites and Russian society as a whole, President Putin exercises power without constitutional or legal or meaningful practical restraint. (§ 31)

ii) The President utilises a range of organisations and individuals to govern the Russian Federation, regardless of any formal legal or constitutional constraints or other formal organs of government. (§ 32)

iii) One of those organisations is the Presidential Administration, which, amongst other things, communicates the President's will by giving informal and/or verbal orders, and ensures that his exercise of power is implemented by and/or through and/or despite the formal organs and ministries of the Russian government. (§ 32.1)

iv) Another is the regulatory and tax authorities, which as necessary are deployed as instruments of persuasion, coercion, oppression and/or punishment. (§ 32.4)

v) Another organisation so deployed is the judicial system and judges. (§ 32.6)

vi) At all material times, the interests of the state (as determined by the President) take precedence over all private rights and interests, and the President utilises all or some of the foregoing (amongst other) organisations and individuals as the instruments of power. (§ 34)

vii) At all material times, the Russian Federation has operated and has been operated in what President Putin has termed 'manual steering' mode

(ruchnoe upravleniye), whereby President Putin and/or those acting on his behalf personally control all significant economic, business and social activity in the pursuit of what President Putin determines are Russia's interests and objectives. (§ 37)

viii) The formal position laid down in Russian law, and any apparent freedom of action which Russian law appears to allow, is an incomplete and inaccurate picture of the real context within which commercial enterprises in Russia must operate and did at all material times operate. The ostensible legal position is therefore insufficient and/or inaccurate as a means of identifying the discretion (if any) which commercial enterprises have in deciding what actions to take and not to take (§ 41)

ix) Some or all of the following methods were at all material times, and are, often used by the President (whether through unidentifiable individuals acting on his behalf or through formal office-holders, ministries or agencies) and/or by the government as means of (i) giving governmental orders (express, implied or tacit) to private individuals and corporate entities, and (ii) influencing and/or controlling decision-making so as to ensure action consistent with the governmental orders which have been given:

a) public and private statements;

b) requests;

c) the use of regulatory and governmental institutions (including the judicial system) as instruments of encouragement, coercion, oppression and/or punishment of any who fail to comply (or exhibit reluctance to comply) with orders, howsoever given.

d) the use of the security services as instruments of influence, persuasion, coercion, oppression and/or punishment.

e) attack or threats of attack on the physical well-being and/or property of those (and/or the families of those) who fail or refuse to comply with express, implied or tacit orders (howsoever given), especially in ways regarded as detrimental to the President's policies or Russia's national security interests as determined by the President. (§ 42)

x) The confiscation and/or seizure and/or restraint and/or detention and/or appropriation of the Aircraft & Engines by the Russian government and/or other public or local authorities of the Russian Federation and/or by the lessees under the Russian government's orders were a means of inflicting financial harm on western businesses domiciled within the EU, the UK and/or the US. (§ 56)

xi) Meetings took place on 26 February 2022, 28 February 2022, 2-8 March 2022 and 4 March 2022 at which Russian airline lessees were given instructions from the Russian government, amounting to tacit orders or

prohibitions, not to return the aircraft to foreign lessors, and that the aircraft should remain in Russia regardless of the lessees' obligations under the leases, and amounting to orders that the Aircraft be confiscated, seized, restrained, detained and/or appropriated. They included orders designed to ensure that steps were taken to register aircraft in the Russian Federation (even though Russian law did not yet permit such registration) (§§ 56A, 57, 58 and 58F).

xii) On 5 March 2022, during a public appearance at an aviation training centre, President Putin indicated that it was the Russian government's policy that foreign-leased aircraft would not be returned to the foreign lessors. (§ 60B)

xiii) Further or alternatively, it is to be inferred that the President, those acting on his behalf (whose identity is not known) and/or the government gave orders to ensure that the required approvals and permissions were not given, such that the aircraft were not allowed to leave the Russian Federation. (§ 61.5)

xiv) On 31 March 2022, President Putin held a meeting about the development of air transport and aircraft manufacturing at which he gave an implicit order to retain and not to redeliver leased aircraft and engines. (§§ 68 and 69)

xv) On 9 February 2023, President Putin and Mr Savelyev met with representatives of the aviation industry in Russia, and in substance credited each other with having decided to retain the Aircraft. (§ 80C)

xvi) In the circumstances, the acts of the lessees in retaining possession of the Aircraft & Engines and/or failing to redeliver the Aircraft & Engines …, and/or the steps taken by the government and/or other public authorities and/or individuals acting on their behalf to cause the lessees so to act, were acts done for political purposes, whether or not the lessees are agents of Russia. (§ 81)

xvii) Further or alternatively, the facts and matters set out amounted to confiscation and/or seizure and/or restraint and/or detention and/or appropriation of the Aircraft & Engines (i) by the government (civil, military or de facto) and/or other public authorities; and/or (ii) by the lessees under an order or orders (express and/or implied and/or tacit) of the government (civil, military or de facto) and/or other public authorities that the Aircraft & Engines (amongst other aircraft and engines leased from Western lessors) must not be returned but must be retained in Russia, where they should continue to be operated and maintained and/or, if necessary, be used as a source of spare parts. (§ 82)

334. It will be noted that these are not merely allegations made by Claimants: they are made by All Risks insurers as part of their case for denying liability on the basis that the loss falls within the War Risks Cover. They are allegations which Claimants claiming under War Risks policies, either on a primary or an

alternative basis, might reasonably wish to adopt; and which claimants in the LP Claims have adopted.

335. The underwriters of the war risks section of the LP Policy (led by Lloyd's Insurance Company S.A.) in turn substantially take issue with those averments, in for example the Re-Re-Amended Defence of the Second Defendant in the AerCap LP Claim dated 9 August 2023. In denying the operation of any war or allied peril insured against, they make *inter alia* the following averments:

i) The Lessees decided: (i) not to comply with repossession notices, which had been issued only as a result of the imposition of EU and UK sanctions in response to Russia's invasion of Ukraine, but instead (ii) to retain possession of the Aircraft & Engines and to continue to use and operate them for their own commercial purposes and/or consistently with their own economic interests. (§ 24.1)

ii) The Lessees sought the support of the Russian government for their decisions aforesaid and the Russian government and/or public authorities have supported the Lessees to retain possession of the Aircraft & Engines and to continue to use and operate them for their own commercial purposes and/or consistently with their own economic interests. (§ 24.2)

iii) If there had been a genuine will on the part of the Lessees to return the Aircraft & Engines to the Insureds, there were ways for them to do so, including (but not limited to) by (i) returning the Aircraft & Engines to the Insureds at locations outside Russia prior to the introduction of the export ban pursuant to Resolution 311 and/or, once the export ban was in effect, by (ii) applying for permission (if and insofar as it was required) to transfer the Aircraft & Engines outside Russia. (§ 24.3)

iv) In retaining possession of and/or failing to return and/or continuing to use and operate the Aircraft & Engines, the Lessees were acting for their own commercial purposes and/or consistently with their own economic interests, as they were acting in their own (perceived) best interests and/or the (perceived) best interests of their owners, directors, officers and employees, including (if and to the extent they did so) by giving effect to any policies, intentions, objectives, wishes, preferences, instructions, guidance, expectations, desires, requests, requirements, demands, suggestions, will, or facilitations of the Russian government and/or public authorities, whether in order to curry favour with such entities and/or to avoid any (perceived) risk of encouragement, influence, persuasion, coercion, oppression, punishment, attack or threats of attack. (§ 29.4)

v) The portrayal or description of the unfettered power of the Russian President and the operation of the Russian State in paragraphs 30 to 45 of the All Risks insurers' Defence is an oversimplified and inaccurate caricature of the Russian political system. (§ 47.1)

vi) The powers of the Russian President were at all material times constrained by formal constitutional or legal limitations, by meaningful political and/or informal and/or practical constraints and de facto limitations arising from, inter alia, Russian law and/or practice, the nature of the Russian Federation including ineffective regulation and bureaucracy, endemic corruption, the weakness of the rule of law, the geographic expanse of the Russian Federation, the influence and power of Russian elites and the need for the Russian government to maintain some degree of popular support. (§ 47.2)

vii) None of the alleged informal expressions of policies, intentions, objectives and so forth were tacit orders of the Russian government (including the Russian President), whether as alleged or at all. (§ 47.3)

viii) It is denied that the Russian President is able to utilise the listed organisations and individuals to "govern" the Russian Federation in the unlimited way alleged by the First Defendant, "regardless of any formal legal or constitutional constraints or other formal organs of government", and it is denied that commercial enterprises (whether significant or otherwise) and/or business leaders operate "under and in subjection to the President". Such entities may act consistently with the President's wishes when it suits their own private or commercial interests to do so, but not otherwise. (§ 51)

ix) The Russian President is not able to exercise power in the unlimited way alleged and is therefore unable to subjugate "all private rights and interests" to the "interests of the state" in the informal way alleged or at all. To the contrary, Articles 34 to 36 of the Russian Constitution provide protections for private property and land, and the use of individuals' abilities and property for entrepreneurial and economic activities. (§ 54)

x) The acts of the President and entities are acts qua the Russian government and/or public authorities only where they are acting in lawful exercise of their constitutional powers. Acts in a private capacity, or for personal benefit or improper purposes are not acts of a public authority or government. Informal statements are also not acts of a public authority or of the government of Russia. (§ 54)

xi) (If necessary) it is denied that the Russian President is able to "control all significant economic, business and social activity in the pursuit of what President Putin determines are Russia's interests and objectives" or otherwise to exercise power in the unlimited way alleged. It is denied that the resources of commercial enterprises are "at his disposal and under his control in what he regards as Russia's strategic interests". (§ 55.1)

xii) It is denied that a statement (whether express, implied or "tacit") by the Russian President of his policies, intentions, objectives and so forth must be or invariably will be acted upon. (§ 55.2)

xiii) It is denied that, at the material times, the Russian President engaged "manual steering mode" in respect of Russian civilian aviation matters and thereby assumed "personal control" of such matters.

> "In late February 2022 and thereafter, the Russian Federation had embarked upon the largest offensive war in Europe since 1945 with the aim of annexing a foreign sovereign state (namely Ukraine). The Russian President was intimately involved in the planning and execution of this war, including on occasion directing battlefield operations. Further, from an early stage, Russia's conduct of the war proved to be poor and Russia suffered early and significant setbacks and later defeats."

The Russian President was also concerned to address other major domestic and international crises. It is denied that the Russian President assumed personal control of (or took any substantial interest in) Russian civilian aviation.

xiv) It is denied that Russian individuals and/or corporate enterprises give or have to give precedence to the interests of the State (as determined by the President) over their own private rights and interests. (§ 57.1)

xv) The powers of the Russian government and/or public authorities (including the Russian President) are constrained by legal, informal and de facto limitations which enable Russian individuals and/or commercial enterprises to act in what they perceive to be their own private or commercial interests. (§ 57.2)

xvi) It is denied that commercial enterprises (including those in which the Russian Federation is a shareholder) are required generally to comply with, or do in fact generally comply with, statements (whether express, implied or "tacit") by the Russian government and/or public authorities (including the Russian President) of any policies, intentions, objectives and so forth. (§ 57.3)

xvii) It is denied that any such statements constitute an "order" within the meaning of the Confiscation Peril.

xviii) To the extent that commercial enterprises do conduct their affairs in conformity with such statements by the Russian government and/or public authorities (including the Russian President), it does not follow that those enterprises are acting for "political purposes" within the meaning of the Political or Terrorist Purposes Peril, whether as alleged or at all. To the contrary, those enterprises may equally be acting (and, in this case, were acting) for their own commercial or economic purposes, and/or otherwise in their (perceived) best interests. (§ 57.5)

xix) If President Putin made the alleged brief remark at an aviation training centre on 5 March 2022, the remark was informal and did not purport to be a statement of "the Russian government's policy". (§ 69B.2)

xx) If made, the remark in fact demonstrates that (among other things) the Russian Government's response to the challenges faced by Russia's air transport industry following the Russian invasion of Ukraine was led by Mr Savelyev, rather than by President Putin; and Mr Savelyev's idea, as supported by President Putin, was to negotiate with partners rather than to coerce Russian operators. (§ 69B.3)

xxi) The same points apply to the events attended by President Putin and Mr Savelyev on 9 February 2023 (§ 96C).

336. The above are averments, pleaded by responsible counsel, which war risks defendants reasonably considered it appropriate to make in the LP Claims, and which are equally likely to be relevant to the present proceedings. They are also allegations which the present Claimants may reasonably wish or feel it necessary to adopt particularly insofar as they make primary claims under the All Risks Cover and therefore wish to dispute All Risks Defendants' averments that the losses were excluded as War Risks perils.

337. Similarly, the Amended Particulars of Claim dated 24 April 2023 of one of the Clifford Chance Claimants, Dubai Aerospace Enterprise (DAE) Limited ("***DAE***") and others in the LP proceedings, extracted more fully in the Annex to this judgment, alleges that the loss falls under the war perils (c) and (e). In doing so, DAE alleges among other things the following.

i) On 24 February 2022, Russia invaded other territories of Ukraine, giving rise to a full-scale armed conflict between Ukrainian and Russian armed forces. At all material times since that date, the conflict in Ukraine continues. There was at all material times thereafter (and is) no apparent prospect of it ending within a reasonable period of time. (§ 18)

ii) By 23:59 on 8 March 2022 at the latest, key Russian state actors (including President Putin, Prime Minister Mikhail Mishustin, First Deputy Prime Minister Andrei Belousov, former Deputy Prime Minister Yuri Borisov, Vitaly Savelyev, the Minister of Transport and former Director General of Aeroflot, and Deputy Minister of Transport Igor Chalik) had determined that foreign-leased aircraft would not be returned to the foreign lessors. (§§ 32 and 35)

iii) In late February and early March 2022 a series of measures had been formulated and were being implemented to ensure that, despite the lessors' demands and notices, the aircraft would not be permitted to be returned to their foreign lessors, including the Claimants. (§ 32)

iv) These measures and their implementation were acts committed for political purposes (within the meaning of paragraph (c) of the War Risks Perils) and/or amounted to confiscation, seizure, restraint, detention and/or appropriation and were ones taken by or under the order of the Russian government (including President Putin) (within the meaning of paragraph (e) of the War Risks Perils). (§ 33)

v) The Claimants will say that §§ 30-83 of AIG's Defence to the AerCap action are materially correct. (§ 33)

vi) The Russian airlines were given instructions about the Aircraft in meetings on 26 and 28 February 2022 and 2 March 2022. (§§ 36-38)

vii) On 3 March 2022 in a meeting between FATA and certain airlines (the identities of which the Claimants are not presently able to particularise) it was made clear that the state would not assist lessors in the repossession of their aircraft, notwithstanding Russia's obligations as a party to the 2001 Convention on International Interests in Mobile Equipment (the "Cape Town Convention", or "CTC") (§ 39)

viii) On 4 March 2022 in one or more telegrams FATA advised airlines that should the airlines receive notices asserting that their leases were terminated, they should enter into negotiations with their lessors, and in the event that they failed to reach a "mutually beneficial agreement", the airlines were invited to re-register the aircraft in Russia. Since (i) the premise of the said advice was that the Russian airlines should not agree to return their aircraft, and (ii) the foreign lessors, including the Lessors, could not agree – and have not agreed – that the aircraft might be retained by the airlines, the suggestion that airlines might "negotiate" with the foreign lessors was not an invitation to carry out genuine negotiations. The Russian airlines were, therefore, in effect being asked to re-register their foreign-leased aircraft on the Russian register, in order to continue to operate those aircraft in Russia. (§ 41)

ix) On 5 March 2022, during a public appearance at an aviation training centre, President Putin indicated that it was the Russian government's policy that foreign-leased aircraft would not be returned to the foreign lessors. (§ 43)

x) Despite the valid demands and notices contained in the Lessors' Notices, the Aircraft have not been returned to the Claimants. Instead: (i) some or all of the Aircraft have been re-registered on the Russian state registry, contrary to the terms of the Leases and in contravention of Art 18 of the Chicago Convention; (ii) the Aircraft continue to be operated by the Lessees and/or have been used, or are at risk of being used, for spare parts to service other aircraft; and (iii) the Aircraft have not been and will not be maintained in accordance with the applicable standards. (§ 54)

xi) It was by no later than 23:59 on 8 March 2022 and (if relevant) continues to be unlikely, or alternatively at least uncertain, that the Aircraft would be and (if relevant) will be recovered within a reasonable time or alternatively at all. (§ 55.2)

xii) The loss was caused by one or more of the War Risks Perils, namely (i) an act of one or more persons for political purposes, and/or (ii) a confiscation, nationalisation, seizure, restraint, detention,

appropriation or requisition for title or use by or under the order of the Russian government. (§ 56)

xiii) The non-return of the Aircraft is a consequence of some or all of the following (i) positive statements that foreign-leased aircraft would continue to be flown in Russia; (ii) positive directions not to fly aircraft to so-called "unfriendly" countries; (iii) the re- registration of foreign-leased aircraft in Russia; (iv) an export ban; (v) other more indirect forms of political pressure to the same or similar effect; and (vi) measures intended to ensure that the foreign-leased aircraft, including the Aircraft, would continue to operate in Russia and so-called "friendly" countries, and be maintained in Russia. (§ 57)

338. The all risks and war risks insurers' Defences to DAE's claims are along broadly similar lines to those in the AerCap claim. The all risks insurers allege, among other things, that the Aircraft were lost due to one or more of the war perils set out in AVN48B, with the result that the loss is excluded from cover under the all risks policy. They contend that strategic decisions of the Russian President and Government are implemented by a variety of means in addition to formal legislation and decrees, including the giving of instructions by the Presidential Administration (which are expected to be obeyed), meetings and discussions with private businesses at which messages are conveyed about how they are expected to act, and the application of various types of pressure to individuals. They say such events occurred at meetings on 26 and 28 February 2022 and on subsequent occasions, and (in § 45B.3) invite the inference that the President and/or Government of Russia and/or other public authorities *"have privately acted in such a way as expressly or impliedly or tacitly to order the lessees to confiscate, seize, restrain, detain and/or appropriate foreign-leased aircraft by retaining possession of them in Russia"*. As in the AerCap LP case, specific reference is made to meetings with President Putin.

339. The war risks insurers in the DAE case, by contrast, deny that there was any reason why the Aircraft could not be returned to the lessors at any time before 8 April 2022, as there was no formal, valid legislative prohibition to that effect and a number of aircraft were returned before and after that date. The alleged private determinations are said to be "irrelevant" in circumstances where they had not manifested in a formal, valid legislative prohibition.

340. War risk insurers deny the relevance of the meetings, comments, requests, invitations, advice and recommendations relied on by the claimants, or any events other than formal executive and legislative action, on the basis that under Russian law they were "*not made by the Russian government and/or public authorities when acting as such; and/or (ii) not formal mandatory commands made by the Russian government and/or public authorities within the scope of their constitutional jurisdiction, authority and power; and/or (iii) informal and/or non-binding and/or non-mandatory"* (Defence § 49.1.1). They deny that anyone, including the Russian government, considered such informal communications to be directions or requirements that they must follow (Defence § 49.1.2). They contend that the lessees were acting for their own actual or perceived best interests, which might include currying favour with the

Russian authorities (Defence § 49.3). Specifically in relation to President Putin, they plead:

> "It is denied that President Putin was able at will and without constitutional, legal, political, informal or practical restraint to act, or procure public authorities in Russia and the Russian government to act, outwith and contrary to the Russian Constitution and Russian law. Any such acts would in any event not be valid acts, and therefore would not constitute "acts" for "political purposes" within the meaning of paragraph (c) of the War Risks Perils, nor "orders" of (or acts by) the Russian government or any public authority within the meaning of paragraph (e) of the War Risks Perils." (Defence § 49.4)

341. An issue also arises in the LP Claims as to the date of loss and whether or not it was clear from an early stage whether the aircraft would be detained. For example, Fidelis Insurance Ireland DAC, as defendant to the Merx claim in case CL-2022-000697, pleads that:

> "…it is denied (if intended to be alleged) there was, at all material times after 24 February 2022, no reasonable prospect of the conflict ending in a reasonable period at time. In at least the first few weeks of the conflict, there was a great deal of uncertainty about how long the conflict was likely to last and how it was likely to develop. As at late February and early March 2022, at most a "wait and see" situation had arisen".

Expert evidence will be required in that case about how long it appeared, at that stage, that the war in Ukraine was likely to last.

342. There is good reason to believe that substantially the same issues, or at least many of them, will arise in the present proceedings. In my view it would be entirely fanciful to suggest that the Russian State would not have an interest in every one of the averments referred to in §§ 333, 335, 337, 338, 339, 340 and 341 above. The level of State interest is demonstrated by the actual involvement of the State, at the very highest levels, in the events and matters described. The negative connotations, as Person X puts it, of many of the allegations made are self-evident.

343. For example, it could not seriously be suggested that the Russian government, or a Russian court, would not consider there to be a State interest and negative connotations (depending on the outcome) on questions such as whether President Putin exercises power without constitutional, legal or meaningful practical restraints (§ 333.i); whether the Russian judicial system and judges are deployed as instruments for President Putin to govern Russia regardless of any formal legal or constitutional restraints (§ 333.v); whether the position apparently set out in Russian law fails accurately to represent the real context in which commercial enterprises in Russia have to operate (§ 333.viii); whether institutions including the Russian judicial system were and are used by the President as means of ensuring government orders (express, implied or tacit) are given or obeyed (§ 333.ix)c); whether the security services are used as

instruments of (*inter alia*) oppression and/or punishment (§ 333.ix)d); whether President Putin uses attacks and threats of attack on physical well-being and property as means of ensuring governmental orders (express, implied or tacit) are obeyed (§ 333.ix)e); whether orders were given in February and March 2022 for aircraft to be re-registered even though Russian law did not permit that (§ 333.xi); whether lessees sought and were given Russia's support in retaining possession of the Aircraft for their own commercial purposes (§ 335.ii); whether the lessees would have been allowed to return the Aircraft to locations outside Russia until the Resolution 311 export ban came into effect (§ 335.iii); whether President Putin's power is constrained by, among other things, *"ineffective regulation and bureaucracy, endemic corruption [and] the weakness of the rule of law*"; whether any of the alleged expressions of policies etc were tacit orders of the Russian government or not (§ 335.vii); whether commercial entities in Russia are able to choose whether or not to act consistently with the President's wishes (§ 335.viii); whether an express or implied statement by President Putin of his policies, intention, objectives etc must be or invariably will be acted on (§ 335.xi); whether President Putin took control of or any substantial interest in Russian civil aviation (§ 335.xiii); whether a remark allegedly made by President Putin on 5 March 2022 purported to be a statement of Russia's government policy (§ 335.xix); whether on 24 February 2022 Russia invaded territories of Ukraine giving rise to a full-scale armed conflict with no apparent prospect of ending within a reasonable time (§ 337.i) and 341); whether it was made clear at a meeting on 3 March 2022 that the Russian State would not assist lessors to repossess their Aircraft despite Russia's obligations under the Cape Town Convention (§ 337.vii); and whether alleged private determinations by the President and other senior Russian officials are of no legal effect (and thus irrelevant under the War Risks policies) if not manifested in a formal, valid legislative prohibition (§ 339 and 340).

344. Moreover, those matters do not only involve some form of essentially neutral 'characterisation' or categorisation of events. They include questions of the validity and effectiveness of actions taken by the Russian government, in wartime, on topics of the highest possible State sensitivity, as well as questions about the integrity of the Russian judicial system.

345. In addition, the specific averments referred to in § 335.xiii) above, that Russia's conduct of the war, in whose planning and execution the Russian President was intimately involved, proved to be poor, and that Russia suffered early and significant setbacks and later defeats, would even on Professor Antonov's evidence amount to a direct breach of the Russian measures referred to in section (F)(4) above. That prospective part of the case of a Claimant claiming under the All Risks Cover simply could not be advanced in a Russian court.

346. For all of these reasons, I am of the clear view that the Claimants would be unlikely to receive a fair trial in Russia on very significant issues that are very likely to arise in these proceedings.

(6) Cape Town issue: validity of Russian decrees.

347. Mr Pirov in his report noted that Russia remains a party to the Convention on International Interests in Mobile Equipment (Capetown, 16.11.2001) and the

Protocol on Matters Specific to Aircraft Equipment (Capetown, 16.11.2001) (together the "***Cape Town Convention***"), whose main purpose is to facilitate and support the exercising of a creditor's (lessor's) right promptly to repossess, de-register and remove leased aircraft equipment without undue bureaucratic formalities, subject to the existence of a registered interest. He explains that, pursuant to paragraph 4 of Article 15 of the Russian Constitution, the international treaties of the Russian Federation are an integral part of its legal system: and if an international treaty of the Russian Federation establishes rules different to those provided by law, the rules of such international treaty will apply. As a result, the Russian court may need to resolve complex issues regarding the relationship between the Cape Town Convention and Russian counter sanctions legislation, such as Russian Presidential Decree No. 100 and Russian Government Resolution No. 311.

348. In other words, Mr Pirov is suggesting that the Russian courts may need to consider whether important parts of the Russian Counter-Measures were unlawful under Russian law because they were inconsistent with Russia's obligations under the Cape Town Convention.

349. Similarly, the War Risks Defendants' skeleton argument on the present applications states that a complex issue arises as to whether the Russian regulations prohibiting the removal of the Aircraft from Russia were in any event incompatible with and trumped by the Cape Town Convention (§ 164.3).

350. The point is already in issue in the LP Claims. For example, the war risks insurers in the AerCap LP claim contend that the export ban on aircraft, pursuant to Resolution 311 as amended from 12 May 2022, was unlawful under Russian law because it contravened Russia's international obligations under the Cape Town Convention, which take precedence over Resolutions pursuant to Article 15(4) of the Constitution of the Russian Federation (Defence §§ 76 and 77). The War Risks Defendants to the DAE LP claim also refer to the Cape Town Convention and related Protocol, and contend that:

> "Resolutions 311 and 312, Presidential Decree 100 and any other Russian municipal law relied upon by the Claimants, is invalid and of no relevant effect insofar as inconsistent with the following obligations thereunder" (Defence § 43.5.4)

and accordingly deny that there is, or was at any material time, any relevant ban on the transfer of aircraft outside Russia under Resolution 311 (Defence § 43.5.5).

351. Person X in their rejoinder report notes this issue, and also that non-Russian reinsurers might rely on it in pursuing subrogation claims against Russia in foreign courts (X 3 §§ 378-380 and 446). Person X states:

> "I cannot comment on whether foreign courts would entertain such claims. I note, however, given the possibility of such claims being made, the Russian courts would be very disinclined to reach a conclusion that the Russian state had acted in any way improperly or unlawfully, as any such finding might provide the

> basis for a claim by the re/insurers against the Russian state." (X 3 § 447)

352. Indeed, the validity of the key Russian Counter-Measures is bound to be a topic of the most obvious and acute interest to the Russian State. A decision that the measures were unlawful would be a clear example of a ruling *"against Russian interests"* in terms of Dr Gould-Davies's formulation. Counsel for the All Risks Defendants in oral submissions accepted that a state interest could arise in the issue, but added that it depends on whether or not a Russian court would view the Cape Town Convention as being inconsistent with the Russian Counter-Measures or whether the two could simply be read together, *"so it is possible that that could raise some sort of state interest, although far from certain".* However, to suggest that the existence of a state interest is in some way contingent on the outcome misses the point, which is that the State has an obvious interest in what the outcome will be.

353. It is likely to be in the interests, not only of War Risks Defendants but also Claimants pursuing All Risks Claims (especially as their primary claims) to argue that the relevant Russian Counter-Measures were invalid under Russian law on this ground. In agreement with Person X, I consider it clear that a Russian court would be unlikely to be able to adjudicate fairly on this issue.

(7) Direct/subrogated claims against Russian airlines or state

354. It is evident from the evidence of Dr Gould-Davies and Person X (and probably common ground) that the civil aviation sector in Russia is of great strategic importance to the Russian state, particularly since the invasion of Ukraine in February 2022 and the resulting sanctions.

355. If the Russian court were to find that Russian airlines wrongfully retained Aircraft, that would leave them exposed to claims. Alternatively, were it held that the Russian State confiscated the Aircraft, then the State itself could be exposed to liabilities. If, in either case, the claims against the reinsurers were to succeed, then the airlines and/or State's exposure would be likely to take the form of subrogated claims. Person X states that, under Russian law, an insurer who has indemnified a policyholder in respect of its loss is subrogated to the policyholder's claim against the person responsible for the loss (X 3 §§ 439). Further:

> "437. In paragraph 114 of his Report, Professor Antonov says that he is limiting the scope of his analysis to the "Russian" part of the Claimants ' claims, because (1) there are no reasonable ways to connect the foreign reinsurers ' liability to any possible state interest, and (2) there is no obvious state interest in whether or not foreign reinsurers are held liable.
>
> 438. As to this, I consider that Professor Antonov has overlooked the possibility of subrogation claims.
>
> 439. Under Russian law, an insurer who has paid an insurance indemnity under a property insurance contract is, as a general

rule, subrogated to the claim that the policyholder has against the person responsible for the insured loss. This is the effect of Article 965(1) of the Civil Code:

> " Unless the property insurance contract provides otherwise, the insurer that has paid the insurance indemnity shall, within the limits of the amount paid, acquire the right of claim that the policyholder (beneficiary) has against the person responsible for the losses compensated as a result of the insurance ".

441. Accordingly, if the Claimants' claims against insurers and/or reinsurers were successful, the latter could rely on the transfer to them of the Claimants' right of claim against the person responsible for the loss. This gives rise to the question of whether the Russian state and/or Russian airlines would be responsible for the losses.

442. From a Russian law perspective, a claim for compensation from the Russian state would presumably be based primarily on the provisions of Article 16 of the Civil Code, which reads as follows:

> " Damages caused to a natural person or a legal entity as a result of illegal actions (inaction) of state bodies, bodies of local self-government or officials of these bodies, including the issuance of an act of a state body or a local self-government body that does not comply with the law or another legal act, shall be subject to compensation by the Russian Federation, the relevant constituent entity of the Russian Federation or a municipality ".

443. Insurers and reinsurers might also rely on the provisions of Article 1069 of the Civil Code, which provides as follows:

> " Damage caused to a natural person or legal entity as a result of illegal actions (inaction) of state bodies, local self-government bodies or officials of these bodies, including as a result of the issuance of an act of a state body or local self-government body that does not comply with the law or other legal act, shall be subject to compensation. The damage shall be compensated at the expense of the treasury of the Russian Federation, the treasury of a constituent entity of the Russian Federation or the treasury of a municipal entity, respectively".

444. As to the possible application of the above provisions and the making of subrogation claims (or any other claims) more generally, my understanding is that there are two possibilities as to who is to be considered responsible for the loss, namely (1) the Russian state in the event that the claim falls within the war

risks insurance/reinsurance and/or (2) the Lessees if the relevant claim falls within the hull all risks insurance/reinsurance.

445. Dealing with the first possibility, I believe that it is very unlikely that the Russian courts would reach any conclusions which imply fault on the part of the Russian state authorities in connection with the special military operation in Ukraine. Therefore, it seems to me that the Russian courts would not uphold subrogation claims against the Russian state (even if the Claimants' insurance/reinsurance somehow succeeded in Russia).

446. However, I must also take into account the possibility that non-Russian reinsurers would pursue subrogation claims against the Russian Federation in foreign courts. Such claims might make the following allegations:

> 446.1. As a result of the Claimants ' termination of the leasing, the lessors had the right to require the Lessees to return the Aircraft. At the same time, the return of the Aircraft was not possible due to the restrictive measures taken by the Russian Federation in contravention of the Cape Town Convention; and/or
>
> 446.2. Pursuant to paragraphs 1 and 2 of Resolution No. 311, a prohibition was introduced on the export of air transport vehicles outside the Russian Federation, including those exported for the purpose of returning them to Lessors from " unfriendly " states. The adoption of this Resolution by the Russian state was the main reason for the loss of Aircraft, as Lessees were deprived of their ability to return Aircraft to lessors in fulfillment of their obligations.

447. I cannot comment on whether foreign courts would entertain such claims. I note, however, given the possibility of such claims being made, the Russian courts would be very disinclined to reach a conclusion that the Russian state had acted in any way improperly or unlawfully, as any such finding might provide the basis for a claim by the re/insurers against the Russian state.

448. As to the second possibility (that the loss was caused by the action of the Lessees and falls within the hull all risks insurance/reinsurance), the Russian state would still have an interest in the outcome of the disputes in this event, given that it is not in dispute that the Russian state is interested in the aviation sector in Russia."

(X 3, footnotes omitted)

356. Given the scale of the losses, the prospect of subrogation claims in the event that the claims against the reinsurers were successful must be a very real and obvious one. Person X's evidence that the Russian State would have an interest in the cases for that reason is, in my view, entirely cogent. Further, it is another reason why rulings in favour of the Claimants would amount to a ruling "*against Russian interests*" in Dr Gould-Davies's formulation, especially given the strategic importance which (as Dr Gould-Davies describes) the Russian state attaches to the civil aviation sector. As AerCap points out, a ruling to the effect that the lessees wrongfully retained the Aircraft would create a prospect of liability for every major and many smaller Russian airlines. Conversely, a ruling to the effect that the Russian State confiscated or detained the planes, in breach of its obligations under the Cape Town Convention, would create a prospect of liability for the Russian state itself.

357. War Risks Defendants in their skeleton argument suggest that Person X raises the subrogation point as *"a quite separate issue of [Person X's] own invention that does not arise (namely, the Hull All Risks Defendants' ability to obtain a fair trial of contingent future claims that [Person X] speculates might be made in Russia against Russian Operators)"*. However, that misses Person X's point, which is that the obvious prospect of follow-on subrogated claims in the event of any decision in favour of the Claimants is itself a ground on which the Russian state has a clear interest in these claims. It is a factor that, in my view, provides a further reason for concluding that the Claimants would be unlikely to receive fair trial in Russia.

(G) APPROACH TO OTHER PARTICULAR ISSUES

358. As noted earlier, it is not disputed that two of the issues very likely to arise in these claims are:

i) whether the Claimants lawfully terminated the leasing of the Aircraft; and

ii) whether the lessees were/are obliged to redeliver/return the aircraft to the Claimants (including by reference to the Russian Counter-Measures).

(1) Right to terminate leasing

359. As to the first issue (right to terminate leasing), the Leases are governed by English, New York, or Californian law and include provisions to the effect that the leasing may be terminated by notice upon the occurrence of one or more Events of Default. As noted earlier, Claimants rely on different permutations of Events of Default, including some expressly related to Western Sanctions, failure to maintain insurance and/or reinsurance, and failure to pay sums due under the Leases.

360. Person X's evidence is that:

i) A Russian court could not recognise or give effect to Western Sanctions, because the application of foreign sanctions on Russian territory is contrary to Russian public policy. Mr Pirov accepts this.

ii) Where termination of the leasing is based solely on Western Sanctions, it will not be recognised by a Russian court (even if such termination is valid under English, New York, or California law). Mr Pirov accepts this too.

iii) Where termination is not based solely on Western Sanctions but is derived from such sanctions (e.g., termination due to impossibility of performance which is directly or indirectly caused by sanctions) then a Russian court would also refuse to recognise the termination. I consider below to what extent Mr Pirov accepts this.

iv) A failure to maintain insurance/reinsurance as required by the Lease Agreements is an example of an Event of Default which is "*highly likely*" to be treated by the Russian courts as deriving from Western sanctions which contradict Russian public policy.

v) A Russian court might also refuse to recognise termination not derived from Western Sanctions if it considered that there was a "political" motive behind such termination.

vi) The Russian courts' approach to the validity and lawfulness of Western sanctions does not depend on the identity of the claimant to the dispute and whether or not they are to be regarded as coming from a state which is friendly or unfriendly.

361. As to proposition (iii) above, Person X in their first report considers several cases in which Russian courts refused to recognise the validity of foreign sanctions, including case A40-99830-2022 *TV News Russia Today v Google.* In that case, TV News brought a successful action against Google in Russia after Google deactivated TV News's YouTube accounts after TV News was included in the UK's sanctions lists. Clause 13.2(c) of the relevant terms of use gave Google the right to terminate or suspend the service if Google was unable to provide it due to changes in legislation or regulations. The Arbitrazh Court of Moscow, upheld by the Ninth Arbitrazh Court of Appeal, held that foreign sanctions could not act as a basis for unilaterally terminating a contract with a Russian entity because they were contrary to Russian public policy. Person X cites other cases in their first report in which Russian courts declined to give effect in Russia to foreign sanctions. Person X concludes that, although the cases were not unanimous, in cases since February 2022 the Russian courts had invariably refused to recognise the validity and legal effects of foreign sanctions.

362. Mr Pirov points out that those were cases where courts did not recognise unilateral terminations that had been "*solely due to*" Western sanctions, and suggests that that would not prevent the Russian courts from giving effect to any contractual rights that are "*not related to*" or "*not linked to*" Western sanctions (e.g. based on breaches of contract by the Russian party). He adds

that non-recognition of Western sanctions, pursuant to the public policy provision in Article 1193 of the Russian Civil Code, also existed before February 2022, as illustrated by one of the cases Person X cited. Mr Pirov does not directly address the situation where a ground of termination, whilst not explicitly based on a Western sanction, has arisen because of the imposition of the sanction. Logically, a termination in those circumstances could readily be regarded as 'due to', 'related to' and/or 'linked to' the Western sanctions.

363. Person X in their rejoinder report notes that in the *TV News Russia Today/Google* case, the terms of service also allowed termination or suspension of the service if there was reason to believe that the user's actions may result in legal liability to any user, third party, YouTube or Affiliates. Person X states:

> "On the basis of the above circumstances, I would venture to suggest that even where a party to an agreement would formally base its termination of the agreement by specific provisions of the agreement (e.g. a right to terminate the agreement at will, a specific breach by the other party, etc.), the court, in examining the case, may link such termination (particularly if the agreement is terminated at will or if the breach of the agreement invoked by the party as a ground for termination of the agreement may in one way or another be linked to sanctions) to sanctions and refuse to recognise it. A party's unilateral termination of an agreement in such a case will only be recognised by the Russian courts as valid if the court does not find any connection between the termination and sanctions." (X 3 § 288)

364. Person X goes on to say that they consider it very important to consider the circumstances that served as the basis for the termination of the leasing in the present cases. Person X notes that some lessors have terminated directly in connection with the sanctions; and

> "Other lessors, citing grounds for unilateral termination of leasing other than sanctions, have terminated because of circumstances which are connected with the sanctions or their effect on Russian persons. For example, one of the grounds for termination of the leasing that I am aware that some lessors used was the non-performance by the Lessees of the obligations to insure the leased equipment with foreign insurers or to ensure that Russian insurers had reinsurance agreements with foreign insurance companies. Obviously, the performance of this obligation became impossible not because of the Lessee's misconduct, but because of the foreign insurers' and reinsurers' compliance with sanctions prohibiting the provision of aviation insurance services to Russian persons. In such circumstances, the Russian court is highly likely to conclude that termination of the leasing due to non-performance of insurance obligations by the Lessee is to be treated as deriving from the sanctions, which, as already noted, (1) are not norms of the legislation of the Russian Federation and (2) are contrary to the public policy of the Russian Federation." (X 3 § 290)

365. Person X draws attention to the Decision of the Arbitrazh Court of Moscow of 14.10.2022 in case No. A40-74815/2022, in which the court, considering a similar claim against Google, said:

> "Thus, economic sanctions of a foreign state cannot act as a basis for violating the rights of a Russian legal entity, including through unilateral termination of agreements, since economic sanctions are contrary to the public policy of the Russian Federation and are not to be applied in its territory by virtue of a direct indication of the law.
>
> However, it is clear from the evidence submitted in the case file that Defendants' actions have a purely political premise at their core." (quoted in X 3 § 297, Person X's emphasis)

366. Person X's overall conclusion is:

> "I believe that a court potentially may refuse to recognise unilateral termination of the leasing not only if it was caused solely by the sanctions, but also if it was in any way derived from the sanctions (for example, if the impossibility of performance of the agreement is directly or indirectly caused by the sanctions). In addition, I do not exclude the possibility that a court, even if the grounds for termination of an agreement are provided for in the agreement itself (e.g., for termination at will), may conclude that the real reason for the rejection was political and therefore reject such a termination as derivative of sanctions." (X 3 §§ 305)

367. Similarly, in the Executive Summary to their rejoinder report, Person X states:

> "I disagree with Mr Pirov's view that it is necessary for sanctions to be the ' sole ' or ' exclusive ' basis of termination. A Russian court would not recognise as valid any basis for termination of the leasing which was derived from Western sanctions." (X 3 § 9.9)

368. Based on the experts' evidence as a whole, I consider it likely that a Russian court would not recognise a termination ground that was based on Western sanctions either explicitly, or implicitly in the sense that the relevant Event of Default was a direct product of the sanctions. That view is supported by Person X's evidence, which I consider to be cogent, and is not inconsistent with Mr Pirov's evidence.

369. On that basis, it is likely that a Russian court would not treat as valid a termination based on failure to maintain insurance, where the failure to maintain insurance resulted from cancellation of the insurance pursuant to Western sanctions (see the evidence of Person X quoted in § 364 above).

370. Substantially the same would apply to termination based on failure to pay, in cases where the failure to pay resulted from Russia's introduction of a 'special

procedure' for payment of rent under leasing agreements with creditors from 'unfriendly' states, such as payment in roubles to a Russian "Type C" bank account. That may apply (though the point is, I believe, contentious) only to failures to pay after 1 April 2022, the date of Presidential Decree no. 179, which allows hire payments to be made in that way. Where the Decree does apply, I understand Person X and Mr Pirov to agree that a Russian court would regard the payments as having been duly made, despite the provisions of the Lease or its governing law.

371. Where a Claimant has relied on an Event of Default which is either explicitly linked to Western sanctions or a direct product of them, Mr Pirov's point that the Russian court would nonetheless be willing to give effect to any additional Events of Default not so linked does not in my view assist. A fair hearing would require a fair hearing in relation to all of the Events of Default on which the relevant Claimant has relied.

372. As noted earlier, Mr Pirov also expresses the view that a Russian court may not need to deal with issues of termination of leasing, given that "*the judge will first of all consider those questions which are easier for him to understand and resolve*." However, Mr Pirov accepts that the Russian court would ultimately need to determine all the issues, and the question is whether the Claimants would be likely to receive a fair hearing of all of them. Even without Mr Pirov's acceptance of that point, there would be no proper basis on which to suppose that the termination issues would not arise (save on the obviously impermissible premise that the Russian court would be bound to avoid them by finding some other basis on which to dismiss the claims).

373. War Risks Defendants in their skeleton argument submit as follows.

i) If, on the facts of any particular claim, a Russian court found that termination of leasing was invalid (because of an overriding mandatory provision of domestic law that the Court would apply because of the conflicts rule embodied in Article 1193 of the RCC), that would be the result of its application of substantive Russian law long predating February 2022 and whose application to contractual termination based on Western sanctions was the subject of Arbitrazh Court decisions some of which themselves pre-dated February 2022.

ii) If, on the facts of any particular claim, a Russian Court found that (a) so long as it was making payments in rubles into Type "C" accounts in accordance with relevant counter-sanctions, an Operator was not in breach of a Lease by not making payments in accordance with the terms; and/or (b) if prevented from exporting Aircraft due to counter-sanctions, Operators would not be in breach of Leases by failing to return Aircraft when requested by Claimants, then (in either case) that would also be no more than the application of substantive Russian law by which relevant counter-sanctions were introduced.

iii) The English court will apply such Russian law in the same way as an Arbitrazh Court judge, unless to do so would engage some mandatory

principle of English public policy (citing *Byers v The Saudi National Bank* [2022] EWCA Civ 43 per Newey LJ at § 104).

iv) Even if an English judge found themselves having to address the issues in terms of the effect of Western Sanctions and/or Russian counter-sanctions, they would be bound to apply the same substantive law.

v) It is, therefore, not open to the Claimants to complain that a Russian judge performing the same exercise in an Arbitrazh Court could lead to an unfair trial. The only potential relevance of these issues to the current applications is, therefore, to the public policy issues.

374. I do not accept that submission. The cited passage from *Byers* merely indicates that when applying foreign law, the court's aim is to determine how the foreign courts would interpret and apply it. However, the prior question is (in the counter-factual situation that the English court retains jurisdiction over these claims) which law the English court will apply to the issue in question. When deciding whether entitlements arose under the Leases to terminate by reason of Western Sanctions or related matters, or to repossess the aircraft, the English court would apply the law governing the Lease, not Russian law. Both the right to terminate and the right to repossession are matters of construction of the Leases, from which both rights derive. Russian law governs the Insurance and Reinsurance Policies, but (a) the rights to terminate the leasing or to repossess the planes are not issues of construction of the policies, and (b) in any event, Article 1193 of the Russian Civil Code is part of Russian private international law (as acknowledged in the All Risks Defendants' skeleton at §§ 62(a)), and forms part of the conflicts of laws section of the Code (Division 6 Chapter 66). The English court would apply its own conflict of law rules, not those applied in Russia (see, e.g., Article 20 of the Rome I Convention, *Dicey, Morris & Collins, "The Conflict of Laws",* § 32-48). Pursuant to those rules, the Leases were not governed by Russian law. The true relevance of the Russian Counter-Measures would be that they may have caused an insured peril to occur.

375. As noted earlier (§ 112 above), it has been held in *forum non conveniens* cases that a 'real risk' of the denial of substantial justice can exist where requiring a claimant to proceed abroad would result in the claimant's arguable claim, under what the English court would consider the proper law, being likely or bound to fail because the foreign court would apply a different governing law to that claim. Here, the issue is whether there are strong reasons not to give effect, by granting a stay, to an EJC. In cases where Claimants have relied only on Events of Default linked to Western Sanctions (in the senses discussed above), their claims would be likely to fail in a Russian court by reason of the court applying to an issue arising under the Leases a law other than the Leases' governing law. That would, in my view, involve a failure to provide a fair trial and (subject to the foreseeability issue discussed later) a 'strong reason' for declining a stay in such cases.

376. In so concluding, I reject the suggestion made by War Risks Defendants that the opportunity to ask a Russian court to apply its own mandatory laws to an issue arising under leases governed by English law is a 'legitimate juridical advantage' of which they would be deprived if the Claimants were allowed to

proceed in England. That view is incompatible with the cases referred to in § 112 above, which treated such a prospective outcome as an injustice. (It makes no difference, in this context, that they were *forum non conveniens* cases.) It is also incorrect in principle: it cannot be a legitimate juridical advantage that a foreign court would apply its own mandatory rules in place of the governing law to which the parties have agreed to subject their agreement (*a fortiori* when those mandatory rules form part of the alleged deprivation on which some Claimants' claims are founded).

(2) Right to repossession/redelivery of Aircraft

377. Lessors' Notices of Termination required that the Aircraft be redelivered/returned to locations outside Russia and the EEU or locations to be specified.

378. As set out earlier, the Russian government has, since the 2022 invasion of Ukraine, enacted a number of Counter-Measures which are intended to override foreign lessors' rights to repossession of aircraft. Person X explains that the effect of the Russian Counter-Measures is that, even if the Russian court were to find the termination of the leasing to be lawful and valid, it would be unlikely to find that the Lessors were entitled to repossession of the Aircraft. In particular, Presidential Decree No. 100 and Government Decision No. 311 expressly prohibited the Lessees from taking the Aircraft out of Russia and, therefore, from returning them to the Claimants outside of Russia.

379. Mr Pirov states, first, that there is no *explicit* prohibition on the return of the Aircraft contained within Presidential Decree No. 100 and Government Decision No. 311, and that the latter contains an exception allowing *"transport vehicles of international carriage"* to fly abroad, *"which means in practice that Russian airlines (lessees) can operate passenger/cargo flights on the Claimants' aircraft abroad"*. However, as Person X explains, Decision 311 clearly states its purpose to be to introduce *"a ban on the export outside the territory of the Russian Federation"* of the listed goods, which include aircraft and parts of aircraft. In those circumstances, there are strong reasons (as Person X explains) for considering that the exception was confined to flights abroad for the purpose of carrying passengers or cargo, as opposed to flying the aircraft out of Russia in order to return them to the Claimants (even before the amendment effected by Resolution 850 of 11 May 2022, which tackled the point explicitly). I note that this point may be in issue between different groups of Claimants, All Risks Defendants and War Risks Defendants in the substantive proceedings, and refrain from making any definitive findings about it.

380. Secondly, Mr Pirov makes the point that Presidential Decree No. 100 and Government Decision No. 311 came into force only on 8 and 10 March 2022 respectively, which was after the date of some (but not all) of the Notices of Termination; and he suggests that before those dates, relations between the Lessors and the Lessees were regulated exclusively by lease agreements subject to foreign law "*without the interference of Russian counter-sanctions legislation in these relations.*" The ban on export applies at the time of attempted export of the Aircraft from Russia, as Person X explains. But Mr Pirov's point then raises (in cases of pre-8 March termination notices) the

question whether the airlines were given instructions by the President and other senior Russian officials to retain the aircraft (as discussed earlier), and whether any such instructions were legally effective under Russian law. I have already explained my reasons for considering that the Russian court would be unlikely to be able to try those issues fairly. There must therefore be a good chance that the Russian court would conclude, by an application of Russian law, that the Claimants did not have valid rights to repossess the Aircraft, whether their notices of termination were given before or after 8 March 2022.

381. Thirdly, Mr Pirov asserts that the Russian court "*may need to resolve complex issues regarding the relationship between the 2001 [Cape Town] Convention [and Protocol] and Russian counter-sanctions legislation*". He does not offer any views on whether there is a conflict between these two sources of law or how any such conflict would be resolved. Again, I have explained already why I do not consider the Russian court would be able to try that issue fairly. There must be a good chance that the Russian court would conclude, rightly or wrongly, that the Russian Counter-Measures were legally valid.

382. As I have already noted, the Russian Counter-Measures may be relevant in the sense of having given rise to an insured peril. However, if and insofar as they were relied on as meaning that Claimants' claims must fail because they have failed to establish a right to repossess the Aircraft from the Lessees, then that would involve a failure to provide a fair trial, and (subject to the foreseeability issue discussed later) be capable of being a 'strong reason' for declining a stay in such cases, for similar reasons to those I discuss in section (G)(1) above in relation to rights to terminate the leasing. In the present context, the unfairness would arise because (i) as discussed earlier, the Russian court would be unlikely to be able to determine objectively whether the Russian Counter-Measures did prevent the return of the Aircraft, and (ii) if the Russian court decided that question in the affirmative, then the result would be the application of a law other than the Leases' governing law.

(H) "UNFRIENDLY FOREIGN STATE" CASES

383. As set out earlier, the Russian state has as part of its Counter-Measures designated the UK and the EU as Unfriendly Foreign States. It is Person X's opinion that, since the enactment of the Counter-Measures, a body of decisions has emerged from the Arbitrazh Courts in which the rights of litigants from Unfriendly Foreign States have been overridden or restricted. The Claimants submit that the tendency of the Arbitrazh Courts to marginalise the interests of 'unfriendly' litigants in this way does not depend upon whether their litigation opponent is a Russian person: though it is not in dispute between the experts that, if the Claimants were to bring the OP Claims in Russia, Russian insurers and/or reinsurers would most likely be joined as third parties to those claims.

384. The Claimants say that Arbitrazh Courts' discriminatory approach to litigants from UFSs is evidenced in a number of ways, including decisions in which claims are dismissed wholly or partly on grounds of "bad faith" because the claimants in question are incorporated in Unfriendly Foreign States.

385. Where claims are dismissed in this way, the Arbitrazh Courts usually make reference to the list of Unfriendly Foreign States attached to Order No. 430-r in conjunction with Article 10 of the RCC. In relevant part, Article 10 provides:

> "(1) The exercise of civil rights solely with the intention of causing harm to another person, bypassing the law with an unlawful purpose, or any other intentionally bad faith exercise of civil rights (abuse of rights) is prohibited.
>
> The use of civil rights to restrict competition and the abuse of a dominant market position are prohibited.
>
> (2) In the event of failure to comply with the requirements set out in paragraph 1 of this Article, the Court, Arbitrazh Court or Arbitral Tribunal shall, taking into account the nature and consequences of the abuse, refuse to protect in whole or in part the right belonging to the person concerned and shall also take other measures prescribed by law. […]
>
> (5) The good faith of participants of civil relations and the reasonableness of their actions are assumed."

Person X confirms that the presumption in (5) is rebuttable.

386. Person X and Mr Pirov agree that the mere fact that a litigant is incorporated (or resident) in an UFS is, as a matter of law, insufficient to engage the application of Article 10. Mr Pirov accepts that some of these decisions are wrong in law, but says they do not reflect court practice. The Claimants' position is that they evidence a discriminatory approach currently taken by the Russian courts against litigants from UFSs.

387. I discuss below the specific cases to which the experts have drawn attention.

(1) Rejection/exclusion of claims

388. In *ABRO Industries Inc / Yakushev A.S.*, a claimant registered in the USA (ABRO) brought a claim against a Russian defendant for protection of its IP rights. After noting that ABRO is incorporated in the USA, a state which has adopted sanctions against Russia, the Arbitrazh Court of Sevastopol dated 13 April 2022 reasoned as follows:

> "Under Article 10(1) of the Civil Code, exercise of civil rights solely with the intention of causing harm to another person, unlawful circumvention of the law and other intentional bad faith exercise of civil rights (abuse of rights) is prohibited.
>
> In the event of failure to comply with the requirements set out in paragraph 1 of the Article, the court, arbitrazh court or arbitral tribunal shall, taking into account the nature and consequences of the abuse committed, refuse to protect in whole or in part the

> rights belonging to the person concerned and also apply the other measures prescribed by law (Article 10(2) of the Civil Code).
>
> In view of the restrictive measures imposed on the Russian Federation and the claimant's status (the claimant's location is in the United States), the court considers that the claimant's actions aimed at obtaining material compensation when similar compensation could not be obtained by Russian residents in the US due to the unfriendly actions of the United States and international organizations constitutes an abuse of rights, which is an independent ground for dismissal of the claim."

389. However, the Arbitrazh Court did not analyse whether Russian individuals were indeed unable to obtain compensation in proceedings brought by them in the USA. The decision accordingly appears to have been made because the claimant was an entity from an UFS. Mr Pirov does not seek to defend the decision. He notes that it was reversed on appeal, but that followed the claimant having in the meantime withdrawn its claim. Mr Pirov states that since this was only a first instance decision, it "*may not be considered as adequate evidence of any existing approach of the Arbitrazh Courts*." I consider that point later.

390. Mr Pirov also notes that the *ABRO/Yakusyhev* decision was made before the final resolution of the *Peppa Pig* case, the result of which was closely followed by the Russian legal community. I consider that case next.

391. In case A28-11930/2021 *Entertainment One UK Limited v Kozhevnikov*, a UK company filed a claim with the Arbitrazh Court of Kirov Region for compensation for violation of exclusive rights to trademarks under international registrations. The rights related to works of visual art, viz the drawings *"Peppa Pig"* and *"Daddy Pig"*. The first instance court (Arbitrazh Court of Kirov Region) on 3 March 2022 dismissed the claim on grounds of bad faith because of the claimant's place of incorporation. That decision was reversed by the Second Arbitrazh Court of Appeal on 27 June 2022, which held that provisions of the Russian Constitution guaranteed equal treatment and made international law and treaties part of Russian law, including the Berne Convention and other conventions for the protection of intellectual property rights (to which the UK is also party); and that accordingly the filing *per se* of the claim could not be declared a bad-faith action under RCC Article 10.

392. The Court of Cassation (the Intellectual Property Rights Court) on 19 October 2022, upheld the Court of Appeal's decision but expressed its reasoning in more restrictive terms. Having cited *inter alia* RCC Article 10, the court stated:

> "The Entrepreneur bases his arguments about the abuse of the Company's right in dealing with this claim on the fact that that pursuant to Decree No. 79 dated 28.02.2022 of the President of the Russian Federation *"On the Application of Special Economic Measures in Connection with the Unfriendly Actions of the United States of America and the Foreign States and International Organisations That Have Joined Them"*, Great

> Britain (the state the company is incorporated in) is classed as an unfriendly state that is subject to restrictive measures.
>
> At the same time, the intention to knowingly dishonestly exercise the rights, the purpose of which is to harm another person, should be found to have taken place at the time of the actions the abuse of the right is seen from.
>
> It is clear from the case files that the violation was identified on 21.03.2019, and this claim was filed by the Company with the Arbitrazh Court of Kirov Region on 09.09.2021, i.e., well before the introduction of restrictive measures by Decree No. 79 dated 28.02.2022 of the President of the Russian Federation.
>
> The cassation applicant's reference to the abuse of right also manifesting itself in the Company's actions aimed at accumulating and using trademarks solely for the purpose of recovering compensation from other participants in economic activity cannot be found to have merit due to lack of any documentation of these facts.
>
> Thus, the finding of the Court of Appeal that there are no grounds for finding the Company's actions to constitute abuse of right is correct."

393. In view of that reasoning, I am unable to accept Mr Pirov's suggestion that the decision establishes that "*the mere fact of bringing of a claim by an entity based in an "unfriendly" state cannot be considered as abuse of right*." Rather, as Person X suggests, it appears more consistent with the proposition that "*if the action was filed before 24 February 2022, there is no reason to retrospectively recognise the action as bad faith; but if the action was filed after 24 February 2022 and the introduction of Russian counter-sanctions measures, the action may be recognised as bad faith*." (X 3 § 175)

394. Person X explains that the reason why a temporal distinction was drawn may be that Article 10 does not provide for the retrospective characterisation as bad faith conduct. In that regard, the disputes in the present cases arose not only *after* the enactment of Russian Counter-Measures but also *as a result of* them.

395. The suggestion that misplaced reliance on Article 10 has disappeared following the appellate decisions in the *Peppa Pig* case in June and October 2022 is hard to square with the later decision in *Revionics Inc/Aptechka Retail Network JSC*, dated 26 April 2023. There, a creditor registered in the USA (Revionics) had entered its claims, apparently denominated in rubles, onto the register of creditors of an insolvent Russian company (Aptechka). The Russian company's receiver applied to exclude that claim from the register. The court found *inter alia* that the creditor was incorporated in the USA and that the USA had adopted sanctions against Russia. Its reasoning including the following passages. First, the following paragraphs, which appear to record the receiver's position:

> "On the meaning of RF Presidential Decree of 28.02.2022 N 79, as well as the RF Government Decree of 05.03.2022 N 430-r, paragraph 1, 2, Art. 10 of the Civil Code, given the introduction of restrictive measures against Russia and the status of the creditor (the location of the beneficiary creditor is the United States), the presence REVIONICS, INC in the register of debtor claims must be regarded as an abuse of right, which is grounds for excluding his claims from the register of creditors.
>
> At the same time, the purpose of excluding the claims of REVIONICS, INC from the register of creditors of Aptechka Trading Network JSC is to prevent distribution of the Debtor's assets to unfriendly countries putting sanctions pressure on the Russian Federation.
>
> Therefore, the bankruptcy receiver believes that the claims of REVIONICS, INC should be excluded from the register of the debtor's creditors on the basis of the above-mentioned circumstances."

396. The court's reasoning and conclusion include the following passages:

> "It must be remembered that the purpose of checking the legitimacy of claims is to prevent unjustified claims from being included in the register, since such inclusion would violate the rights and legitimate interests of creditors with justified claims, as well as those of the debtor and its founders (participants).
>
> According to the register of debtor's creditors claims, REVIONICS, INC is included into the 3rd priority unsecured claims (13,166,658.00 rubles), as well as penalties (1,284,456.06 rubles). However, within the meaning of Presidential Decree of 28.02.2022 No. 79, as well as the Russian Government's Order of 05.03.2022 No. 430-r, paragraphs 1 and 2 of Article 10 of the Civil Code, given the introduction of restrictive measures against the Russian Federation and the creditor's status (the location of the beneficiaries of the creditor is the United States), the presence of REVIONICS, INC in the creditor claims register should be considered an abuse of right, which is grounds for excluding his claims from the register of creditors.
>
> Thus, Presidential Decree №79 of 28.02.2022 introduced a ban on currency transactions, associated with the provision of foreign currency by residents in favor of non-residents under loan agreements.
>
> …
>
> The Bankruptcy Law does not establish a specific list of grounds for excluding a creditor's claims from the register of the debtor's creditors.

> The arbitrazh court, considering the application of the receiver or other person involved in the case to exclude the creditor's claims from the register of creditors, does not review the judgment by which the claims of such creditor were included in the register, but considers the legality of the creditor in the register after the grounds in connection with which the receiver requests the exclusion of claims.
>
> Considering the restrictions in force in the Russian Federation with regard to transactions (operations) with non-residents from unfriendly states, the receiver is deprived of the opportunity to make settlements with creditors, which will lead to a violation of the rights and legitimate interests of other creditors, the court therefore concludes that the application of the debtor's receiver for exclusion of the claim of creditor Revionics, Inc. in the total amount of RUB 14,448,114.06 from the creditor claims register should be granted."

397. The court thus based its decision to exclude Revionics' claim at least in part on RCC Article 10. Insofar as it also made reference to Decree 79, it is unclear how that measure could have had any relevance, since (as is mentioned numerous times in the judgment) the debts were in rubles, and the claim was not for actual payment but merely for inclusion in a list of creditors.

398. Mr Pirov says this was a first instance decision, and suggests that it is "*an exception to the court practice*". I note, though, that it was a decision by a court in Moscow, rather than a provincial court, and is one of the more recent cases to which the experts refer.

399. In *PNB Banka AS / Pochtovoye JSC* and *PNB Banka AS / Avangard JSC*, a Latvian bank (PNB – incorporated in an Unfriendly Foreign State) petitioned for the bankruptcy of two Russian companies (Pochtovoye and Avangard). At all levels, the Arbitrazh Courts refused the petitions on the basis that the Latvian bank was acting in bad faith. By way of example, in the proceedings against Avangard, the Arbitrazh Court of the Moscow Circuit (on appeal) held:

> "However, the applicant bank is a non-resident legal entity and its place of registration (jurisdiction) is Latvia.
>
> According to Order №430-r of the Government of the Russian Federation dated March 5, 2022, all countries of the European Union are included in the list of unfriendly states. Latvia is a member state of the European Union; accordingly, restrictions are imposed on all Latvian economic entities.
>
> The court, having analyzed the circumstances of the case under Article 71 of the Arbitrazh Procedural Code of the Russian Federation based on its internal conviction and a comprehensive, full, objective and direct examination of the available evidence, used Article 10 of the Civil Code and refused to satisfy the Bank's application.

> The grounds on which the courts had arrived at those conclusions were set out in the court decisions. The appeal court had no grounds for challenging them."

400. Despite the references in the appellate decisions in both cases to the lower court having applied Article 10, the lower court did not (so far as I can see) do so. The actual reason for the ultimate decisions in both cases appears to be, as Mr Pirov says, that the Russian President had on 28 February 2022 and 1 March 2022 issued Decrees 79 and 81 *"on the application of special economic measures in connection with unfriendly acts by the United States of America and associated foreign states and international organisations and on additional temporary economic measures to ensure financial stability in the Russian Federation"*. Their effect was that from 1 March 2022, currency transactions related to the provision of foreign currency by residents to non-residents under loan agreements were prohibited. The loan debts on whose repayment the bankruptcy provisions were based were denominated in US dollars. That meant, as the Arbitrazh Court of the Moscow Circuit (the Court of Cassation) said in its 9 August 2022 ruling in *Avangard*, that *"any transfer of money in a foreign currency to a non-resident under existing loan agreements made before 1 March of the current year shall be immediately terminated"*. I therefore do not consider these cases to be clear examples of the application of Article 10, which in substance does not appear to have informed their reasoning. At the same time, as Person X points out, the Decrees did not prevent the institution of bankruptcy proceedings (nor payments in rubles, albeit the loans were denominated in dollars), and I note that the bank's demands for repayment, on which the petitions were based, pre-dated the Decrees. It is therefore unclear why the courts in these cases considered that the Decrees precluded the initiation of bankruptcy proceedings as distinct from actual post 1 March 2022 dollar payments.

401. Person X also referred to Case A21-12303/2021, a dispute between Orneto Partners Limited Partnership ("*Orneto*") (a limited partnership registered in the UK) and Kaliningrad Arbitrazh Seaport JSC ("Kaliningrad") (a Russian joint-stock company). This case did not involve RCC Article 10, but Decree no. 351 of 12.03.2022, which provides that joint stock companies have the right to deny shareholders the right to provide documents and information about the activities of the joint stock company in the event that disclosure of such information *"will or may"* result in imposition of sanctions against the joint stock company and/or other persons. Orneto wished to exercise its statutory right as shareholder to information and documents about its activities, viz its balance sheet, list of debtors, list of affiliates and information on concluded major transactions. The courts, at all three levels, dismissed Orneto's claims on the grounds that Orneto was registered in the UK, whose state authorities had imposed sanctions on many Russian persons, while Kaliningrad was operating in the transport sector (i.e., servicing a marine terminal), which was vital for the transport infrastructure of the Kaliningrad region. The court noted that the UK had adopted restrictive measures against Russian entities carrying on transport activities, among others; and stated that providing Orneto with documents and information could result in restrictive measures being imposed on JSC Kaliningrad. As Person X points out, the courts did not investigate whether the

contents of the requested documents would in fact create a risk of the imposition of foreign sanctions. However, I am not persuaded that this case can be regarded as an example of the Russian court rejecting a claim merely on the basis that the claimant was from an 'unfriendly' state.

402. Person X referred to five further cases in their rejoinder report. In the first of these, case A40-129293/2020, the court refused an application by a Slovakian company, *Smart Technological Systems LLC*, to repay all the claims of the insolvent *Almaz-Avia TrainingCentre LLC* and termination of its bankruptcy proceedings. The Bankruptcy Law provided for the possibility of a third party paying all creditors' claims in order to terminate a bankruptcy case. The Ninth Arbitrazh Court of Appeal on 3 May 2023 refused the application on grounds which included reference to STS being a subsidiary of a foreign legal entity from an UFS. The court said:

> "As follows from the case materials, Smart Technological Systems LLC is a shareholder of the debtor's majority shareholder AC Travicom JSC.
>
> At the same time, Smart Technological Systems LLC was a subsidiary of a foreign legal entity from the countries unfriendly to Russia according to the Order of the Government of the Russian Federation No 430-r dated 05.03.2022.
>
> …
>
> Thus, the court of the first instance correctly concluded that the repayment of the register of creditors of Almaz-Avia Training Centre LLC by STS LLC will not lead to the termination of bankruptcy proceedings, but to the transition to bankruptcy proceedings in order to sell the property of Almaz-Avia Training Centre LLC and to disrupt the deadlines for the execution of state defence contracts.
>
> …
>
> If external management is terminated and the debtor is declared insolvent (bankrupt), the only liquid asset – real estate - will leave the possession of Almaz-Avia Training Centre LLC in favour of foreign persons (taking into account that the founder of Smart Technological Systems LLC is a foreign person).
>
> …
>
> The court of appeal concluded that the actions of Smart Technological Systems LLC showed clear signs of abuse of right, since the actions were not aimed at restoring the debtor's solvency, but at obtaining a liquid asset of the debtor for purposes contrary to the interests of the debtor, creditors and society (in violation of Article 20.3(4) of the Bankruptcy Law and Article 10 of the Civil Code of the Russian Federation).

> With regard to the appellant's objections concerning the alleged failure to prove the fact of bad faith behaviour of STS LLC …, the court of appeal notes that the court of the first instance, in making the appealed order, coming to the conclusion about the applicant's bad faith, proceeded from the fact that the actual actions of STS LLC and AC TRAVICOM JSC are currently aimed not at restoring the debtor's solvency, but at foreclosing on its only asset and effectively terminating the activities of TC Almaz-Avia LLC, which has not been refuted by the appellant".

Thus, although the reasoning contained several strands, part of the basis of the decision was that STS was owned by a company from an UFS and the result of granting the application would be the transfer to it of the insolvent company's only asset.

403. Person X also cites four cases where the Russian courts have held overseas parties acting in compliance with Western sanctions to have thereby acted in bad faith for the purposes of RCC Article 10. Thus, for example, in case A40/167352/2023 *Sovcombank v Citibank NA*, the Moscow Arbitrazh Court upheld a claim for losses caused by the blocking of funds pursuant to US sanctions against Sovcombank. The court's reasoning included these passages:

> "In terms of ordinary good faith behaviour, it would not have been difficult for CITIBANK N.A. and CB Citibank JSC, given their affiliation and control over a single decision-making centre, to transfer the performance of obligations to Sovcombank PJSC from CITIBANK N. A. to CB Citibank JSC, a Russian legal entity not subject to foreign sanctions regulation.
>
> Moreover, the general principles of applying foreign law in the Russian Federation are established by Article 4 of the Constitution of the Russian Federation, Articles 1189, 1191, 1192, and 1193 of the Russian Civil Code and do not provide for the obligation of Russian legal entities to implement the prohibitions (export restrictions) imposed by international organisations or foreign states against the Russian Federation.
>
> This legal position has been developed by arbitrazh courts in cases to compel Russian entities under foreign control to continue to fulfil in kind their obligations to Russian persons despite foreign sanctions restrictions.
>
> For example, in the case of Russian Railways PJSC v. Der Siemens Aktiengesellschaft and Siemens Mobility LLC (Ruling of the Ninth Arbitrazh Court of Appeal dated 15 June 2023 …), despite the fact that Russian Railways PJSC had contractual relations only with the foreign company, its Russian controlled company Siemens Mobility LLC was also forced to fulfil its obligations in kind.

> Applying a similar approach to this case means that CB Citibank JSC, following accepted standards of good faith, could and should have fulfilled its obligations to the Claimant. To do otherwise would mean that foreign legal entities and their Russian controlled entities could evade their obligations by taking advantage of the sanctions regime of unfriendly states in Russia."

and:

> "Thus, in the present case there is a full legal structure for the recovery of losses: Sovcombank PJSC suffered losses as a result of the blocking of funds owed to it; this loss arose as a result of the Defendants' bad faith actions, expressed in following the regime of sanctions of unfriendly states against the Russian Federation; there is an obvious causal link between the Defendants' bad faith actions and the Claimant's losses.
>
> It should be taken into account that the Defendants have not committed an ordinary civil law tort, but a tort complicated by following the regime of sanctions of foreign states against the Russian Federation.
>
> In other words, the Defendants' behaviour contradicts such basic principles of public policy as the prohibition of abuse of right (Article 10 of the CC RF) and the inadmissibility of unilateral refusal to fulfil an obligation (Article 310 of the CC RF)."

404. I would not regard this is an example of unfair discrimination by the court against a litigant from an UFS. The court's reasoning appears to have been based on Russian legal provisions, including Article 1193, which were interpreted in substance as mandating (or at least permitting) the court not to give effect to foreign sanctions by allowing them to be used as a ground for non-performance of obligations that would otherwise exist. I would take the same view in relation to the other three cases Person X cites in this context, case A40-84574/2023 *Sberbank/Deutsche Bank*, case A40-191489/2022 *AI Capital v Credit Suisse* and case A40-205635/2022 *Bank St Petersburg/Euroclear*. In the last of these, for example, the court said:

> "Article 1193 of the Russian Civil Code invoked by Euroclear Bank SA/NV does not specify that the contents of foreign law provisions shall be established; the application of the public policy clause is conditioned on the implications of application of foreign law provisions, while the implications may be determined without the establishment of contents of the Belgian law.
>
> According to Article 1193 of the Russian Civil Code, the foreign law provision to be applied in accordance with the provisions of this section may, in exceptional cases, be not applied, when the implications of its application would expressly contradict the

> fundamentals of legal order (public policy) of the Russian Federation."

and:

> "The inadmissibility of the execution of unilateral sanctions restrictions was pointed out by the Constitutional Court of the Russian Federation in the Decision of 13.02.2018 No 8-P, according to which the right, the realisation of which is conditioned by following the regime of sanctions against the Russian Federation, its economic entities, which are established by any state outside the proper international legal procedure and in contradiction with multilateral international treaties to which the Russian Federation is a party, is not subject to court protection.
>
> The mere location of a litigant from an unfriendly state does not in itself indicate an abuse of a right by that person, nor does it deprive such a person of the right to court protection.
>
> At the same time, if there are specific grounds for a person from an unfriendly state to commit acts in violation of the legislation of the Russian Federation, the affiliation of such a person to an unfriendly state will be an additional circumstance indicative of abuse of right.
>
> Since the law of the Russian Federation is applicable to the present legal relations, the unlawful actions (inaction) of Euroclear Bank SA/NV to block on the basis of sanctions the funds owed by the Bank are not subject to court protection and testify to the bad faith of Euroclear Bank SA/NV."

405. Mr Pirov cites fourteen cases in which Russian Arbitrazh Courts rejected arguments based on 'unfriendly' origin and/or 'bad faith' on the part of foreign parties. These can for convenience be grouped into six categories.

406. First, there are three cases where Person X accepts that the court refused to discriminate against persons from an UFS. These are case A56-68331/2022 *Sealand Maersk Asia Ptd/DTZ Logistik LLC* (decision dated 22 September 2023 of Arbitrazh Court of the North West Circuit, upholding a claim by a Singapore company for around US$5.3 million); case A53-40180/2022 *Pepsico Holdings LLC/Zheldorsnab LLC* (decision dated 27 June 2023 of Arbitrazh Court of the North Caucasus Circuit, upholding a German/Swiss-owned Russian company's claims for around €575,000 for delivered goods and penalties); and case A40-197448/2022 *P.P.U.H. Perfopol Sp.Z.o.o/Center Trade LLC* (decision dated 14 September 2023 of Arbitrazh Court of the Moscow Circuit, upholding a Polish company's claim for around €33,000 due under a supply contract).

407. Secondly, there are five cases where in point of fact the relevant claim arose before (in some cases years before) the February 2022 invasion of Ukraine and the Russian Counter-Measures including extension of the list of UFSs, but

where the court does not refer to or rely (at least explicitly) on that factor: case A40-126377/2021 *Power Sports Management Co. Ltd/Fitcom LLC* (decision dated 19 October 2022 of Russia Intellectual Property Court); case A56-109726/2021 *Mostos Espanoles S.A./Dionis LLC* (decision dated 23 May 2023 of Arbitrazh Court of North West Circuit); case A56-69586/2019 *Stony Island Plus LLC/Rietumu Banka* (decision dated 25 October 2022 of Arbitrazh Court of St Petersburg and Leningrad Region); case A41-78484/2015 *Poimanov/Suintex Limited Company* (decision dated 8 August 2023 of Arbitrazh Court of the Moscow Circuit); and A45-23915/2015 *ZapSib-Transservis LLC/Solution Capital Partners Sarl and Nord Wind Limited* (decision dated 11 September 2023 of Seventh Arbitrazh Court of Appeal). The reasoning in each of these cases included the point that the mere fact of residence in an UFS was not sufficient to deny the claim. For example, in *Poimanov* the court referred to Decree 79, and to Decree No. 95 dated 05.03.22 (which established a temporary order of fulfilment of obligations to certain foreign creditors, allowing Russian persons to discharge foreign currency obligations in rubles, but not providing for the termination of the indebtedness itself). The court continued:

> "At the same time, these Decrees of the President of the Russian Federation do not adopt a measure in the form of refusal of settlements with residents of foreign states as well as they do not establish a special procedure for inclusion or exclusion of claims of foreign persons associated with unfriendly states from the register of creditors 'claims in bankruptcy cases.
>
> The courts took into account that the creditor himself did not apply to the court with an application for the exclusion of his own claims from the register of creditors 'claims, it submitted statement of defence related to the merits of the dispute.
>
> Contrary to the arguments of the applicant, the mere fact that the Company Suintex Limited is a resident of a foreign state related to a group of states unfriendly to the Russian Federation is not an unconditional ground for denial of protection of such person's right to judicial protection."

408. Thirdly, there are two cases where the courts did not accept a 'bad faith' argument, but where Person X refers to reasons given by the lower courts that potentially indicated additional reasons for the outcome. In case A45-1804/2014 *Transinvest LLC/Khepri Finance Designated Activity Company*, the claim pre-dated the Russian Counter-Measures and a lower court made specific reference to that fact, but the appellate court did not. The Arbitrazh Court of the Novosibirsk Region in its ruling of 27 June 2022 made reference to the fact that *"[t]he applicant did not point to any circumstances indicating that the claims of the mentioned creditor were unlawful at the time of its inclusion in the debtor's creditor claims register"*. However, the Seventh Arbitrazh Court of Appeal in its 19 September 2022 ruling simply stated:

> "The issuance of the aforementioned legal acts and the fact of the location of Khepri Finance Designated Activity Company,

> registered on the territory of a state connected to the group of states that are unfriendly to the Russian Federation does not constitute unconditional grounds for excluding the claims of the debtor from the register of creditors' claims.
>
> The Decrees of the President of the Russian Federation, No. 79 dated 28.02.2022 and No. 95 dated 05.03.2022 establish the procedure for the performance by residents of the Russian Federation of foreign currency operations, the acquisition of shares, the discharge by the Russian Federation, constituent entities of the Russian Federation and municipalities of their obligations on credits and loans to foreign companies connected to the group of states that are unfriendly to the Russian Federation.
>
> At the same time, no measures in the form of the refusal of settlements with residents of foreign states have been enacted and in addition no special procedure has been introduced for including or excluding the claims of foreign persons related to unfriendly states from the register of creditors' claims in bankruptcy cases.
>
> At present the rules of effective legislation do not stipulate such grounds for the termination of an obligation as the affiliation of a creditor to an unfriendly country."

In case A27-9400/2019 *Krasnobrodskiy Yuzhniy LLC/Nitro Siberia-Kuzbass JSC* (decision dated 5 September 2022 of the Arbitrazh Court of the West Siberian Circuit), both of the lower courts had noted the lack of evidence to show that the creditor was in fact controlled by an entity from an UFS (Sweden). On the other hand, the ultimate decision dated 5 September 2022 of the Arbitrazh Court of the West Siberian Circuit stated that *"[b]y itself the fact that the creditor has a beneficiary who is a resident of a state relating to a group of states unfriendly to the Russian Federation is not an unconditional ground for denial of protection of such person's right to judicial protection"*.

409. Fourthly, there are two cases where there was arguably more than one expressed reason for the decision. In case A58-10682/2019 *Airfleet Resources Ltd/Yakutia Airlines JSC* (decision dated 27 February 2023 of the Arbitrazh Court of the West Siberian Circuit), the court held that the counter-measures did not relieve a Russian party from performance of its contractual obligations, rejecting the defendant's arguments based on alleged abuse of right and RCC Article 10. The court said:

> "The court of appeal rejects the assertion of the defendant that Decree No. 79 …, as this decree does not release the defendant from the obligations that it assumed.
>
> Furthermore, the claimant filed this claim for the protection of its rights on 17.10.2019, in other words, prior to the adoption of this Decree. In addition, the defendant did not indicate the

> specific measures stipulated by Decree No. 79 of the President of the Russian Federation dated 28.02.2022 which are applicable in this case, while the declared fact of the abuse by the claimant of its right based on the meaning of Article 10 of the RCC is not confirmed by any supporting documents"

This reasoning can fairly be read as including both a temporal point and a point of principle about the effect of the Decree. In case A40-204600/2022 *Insurance Company Chubb LLC/SOGAZ JSC* (decision dated 27 April 2023 of the Ninth Arbitrazh Court of Appeal), the court refused to release a Russian reinsurer defendant from its obligations on the basis that the claimant's owner was resident in the UK. The court's reasoning included these two passages:

> [1] "The norms of effective legislation do not stipulate grounds for releasing an insurer (reinsurer) from the performance of its obligations on the grounds of the control of the other party to the contract by unfriendly persons.
>
> Moreover, Decree No. 254 of the President dated 04.05.2022 cited by the defendant establishes a temporary period for the performance of specific types of transactions with foreign persons, inter alia, from unfriendly states, but does not establish a ban on the performance of these transactions and all the more so does not release the Russian counterparties in such transactions from the performance of their obligations.
>
> The court also established that Chubb Insurance Company LLC is an insurance company established and operating under the laws of the Russian Federation, is a tax resident of the Russian Federation, an existing member of the All-Russian Union of Insurers and engages in insurance on the basis of licences obtained in the Russian Federation, SL, No. 3969/
>
> The restrictions of Law No. 55-FZ also apply to the Claimant as a resident of the Russian Federation, including all the bans on the transfer of funds to companies from unfriendly countries. In addition, the actions of Chubb Insurance Company are aimed at compensating the loss of a Russian insurer (Alfa-Strakhovanie JSC) and a Russian policyholder (Magnitogorsk Iron and Steel Works), in other words, the reinsurance cover was granted specifically to Russian companies on whose behalf the claimant paid its share of the loss pursuant to the procedure established by the law and the contract.
>
> The claimant also confirmed its separation from Western companies, as well as the termination of financial mutual relations with Chubb Group, which is confirmed: - excerpt from the Decision of Chubb Insurance Company LLC (Volume 1, case page 76), pursuant to which all the underwriting decisions on losses and operating decisions should be adopted by the Company without the consultation and without the resources of

> other companies of Chubb Group, and also the letters submitted to the case."
>
> [2] "The law does not release the insurer (reinsurer) from fulfilling obligations to pay the insurance (reinsurance) indemnity to a policyholder (cedent) with foreign participation.
>
> The claimant is authorised by the Central Bank to receive reinsurance indemnity, which is confirmed by the permission of the Central Bank dated 07.04.2022 (volume 2, case page 42).
>
> The Central Bank … stipulated special authorisation for the full exercise of their rights under an insurance (reinsurance) contract by insurance companies controlled by persons from unfriendly states, including authorisation to receive reinsurance payments.
>
> The fact per se that a company belongs to an owner from a state that is unfriendly to the Russian Federation does not attest to the fact that such a firm is taking unfriendly actions which contravene international law."

The third to fifth paragraphs of quotation [1] above can fairly be regarded as including an alternative basis, to the effect that the claimant was not, on the facts, to be treated as controlled by a person from an UFS.

410. Fifthly, there is a case – case A73-10158/2020 (*Torex LLC/Global Metcorp Ltd* (decision dated 21 June 2022 of the Sixth Arbitrazh Court of Appeal) – where the court expressly held in relation to one of a number of creditors seeking a meeting to select a new trustee in bankruptcy that:

> "The argument on the legal status of the creditor - Global Metcorp Ltd, a foreign entity from an unfriendly country - as the grounds for the adoption of interim measures should be denied as it does not affect the status of the creditor in civil law relations, will not lead to recognition of the creditor's actions in an insolvency (bankruptcy) case as bad-faith actions"

albeit, as Person X points out, a decision the other way would have affected not only that creditor but also the rights of other creditors including Russian creditors.

411. Sixthly, there was one case which did not in fact turn on 'bad faith' or similar considerations at all, as they were not raised: case A40-123147/2022 *STK Razvitie JSC/Hewlett Packard Enterprise LLC* (decision dated 17 March 2023 of the Arbitrazh Court of the Moscow Circuit).

(2) Interim measures

412. Person X refers to a number of cases about interim measures which they consider demonstrate a general trend since February/March 2022 of unfavourable and discriminatory treatment of foreign litigants from UFSs.

413. Such measures are imposed pursuant to APC Article 90 part 2:

> "Interim measures are allowed at any stage of arbitrazh proceedings, if the failure to take these measures may complicate or make it impossible to enforce the judicial act, including if the enforcement of the judicial act is supposed to be outside the Russian Federation, as well as to prevent the causing of significant damage to the applicant".

414. The basis on which such measures can be imposed was set out in Resolution of the Plenum of the Russian Supreme Arbitrazh Court dated 12.10.2006 No. 55, subsequently replaced by Resolution of the Plenum of the Russian Supreme Court dated 01.06.2023 No. 15 "*On some issues of the adoption by the courts of measures to secure the claim interim measures and measures of preliminary protection*". Interim measures are issued in order to secure a claim and in order to prevent violations of rights, freedoms and legitimate interests of the applicant or of an indefinite circle of persons, to reduce the negative impact of violations committed and to create conditions for the proper execution of a judicial act. They are required to be proportionate to the claim. Paragraph 14 of Resolution 15 indicates that while considering an application for interim measures, Arbitrazh Courts should decide to what extent the specific measure requested by the applicant is related to the subject of the claim and proportionate to it. Arbitrazh Courts may adopt interim measures only upon establishment of at least one of the grounds for their adoption:

> "In this regard, when assessing the applicant's arguments, courts should, in particular, take into consideration:
>
> - reasonableness and validity of the applicant's claim for interim measures;
>
> - relation of the requested interim measure with the subject matter of the filed claim;
>
> - probability of causing significant damage to an applicant in case of failure to take interim measures;
>
> - ensuring a balance of interests of the parties;
>
> - prevention of violation of public interests and interests of third parties when taking interim measures.
>
> In order to prevent significant damage to the applicant, interim measures may be aimed at preserving the existing state of relations (status quo) between the parties".

415. APC Article 91 non-exhaustively lists types of interim measures that can be ordered:

i) seizure of funds (including funds that will be credited to a bank account) or other property belonging to the defendant and held by him or other persons;

ii) prohibiting the defendant and other persons from performing certain actions concerning the subject matter of the dispute;

iii) imposing on the defendant the obligation to perform certain actions in order to prevent damage, deterioration of the disputed property;

iv) transfer of the disputed property for storage to the claimant or another person;

v) suspension of recovery under the enforcement or other document disputed by the claimant, the recovery of which is carried out in an undisputed (non-acceptance) order; and

vi) suspension of the sale of property in the event of a claim for the release of property from arrest.

416. The first example Person X mentions is case A42-7285/2022 *Enel Rus Wind Cola LLC/Siemens Gamesa Renewable Energy LLC*, in which interim measures were imposed after Siemens Gamesa unilaterally withdrew from a wind power construction contract due to Western Sanctions. The measures prohibited Siemens from removing equipment from the site and provided for it to be deposited with the applicant for its use in construction of the wind farm. The first instance court (Arbitrazh Court of the Murmansk Region, decision of 13 September 2022) seems to have treated the company's compliance with Western Sanctions as demonstrating intention to cause harm:

> "Siemens Gamesa has publicly announced its acceptance of the non-friendly states unilateral sanctions against the Russian Federation and Russian persons (" protocol of examination of evidence " – internet page of Siemens Gamesa of Spain).
>
> Due to the failure to complete the project for the construction of the Kolska Wind Farm, the applicant will not ensure the fulfilment of its public legal obligation under 54 959 the RESP, nor will it ensure the fulfilment of its obligations under the special investment contract to the Government of the Murmansk Oblast.
>
> Thus, the defendant's actions of willfully terminating its obligations under the supply contract and claiming the transfer of the disputed property, caused by the defendant and its controlling persons ' compliance with the restrictive measures of states engaging in unfriendly acts against the Russian Federation, Russian individuals and legal entities, were committed with the intention of causing damage to the applicant and the Russian Federation energy system, violating the energy sovereignty of the Russian Federation …"

417. However, the decision was reversed on appeal. The Thirteenth Arbitrazh Court of Appeal in its decision dated 30 November 2022 said:

> "Under paragraph 10 of the Resolution No. 55 while assessing the argument of the applicant in accordance with paragraph 2 of Article 90 of the Russian Arbitrazh Procedure Code arbitrazh courts should take into account: the reasonableness and validity of the applicant's claim for the application of interim measures; the likelihood of causing significant damage to the applicant in the event of failure to take interim measures; ensuring a balance of interests of interested parties; preventing violations of public interests, interests of third parties when taking interim measures.
>
> Proceeding from the legal position contained in the second paragraph of paragraph 13 of the resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation dated 09.12.2002 No. 11 "On Some Issues Related to the Entry into Force of the Arbitrazh Procedure Code of the Russian Federation'', arbitrazh courts should not take interim measures in case the applicant has not substantiated the reasons for applying for interim measures in respect of the claim with reference to specific circumstances confirming the necessity of adoption of interim measures and has not provided evidence confirming his arguments."

418. On the other hand, it is difficult to see any real indication of such careful reasoning in another (albeit earlier) case Person X cites, case A40-34811/2022 *Biotechprogress NPP JSC/MT Russia LLC*. In that case the assets of a Russian company (MT Russia) with foreign shareholders were arrested. The following was the entirety of the reasoning of the Arbitrazh Court of Moscow in its decision dated 28 June 2022:

> "The Arbitrazh Court of Moscow considers a case filed by SPE BIOTECHPROGRESS JSC against the respondent MT RUSSIA LLC seeking recovery of RUB 36,633,410 under the Supply Agreement, including RUB 32,878,452.50 in debt and RUB 3,754,958.20 in penalty interest.
>
> The plaintiff filed an application for interim measures in the form of seizure of the respondent's funds. The applicant states that the respondent is controlled by legal entities being residents of unfriendly countries; as of 07 June 2022 the shareholders of MT Russia LLC are Tecnimont S.P.A. (Italy), owning 99% of the authorized capital, and TPI - Tecnimont Planung und Industrieanlagenbau GmbH (Germany); several arbitrazh proceedings are pending against the respondent and the respondent is unable to pay its debts.
>
> Having considered the application, the court found that it should be satisfied partially, since failure to grant the interim measures

> being sought might complicate or render enforcement of the court order in the case impossible, should it come into force."

419. Mr Pirov suggests that the court applied the status quo and balance of interests tests. However, the reasoning quoted above gives no indication of any balancing of interests, and the reference to MT Russia's shareholders being resident in 'unfriendly countries' suggests that that factor played a part in the decision without any explanation of its relevance to the issues. In that regard it might be contrasted with case A56-42593/2022 *Russian Railways JSC/Siemens Mobility GmbH*, where no reliance was placed on any UFS argument: rather, the basis for the grant of relief was stated to be the difficulty in recovering the equipment in question from 'a foreign country'.

420. In case A40-64805/2022 *Entertainment Park LLC/H&M LLC* (decision of the Arbitrazh Court of Moscow dated 31 May 2022), the court had in a judgment the previous day upheld the claimant's claims for *inter alia* recognition of a preliminary lease agreement dated 24 August 2019 as terminated, and recovery of unjust enrichment in the amount of approximately 537 million rubles. Granting an application for interim measures seizing that sum from H&M's bank accounts, the court said:

> "In support of its application, the plaintiff points out that H&M (Hennes & Mauritz) is a Swedish company, Europe's largest clothing retailer, headquartered in Stockholm and New York. H&M and its subsidiaries operate in 71 countries with 4,968 shops as of November 2018. … At the same time, Sweden, as a European Union Member State, is included in the list of foreign countries and territories that take hostile actions in respect of the Russian Federation, Russian legal entities and individuals …
>
> The respondent published the following press release on its official website on 02 March 2022: *"H&M Group is deeply concerned about the tragic developments in Ukraine and stand with all the people who are suffering. H&M Group has decided to temporarily pause all sales in Russia. The stores in Ukraine have already been temporarily closed due to the safety of customers and colleagues. The situation is continuously monitored and evaluated. Representatives of the company are in dialogue with all relevant stakeholders. H&M Group cares for all colleagues and joins all those around the world who are calling for peace. Clothes and other necessities are donated by the company. H&M Foundation has also made donations to Save the Children and to UNHCR."*
>
> On 03 March 2022, the respondent sent a letter of similar content to the plaintiff: *"We would like to inform you of the following: H&M Group (hereinafter, H&M Group), represented by its sole shareholder H&M Hennes & Mauritz GBC A.B., Private Limited Company, within the scope of its sole and exclusive competence to determine the core business of the company, due to the uncertain situation, extremely unfavourable market conditions*

> *and a significant interruption in the supply chain of products and goods, has decided to temporarily suspend all retail shops and online sales in the Russian Federation and Belarus. In view of the above, the shop located in the leased premises in your shopping centre will temporarily suspend its business activities from 03 March 2022."*
>
> Although the respondent is a Russian legal entity, it is fully controlled by a legal entity which is a resident of an unfriendly country (Executive Order of the Russian President No. 95 dated 05 March 2022 On Temporary Procedure for Meeting Loan Obligations to Certain Foreign Creditors).
>
> Therefore, the plaintiff believes and documents that the respondent has no intention of both complying with the obligations under preliminary lease agreement for premises No. RU0753 dated 24 August 2019 entered into between the parties and enforcing the court order in the future, considering the specifics of economic sanctions imposed and observed by the European Union in respect of the Russian Federation, which sanctions were also supported by Sweden, among others.
>
> Thus, the likelihood of difficulties in enforcing the judgment in the case, and failure by the respondent to duly perform contractual obligations resulting in substantial damage to the plaintiff are more than obvious and prove that the plaintiff's application is well founded in the form claimed by it. The interim measures being sought are aimed at preventing actions which may result in impossibility or difficulty for the enforcement of the court order in the case, correspond to the subject matter of the claim filed, are commensurate with the application filed and do not violate the balance of interests of the parties.
>
> Taking of the said measures will not make it impossible or substantially difficult to carry out lawful activities of the respondent, and these are consistent with requirements contained in Article 91 of the Russian Arbitrazh (Commercial) Procedure Code."

421. Without the benefit of the substantive judgment, it is difficult confidently to evaluate this interim measures decision. Mr Pirov suggests that it was simply a routine application of the usual factors relevant to interim relief. It is, however, unclear precisely how the court's references to H&M being from an unfriendly state led it to conclude that H&M had no intention of complying with its obligations, and unclear why the court considered the company's press release of 2 March 2022 (expressing support for Ukraine and referring to temporary closure of shops there) to be relevant to its consideration of the issues.

422. According to a subsequent decision dated 24 November 2022 in this case, the interim attachment of H&M's funds was revoked after the recoverable amount

had been debited in full from its account. Person X observes in their rejoinder report that:

> "… in 11 of the 12 examples I have cited, the interim measures that were imposed became a means of coercing the person from the "unfriendly" state (or its Russian subsidiary) to settle the dispute with the claimant (including by satisfying the claimant's claims). In my view, this information shows that in the cases at hand, the arbitrazh courts deliberately imposed severe interim measures with a view to putting pressure on one of the parties to the proceedings."

albeit at least the latter point is disputed by Mr Pirov. The documents in evidence do not enable me to verify which of the 12 cases did or did not settle following the grant of interim measures, though it is clear that that did happen at least in two *Entertainment Park/H&M* cases and the *Fifteenth Vetropart/Vestas Rus, Talmer/Dell* and *Transkapitalbanik/Credit Suisse* cases.

423. In case A06-5859/2022 *Fifteenth Vetropark PRV LLC/Vestas Rus LLC*, the Arbitrazh Court of Astrakhan Region by a decision of 8 July 2022 arrested all stored goods of a Russian company controlled by foreign persons. The court referred to Vestas Rus being under Danish control, and to the inclusion of all EU countries on the list of UFS, continuing:

> "As the Vestas Group has announced that it is leaving the Russian market, closing its production facilities in Russia, and Vestas Rus Ltd in its letters to the other party has pointed out the existing obstacles to fulfil its obligations and the impossibility to perform services and other maintenance works after 10.07.2022, in view of the specific and categorical anti-Russian sanctions imposed by the European Union there is a real threat of disposal and removal from the Russian Federation of the property of Vestas Rus Ltd".

424. Just over two weeks later, the interim measures were set aside. The court quoted the claimant's statement that *"the preliminary interim measures of the Arbitrazh Court of the Astrakhan Region had served as an effective incentive for the amicable settlement of the dispute of the parties and stated that the Contractor had settled the Client's claims of its own volition"*. The court noted that the Contractor *"had settled in full"* the claimant's claims. In those circumstances, it is legitimate to question how 'voluntary' the settlement was. The course of events, and the court's recitation of them, in my view lend some credence to the point made by Person X quoted in § 422 above.

425. Person X also describes the events in case A41-54894/2022 *GPN Salym Project LLC/Shell Salym Development B.V.* However, the circumstances there were slightly different since the case involved the application of new legislation on 14 July 2022 (Law no. 320-FZ) making provision for the conversion into Russian companies of branches of foreign companies.

426. Person X provides a list of six further cases in which, they say, the courts considered a party or its parent company's incorporation in an UFS as a relevant ground when imposing interim measures, viz case A40-72905/2022 *Talmer LLC/Dell LLC* (11 April 2022), case A01-1658/2022 *Tlekhusezh Z.B./URP LLC* (25 May 2022), case A55-25729/2022 *Vicktor & Co Mega Park LLC/Zara SNG LLC* (1 September 2022), case A40-257497/2022 *Entertainment Park LLC/H&M LLC* (29 November 2022), case A56-129797/2022 *Ruskhimalians LLC/Linde GmbH* (30 December 2022) and case A40-129186/2022 *Transkapitalbank PJSC/Credit Suisse AG* (19 July 2022). I broadly agree that the courts did appear to attribute relevance to the relevant party's origins. For example, in the first of those decisions (*Talmer/Dell*, Arbitrazh Court of Moscow 11 April 2022) the court's reasoning included the following:

> "In this case, the plaintiff states that failure to grant the interim measures being sought might complicate or render enforcement of the court order impossible. The court finds that, as stated by the plaintiff, the information about the suspension of technical support services posted on the official website https://www.dell.com/restrictions/support/ru-ru/index.html is valid throughout the Russian Federation. In addition, the Respondent's founders are foreign companies … registered in the country (the Netherlands) that took hostile actions in respect of the Russian Federation and Russian legal entities.
>
> Given these circumstances, the court finds that there is a real threat of difficulty of enforcing the court order or threat of unenforceability of the court order in the future. The court considers that the interim measures being sought are directly related to the subject matter of the dispute, proportionate to the claims, necessary and sufficient to secure the enforcement of the court order. Given these considerations, the court considers it necessary to satisfy the application for interim relief."

427. Similarly, in *Ruskhimalians /Linde*, the North-Western District Arbitrazh Court said in its 7 September 2023 decision:

> "The amount of Ruskhimalyans LLC's claims against the Defendants is more than 100 billion rubles at the current euro exchange rate.
>
> The companies are subsidiaries of foreign legal entities from countries unfriendly to Russia according to the Russian Federation Government Order N 430-r dated 05.03.2022 "On Statement of the List of Foreign States and Territories Committing Unfriendly Actions against the Russian Federation, Russian Legal Entities and Individuals".
>
> The mentioned circumstances may indicate that the Defendants intend to withdraw their own assets from the territory of the Russian Federation, which will lead to difficulties in the performance of the Decision of the court.

> The seizure of the disputed property and Shares in the corporate structure of Linde GMBH and Linde plc prevents the withdrawal of assets from the subsidiaries, which the Claimant could awarding in the event the claim is successful."

428. Mr Pirov refers to two further decisions, which he states indicate that the Arbitrazh Courts dismiss interim measures applications in the absence of proper grounds, even if the defendant is from an UFS and is suspending its operations in Russia. These are case A43-9801/2023 *GAZ Automobile Plant LLC/Volkswagen AG* (decision of Arbitrazh Court of Nizhny Novgorod Region dated 11 April 2023) and case A43-6651/2023 *GAZ Automobile Plant LLC/Volkswagen AG* (decision of Arbitrazh Court of Nizhny Novgorod Region dated 19 April 2023). In the first of these, for example, the court said:

> "The claimant did not produce any objective evidence confirming that it had taken any real actions aimed at reducing the volume and sale of any of its property (in particular, evidencing the likelihood of concealing property, siphoning-off assets, alienating property to third parties, selling real estate or business, entering into transactions, transferring funds, etc.), as well as the absence on the part of the defendant of property on which execution could be levied at the enforcement proceedings stage.
>
> …
>
> The measures sought concern the defendant's property interests and may lead to an imbalance of the interests of the parties to the dispute, as well as a violation of the rights of the defendant, if the measures sought are adopted.
>
> The mere fact that VOLKSWAGEN AKTIENGESELLSCHAFT has suspended its operations in Russia does not attest to the fact that failing to adopt measures to secure the claim may render enforcement of a court decision difficult or impossible,"

In the second case, cancelling in full certain interim measures that had been imposed on 17 March 2023, the court said:

> "The Volkswagen Group's intention to sell its assets is not linked to the claim brought and cannot be regarded as an attempt to evade the execution of a court decision rendered in favour of the claimant.
>
> There is currently no reason to believe that the defendants will evade execution of a court decision (if rendered in favour of the claimant) and that their financial situation will not allow them to comply with such decision.

> At the same time, the interim measures adopted against the defendants have a negative effect on their business reputation, since these measures support the view of the defendants as organizations that are unable to pay off their debts and that are trying to evade this. However, the court has no information that would characterise the defendants in this way. Paragraph 5 of Article 10 of the Russian Civil Code establishes that the good faith of participants in civil legal relations and the reasonableness of their actions are assumed."

429. There is an apparent difference of approach between the reasoning quoted above in the *Volkswagen* cases and that in some of the other cases mentioned above, particularly as regards the inferences that can or cannot be drawn from a policy of withdrawal from Russia. Person X in their rejoinder report suggests an alternative explanation for the *VW* cases, in the light of Russian media reports indicating that the attachments had been sought in an attempt to prevent the sale of the plant to a Russian person whose candidature had been approved by a Government Commission. Person X fairly acknowledges that they are unable to state that these circumstances influenced the court's decision. They note, though, that subsequent decisions (such as *Ruskhimalians/Linde*) have continued what Person X regards as the general approach.

(3) Invalidation of contracts/payments

430. Person X states that in some cases the Arbitrazh Courts invalidate or vary contracts between Russian persons and foreign counterparties, seemingly with a view to protecting the economic interests of the former. The juridical basis cited is either Article 10 of the RCC or Article 451, which provides that: "*Substantial changes in the circumstances upon which the parties entered into the contract are grounds for changing or terminating it …*".

431. Person X refers to case A62-2478/2020 *Dorogobuzhkotlomash JSC/Karl Dungs LLC* (later renamed as *Ted Gaz Systems LLC*) (decision dated 7 February 2023 of the Arbitrazh Court of the Smolensk Region). The receiver of an insolvent Russian company applied to the Arbitrazh Court to invalidate payments made to another Russian company with a foreign shareholder (Dungs). The first ground for the application was that the payments were unlawful preferences given within 6 months of the company being declared bankrupt. In addition, the receiver stated that Dungs' shareholder was a foreign entity from an UFS. The court granted the relief sought.

432. Person X suggests that the main ground for doing so was that Carl Dungs' shareholder was incorporated in an UFS, and that the decision failed properly to analyse the criteria of actual relevance. In my view, however, the decision, which is reasoned in detail, is primarily based on the unlawful preference provisions of the bankruptcy code (in particular, Article 63.1 of the Federal Law on Insolvency), and analyses the grounds on which the court considered Dungs to be aware of the company's lack of solvency. Pursuant to the Resolution of the Plenum of the Supreme Arbitrazh Court No. 63 dated 23 December 2010, the court was entitled, in doing so, to have regard to the parties' dealings in relation to the debt whose payment is alleged to have constituted a preference.

In addition, it is common ground between Person X and Mr Pirov that the court also set aside a tax payment by the company as a preference.

433. At the same time, towards the end of the judgment in the *Dungs* case, the court said this:

> "When assessing the arguments of the administrator regarding the membership of a foreign legal entity from an unfriendly country in Limited Liability Company TED Gas Systems, the arbitrazh court relies on the following.
>
> As it follows from the extract from the Unified State Register of Legal Entities regarding TED GAS SYSTEMS LLC …, DUNGS BETEILIGUNGS-GMBH (Germany) is a member of the respondent.
>
> On 28 February 2022, Executive Order of the President of the Russian Federation No. 79 dated 28 February 2022 on Imposing Special Economic Measures in Connection with the Hostile Actions of the United States in League with Other Foreign States and International Organisations was issued. In accordance with Executive Order No. 95 dated 5 March 2022 on Temporary Procedure for Meeting Loan Obligations to Certain Foreign Creditors of the President of the Russian Federation, the list of foreign countries and territories that take hostile actions in respect of the Russian Federation, Russian individuals and legal entities, which list includes European Union Member States, was approved by Executive Order of the Government of the Russian Federation No. 430-r dated 5 March 2022.
>
> Currently, all the remedies provided for by the insolvency (bankruptcy) institution shall pursue the objective not only to protect the rights and legal interests of the entity, its creditors, and employees, but also to protect the national interests of Russia and ensure its financial stability.
>
> According to paragraph 1 of Article 10 of the Russian Civil Code, exercise of civil rights solely with the intention to harm another person, to act in circumvention of the law with an unlawful purpose or to otherwise knowingly exercise civil rights in bad faith (abuse of the right).
>
> As it is established in the case, the respondent is controlled by a legal entity being a resident of an unfriendly country, and, therefore, the actual beneficiary under the challenged transactions is a foreign legal entity.
>
> In case of non-observance of the requirements provided for by paragraph 1 of the Article, the arbitrazh court or mediation court, taking into consideration the nature and the consequences of the abuse of the right, shall refuse to protect the person's right in full

> or in part and shall apply other measures provided for by the law (paragraph 2 of Article 10 of the Russian Civil Code)."

434. Mr Pirov suggests that the court was, in this passage, merely summarising the arguments of the receiver. However, that is not a conclusion that can readily be drawn from the above passage, bearing in mind the phrases *"the arbitrazh court relies on the following"* and *"[a]s it is established in the case"*, and the absence of any statement of the court's view of the kind one would expect were the paragraphs quoted above merely a recitation of submissions. It does appear that the court treated the UFS as a further basis of decision, and either endorsed or did not dissent from the proposition that the national interests of Russia were a potentially overriding consideration.

435. The experts also discuss case A32-13267/2022 *Ferroni Tolyatti LLC and Ferroni Yoshkar-Ola LLC/Leasing Company Siemens Finance LLC*, where the courts granted the applicant more time to make payments under lease contracts, pursuant to Article 451, based on the adverse effects of the Western sanctions. The courts referred to Siemens' founder shareholder being from an UFS in the course of rejecting one of its arguments, viz that the adverse economic effects affected both parties to the contract. However, it was a subsidiary point, in my view, and was coupled with the further point that *"[a]t the same time the Russian Federation has not taken any reciprocal measures in the form of a termination of its obligations in respect of the activities of foreign companies, including the group of companies to which [Siemens] belongs"* (first instance decision of Arbitrazh Court of Krasnodar dated 28 June 2021). I do not therefore find the case of particular assistance.

(4) Enforcement of judgments

436. Person X states that the Arbitrazh Courts have refused to enforce (in Russia) judgments entered in favour of persons from UFSs.

437. By way of example, in case A14-13590/2022 *Universal Panel Products Ltd/Fanerniy Cambinat LLC*, the Arbitrazh Court of the Central Circuit on 27 February 2023 decided an appeal from a lower court decision to permit enforcement of a judgment of the International Commercial Arbitrazh Court at the Chamber of Commerce of the Russian Federation (ICAC) dated 21 July 2022 in favour of a UK company and against a Russian company. The case related to a claim by the UK company to terminate a contract and to recover a debt due from the Russian company. The court remitted the matter to the lower court on the basis that it had failed to check whether enforcement of the award would be inconsistent with Russian public policy, which would be a refusal ground under APC Article 239. The court stated that refusal was permitted only in the event of breach, in the course of the 'mediation' proceedings, of fundamental legal principles. However, the court referred to the fact that Russian Counter-Measures introduced in early 2022 among other things impacted restrictions and permitted procedures for the performance of obligations in relation to transactions with legal entities under the jurisdiction of UFSs:

> "which transactions entail, inter alia, the creation of the right of ownership of the immovable property, and which transactions (operations) entail, directly and (or) indirectly, the establishment, change or termination of rights of ownership, use and (or) disposal of interests in authorized capitals of limited liability companies (except for credit institutions and non-credit financial organizations) or other rights that make it possible to state the terms of control of such limited liability companies and (or) conditions on which they conduct business activities".

The court did not explain (and nor does Mr Pirov) how any of those provisions could have been engaged by the contractual claim which the ICAC had upheld.

438. In case A40-149699/2021 *Siemens Energy LLC/Cantreva LLC*, the court stayed execution of a judgment in favour of Siemens against Cantreva on the ground that there were ongoing appeal proceedings between the parties. Both companies had owners from UFSs. The court considered there to be a risk that, absent a stay, Cantreva would find it hard to recover its funds in the event of a successful appeal. That was said to be based partly on Siemens group's official position of supporting sanctions against Russia, and partly on its low level of audited net assets. I do not consider it possible to draw any relevant conclusions from this case.

439. Finally, in case A32-47144/2022 *Louis Dreyfus/Infotec Novo LLC* (decision dated 16 October 2023 of North-Western District Arbitrazh Court), Louis Dreyfus (a Swiss company) applied to have recognised and enforced in Russia an arbitral award obtained in England against Infotec (a Russian company). The courts held that recognition and enforcement of the award would be contrary to Russian public policy, making reference to four particular counter-sanctions decrees issued by the Russian President:

> "At the same time, the court correctly rejected the company's request to recognise and enforce the decision in case №204930, referring to Article 244(1) of the APC RF, according to which the arbitrazh court rejects recognition and enforcement of a foreign court decision and a foreign arbitrazh decision if the enforcement of the foreign court decision would be contrary to the public policy of the Russian Federation.
>
> In rejecting the company's application, the court correctly mentioned that the enforcement of the decision in case №204930 would be contrary to the public policy of the Russian Federation, which presupposes good faith and equality of parties entering into private relations.
>
> At the same time, the company that applied for recognition and enforcement of the decision in case №204930 is under the jurisdiction of Switzerland, which is included in the List of foreign states and territories that commit unfriendly actions against the Russian Federation, Russian legal entities and individuals, approved by the Order of the Government of the

> Russian Federation №430-r of 05.03.2022 (hereinafter - the List), adopted in pursuance of the Decree of the President of the Russian Federation №95 of 05.03.2022 "On Temporary Procedure for the Performance of Obligations to Certain Foreign Creditors".
>
> The statement of the List is a consequence of the countries mentioned in the List (and companies under their jurisdiction) committing unfriendly actions towards the Russian Federation that cause damage to sovereignty and security, including economic security, and the Russian Federation's response in order to prevent damage to the sovereignty and security of the state, protect the interests of large social groups, and respect the constitutional rights and freedoms of individuals.
>
> Thus, according to public information, since March 2022, the company has suspended its activities in the Russian Federation despite the fact that there are no obstacles for it to carry out its activities in the Russian Federation, while the company is objectively deprived of the possibility to carry out business activities (including for the performance of the contract concluded with the company) in the territories of the List of states due to the imposition of economic sanctions.
>
> These circumstances show the inequality of the parties to the contract, due to the objective impossibility of enforcement of which the decision in case №204930 was made.
>
> In reaching the conclusion that there were no grounds to satisfy the company's application for recognition and enforcement of the decision in case №204930, the court correctly pointed out that its enforcement would be contrary to the public policy of the Russian Federation as mentioned in Decrees of the President of the Russian Federation №81 of 01.03.2022 "On Additional Temporary Economic Measures to Ensure Financial Stability of the Russian Federation", №95 of 05.03.2022 "On Temporary Procedure for the Performance of Obligations to Certain Foreign Creditors", №252 of 03.05.2022 "On the Application of Retaliatory Special Economic Measures in Connection with the Unfriendly Actions of Certain Foreign States by International Organisations", and №254 of 04.05.2022 "On the Temporary Procedure for the Performance of Financial Obligations in the Scope of Corporate Relations to Certain Foreign Creditors", Order of the Government of the Russian Federation №430-r of 05.03.2022, regarding the performance of obligations to foreign creditors under the jurisdiction of countries unfriendly to the Russian Federation."

440. Mr Pirov states that to the extent that the decision not to enforce the award on public policy grounds was upheld by reason of Louis Dreyfus's incorporation in an UFS, this single case is to be regarded as at odds with the generality of

cases explained above; and cannot be regarded as representing any consistent or established approach of the Arbitrazh Courts.

(5) Discussion

441. Reflecting on these decisions taken as a whole, I consider that (as Person X and the Claimants accept) they present a somewhat mixed picture. I agree with Mr Pirov that there are some decisions in which the courts have taken a position opposed to inappropriate discrimination based on a party being based in, or owned by persons based in, an UFS: for example, the cases referred to in §§ 406, 407, 408, 410 and 417 above. However, there are decisions, spread across the period spanned by the cases as a whole, that do give rise to real concerns that the courts have treated UFS status as a ground, and sometimes the main or only ground, for making a decision adverse to a party: see the cases referred to in §§ 388, 391, 395-398, 402, 418, 420, 423, 426, 427, 431, 437 and 439 above (several of which post-date *Peppa Pig*), and see my conclusion in § 393 above about the reasoning in *Peppa Pig*.

442. Where Mr Pirov has not sought to defend decisions, he states that they do not reflect the courts' approach in general, and (in some cases) that decisions were mere first instance decisions that cannot be regarded as evidence of court practice. In connection with the latter point, there is a debate between Person X and Mr Pirov about the extent to which judicial decisions are regarded as a source of law in Russian jurisprudence. Person X, as part of the overview of the Russian legal system in their first report said that Supreme Court decisions were in practice recognised as an independent source of law, but the courts also took into account the jurisprudence of appeal and cassation courts. Mr Pirov accepted that one could speak of 'dominant' court practice in situations where courts faced similar facts and legal issues, but did not consider that previous court practice was always persuasive (leaving aside decisions of the Plenum or Presidium of the Supreme Court); and suggested that it was 'quite rare' for courts to refer to previous decisions. Person X in their rejoinder report maintained that, regardless of the formal position, case law is a 'soft' source of law regularly applied by the Russian courts. A 2021 statistical study which Person X mentions indicates that, of 6.9 million Arbitrazh Court decisions reviewed, about 540,000 (still a sizeable number) referred to legal propositions expressed in other Arbitrazh cases.

443. To the extent that there is any real disagreement between the experts on this point, it is unnecessary to resolve it. Contrary to a submission made by the Defendants, Person X's evidence about the practices of the Russian courts is not dependent on prior decisions being a source of law; and nor is there any logical reason why it should be. Their examples of court practice are put forward as evidence of the trends and tendencies Person X identifies. That approach is not contingent on the existence of any rules or practices about precedential effect.

444. The Defendants make the point that the examples Person X cites are a small number of cases compared to the many thousands of cases decided in Arbitrazh Courts each year. Mr Pirov refers to statistics indicating that in 2022 the Arbitrazh Courts decided 14,800 cases, about half of which involved foreign persons from outside the CIS. The Defendants accept that those statistics do

not indicate how many cases involved parties from UFSs, nor which party prevailed in such cases (though the Chairman of the Russian Supreme Court stated that 97% of foreign investors' claims were successful in 2022). Person X and Mr Pirov disagree about whether most of the cases heard concerned minor claims, Mr Pirov suggesting that the Russian courts tend to give particularly careful consideration to cases involving foreign parties, and that most of the cases in which he took part involving foreign parties were significant claims and concerned state interests in one way or another. It is of course important to bear in mind that the experts have, inevitably, been able to give evidence about only a small sample of cases. Provided that is borne in mind, it is nonetheless legitimate in my view to have regard to the way in which the courts have approached the issues in those cases, including the significance attributed to UFS status.

445. The Defendants point out that several of the cases Person X cites concerned pre-February 2022 events, which may be hard to reconcile with the view that the Russian courts distinguish between claims arising before and after that date. It does not appear to me, however, that that point assists the Defendants. The courts have in some cases drawn a distinction, implying that claims that arose before the Russian Counter-Measures should not be adversely affected by UFS status (and that later claims may be so affected). The fact that in some cases the courts have afforded adverse treatment even for older claims if anything makes matters worse rather than better.

446. The Defendants also note that Person X's examples involved a Russian counterparty to the dispute. That is broadly correct, but as noted earlier, it is common ground between Person X and Mr Pirov that if the present claims had to be brought in Russia, then Russian insurers and reinsurers would be very likely to be parties to the proceedings because the proceedings will affect their rights and obligations. Moreover, the focus in the cases discussed in this section is on the attributes of the claimants rather than the fact that the defendants were Russian.

447. Viewing the matter in the round, I consider that the cases of concern referred to in § 441 above provide further grounds on which to conclude that the Claimants would be unlikely to obtain a fair trial in Russia.

(6) Beneficial ownership of the present Claimants

448. It is Professor Antonov's view that when assessing the treatment that the Claimants may face in the Russian courts, it is necessary to look behind the place of their incorporation to ascertain whether persons from 'friendly' states – i.e., those with which Russia shares channels of economic cooperation – have direct economic interests in the capital of the Claimants.

449. This issue arises in relation to one of the MLB Claimants and several of the Clifford Chance Claimants, as explained earlier.

450. Professor Antonov's evidence on this point is somewhat tentative. He says:

> "In recent years, the Russian State has managed – under the new geopolitical situation – to create new channels of economic cooperation with states friendly to Russia (at least, in the sense that they are not introducing anti-Russian sanctions and, therefore, are not on the list of "unfriendly states").
>
> It is clearly in Russia's vital interest – to help ensure its economic survival – to develop these channels; profiting from cooperation with China, India, the UAE, Saudi Arabia, Brazil, and other "friendly" economic and geopolitical partners. I am also instructed and assume that some of the Claimants are ultimately owned or financially backed by Chinese or UAE interests, including the Governments of Dubai and China.
>
> 128.2. In assessing any State interest in possibly treating the Claimants in the present dispute unfavourably – or discriminating between them and the Russian litigants, as [Person X] suggests – it may also be necessary to look behind the place of incorporation of the Claimants. Should Chinese, Indian, or other beneficiaries have direct economic interests in the capital of the Claimants, it would also need to be put on the scales when the State weighs its interests which could potentially be engaged in the present dispute. If and insofar as that is the case, a strong argument could be made that it is politically more important for the Russian State, strategically, to avoid any deterioration in Russia's relations with China, India, and other geopolitical allies. I.e., not to discriminate against commercial interests of business groups of (entities from) these states by affording unlawful preferences to Russian litigants; not to discourage investment from those (and other) countries." (report § 128)

and when stating his overall conclusion that he would expect the Russian state to treat the Claimants fairly, he adds *"particularly as regards the interests of those from certain wealthier "friendly" countries such as China."* (report § 138).

451. Person X expresses the view that the fact that the shareholders or beneficiaries of a Claimant are affiliated with 'friendly' states reduces the risk of that Claimant not receiving a fair hearing based on their place of incorporation; and that it is possible that the Russian courts in such circumstances will focus on the interests of the Claimant's shareholders/beneficiaries rather than the interests of the Claimant itself for these purposes. That said, Person X considers that "*there is no basis for an accurate assessment of the probability of this outcome*."

452. However, Person X adds, the Decrees addressing the approach to be taken to persons from UFSs do not in general contain exceptions by reference to such persons' owners. Where provision is made for such exceptions, they are to be found in specific areas of regulation which are of no application to the present cases. The general rule is that the courts will focus on the formal criterion of incorporation in an UFS.

453. By way of context, the Clifford Chance Claimants point out that:

i) None of the ABCD Claimants is itself incorporated in a 'friendly' jurisdiction.

ii) None of the ABCD Claimants has a first tier parent company that is incorporated in a 'friendly' jurisdiction.

iii) Of the 15 ABCD Claimants that have an entity incorporated in a 'friendly' jurisdiction at the second parent tier, 10 also have entities incorporated in an 'unfriendly' jurisdiction as part-owner.

iv) Of the remaining nine ABCD Claimants, entities incorporated in a 'friendly' jurisdiction only appear at the third parent tier or above.

v) The vast majority of the ABCD Claimants have an ownership structure that either consists of multiple parent tiers (up to eight) and/or features a chain of entities and/or subsidiary companies which are incorporated in 'unfriendly' jurisdictions.

vi) No positive case has been advanced against the ABCD Claimants as to the extent to which ownership is to be equated with "control", and if so whether that matters. Be that as it may, given that the ownership structures of the ABCD Claimants are not straightforward, being characterised by lengthy chains of ownership featuring 'unfriendly' as well as 'friendly' entities, the Court is entitled to infer that the question whether the Russian Court would actually conclude (if it is relevant) that a 'friendly' entity controls the relevant Claimant is similarly complex as well as various.

454. Over and above those points, the following considerations are also relevant.

455. First, the state interest matters considered in section (F) above are not dependent on the ultimate beneficial ownership of the parties. Nor are the considerations discussed in section (G) above, bearing in mind that the relevant Russian Counter-Measures, including those prohibiting the removal of Aircraft (and, if relevant, those providing a special procedure for satisfaction of payment obligations), draw no distinction based on lessees' ultimate beneficial ownership, or make that an additional ground for classifying an entity as 'unfriendly'. For example, Decree no. 81, which Person X refers to as *"the first and main counter-sanctions decree which introduces the concept of a person of a foreign state committing "unfriendly" actions"*, applies to:

> "foreign persons associated with foreign states that commit unfriendly acts against Russian legal entities and individuals (<u>including if such foreign persons have citizenship of these states, the place of their registration, the place of their preferential business activities or the place where they preferentially derive profits from their activities is these states</u>), <u>and</u> with persons that are under the control of the mentioned foreign persons, regardless of the place of their registration or

> the place where they preferentially derive profits from their activities". (§ 1(a), my emphasis)

Person X explains that certain other Decrees and Resolutions exclude persons that are controlled by persons from "friendly" states, but that is an exception to the general approach.

456. Secondly, it is likely that Russian defendants will be involved in the proceedings should they be pursued in Russia.

457. Thirdly, there is no indication that the ABCD Claimants, or other Claimants with ultimate owners in 'friendly' states, have gained any advantage from that fact: their Aircraft were and are detained in Russia.

458. Fourthly, neither expert is able to assess the extent of any reduction in the risk of an unfair trial arising from ultimate ownership in a 'friendly' state.

459. In these circumstances, it would in my view not be justifiable to distinguish between Claimants on the basis of their ultimate beneficial ownership.

(I) FORESEEABILITY OF UNFAIR TRIAL

460. In section (D)(2) above, I have expressed doubt about whether foreseeability is relevant where the concern is whether the claimant is likely to receive a fair trial in the chosen forum; and, in any event, have concluded that the highest the matter can in my view be put is that, if and to the extent that a risk of an unfair trial was foreseeable, that is a factor the court should bear in mind in deciding whether 'strong reasons' have been shown and whether to exercise its discretion to grant a stay. Further, even on the footing that foreseeability of a risk of an unfair trial may be a relevant consideration, it is likely to carry weight only to the extent that the parties could foresee a risk of an unfair trial in respect of the kind of dispute likely to arise under their contract.

461. In the present case, the gist of the Defendants' submissions is that:

i) many, if not most, of the problems with the Russian legal system (and the State influence over it) pre-dated the date on which cover was placed under the insurance and reinsurances;

ii) to that extent, it was foreseeable that a trial before a Russian court might not be fair;

iii) specific aspects of the Russian legal system were also pre-existing and hence foreseeable, including the presence of Article 1193 of the Russian Civil Code and hence the prospect of mandatory Russian legal provisions overriding what would otherwise be rights under contracts governed by other systems of law;

iv) it was also foreseeable that RNRC would be one of the reinsurers, since Russian law mandates its participation, and some of the Leases expressly stated that reinsurance may be placed with RNRC (as indicated in a

"Schedule of References to Russia Reinsurers in the Leases" provided during the hearing); and

v) the Claimants 'bought into' all such risks by entering into contracts subject to exclusive Russian jurisdiction.

462. War Risks Defendants submit that these matters should, moreover, be assessed in the context of:

i) Policies which cover, among other things, perils including war, invasion, hostilities, confiscation, detention and the like, at least some of which would arise in situations inherently likely to engage Russian state interests, and

ii) a factual situation where Russia had already invaded Crimea in 2014, an action which was condemned by the UK and internationally and led to Western sanctions and Russian counter-sanctions, as well as involvement in conflict in the Donbas region. It was, the Defendants say, foreseeable that the situation might escalate, yet the Claimants were willing to carry on doing business with Russian airlines and relying on insurance policies that contained Russian law and jurisdiction provisions.

463. In my view, the Defendants significantly overstate the foreseeability argument.

464. Based on the objective contractual context, and the nature and sophistication of the parties, it might plausibly be argued that it was foreseeable by a sufficiently informed party, that (a) Russian law and jurisdiction provisions could govern the policies (though, as discussed earlier, at least some Claimants deny actual awareness of this), (b) some of the insured perils might engage state interest, on the part of the relevant state, if they arose from state action (e.g. war, invasion or confiscation), (c) if that state were the Russian state (as opposed to some other state to whose country an Aircraft travelled), then it might seek to influence the outcome of legal proceedings and (d) (at a stretch) situations could arise where the Russian state might pass mandatory laws which, by reason of Article 1193 of the Russian Civil Code, Russian courts would be obliged to apply and which might be relevant to claims under the policies. Even that degree of foreseeability would assume that, given the possibility of Russian law and jurisdiction provisions applying, the party in question would or should have taken advice from a suitable lawyer or other expert about how the Russian courts might approach such disputes as might arise under the policy and whether they might be subject to Russian State influence.

465. However, even if the matters indicated above could properly be regarded as having been foreseeable, I do not consider that it could realistically be said to be foreseeable in any meaningful sense, by entities in the position of the Claimants:

i) that there would be a full-scale invasion by Russia of Ukraine, going far beyond the limited incursion in 2014 when Russia invaded Crimea, including an advance on Kyiv (in an apparent attempt to overthrow the

Ukrainian government), leading to millions of Ukrainians fleeing the country, and resulting in a war regarded by the Russian government as an existential struggle with the West;

ii) that that would lead to Western sanctions and Russian Counter-Measures, which were far more extensive and severe than those which followed the invasion of Crimea;

iii) that such Western sanctions would prohibit the provision of insurance services to Russian airlines;

iv) that such Russian Counter-Measures would, potentially, override lessees' contractual obligations,

v) that the court would need to resolve highly sensitive issues about whether or not such measures were legally valid under Russian law,

vi) that events would result in the detention of a very high proportion of the fleet of foreign-owned aircraft in Russia at the time,

vii) that the Claimants' aircraft would thereby become the focus of intense attention from the Russian government, at the very highest levels,

viii) that so many aircraft would be detained as to give RNRC, a Russian state entity, a potential liability of the order of US$1.28 billion,

ix) that successful claims under the policies could have the potential to result in vast liabilities for Russian airlines and/or the Russian state, or

x) that the issues arising in insurance claims would involve matters of the utmost sensitivity to the Russian state of the kind discussed in sections (E) and (F)(4)-(6) above.

466. It is the concatenation of all these factors that has created a situation where, for all the reasons discussed in sections (F) to (H) above (both individually and, even more potently, in combination), the Claimants are unlikely to receive a fair trial in Russia. Even if the All Risks Defendants were correct (which in my view they are not) to say the Claimants must show a qualitatively different and materially greater risk of an unfair hearing than could have been anticipated when the policies were placed, I would conclude that they have so shown.

467. The Defendants make the point that the amounts involved in some of the 'deprivatisation' cases mentioned by Person X in their report were less than would be involved in the loss of a single Aircraft, yet (in Person X's view) engaged state interest because of their political nature as opposed to the sums involved. Thus, the Defendants say, the fact that the war has resulted in very large losses being involved is beside the point: it was always the case that the Russian State would be liable to interfere if the nature of the matter was of interest to the state. I do not accept that submission. First, the fact that some matters were of interest to the Russian State despite involving sums smaller than some individual claims in the present cases is not inconsistent with the view that

the State might also be interested in a matter involving very large potential exposures for Russian State-owned entities. Secondly, the circumstances of the present dispute are very likely to be of interest to the Russian State not only because of the sums involved but also for all the other reasons I mention earlier in this judgment.

468. The Defendants also submit that if it could be foreseen that claims under the Operator Policies could foreseeably give rise to Russian State interest, then the Rubicon has been crossed and it is irrelevant if the dispute that has actually arisen involves a particularly high level of likely state interest. I disagree. That submission is another attempt to graft an artificial 'bright line' test onto the 'strong reasons' criterion. In any event, I do not accept the premise. Russian State interest in disputes arising under the Operator Policies was foreseeable, if at all, only in the highly tenuous and contingent sense mentioned in § 464 above. It does not follow that there could never be strong reasons to refuse a stay, no matter how acute the likelihood of an unfair trial in the circumstances that have actually arisen.

469. Similarly, War Risks Defendants' point that an EJC cannot 'flex' depending on the nature, size or number of disputes that might unfold does not address the real issue. As a matter of contract, the EJC has the same effect regardless of such matters. However, in deciding whether there are strong reasons not to exercise its discretion to grant a stay, the court can properly have regard to the circumstances then in existence, including in particular the prospect of an unfair trial.

470. So far as concerns the matters considered in section (H) above, the case law largely post-dates February 2022 and arises from the UFS designation given to many Western countries pursuant to the Order No. 430-r in March 2022. The Defendants point out that the Russian government has had power to designate 'unfriendly' states since 2018. However, only the USA and certain specific entities from other countries (including the UK) were designated at that stage, and the Russian measures imposed then in any event fell far short of those later introduced following the February 2022 invasion of Ukraine. The designations of the UK, the whole of the EU and Bermuda all post-date February 2022. None of those events could be regarded as foreseeable in any meaningful sense.

471. All of the above considerations in my view very substantially, if not entirely, undermine any weight that could in the abstract be attributed to the foreseeability argument.

(J) OVERALL CONCLUSION ON FAIR TRIAL ISSUES

472. For the reasons given earlier in this judgment, I consider that the Claimants are unlikely to receive a fair trial, for several reasons. Whilst some of those reasons apply only to certain Claimants, most apply to all of them. In summary, a fair trial would be unlikely, indeed very unlikely in my view, to be provided because:

    i) there is substantial Russian State exposure via RNRC (§ 276 above);

ii) the Russian courts would be unlikely to be able objectively to determine whether the alleged losses were caused by war or invasion (§ 323 above);

iii) the Russian courts would be unlikely to be able objectively to determine whether the alleged losses were caused by other war perils, or fell within the All Risks Cover (§ 346 above);

iv) the Russian courts would be unlikely to be able objectively to determine whether the Russian Counter-Measures were invalid under Russian law (§ 353 above);

v) there is Russian State interest by virtue of contingent subrogated claims against the civil aviation sector or the State itself (§§ 355 and 356 above);

vi) the Russian court would be likely to apply provisions other than the governing law of the Leases to the question of whether terminations were valid (§ 375 above);

vii) the Russian courts would be likely to apply provisions other than the governing law of the Leases to the question of whether Claimants had the right to recover the Aircraft, if they considered those provisions valid and applicable (§ 382 above); and

viii) the Claimants are from Unfriendly Foreign States (§ 447 above).

473. Further, for the reasons given in section (I) above, I do not consider the potency of these matters to be undermined to any significant degree by the Defendants' arguments based on foreseeability.

474. Viewing the matter in the round, even after taking account of the importance of comity between the courts of different nations and the importance attached by the English courts to giving effect to EJCs, I consider the unlikelihood of the Claimants receiving a fair trial to be a strong reason for declining to stay these proceedings. If necessary, I would also regard it as a very strong reason, and indeed a compelling reason, for taking that course.

(K) MULTIPLICITY OF PROCEEDINGS

475. The Claimants submit that further reasons for declining a stay are the risk of multiplicity of proceedings and severe risks of inconsistent judgments, having regard in particular to the facts that (a) many defendants, particularly All Risks Defendants, have now submitted to English jurisdiction, (b) the LP Claims are proceeding in England in any event and (c) some Claimants may be entitled to sue in England for particular reasons in any event.

(1) Principles

476. Lord Bingham in *Donohue* said:

> "27. The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the

> exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. These decisions are instructive. In *Evans Marshall and Co Ltd v Bertola SA and Another* [1973] 1 WLR 349 there was a tripartite dispute but only two of the parties were bound by a clause conferring exclusive jurisdiction on the court in Barcelona. Kerr J at first instance was impressed by the undesirability of there being two actions, one in London and the other in Barcelona (pp 363–364). The Court of Appeal took a similar view (pp 377, 385). Sachs LJ thought separate trials particularly inappropriate where a conspiracy claim was in issue (p 377). In *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119 the primary dispute was between cargo interests and the owner of the vessel, both parties being bound by a clause in the bill of lading conferring exclusive jurisdiction on the courts of Egypt. But the cargo interests had also issued proceedings against the Mersey Docks and Harbour Co, which was not bound by the clause. The Court of Appeal upheld the judge's decision refusing a stay. In the course of his leading judgment in the Court of Appeal Brandon LJ said, at p 128: "*I agree entirely with the learned Judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries. …*"

477. Lord Bingham went on to cite other cases where stays had been refused in situations involving third parties not bound by an exclusive jurisdiction clause. Conversely, Lord Bingham referred to *Crédit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237, where Rix J granted an injunction to restrain the prosecution of claims covered by an exclusive jurisdiction clause, even though that would leave multiple proceedings on foot, in a complex situation where the court was unable to avoid multiplicity save by granting further injunctive relief in respect of claims falling outside the jurisdiction clause and which it would have been inappropriate to grant.

478. In *Citi-Marsh Ltd v Neptune Orient Lines Ltd* [1996] 1 WLR 1367, Colman J regarded as "*highly relevant*" to the exercise of his discretion the fact that applying the Singaporean jurisdiction clause would lead to a "*highly unsatisfactory procedural situation*" in which the claim against the first defendant would have to be pursued in Singapore, whereas the claims against the second, third and fourth defendants would proceed in England, leading to inconvenience, potential injustice and the risk of inconsistent decisions on the facts. (Another factor was the operation of a Singaporean time bar.)

479. Rix J in *The MC Pearl* [1997] 1 Lloyd's Rep 566 refused a stay of proceedings brought in breach of a Korean exclusive jurisdiction clause, on the basis that there was a strong case for "*concentrating all claims arising out of a single casualty in a single jurisdiction*", and a danger of inconsistent findings in different jurisdictions. Like *Donohue*, it was a case where a single forum could determine all the related disputes.

480. In *Bouygues Offshore S.A. v Caspian Shipping Co. and Others (Nos. 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461, the Court of Appeal discharged an anti-suit injunction preventing the claimants from pursuing proceedings in South Africa in breach of an exclusive English jurisdiction clause, for three reasons, including that "*this is the only way to minimise, if not avoid altogether, the risk of inconsistent decisions in different jurisdictions*". The other considerations included related claims that were not subject to the EJC in favour of England and could not be withdrawn.

481. The gravity of the risks to which multiplicity of proceedings gives rise, and the weight to be given to this factor, will turn on the facts of the individual case: see *Import Export Metro Ltd* (supra) § 18.

482. In *Konkola Copper Mines Plc*, Colman J stated:

> "it should not be open to a party seeking to justify service outside the jurisdiction in contravention of a foreign jurisdiction to rely as grounds for strong cause or strong reasons the risk of inconsistent decisions of different courts when he ought to have appreciated the existence of that risk at the time when he entered into the exclusive jurisdiction clause" (§ 32)
>
> and
>
> "In the present case….the just, cost-effective and consistent determination of all the issues could only be achieved if they were all determined by the same tribunal. However, for this court to permit KCM to pursue these proceedings against the Zambian insurers in the interests of avoiding fragmentation of the proceedings would in substance be permitting KCM to avoid the foreseeable consequences of the contractual structure which they themselves created. In my judgment, in these circumstances justice does not require that KCM should now be permitted to break their contract in order to cure the consequences of the very fragmentation which they have created. To enable joinder of these defendants would be a serious misuse of the necessary or proper party jurisdiction." (§ 42)

483. Dicey § 12-109 states that "*it is not open in principle (although this is not a fixed and invariable rule) to either party to object to the exercise of jurisdiction at least on grounds which should have been foreseeable when the agreement was made, for example that … there may be inconsistent findings as a result of concurrent proceedings"*, citing *CH Offshore*, where Carr J said:

> "88. As for an alleged risk of irreconcilable judgments, this cannot amount to a strong reason. Even if I am wrong that there is no real risk, the risk was one accepted by the parties when they agreed to exclusive jurisdiction.
>
> 89. In a similar vein, any inconvenience in dealing with the Petroleo claim in Venezuela or in having separate or concurrent proceedings cannot amount to strong reasons for disregarding the parties' contractual bargain when such matters were foreseeable at the time of the Services Contract. I am in any event far from convinced that there would be any such inconvenience …"

Bearing in mind the authorities discussed earlier, it is not clear why Carr J stated that a risk of irreconcilable judgments "*cannot amount to a strong reason*". However, the accepted/foreseeable risk point is consistent with, for example, *Konkola*, which Carr J cites earlier in her judgment.

484. A risk of irreconcilable judgments may have less, or possibly no, weight if it was self-induced by the party asking the court not to give effect to the EJC. *Lungowe v Vedanta* [2020] AC 1045 was a *forum non conveniens* case concerning claims brought against a defendant domiciled in England who could be sued in England as of right (the 'anchor defendant', Vedanta) and its Zambian subsidiary (KCM). The defendants having challenged jurisdiction, the Supreme Court had to consider the proper approach to ascertaining the appropriate forum where Vedanta had, after proceedings were issued, offered to submit to the jurisdiction of the Zambian courts so that the whole case against both defendants could be tried there (§§ 40 and 75). The Supreme Court held that the judge had erred in principle in regarding the risk of inconsistent judgments as decisive (§ 84) and that if (as it found to be the case) substantial justice was available to the parties in Zambia, it would offend common sense to think that the proper place for the litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than against both in Zambia (§ 87). Lord Briggs said:

> "…the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather that because Zambia is not an available forum for the purpose of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?" (§ 75)

and, a little later:

> "84 That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card …" (§ 84)

Those statements were, as the War Risks Defendants point out, made in the context of a *forum non conveniens* analysis.

485. In *ID v LU* [2021] EWHC 1851 the court granted a declaration that it did not have jurisdiction to try a claim against the second defendant (resident in Ukraine) where the first 'anchor' defendant, an EU resident, could not have been served in accordance with the CPR at the time of issue of the claim form, but subsequently submitted to the jurisdiction. That voluntary submission could not found jurisdiction against the second defendant. Rejecting, *obiter,* the claimant's case that a risk of inconsistent judgments in parallel proceedings favoured England as the proper place to bring the claim, HHJ Judge Pelling QC said:

> "93. Turning now to the irreconcilable judgments factor, in my judgment this does not lead to a different outcome when it is weighed in the balance with those I have so far considered. This situation only arises because the first defendant chose to submit to the jurisdiction of this court. …
>
> 94. In those circumstances, I accept the second defendant's submission that merely because these proceedings have been commenced against the first defendant does not provide a good reason for requiring the second defendant to submit to the jurisdiction of this court, when the much more natural forum for the resolution of these disputes is the Ukrainian court. …"

486. Fragmentation is not uncommon in multi-party situations (*SCM Financial Overseas Ltd v Raga Establishment* [2018] EWHC 1008 (Comm) § 66), and may be the unavoidable result of upholding parties' contractual arrangements. Males J in *Nori Holdings Limited and Others v PJSC Bank Okritie Financial Corporation* [2018] 2 Lloyd's Law Reports 80 said:

> "113. That being so, I accept Mr Midwinter QC's submission that the present case is materially different from *Donohue v Armco* because it is not possible to achieve submission of the whole dispute to a single forum. In those circumstances the parties' agreement to arbitrate is in my judgement the decisive factor. Some degree of fragmentation is unavoidable but, as I pointed out in *SCM Financial Overseas Ltd v Raga Establishment Ltd* [2018] 2 Lloyd's Rep 99 at para 66, it is common for a dispute to involve multiple parties, some but not all of whom have contracts containing arbitration clauses. In such circumstances a party is entitled to a mandatory stay of domestic court proceedings notwithstanding that court

> proceedings will continue against other parties. If a mandatory stay of domestic proceedings and an injunction to restrain foreign proceedings are indeed opposite and complementary sides of a coin, fragmentation of proceedings does not provide a strong reason to refuse an injunction." (§ 113)

(2) Application

487. The Claimants make the following submissions in respect of the OP Claims themselves.

i) As a result of the submission to the jurisdiction of the English court by Chubb, Swiss Re and numerous All Risks Reinsurers, the English court will be deciding the OP Claims against those reinsurers.

ii) The substantial number of submitting Defendants distinguishes this case from cases such as *ID* where a single defendant had submitted.

iii) The OP Claims will also proceed against any further Defendants whose jurisdiction challenges fail, for example if the Court were to conclude that the jurisdiction challenges of those Defendants who have chosen not to rely on the evidence of Mr Pirov and Professor Antonov but who have not submitted to the jurisdiction fail. The same will apply to the GTLK OP Claimants, Genesis and Shannon if the additional points relied on by them were to succeed.

iv) Thus, the issues in dispute in the OP Claims, including whether there has been an insured loss, whether that loss has been caused by an All Risks or War Risks peril, and whether the Claimants can claim directly against the reinsurers, will be determined by the English court in all the OP Claims against Chubb, Swiss Re and numerous All Risks Reinsurers, and any other Defendants whose jurisdiction challenges fail, leading to judgments binding on the Claimants and those reinsurers.

v) Requiring the OP Claims against other reinsurers to be tried in Russia would give rise to a risk of inconsistent judgments and the potential for serious injustice.

vi) An obvious risk is that the Russian court and the English court would give conflicting judgments on whether the operative peril was an All Risks or War Risks peril. It is, for political reasons, highly unlikely that the Russian Court would conclude that the loss of the aircraft was caused by a "war" or "invasion", and unlikely that they could conclude that any other War Risks peril caused the loss. Even in the absence of that factor, the risk of inconsistent judgments would remain. It would be highly unsatisfactory, to put it at its lowest, if the English court agreed with the All Risks reinsurers that the loss was caused by a War Risks peril, and therefore dismissed the OP Claimants' claims against the All Risks reinsurers, but the Russian court accepted the War Risks reinsurers' case that there was no operative War Risks peril and dismissed the OP

Claimants' claims against War Risks reinsurers, leaving the OP Claimants with no right to indemnity from either set of reinsurers.

vii) There is the same potential for conflicting decisions from the English and Russian Courts on numerous other issues which are likely to be in dispute – including the key issues of whether there has been an insured loss, in circumstances where the Aircraft remain in the Lessees' possession and are lost to the Lessors, and whether the Claimants are entitled to claim directly against reinsurers. There may well be conflicting decisions in relation to the same claims, the same Aircraft and the same insurance/reinsurance programmes.

488. As to the links between the OP Claims and the LP Claims, the Claimants make these points:

i) There are six sets of existing proceedings in the English court which are listed for an 11.5 week trial before Mr Justice Butcher commencing in October 2024. Not only are the circumstances giving rise to those claims and the issues which arise for determination very closely related to those giving rise to, and the issues in dispute in, the OP Claims, but further – the very question of whether there is cover under the Operator Policies is at issue in those proceedings. In broad summary: either as their primary or an alternative case, all LP Defendants assert that the losses fall outside the scope of cover which was intended to be provided by the insurances to be taken out by the lessees in accordance with the leases (i.e. the Operator Policies), with the alleged result they are not covered under the Lessor Policies; however, one LP Defendant (Chubb) runs, as its primary case, a positive case that any alleged losses would be covered, and the Lessors could recover in respect thereof, under the Operator Policies, with the result that those losses are not covered/excluded under the Lessor Policies.

ii) The pleaded issues in the LP Claims relating to coverage under the Operator Policies include (a) whether the Lessors can claim as additional insureds under the Operator Policies pursuant to Article 308(1) of the Russian Civil Code, where the insured itself (i.e., the Russian airline) remains in possession of the aircraft and has suffered no loss; and (b) whether the Claimants have a direct claim against reinsurers by reason of Articles 430(1), 929(1) and/or 930(1) of the Russian Civil Code.

iii) The Operator Policies relevant to the LP Claims are, to a very large extent, the very same policies as those under which claims are brought in the OP Claims: this is because the policies are fleet-wide policies, insuring all aircraft operated by the insured airline. Thus the English court is, in the context of the LP Claims, addressing the issues of coverage under the very same Operator Policies pursuant to which the Claimants claim in the OP Claims. As noted earlier, there are numerous common parties – i.e. entities which are parties to both the OP Claims and the LP Claims.

489. For these two groups of reasons, the Claimants submit that requiring the OP Claimants to bring claims under Operator Policies against certain reinsurers in Russia would give rise to a multiplicity of proceedings and a risk of inconsistent judgments, and undesirable fragmentation of the dispute and procedural inefficiency. By contrast, if the OP Claims against all reinsurers are tried here, then the English court can case-manage the OP and LP Claims together so as to ensure that the hearing of the issues which are common to the OP Claims and LP Claims are heard together or otherwise co-ordinated, so as to avoid the risk of inconsistent findings. They make the point that the events which have given rise to the current disputes, the nature and scale of the losses and ensuing litigation are unprecedented: no-one could have foreseen, at the time of contracting, circumstances which would lead to the loss by numerous Western lessors of entire fleets of aircraft leased to Russian lessees. This is a market-wide insurance and reinsurance dispute, a factor that has not previously been considered in relation to the enforcement of jurisdiction clauses. Such a dispute should be determined (so far as is possible) in a single forum and be case-managed by its courts so as to avoid unnecessary duplication of proceedings and inconsistent judgments and achieve a resolution as speedily and cost-effectively as possible.

490. The Claimants accept that the court will not be able to ensure that the totality of the dispute will be heard in one forum. Some LP Policies contain jurisdiction clauses in favour of other fora, and claims are also being brought in California, Florida, New York and the Republic of Ireland. For instance, six LP Claims, though no OP Claims, are also being brought in the Republic of Ireland. However, the English court is the principal forum for claims under both Operator and Lessor Policies. AerCap and Genesis are bringing proceedings only in England. Further, the courts of those other jurisdictions would be likely to give some weight to a decision of the English court. Conversely, so far as is known, there are no proceedings in Russia under Operator or Lessor Policies, nor does it appear that there will be – unless the Claimants are forced to bring their OP Claims there.

491. The Defendants make the following submissions as regards the different sets of OP Claims.

i) A defendant's right to be sued in the agreed forum is "*an important and substantial, and not a formal and technical, right*" (*Donohue* § 29); and bringing proceedings other than in the agreed jurisdiction is a breach of contract which will inevitably cause prejudice (see *Catlin Syndicate* § 36).

ii) The Claimants identify no case involving the commencement of proceedings in breach of an EJC where the party in breach of contract has been rewarded (by disapplication of the EJC) for itself creating the risk of multiplicity in the manner contended for by the Claimants (where no other factor is present). Such a result would be contrary to the basic principle that a party ought not to be permitted to benefit from his own wrong.

iii) Conversely, there are numerous cases where the courts have enforced an EJC (or arbitration clause) even where this results in or increases fragmentation (e.g. *Konkola*, *Hamilton Smith v CMS Camron McKenna* [2016] EWHC 1115, *Nori* and *Riverrock Securities*).

iv) Multiplicity of actions in the OP Claims (in England and in Russia) is the (foreseeable) result of the Claimants' choice to sue multiple Defendants in this jurisdiction, in breach of exclusive jurisdiction clauses, some of whom have since voluntarily submitted. It is therefore self-induced.

v) It was foreseeable when the Reinsurance Policies were concluded, as well as when proceedings were commenced.

vi) In the context of the operator aviation reinsurance market, which any participant would have known involved the placement of hundreds of policies in respect of hundreds of aircraft leased by numerous different parties from multiple jurisdictions to Russian airlines, a multiplicity of actions arising as a result of claims made under the separate contracts made with each reinsurer was entirely foreseeable when the Reinsurance Policies were entered into. No Claimant could reasonably expect a single convenient forum to determine all claims.

vii) It was foreseeable that some parties might submit to, and others contest, the jurisdiction of the English court: parties can and do choose to litigate their disputes in a forum different from the contractually agreed forum for commercial and other reasons particular to their own interests which should not impact parties with a right and desire to invoke a contractually stipulated exclusive jurisdiction elsewhere.

viii) Multiplicity could have been avoided (or at least minimised) by the Claimants suing all parties to all claims in the agreed and available contractual forum, Russia, in compliance with the EJCs.

ix) Disapplying the EJCs for the purpose of determining claims against all Defendants in England will not achieve the resolution of all OP Claims in one forum (let alone in one court), some claimants having chosen to bring OP Claims in Ireland. (I record, though, that the Claimants' counsel confirmed during the hearing that, to the best of their knowledge, no OP Claims are being brought in Ireland.)

x) Further, the OP claims are separate claims against separate parties, relating to separate contracts. There is no necessity for separate OP Claims to be tried together and there has been no suggestion that they should be consolidated.

xi) In circumstances, where the Claimants have not shown strong reasons why there should be a stay because they would not receive a fair trial in Russia, the only relevant multiplicity risk that arises is that brought about by the Claimants themselves, by commencing proceedings in breach of

contract. It follows that the Claimants are in no better position than the claimants in, for example, *Vedanta*.

xii) The Defendants are in a qualitatively different position from the (alleged) co-conspirators in cases such as *Donohue*: they are not jointly and severally liable for the same losses. Nor is it the position that the totality of the Lessors' disputes can ever be resolved in a single forum.

xiii) As in *ID v LU*, the mere fact of a submission to this jurisdiction by certain parties in certain claims does not provide a good reason to force the remainder of the defendants into the English court. The Claimants were not obliged to sue any of the Defendants in England.

xiv) The court should not accept the submission that evidence can be 'siloed' in the way the Claimants suggest. Even if it did, the multiplicity would still arise from the Claimants' choice to sue here.

xv) The outcome of the GTLK jurisdiction issues cannot be pre-judged now, and in any event cannot be a strong reason to refrain from staying proceedings brought by other Claimants to whom the relevant additional factors do not apply. The same applies to the factors said to apply to Genesis and Shannon, even if they had any merit. In any event, the possibility of exceptions should carry no weight in circumstances where not all OP Claims can be decided in one forum anyway.

492. As to the LP Claims, the Defendants make the following points.

i) The Defendants accept that there is some overlap between the Russian OP Claims and the LP Claims in terms of both the claimants and the aircraft concerned. Certain issues which arise in the LP Claims are likely to be similar to or overlap with issues which may arise in these Russian OP Claims. For example, there is likely to be a degree of overlap between the two sets of claims when it comes to issues of loss, peril and causation. There is also an overlap in respect of certain issues of Russian insurance law – namely whether the LP Claimants have a recoverable claim under the Operator Policies as a matter of applicable (i.e. Russian) law (the "Russian Insurance Law Issues"). At this stage it is too early to determine the true extent of the overlap, given that none of the Defendants to the Russian OP Claims has pleaded a defence.

ii) However, first, the key issues fall to be determined applying different systems of law: Russian law for the OP Policies and English law for the LP policies. Though there will be an overlap between the proceedings in respect of the Russian Insurance Law Issues, those issues are not central to the resolution of the LP Claims. Although there will also be an overlap in the factual questions to be addressed in the LP Claims and Russian OP Claims, the key issues in the two sets of proceedings are not factual, but rather legal questions concerning the proper interpretation of the facts and the application of the law to those facts. At §188.3 of their skeleton, the War Risks Defendants said:

> "Taking the question of loss as an example, the facts themselves are unlikely to be contentious – it is common ground in the LP Claims (and likely to be so in the Russian OP Claims) that the aircraft have not been returned to the lessors and continue to be operated by the Russian Operators – but the key issue is whether, as a matter of applicable law, those facts amount to a loss of the aircraft. Similar points arise in relation to peril and causation, which are quintessentially mixed questions of fact and law."

Deciding questions of law in the two sets of proceedings before different courts would not give rise to any inefficiency, increased costs or risk of inconsistent judgments, because the two courts would be answering different questions. Indeed, having questions of Russian law determined by a Russian court is likely to be considerably more efficient and cost-effective than asking the English court to answer such questions with the assistance of Russian law experts.

iii) Secondly, any multiplicity between the English LP Claims and the Russian OP Claims was foreseeable at the time the Reinsurance Policies were agreed, and indeed was the obvious upshot of the contractual scheme under which the Insurance and Reinsurance Policies were agreed to be subject to Russian jurisdiction, while the LP Policies were agreed to be subject to the jurisdiction of the courts of England, Ireland and various US states. This was itself the consequence of the Claimants' own decision not to stipulate the jurisdiction of the Insurance and Reinsurance Policies pursuant to the Leases (each of which appears to be the relevant Claimant's own standard form of document), but instead to leave jurisdiction to be agreed as between the Operators and their insurers.

iv) Thirdly, there is in any event a multiplicity problem within the LP Claims – which are proceeding before courts in England, Ireland and the USA – which will occur regardless of the decision taken in relation to jurisdiction in the Russian OP Claims. It will therefore be impossible to avoid the multiplicity problem identified by the Claimants regardless of whether the Russian OP Claims proceed in England or Russia. It follows that the multiplicity problem identified by the Claimants does not give rise to a *Donohue* situation (where New York was a pragmatic single forum for resolution of the whole dispute).

493. I see considerable force in the Defendants' point that multiplicity of proceedings in relation to OP Claims was foreseeable and self-induced. At the same time, I note that the present situation is not entirely on all fours with *Vedanta*. There, the anchor defendant had offered to submit to the jurisdiction of the foreign court, but the claimant was able to sue in England as of right. Here, by contrast, the submitting All Risks Defendants could have sought to resist English jurisdiction in reliance on the EJCs, but have in fact agreed that the litigation can proceed in England.

494. Of course, the fact that one or more Defendants choose to submit to the jurisdiction, creating potential multiplicity of proceedings, is not necessarily a

factor that should assist a party who sues otherwise than in the agreed forum, as *ID* illustrates. At the same time, the position in the present case, now, is that a large number of parties, particularly All Risks Defendants, have in effect agreed to allow the litigation to proceed in England. That is a facet of the Claimants' point, which also has force, that this is a market-wide point of a kind not contemplated in the previous case law.

495. There is no evidence as to those All Risks Defendants' reasons for taking that position. They may have done so for (in the War Risks Defendants' phrase) *"commercial and other reasons particular to their own interests"*, or (if different) they may have come to the view that they could not receive a fair trial in Russia. It is striking that a large body of All Risks Defendants have submitted to English jurisdiction, whereas very few War Risks Defendants have done so, and that may reflect the extent to which they believe their differing positions on a number of potentially highly sensitive facts would or could be fairly assessed in Russia. As AerCap point out, there are even some Defendants who have submitted to the jurisdiction in respect of claims where they are All Risks Defendants but contest the jurisdiction on claims where they are War Risks Defendants. Tokio Marine Kiln Syndicates Limited for and on behalf of Lloyd's Syndicates 510 and 1880 in their capacity as an All Risks Reinsurer have indicated their intention to submit to the jurisdiction in CL-2023-000102 (the 'AerCap – IKAR' claim), but not in their capacity as a War Risks Reinsurer in CL-2023-000104 (the 'AerCap – Alrosa' claim). Nonetheless, in the absence of evidence I do not feel able to assess whether All Risks Defendants have submitted to English jurisdiction by reason of fair trial concerns, or for other reasons. All that can really be said is that their reasons may or may not have included concerns about fairness of trial in Russia.

496. The War Risks Defendants in my view mischaracterise the likely factual issues in the LP and OP Claims. In particular, the suggestion that the facts in both sets of proceedings are "*unlikely to be contentious*" strikes me as absurd. The opposite is highly likely to be the case, for the reasons discussed in sections (F)(4) and (5) above. Separation between groups of OP Claims, and between OP Claims and the LP Claims, increases the prospect of divergent factual findings on issues that may well be very important to the outcomes in both sets of claims.

497. So far as concerns the LP Claims specifically, it is true that the multiplicity of proceedings can be traced to the original contractual structure, in the sense that the LP Policies are subject to English jurisdiction whereas the Claimants left the jurisdiction provisions of the OP Policies to be determined by the Lessees and their insurers; and that counts against the Claimants to a degree in this context. As noted above, factual issues are likely to loom large in the LP Claims, and I have significant doubts about the suggestion that the issues will primarily be legal ones. It is true that it will in any event not be possible for all OP and LP Claims to be determined in a single forum. However, if the English court were to retain jurisdiction over the present OP Claims, that would result in a very large body of OP Claims and LP Claims, possibly amounting to a majority of them, being determined in a single forum. The risk of inconsistent judgments will probably be reduced, as compared to the situation where the OP Claims

proceed in Russia, even if the OP and LP Claims are not tried concurrently in England: they will still be adjudicated by a single court applying a consistent approach in principle to matters of law and evidence.

498. In all these circumstances, I consider that the prospect of multiplicity of proceedings, and the resulting risks of inconsistent findings on key issues, though not decisive, are factors that can properly be taken into account.

499. Insofar as the Claimants also rely on the fact that some Claimants may be entitled to proceed in England in any event, I do not take that factor into account (a) in the case of Genesis's and Shannon's collateral contract claims, for the reasons given in section (P) below and (b) in the case of the special position of GTLK, because it would be speculative at this stage to try to assess whether its special reasons for suing here will result in the refusal of a stay that would otherwise be granted.

(L) PUBLIC POLICY

500. The Claimants submit that the English court should not enforce foreign jurisdiction clauses where it would lead to the foreign court applying foreign laws that are inconsistent with the fundamental public policy of English law, particularly when the foreign laws in question have been introduced in furtherance of acts in violation of international law such as invasion by force of another country. They say the same applies where the foreign court would fail to apply particular laws, when such failure would be contrary to English public policy, inconsistent with the requirements of English justice, or would undermine the English legal system.

(1) Principles

501. Dicey, Rule 5 at 5R-001 states:

> "RULE 5 - English courts will not enforce or recognise a right … or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right … or legal relationship would be inconsistent with the fundamental public policy of English law."

Nor will the Court enforce or recognise a foreign judgment if its recognition or enforcement would be contrary to public policy: Dicey, 14R-148.

502. In domestic English law, this doctrine of public policy "*should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds*" (*Fender v St John-Mildmay* [1938] AC 1 at p12 per Lord Atkin). In the context of conflicts of laws, Dicey § 5-003 states that it is *"even more necessary that the doctrine should be kept within proper limits, otherwise the whole basis of the system is liable to be frustrated*". Lord Nicholls in *Kuwait Airways v Iraqi Airways (Nos 4 and 5)* [2002] 2 AC 883 § 17 quoted the "*much repeated*" words of Judge Cardozo:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." (*Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202)

Lord Nicholls stated that the exception was to be *"exercised exceptionally and with the greatest circumspection"* (§ 18). See, to similar effect, *Belhaj v Straw* [2017] UKSC 3 § 37:

> "However recognition will, exceptionally, be refused, when recognition would conflict with a fundamental principle of domestic public policy. The classic authorities in respect of legislation affecting property or contracts are *Oppenheimer v Cattermole* [1976] AC 249 (non-recognition of Nazi laws discriminating against Jews) and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (non-recognition of an Iraqi law confiscating the Kuwait Airways fleet, which was in Iraq, and giving it to Iraqi Airways in undeniable breach of Security Council Resolutions). Similarly, recognition may be denied to foreign judgments where this would be contrary to public policy: Dicey, Morris & Collins, rule 51; see also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [*2012] 1 WLR 1804 … and *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458."

503. The general rule is that a domestic court will not adjudicate on a foreign act of state. See, e.g., *Belhaj*:

> "121 The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.
>
> 122 The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.
>
> 123 The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; "*Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory*" - per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237.

> Nissan was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in *Rahmatullah v Ministry of Defence* [2017] UKSC 1, but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels (see *Shergill v Khaira* [2015] AC 359, paras 40 and 42)."

Similarly, in *Kuwait Airways* Lord Nicholls stated that ordinarily the court *"will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic or international law."* (§ 24).

504. The general rule was more recently restated in *Deutsche Bank AG London Branch v Receivers Appointed by the Court, Central Bank of Venezuela v Governor and Company of the Bank of England & Ors* [2021] UKSC 57:

> "that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state. The rule also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. … The rule does not turn on a conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law of the state in question. On the contrary, it is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings. In the words of Lord Cottenham LC, it applies "whether it be according to law or not according to law". …" (§ 135)

subject to the exceptions listed at § 136 including:

> "foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights (*Oppenheimer v Cattermole* [1976] AC 249, 277-278, per Lord Cross of Chelsea; *Kuwait Airways (Nos 4 and 5)* [2002] 2 AC 883 and *Yukos Capital (No 2)*, paras 69-72)."

505. The competing requirements of private international law and English public policy were considered by the Commercial Court, the Court of Appeal and the House of Lords in *Kuwait Airways (Nos 4 and 5)* [2002] 2 AC 883. Following the invasion of Kuwait in August 1990, the Iraqi regime of Saddam Hussein passed a law, Resolution 369, to transfer aircraft belonging to Kuwait Airways to Iraqi Airways, which then treated them as its own, incorporating them into its own fleet and using them for its own flights. The confiscatory law was referred to as *"a flagrant international wrong"* (§ 149) and the basis on which it proceeded "*was the subject of universal international condemnation*" (§ 168). It was passed in the context of "*universal and unequivocal*" UN Security Council resolutions, including UN Resolution 662 which called on all states to refrain from any action which might be interpreted as an indirect recognition of the annexation (§§ 20, 146, 149 and 168).

506. Kuwait Airways commenced claims against Iraqi Airways in the Commercial Court for wrongful interference with the aircraft and consequential damages. The principal issue for the English courts was, given that they were obliged by conflict of laws rules to apply the laws of Iraq, whether they were as a result bound to enforce the provisions of Resolution 369, or whether it was contrary to English public policy to recognise a resolution that was in breach of established principles of international law.

507. The House of Lords held that it was not bound to recognise Resolution 369. Lord Nicholls recognised the nature of the public policy exception:

> "Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy." (§ 16)

508. Having considered the material circumstances including Resolution 369, he stated:

> "25 … Undoubtedly there may be cases, of which [*Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888,] is an illustration, where the issues are such that the court has, in the words of Lord Wilberforce, at p 938, "no judicial or manageable standards by which to judge [the] issues": "the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were `unlawful' under international law." This was Lord Wilberforce's conclusion regarding the important inter-state and other issues arising in that case: see his summary, at p 937.
>
> 26 This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to

> have regard to the content of international law in deciding whether to recognise a foreign law. Lord Wilberforce himself accepted this in the Buttes case, at p 93 ID. Nor does the "non-justiciable" principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the Buttes litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not in doubt. That is the present case.
>
> …
>
> 28. … RCC Resolution 369 was not simply a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today."

and stated that its recognition:

> "…would be manifestly contrary to the public policy of English law…Further, it would sit uneasily with the almost universal condemnation of Iraq's behaviour and with the military action, in which this country participated, taken against Iraq to compel its withdrawal from Kuwait." (§ 29)

509. Lord Nicholls' allusion to the need for the judiciary to have reference to the position of the UK government in determining the limits of public policy was echoed in the speech of Lord Hope, who observed that:

> "… in seeking which direction to take in such matters where decisions must be taken on grounds of public policy, the judges should try to work in harmony with the executive." (§ 146)

Lord Steyn stated that "*the public policy condemning Iraq's flagrant breaches of public international law is yet another illustration of such a truly international public policy in action*" (§ 115). However, Lord Hope emphasised the need for caution in this regard:

> "138 It is clear that very narrow limits must be placed on any exception to the act of state rule. As Lord Cross recognised in *Oppenheimer v Cattermole* [1976] AC 249, 277-278, a judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. Among these accepted principles is that which is founded on the

> comity of nations. This principle normally requires our courts to recognise the jurisdiction of the foreign state over all assets situated within its own territories: see Lord Salmon, at p 282. A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognise it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.
>
> 139 But it does not follow, as Mr Donaldson for IAC has asserted, that the public policy exception can be applied only where there is a grave infringement of human rights. This was the conclusion that was reached on the facts which were before the House in the *Oppenheimer* case. But Lord Cross based that conclusion on a wider point of principle. This too is founded upon the public policy of this country. It is that our courts should give effect to clearly established principles of international law. He cited with approval Upjohn J's dictum to this effect in In re Claim by *Helbert Wagg & Co Ltd* [1956] Ch 32.3, 334. As Upjohn J put it, the true limits of the principle are to be found in considerations of public policy as understood in the courts. I think that Mr Donaldson sought to achieve a rigidity which is absent from these observations when he said that, whatever norm one finds that has been abused, it cannot be applied in our law if it is a manifestation of international law and does not fall within the recognised exception relating to human rights.
>
> 140 As I see it, the essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated."

510. The question of whether trade sanctions violate English public policy was considered by the Court of Appeal and Supreme Court in *Law Debenture Trust PLC v Ukraine* [2018] EWCA Civ 2026 and [2023] UKSC 11. Russia had acquired Eurobond notes issued by Ukraine, but Ukraine had imposed a payment moratorium. The trustee, on Russia's direction, applied for summary judgment. One of the issues was whether the notes were voidable for duress on the basis that their issue had been procured by unlawful threats made and pressure exerted by Russia. The latter were acts of high policy by Russia in the sphere of international relations, and so *prima facie* non-justiciable as involving a foreign act of state. However, it was held that Ukraine had a good arguable case that the public policy exception to the act of state doctrine applied, bearing in mind among other things that there was an especially strong public policy that no country should be able to take advantage of its own violations of norms of *ius cogens*. The Court of Appeal considered the public policy exception to

the rule that acts of foreign states are non-justiciable in the English courts, observing:

> "… domestic public policy here is informed by public policy inherent in international law when it identifies norms as peremptory norms with the character of ius cogens. Identification of norms as having that character indicates the strong international public policy which exists to ensure that they are respected and given effect. Domestic public policy recognises and gives similar effect to that strong public policy. There is no norm more fundamental to the system of international law and the principle of the rule of law than that set out in article 2(4) of the UN Charter." (§ 180)

511. The Supreme Court dismissed the appeal, but in doing so the majority distinguished between Russia's threats of force against Ukraine and Ukraine's averments of economic pressure, concluding that the former but not the latter were capable of amounting to duress. The court found the relevant question to be whether the pressure in question was of a kind that English law regarded as illegitimate. Duress of the person and duress of goods were clear examples of illegitimate pressure; whereas economic pressure was not necessarily illegitimate, particularly when it was lawful (§ 142).

512. The trade measures alleged to constitute duress included a ban on the import into Russia of Ukrainian confectionery products, the effective blocking of imports from about 40 Ukrainian companies placed on a list of 'high risk' producers by the Russian Customs Service, control procedures severely inhibiting all imports from Ukraine, a threat to suspend gas supply and to procure that Russian banks bankrupted factories in eastern Ukraine in certain circumstances (§ 119). There were also threats to cancel joint projects or otherwise withdraw from co-operations in a number of industries (§ 121). The Supreme Court stated:

> "152. … the imposition or threat of trade restrictions in order to exert pressure upon other states, and thereby achieve political objectives, has been part of the armoury of the state since classical times. … Trade sanctions, embargoes and protectionism more widely remain normal and important aspects of statecraft in the modern world. There is, for example, a section of the UK Government's website devoted to the trade sanctions, embargoes and other trade restrictions imposed by this country on other countries (73 countries are currently listed). As it explains, the UK uses sanctions to fulfil a range of purposes, including supporting foreign policy and national security objectives, as well as maintaining international peace and security, and preventing terrorism. Other countries do likewise. In particular, the trade restrictions alleged to have been adopted or threatened by the Russian Federation are another example of the use of such measures by a sovereign state in the pursuit of its interests.

153. There is no trace, as far as the court has been made aware, of the pressure imposed by such measures ever having been treated in English law as constituting duress. That is so, notwithstanding their long history, and the amplitude of case law concerned with state practice, including restrictions on trade, in other contexts. That appears to us to be unsurprising. Measures of this kind, whether imposed by the UK or by other countries, cannot sensibly be regarded as being, as a category, inherently illegitimate or contrary to public policy. Indeed, they are often imposed for reasons which are widely regarded as morally admirable, such as to encourage other countries to alter objectionable practices (for example, sanctions are currently imposed by the UK for the purpose of encouraging the Russian Federation to cease actions which destabilise Ukraine, including actions which undermine or threaten its territorial integrity, sovereignty or independence). That remains the position even if the measures have the effect of exerting pressure on a targeted state to enter into an agreement which it would not otherwise have concluded. That is not infrequently the purpose of such measures.

154 Nor can warnings or threats of the possibility of restrictions on the importation of Ukrainian goods into the territories of the Russian Federation or the Eurasian Customs Union, or of the cancellation of joint projects in a number of industries, be characterised as duress of goods. There is not, for example, a pleaded case of threats to destroy or damage property, or to seize or detain goods contrary to Russian domestic law or at all. Refusing to accept Ukrainian goods into Russian sovereign territory, or persuading other members of the Eurasian Customs Union to do likewise, is a different matter.

…

162 There appears to us in any event to be no principled basis for treating international law as a guide to the illegitimacy of conduct under the English law of duress. …

163 In the first place, such a rule would be contrary to the approach adopted by the House of Lords in *Dimskal Shipping* [1992] 2 AC 152. … Similarly, in the present case, it is English law, not international law, which provides the yardstick of legitimacy, whether the alleged breach of international law is arguable or manifest. The point is that non-domestic law, whether national as in *Dimskal Shipping*, or international as in the present case, does not provide the relevant standard. That is not to deny that international law may be relevant in some cases to an assessment of public policy, although not determinative of the issue; but we have already explained that trade restrictions of the kind in question in the present case cannot be regarded as contrary to English public policy: para 153 above."

513. By contrast, the Supreme Court concluded that threats to the safety of a state's citizens or armed forces could constitute duress of the person (§ 175). In addition, the threatened use of force to break up Ukraine would almost inevitably result in the destruction of or damage to property, including state property, which could amount to duress of goods (§ 183).

514. The Claimants also cite two cases relating specifically to jurisdiction clauses. In *The Hollandia* [1983] 1 AC 565, the House of Lords refused to enforce a Dutch jurisdiction agreement in circumstances where the Dutch court would have applied a lower limit of liability than that applicable under the Hague-Visby Rules, which rules have the force of law by virtue of the Carriage of Goods by Sea Act 1971. However, I agree with the Defendants that the case was not decided on public policy grounds: the point, rather, was the jurisdiction agreement was rendered void by Article III(8) of the Hague-Visby Rules:

> "My Lords, it is, in my view, most consistent with the achievement of the purpose of the Act of 1971 that the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by article III, paragraph 8 should be when the condition subsequent is fulfilled and the carrier seeks to bring the clause into operation and to rely upon it. If the dispute is about duties and obligations of the carrier or ship that are referred to in that rule and it is established as a fact (either by evidence or as in the instant case by the common agreement of the parties) that the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if article IV, paragraph 5 of the Hague-Visby Rules applied, then an English court is in my view commanded by the Act of 1971 to treat the choice of forum clause as of no effect." (p.575 per Lord Diplock)

515. The War Risks Defendants cite Lord Diplock's words *"established as a fact"* in the above passage for the proposition that a claimant relying on a public policy argument must establish as a fact, by proving on the balance of probabilities, that the foreign court would apply the law that is said to be inconsistent with a fundamental public policy of English law. That is an illogical deduction in circumstances where it is the Defendants' own submission (with which I agree) that *The Hollandia* was not decided on public policy grounds; and nor does the passage quoted above relate to such grounds. As a general matter, though, I would be inclined to agree that before making a decision on public policy grounds, the English court would need to be satisfied to the appropriate standard that the alleged public policy consideration is in fact engaged.

516. In *Petter v EME Europe Limited* [2015] EWCA Civ 828 Sales LJ stated:

> "Where, as here, a party is seeking to sue in England there may be "strong reasons" of public policy against simply respecting the parties' contractual choice which are based on the public policy of the foreign state (which the English court may be

> prepared to recognise and give weight to on grounds of comity) or which are based on the public policy which is inherent or reflected in English law." (§ 51)

Sales LJ went on to discuss the weight to be given to public policy:

> "… where the English court has to consider whether public policy as reflected in English law should be given weight so as to outweigh party autonomy and the principle of pacta sunt servanda in respect of a foreign country exclusive jurisdiction clause (as in our case), the effect of the law and its role to protect public policy considerations which are to be recognised in the English domestic jurisdiction are much more direct and the discretion of the English court to disregard it or give it little weight is much less. The domestic legislator (including for these purposes the EU legislator when enacting directly effective EU law, as in the Regulation) has the primary responsibility for identifying what public policy requires and for enacting law to give effect to that public policy; and its judgment on that question may be very direct and clear, as it is in the provisions in section 5 of the Regulation." (§ 53)

That case, though, was in substance an application of a legislative provision. The contract was found to be within section 5 of the Recast Brussels Regulation (Regulation 1215/2012), which overrode choice of jurisdiction clauses in employment contracts.

517. The mere fact that the law of a foreign jurisdiction differs from English law is irrelevant. English courts give effect to applicable foreign law save in exceptional circumstances – that is, where the applicable law conflicts with overriding *mandatory* provisions of English law (See *Dicey* Rule 220, §32R-222). Hence, the court will not refuse a stay merely on the basis that the application of foreign law will prejudice the Claimants' claim: see, e.g., *The Benarty* [1985] QB 325, 343F:

> "the party seeking to extricate himself from an exclusive jurisdiction clause to which he has agreed cannot pray in aid that the legislation which would be applied for the resolution of the dispute would be more advantageous to his opponent. That was part of the bargain".

518. The Claimants also cite Lord Toulson's summary of the approach to be taken in cases engaging the illegality rule, in the context of a domestic unjust enrichment claim, in *Patel v Mirza* [2017] AC 467 at [120].

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the

> public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate." (§ 120)

(2) Application

519. In the light of my findings on the other issues considered in this judgment, it is unnecessary to decide the public policy issue. Further, there may be good reason to refrain from doing so, given its connection with some of the substantive issues involved in these cases which are contentious between the parties. I shall therefore confine myself to certain brief observations.

520. The MLB Claimants (and those supporting them on this issue) submit that granting a stay in favour of proceedings in Russia would be contrary to English public policy because:

i) the Events of Default relied on in many instances were based on, related (or linked) to and/or gave effect to Western sanctions;

ii) the Russian courts will not recognise or give effect to Western sanctions and, accordingly, will not treat as effective a Notice of Termination where (or to the extent that) the Events of Default relied on were based on or related/linked to Western sanctions;

iii) the Russian courts will recognise and give effect to Russia's Counter-Measures and, accordingly, in the event that they held the Notices of Termination to be valid, they would still not find that the Lessees were under any obligation to redeliver/return the Aircraft outside Russia or the EEU as required by the Notices of Termination;

iv) requiring Claimants to sue in Russia would therefore (a) render the Western sanctions of no effect insofar as they related to the Aircraft and their leasing, and (b) give effect to Russia's Counter-Measures insofar as they relate to the Aircraft and their leasing; and

v) such a result would be contrary to public policy: the Western Sanctions represent an internationally co-ordinated effort to enforce international law, to punish Russia for its illegal invasion of Ukraine and to put pressure on Russia to end that invasion. The sanctions enacted by the

> UK government as part of that co-ordinated effort form part of the laws of England and Wales. To adopt the language of Lord Hope and Lord Steyn in *Kuwait Airways*, it would involve the court acting not in harmony but in friction with the executive and with a "*truly international public policy in action*", that is "*the public policy condemning Russia's flagrant breaches of public international law*".

521. As to the latter point, AerCap submits that the United Kingdom considers Russia's invasion of Ukraine in February 2022 to have been in violation of two fundamental tenets of public international law and the international legal order that form part of, or are reflected in, English public policy, i.e. (i) respect for the territorial integrity and sovereignty of nation states (see, e.g., M. Shaw, *International Law*, 9th ed., 2021: *"The principle of respect for the territorial integrity of states is well founded as one of the linchpins of the international system…"*); and (ii) the prohibition on the use of force between States, reflected in Art. 2(4) of the Charter of the United Nations 1945. Following the February 2022 invasion, the United Kingdom in co-ordination with the US and the EU imposed sanctions against Russia. Regulation 4 of the Russia (Sanctions) (EU Exit) Regulations 2019 ("***UK Russia Sanctions***") identifies the purpose of the UK's sanctions as:

> "(a) encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine; (b) promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine on or after 24th February 2022 as a result of Russia's invasion of Ukraine".

To that end, the UK Russia Sanctions in particular provide that a person must not export "*restricted goods*" (which includes "*aviation and space goods*": reg. 21(1)) to Russia or make them directly or indirectly available (a) to a person connected with Russia or (b) for use in Russia (regs 22(1) & 25(1)). Contravening those restrictions is a criminal offence (reg 25(3)).

522. Further, the UK Russia Sanctions were part of a coordinated effort. The UK FCDO in a Press release of 24 February 2022 said:

> "The UK's sanctions against 120 businesses and oligarchs are part of a concerted strike against the Putin regime carefully co-ordinated with our international allies including the US, the EU, and other G7 partners."

and on 9 March 2022, introducing new sanctions, said:

> "These new measures will further tighten the growing economic pressure on Russia and ensures the UK is in line with sanctions imposed by our allies."

523. The Defendants make the following points.

i) Under the UK's dualist approach to international law, the courts do not enforce international law except to the extent it forms part of domestic law (see, e.g., *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476-477).

ii) EU and US sanctions, and Article 2(4) of the UN Charter, do not form part of English law and are therefore irrelevant. It is no part of the court's role to give effect to other countries' sanctions.

iii) The UK Russia Sanctions do not apply extra-territorially, except to conduct by a United Kingdom person (section 21 of the Sanctions and Money-Laundering Act 2018). None of the Claimants is a United Kingdom person. Thus the UK Russia Sanctions have no application to the Claimants or the Aircraft.

iv) The origin of the UK's Russia sanctions regime was the EU model, but when extending the UK Russia Sanctions on 1 March 2022 Parliament did not adopt the EU's 25 February 2022 extended sanctions wording. Instead, it prohibited restricted goods from being (i) supplied or delivered to Russia or (ii) made available to a person connected with Russia or for use in Russia. On 8 March 2022 those sanctions were extended to prohibit the provision of insurance and reinsurance services relating to aviation goods to a person connected with Russia or for use in Russia. The extended EU, US and UK sanctions regimes of February and March 2022 each reflect different foreign policy considerations, different approaches and have different results. There was no coordinated pan-global effort of the type so influential in *Kuwait Airways*, which included a Security Council resolution.

v) The objective of the sanctions is to stop Russia accessing aircraft and spares (and, in the case of the EU and UK, the insurance and reinsurance required to operate those aircraft). Enforcing the EJCs as between Irish/US/Bermudan lessors and reinsurers has no public policy impact at all.

vi) The courts' decision on these claims will have no effect on the physical location of the Aircraft, and so could not engage the UK Russia Sanctions.

vii) The *Kuwait Airways* exception does not apply, or cannot assist certain Claimants, because:

    a) Foreign acts of state in determining not to recognise external sanctions or in issuing an embargo on export of aircraft are *"normal and important aspects of statecraft"* used by states (including the UK itself) in pursuit of their interests (*Law Debenture* § 152), and *"Measures of this kind, whether imposed by the UK or by other countries, cannot sensibly be regarded as being, as a category, inherently illegitimate or contrary to public policy"* (§ 153).

b) The situation in *Kuwait Airways* was wholly exceptional. The Iraqi resolution that the English court was being asked to recognise was a part of Iraq's attempt to extinguish Kuwait's existence as a separate state; and would have had the effect of depriving the aircraft owner of its claim for tortious conversion.

c) Not all termination notices relied on sanctions as a ground of termination.

d) AerCap's and Shannon's position is that the Russian Counter-Measures did not impose an export ban on aircraft. The War Risks Defendants agree: they say the regulations did not prohibit return of aircraft, post-dated the demands for return of the aircraft, and may be trumped by the Cape Town Convention (skeleton argument § 164).

e) The mere fact that the points in (d) above are arguable prevents reliance on the *Kuwait Airways* exception, because it means the Claimants cannot show that the Russian courts will find that the lessees were prohibited from returning the Aircraft.

f) The issue of whether the termination was valid may or may not even arise before the Russian courts (relying on Mr Pirov's evidence about 'priority' issues).

g) The Russian courts would find termination invalid, if at all, only where sanctions were the direct and only grounds for termination (again relying on Mr Pirov's evidence).

h) The Claimants have not established that any airlines made payments in rubles into a special "C" account pursuant to Decree 179 (which may not prevent termination relying on non-payment before the Decree came into force on 1 April 2022).

524. In my view there is some force in the MLB Claimants' point that Russia's 2022 invasion of Ukraine is comparable to Iraq, and that the absence of a Security Council resolution carries little weight given Russia's veto right. On the other hand, unlike *Kuwait Airways* (where a breach of international law was not contested), difficult issues would arise here about the court's ability to determine whether the invasion of Ukraine amounted to a flagrant breach of international law.

525. Further, Russia's 'temporary' ban on removal of the Aircraft arguably has the characteristics of an expropriation; and I do not consider Russia's measures to be comparable to the type of standard trade sanctions at issue in *Law Debenture*, where the court specifically noted that there was no question of seizure of goods (§ 154). However, the situation here differs from that in *Kuwait Airways*, where aircraft outside Iraq had been forcibly taken there. The Russian Counter-Measures here were not directed at Ukrainian assets seized during the invasion, in a way comparable to the facts of *Kuwait Airways*.

526. In addition, the nexus between the decision the court is asked to make and the overseas measure said to contravene public policy is less close here than in *Kuwait Airways*. There, the court was asked to recognise the offending measure itself. Here, the question is only about where the issues are to be tried. As indicated in section (G)(2) above, there is a contentious issue about how the Russian courts will decide the repossession issue, if they do not dismiss the claims on other grounds. For the reasons I have already given, I do consider it unlikely that the Claimants will obtain a fair trial of that issue in Russia. That is not, however, the same as concluding that the Russian courts will necessarily decide the issue in a particular way, contrary to English public policy.

527. I would accordingly have been hesitant about refusing the Defendants' stay applications on public policy grounds.

(M) GENUINE DESIRE FOR TRIAL IN RUSSIA

(1) Principles

528. The Claimants submit that a further relevant factor is whether the Defendants challenging English jurisdiction genuinely desire trial in the contractual forum. Where there is no discernible reason why a defendant should wish for the dispute to be resolved in the contractual forum, the court may infer that the defendant is insisting on the contractual forum only in order to extract a tactical advantage. That may constitute a strong reason why the jurisdiction agreement should not be enforced: *The Vishva Prabha* [1979] 2 Lloyd's Rep 286; *The Atlantic Song* [1983] 2 Lloyd's Rep 394; *The Pia Vesta* [1984] 1 Lloyd's Rep 169; Peel, *"Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws"* [1998] LMCLQ 182, 196.

529. The Defendants submit that where there is an EJC, it is irrelevant whether a party genuinely desires a trial in the contractual forum or is only seeking procedural advantages, citing *Euromark v Smash Enterprises* [2013] EWHC 1627 (QB):

> "Mr Catherwood suggested that this [i.e. Eleftheria factor (4)] was a stand-alone factor which, depending on the circumstances, could be considered in the exercise of the court's discretion as a 'strong reason' to allow the claimant to avoid the exclusive jurisdiction clause. I do not accept that submission. This is just one of a list of possible factors for the court when considering questions of convenience. It is not a relevant consideration when there is, as here, an exclusive jurisdiction clause. As Mr White correctly submitted, the defendant can answer this contention simply by asserting the right to rely on the exclusive jurisdiction clause which was agreed as part of the contract." (§ 17)

530. I do not consider that the point can be so easily disposed of, bearing in mind that *The Eleftheria* and *Donohue* (in which the *Eleftheria* criteria were approved) involved exclusive jurisdiction clauses, as did the cases cited in § 528 above. In principle, there is no reason why a lack of genuine desire for a trial

in the agreed forum should not be relevant when considering whether or not strong reasons exist to refuse a stay.

531. On the other hand, (a) a defendant's agreement to an EJC, especially if the defendant also proffered it, ought logically to be evidence of a genuine desire, at least when the contract was made, for trial in the agreed forum, (b) the fact that the forum has been agreed may itself be regarded as sufficiently valid reason for wishing the trial to occur there and (c) where the agreed forum is the courts whose law is the agreed governing law, that is a further reason why a defendant might reasonably wish any trial to occur before those courts (cf *Al Mana Lifestyle Trading v United Fidelity Insurance* [2023] EWCA Civ 61 § 23).

(2) Application

532. The Claimants submit that the court should infer that the Defendants contesting jurisdiction are doing so not because they genuinely desire trial in Russia but rather to obtain tactical or procedural advantages, in circumstances in which:

i) none of those Defendants is based in, or otherwise connected with, Russia and many are based in England/the EU;

ii) it would therefore clearly be more convenient for those Defendants to be involved in litigation here than in Russia, particularly in circumstances in which very many of them are already engaged in the LP Claims before the English Court; and

iii) the Defendants contesting jurisdiction have put forward no coherent reason for requiring the claims under the Operator Policies to be determined in Russia.

533. The Defendants submit that, aside from their legitimate interest in seeking to hold the Claimants to their bargain, there are specific reasons for wishing the trial to be in Russia because (a) significant issues of Russian law arise, (b) the relevant events occurred in Russia and (c) it would be advantageous for the Russian insurers to be parties (as they would be in Russia), in case the Claimants' claims against the Defendants fail and the Claimants then seek to pursue claims against the insurers in Russia, who in turn seek indemnification from the Defendants, in which event it would be desirable for both sets of claims to occur in the same forum.

534. In circumstances where (a) strikingly, large numbers of All Risks Defendants but few War Risks Defendants have decided to submit to the jurisdiction, and (b) as noted earlier, All Risks Defendants may be motivated by concerns over whether they would receive a fair trial in Russia, on issues where they are in direct conflict with War Risks Defendants, it is tempting to regard the non-submitting Defendants' continuing challenges to the jurisdiction as being purely tactical. However, (a) to draw any such inference would frankly involve speculation and (b) I cannot say that the considerations referred to in § 533 lack any coherence. In those circumstances, I do not consider it possible to conclude that the Defendants have no genuine wish for trial in Russia.

(N) OTHER FACTORS

535. The Defendants suggest that, in addition to their rights under the EJCs, there are factors of convenience that favour trial in Russia.

i) The policies are governed by Russian law, and issues of Russian law arise, which the Russian courts are necessarily better placed to determine than the English court (see *Al Mana*, supra, § 23).

ii) The events said to give rise to the claim took place in Russia and concern acts of the Russian Government (including legislation and public statements in the Russian language) and transport authorities (again, including public statements).

iii) Most of the relevant documents (including such legislation and statements) are likely to be in Russian.

iv) Insofar as there is any dispute about the nature and character of the acts giving rise to the alleged loss, that dispute will require factual and expert evidence from witnesses who are likely to be Russia-based.

v) The airlines and insurers are all Russian companies. That is presumably why the parties originally agreed that the insurance and the reinsurance would be subject to Russian law and any disputes would be resolved in Russia.

536. The argument based on Russian law issues is overstated. First, there are important issues of English law, as the law governing many of the leases, relevant to the rights to terminate the leasing and to recovery of the Aircraft. Secondly, the claims arise under reinsurance policies placed in the international market on standard terms; and the English court has *"…a particular degree of experience and expertise in reinsurance matters, particularly those concerning Lloyd's"*: *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm) §39. Thirdly, what are likely to be the Russian law issues are already being considered by the English court in the LP Claims. Fourthly, in the LP Claims, the Lloyd's War Risks Defendants have suggested that the oral evidence of the Russian insurance law experts relevant to OP recoverability will occupy only 1-2 days of the LP trial.

537. As to the factual issues and evidence, it is true that the former will largely turn on events in Russia. On the other hand, it is unclear to what extent the parties will need to call Russian witnesses. The MLB Claimants, for example, say the only witnesses likely to be called are representatives of the lessors (to address attempts made to recover the Aircraft) and, possibly, London-based brokers responsible for placing the reinsurance. AerCap's position is similar. The All Risks Defendants identify some particular issues on which they say they will call Russian witnesses of fact (e.g. regarding the possibility of retrieval of aircraft and the availability of maintenance in Russia). So far as language is concerned, there are bound to be some documents in Russian, but also some in English on the basis that the relevant business was largely conducted in English.

538. It is likely that expert evidence will be required. In the LP Claims, permission has been given for expert evidence in the fields of insurance underwriting and broking; US law in relation to sanctions; Russian politics, public policy and economics; Russian civil aviation sector; and Russian law and practice relating to the Counter-Measures. Some of that evidence will no doubt have to be given by Russian nationals, who would have to travel and may need to give written and oral evidence in translation. On the other hand, there is likely to be a significant overlap in the evidence needed for the OP and LP Claims, so it may be possible to achieve efficiencies by case management.

539. There are additional considerations. The Clifford Chance Claimants state that it is a matter of public record that the parties in the LP Claims have obtained (and will further seek) orders from this court protecting the identities of certain individuals, especially factual and expert witnesses, because of the evidence they will give and consequent risks to their personal safety; and that it is inconceivable that those individuals could give evidence in a Russian court. Genesis states that the factual witnesses who Genesis would rely upon would (as in the LP Claims) be its employees in Dublin or the USA, especially Mrs Anna Reimers, who has already given a witness statement in the LP Proceedings. Mrs Reimers is the Chief Legal Officer for Genesis, and is an American national resident in the United States. As well as being a witness, she is one of the main sources of instructions in this case for Genesis. Her safety would be a concern, as a national recognisably from an UFS to which Russia is hostile. The advice from the US Department of State – Bureau of Consular Affairs against travel to Russia identifies risks such as "*harassment and the singling out of US citizens for detention by Russian government security officials*", and refers to the "*Embassy's limited ability to assist US citizens in Russia*".

540. The Defendants respond that (*per* Person X) it is unusual for Russian courts to accept evidence from witnesses, and unclear what oral evidence Claimants would need to adduce bearing in mind, for example, that communications with the airlines about termination will almost certainly be written. However, quite apart from the question of whether witness evidence would be required, it is a serious matter if experts or client representatives would be unable to attend a trial due to a risk of targeted attacks on them of the kind referred to by Genesis and the Clifford Chance Claimants. In my view, it outweighs any considerations of convenience of the kind relied on by the Defendants, and is a further factor to be taken into account in deciding whether there are strong reasons to decline to stay the proceedings.

(O) EVIDENTIAL POSITION OF ALL RISKS REINSURERS AND CERTAIN CLAIMANTS

541. As mentioned earlier, the MLB Claimants served and rely on the three reports of Person X and the two reports of Dr Gould-Davies. The other Claimants generally adopt the MLB Claimants' expert evidence, save that AerCap and Shannon do not rely on §§ 30.6, and 334 to 339 of X 1; §§ 306 to 380, 631 to 637 and 230 (to the extent it derives from or relies on the reasoning in the aforementioned paragraphs) of X 3; or any of the evidence of Dr Gould-Davies. Those paragraphs of X 1 and X 3 deal with the question of whether the Russian

court would decide that the Russian Counter-Measures prevent the lessors having a right to repossess the Aircraft.

542. AerCap explain its reasons for adopting this position as follows:

> "38.1. AerCap relies on the three expert reports of [Person X] served on behalf of the MLB Claimants, save for certain passages which relate to the interpretation of certain Russian counter-sanctions legislation (principally on the question of whether the export regulations enacted shortly after the invasion (Government Resolutions 311 and 312 and associated legislation) prohibited the airlines from returning the Aircraft to AerCap). AerCap's primary case on the merits is that the export regulations did not prevent return of the Aircraft (until they were subsequently amended to do so). The question as to who is right about that may have an impact on the question of whether the loss falls within the All Risks cover or the War Risks cover, which is one of the central points in dispute between the parties on the merits. It does not matter for present purposes who is right about the interpretation of the export regulations. AerCap will therefore invite the Court to avoid making any findings on that point which might trespass on or prejudge an issue going to the merits.
>
> 38.2. AerCap does not rely on the reports of Dr Gould-Davies. The reason for this is that, whilst AerCap agrees with many of the conclusions reached by Dr Gould-Davies regarding the lack of independence and impartiality of the judiciary in Russia, it does not fully agree with some of his evidence as to the role of President Putin and the exercise of power generally within the state[FN]. Again, that is a contentious topic which will arise on the merits (again going to whether the loss was a War Risk or All Risk loss). It is not necessary to resolve the debate as to the exercise of power generally within Russia for the purposes of determining the jurisdiction challenges and AerCap invites the Court to avoid making any findings which might prejudge it."
>
> [FN] For example, Gould-Davies 1 para 48 ("*The Russian state dominates all other domestic institutions…President Putin wields executive power unconstrained by legal, political or other checks and balances*") and para 91 ("*There is no longer any separation of powers…*").

543. The Defendants have adopted very different positions from each other as regards the expert evidence upon which they rely. Broadly speaking, the War Risks Defendants rely on the evidence of Professor Antonov and Mr Pirov, whereas the All Risks Defendants do not rely on the evidence of those experts. In effect, the All Risks Defendants put the Claimants to proof as to whether they have discharged the burden of showing 'strong reasons' to refuse a stay. They express the point in this way in their skeleton argument:

> "As noted above, the HAR Applicants do not rely on any expert evidence in support of their jurisdiction challenges [save for one discrete point relevant to genuine desire for trial in Russia, on which some All Risk Defendants rely on a part of Mr Zubarev's evidence]. In particular, the HAR Applicants do not rely on the evidence of Mr Pirov and Professor Antonov (and nothing in this skeleton is intended to be, or should be interpreted as, an endorsement of any of the views expressed by those experts). The HAR Applicants' case does not rely on disputing the views articulated by Person X and Dr Gould-Davies, but on assessing whether the case mounted by reference to that evidence (on the assumption it is well-founded) suffices to demonstrate "strong reasons" not to hold the parties to the EJCs, which it does not." (§ 15)

544. The MLB Claimants say it follows that if the court is satisfied that, having regard to the reports produced by Person X and Dr Gould-Davies (and without regard to the reports of Mr Pirov and Professor Antonov), the Claimants have established strong reasons for not enforcing the jurisdiction agreements, the jurisdiction challenges made by those Defendants who do not rely upon the reports of Mr Pirov and Professor Antonov should be dismissed. Their having actively decided not to rely upon the contents of those reports, it would be both wrong and unprincipled for that evidence to be taken into account in determining their jurisdiction challenges. By contrast, the War Risks Defendants note that the court directed a common hearing and made no provision for 'siloing' of evidence in this manner. The court should determine the common issues based on the totality of the evidence, and any other approach would place the court in an intolerable position inconsistent with the common case management approach that the Claimants invited it to take.

545. In oral argument, in response to a question from the court, counsel for the All Risks Defendants (Mr Christie KC) confirmed that his clients do not suggest that, by reason of their non-reliance on the evidence of Professor Antonov and Mr Pirov, the reply/rejoinder reports of Person X and Dr Gould-Davies are inadmissible against them.

546. I am not convinced that it is necessary for me to form a concluded view on this point. So far as the Defendants are concerned, I have concluded that no stay should be granted even taking account of the evidence of Professor Antonov and Mr Pirov. So far as AerCap is concerned, the conclusions I have come to are supported by the evidence of both Person X and Dr Gould-Davies (and, in certain respects, by the evidence of Professor Antonov), and do not turn on the discrete point about right to repossession of the Aircraft. Had it been necessary to determine the point, I would have concluded that the War Risks Defendants were correct. The evidence of all the experts was in my view admissible for and against the parties participating in the joint hearing, even if that might have given some parties a fortuitous advantage in the sense that conclusions in their favour were reached (in whole or in part) on the basis of evidence on which they had chosen not to rely.

(P) COLLATERAL CONTRACT CLAIMS

547. Genesis and Shannon seek to advance their claims against the Defendants by an additional route over and above that advanced by other Claimants.

548. Like other Claimants, they advance claims on the basis that they are entitled to the benefit of the Reinsurance Contracts, by reason of CTCs and/or other bases of entitlement referred to in § 80 above. In addition, they claim to have direct contract claims pursuant to contracts made on their behalf, or for their benefit, directly with reinsurers on the terms *inter alia* of the CTCs.

549. Shannon in its skeleton argument explains the basis of its direct claim in this way. It will contend that it was objectively apparent from the commercial and contractual structure that Shannon's agreement to lease the engines was conditional on it acquiring enforceable contractual rights directly against the Reinsurers to be paid any indemnity due under the reinsurances. By receiving the premiums, and permitting the placement to be confirmed to Shannon by certificates of reinsurance, reinsurers are to be treated as having agreed to that arrangement and undertaken to Shannon a corresponding obligation to make payment directly. Shannon refers to the discussion in "*Cut-Through Clauses in Aviation Insurance and Reinsurance Policies*", Air and Space Law, vol 47, issue 1 (2022) p61 (Beale/Graham-Evans), stating that:

> "a collateral contract can be said to arise because the reinsurer is assuming an obligation to the insured in exchange for consideration, namely its premium which on some occasions may be paid directly by the insured or by the insurer's broker, and will in any event ultimately be funded by it in the sense that the insurer will use the premium it receives from the insured to pay the reinsurance premiums."

550. Genesis and Shannon say their collateral contracts do not include the EJCs, which were not referred to in the documents provided to them, and of which they say they were unaware. Though their non-collateral claims allege entitlements under the reinsurances, they were not parties to the Reinsurance Policies and never in fact agreed to be bound by the EJCs. They rely on inferred collateral contracts, with no terms as to law and jurisdiction, to the effect that if and insofar as money is due under the reinsurances, then they will receive payment direct. They submit that the conditional benefit principle does not apply, since they are not seeking to recover under the reinsurances themselves.

551. Genesis and Shannon contend that the Defendants have not challenged this court's jurisdiction over their collateral contract claims, nor served any evidence in response to them, even though both gave fair notice of those claims, and it is not open for them to do so now.

552. As a result, Genesis and Shannon say, the collateral contract claims will proceed here in any event. That, they submit, is a factor lending further support to the Claimants' arguments on multiplicity of proceedings.

553. The Defendants submit, briefly, that:

i) Genesis's and Shannon's claim forms do not refer to collateral contract claims, albeit Genesis's Particulars of Claim do;

ii) in any event, the Defendants have challenged jurisdiction in respect of the totality of Genesis's and Shannon's claims;

iii) the logic of Genesis and Shannon's non-collateral claims must be that they are to be treated as parties to the reinsurance contracts;

iv) as a matter of construction, the EJCs are wide enough to cover the collateral contract claims;

v) according to Genesis's Particulars of Claim, the collateral contract claim remains a claimed entitlement "*to be paid under the Reinsurances*";

vi) any such claim can be advanced, if at all, only subject to the agreed framework in the Reinsurance Policies, viz the EJCs;

vii) in that context, actual knowledge or otherwise of the EJCs is irrelevant; and

viii) alternatively, any problem of multiplicity could be addressed by staying the collateral contract claims until after the Russian court had disposed of the other claims (cf *Sodzawiczny v. Ruhan* [2018] EWHC 1908 (Comm) § 44, albeit Genesis points out that such case management stays are rarely granted: see *Pacific International Sports Club Ltd v Surkis* [2009] EWHC 1839 (Ch) § 114 citing *Reichhold Norway ASA v Goldman Sachs International* [2000] 1WLR 173, 186C).

554. As to point (vi) above, the Defendants refer to the cases mentioned in § 155(i) above, and to Bryan J's statements in *Qingdao Huiquan Shipping Company v. Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm), a case concerning an application for an anti-suit injunction against a foreign company which was not a party to the relevant contract containing a London arbitration agreement:

> "[31] … a claimant abroad will be restrained by injunction from suing inconsistently with a forum clause contained in the contract which forms the basis of the claim… In essence, he is not entitled to found a claim on rights arising out of a contract without also being bound by the forum provisions of that contract…
>
> [33] As is clear from the relevant authorities it is necessary to characterise the substance of the claim being asserted by the foreign claimant. The question is whether the claimant is, in substance, asserting a contractual liability…
>
> [34] Guidance on the proper approach to characterising the foreign claim was set out by the Court of Appeal in *The Prestige*

> [2015] 2 Lloyd's Rep. 33 at [10]-[16] per Moore-Bick LJ. In particular:
>
> > (1) The key question is the substance or content of the right asserted abroad, not the derivation or formal source of the right: see at [14]; and
> >
> > (2) when determining the substance or content of the foreign right, it is necessary to look at the questions or issues raised, rather than the form of the claim, see at [11]."

555. In the light of my findings on other issues, I do not consider it necessary to seek to resolve this debate (and what follows should not be regarded as making any findings on it). Had it been necessary to do so, I would have been inclined to conclude that the Defendants had a good arguable case that Genesis and Shannon were *prima facie* subject to the EJCs even as regards their collateral contract claims. By analogy with *The Jay Bola* conditional benefit principle, it would strike me as counter-intuitive to think that Genesis and Shannon could be entitled to make claims which in substance amount to claims to entitlements arising by reason of the Reinsurance Policies (albeit not under those policies), yet could advance such claims without reference to the dispute resolution mechanisms contained in the Policies. Putting it another way, I would be inclined to think it unlikely that a collateral contract with the reinsurers could be inferred pursuant to which Genesis and Shannon would have an entitlement to payment of sums equal to those due under the reinsurances, but which did not include the law and jurisdiction provisions of the reinsurances. I would have thought that any such outcome could be arrived at only by agreement with the Defendants that expressly or by clear implication excluded the application of the dispute resolution provisions.

556. Moreover, in the broker's letters of undertaking, the thing which they promise to hold to the order of the lessors is (taking the language from a Genesis example) *"the reinsurance slips and the benefit of those reinsurances to your order in accordance with the loss payable provision referenced in the said Certificate of Reinsurance"*. That seems to me hard to square with the notion that the reinsurers have nonetheless themselves impliedly contracted with the lessors in terms which include only some of the terms of the reinsurance policies.

(Q) CONCLUSIONS

557. For the reasons given in this judgment, I consider that the Claimants have shown strong reasons why the court should decline to stay these proceedings. I consider that in all the circumstances – including having regard to comity, to the importance of giving effect to exclusive jurisdiction clauses in general, and to the extent to which such problems might be said to have been foreseeable – the court should decline to stay the proceedings. The main reason is that the Claimants are very unlikely to obtain a fair trial in Russia, which in itself is a strong reason to decline a stay. In addition, the inevitability of increased multiplicity of proceedings and far greater risk of inconsistent findings on fundamental issues were these claims to proceed in Russia, as well as an element

of risk of personal attacks on individuals who in the ordinary course would attend trial, add further support to the view that strong reasons exist to refuse a stay.

List of annexes

Annex A: Parties and claims

Annex B: LP Proceedings causation/loss issues

ANNEX A: PARTIES AND CLAIMS

MLB Operator Policy Claims

1. CL-2022-000637 - ZEPHYRUS CAPITAL AVIATION PARTNERS 1D LIMITED & OTHERS v FIDELIS UNDERWRITING LIMITED & OTHERS

2. CL-2022-000663 - VX FREIGHTER INVESTMENT (IRELAND) LIMITED & ANOTHER v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE & OTHERS

3. CL-2023-000007 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v CONVEX INSURANCE UK LIMITED & OTHERS

4. CL-2023-000061 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v CONVEX INSURANCE UK LIMITED & OTHERS

5. CL-2023-000065 - EOS AVIATION 2 (IRELAND) LIMITED & ANOTHER v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

6. CL-2023-000088 - FLY AIRCRAFT HOLDINGS SEVENTEEN LIMITED v CONVEX INSURANCE UK LIMITED & OTHERS

7. CL-2023-000130 - SHEARWATER AIRCRAFT LEASING 28533 LIMITED & ANOTHER v ALLIANZ GLOBAL CORPORATE & SPECIALITY SE (UK BRANCH) & OTHERS

8. CL-2023-000145 - WWTAI AIROPCO II DAC v CONVEX INSURANCE UK LIMITED & OTHERS

9. CL-2023-000162 - WWTAI AIROPCO II DAC & OTHERS v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

10. CL-2023-000164 - RISE AVIATION 1 (IRELAND) LIMITED & OTHERS v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

11. CL-2023-000200 - STORM PETREL LEASING 979 LIMITED v ALLIANZ GLOBAL CORPORATE & SPECIALITY SE (UK BRANCH) & OTHERS

12. CL-2023-000205 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v AXA XL INSURANCE COMPANY UK LIMITED & OTHERS

13. CL-2023-000208 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v CHAUCER CORPORATE CAPITAL (NO.3) LIMITED & OTHERS

14. CL-2023-000218 - MONTGOMERY AVIATION LIMITED v CONVEX INSURANCE UK LIMITED & OTHERS

15. CL-2023-000230 - RISE AVIATION 1 (IRELAND) LIMITED & OTHERS v CONVEX INSURANCE UK LIMITED & OTHERS

16. CL-2023-000233 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

17. CL-2023-000237 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

18. CL-2023-000240 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE, UK BRANCH & OTHERS

19. CL-2023-000256 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v CONVEX INSURANCE UK LIMITED & OTHERS

20. CL-2023-000261 - CARLYLE AVIATION MANAGEMENT LIMITED & OTHERS v LIBERTY MUTUAL INSURANCE SE & OTHERS

21. CL-2023-000320 - AIRCASTLE (IRELAND) LIMITED v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

22. CL-2023-000328 - VOYAGER AVIATION HOLDINGS LLC & OTHERS v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE, UK BRANCH & OTHERS

23. CL-2023-000344 - AIRCRAFT MSN 35233 LLC & OTHERS v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE UK BRANCH & OTHERS

24. CL-2023-000371 - AIRCASTLE (IRELAND) LIMITED v CONVEX INSURANCE UK LIMITED & OTHERS

25. CL-2023-000625 - GTLK EUROPE DAC & OTHERS v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

26. CL-2023-000622 - STLC EUROPE FOUR LEASING LIMITED v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

27. CL-2023-000621 - GTLK EUROPE DAC (IN LIQUIDATION) v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

28. CL-2023-000618 - STLC EUROPE SIXTEEN LEASING LIMITED v AMERICAN INTERNATIONAL GROUP UK & OTHERS

29. CL-2023-000623 - GTLK EUROPE DAC (IN LIQUIDATION) & ANOTHER v STARR INTERNATIONAL (EUROPE) LIMITED & OTHERS

30. CL-2023-000751 - AURUM LEASING ONE (IRELAND) LTD & ANOTHER v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

HSF Operator Policy Claims

1. CL-2023-000098 – CELESTIAL AVIATION TRADING IRELAND LIMITED v. LANCASHIRE SYNDICATES LIMITED & OTHERS

2. CL-2023-000100 – ILFC AIRCRAFT 73B-30669 LIMITED & OTHERS v. AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

3. CL-2023-000101 – CELESTIAL AVIATION TRADING 27 LIMITED & OTHERS v. LANCASHIRE SYNDICATES LIMITED & OTHERS

4. CL-2023-000102 – BALLYMOON AIRCRAFT SOLUTIONS LIMITED & OTHERS v. ALLIANZ GLOBAL CORPORATE & SPECIALTY SE, UK BRANCH & OTHERS

5. CL-2023-000104 – CELESTIAL AVIATION TRADING 41 LIMITED & OTHERS v. AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

6. CL-2023-000105 – FORTRESS AIRCRAFT 1 LIMITED & OTHERS v. LANCASHIRE SYNDICATES LIMITED & OTHERS

7. CL-2023-000106 – CELTAGO II FUNDING LIMITED & OTHERS v. LANCASHIRE SYNDICATES LIMITED & OTHERS

8. CL-2023-000107 – AERCAP LEASING 1 LIMITED & OTHERS v. ALLIANZ GLOBAL CORPORATE & SPECIALTY SE, UK BRANCH & OTHERS

9. CL-2023-000108 – JASMINE AIRCRAFT LEASING LIMITED v. FIDELIS UNDERWRITING LIMITED & OTHERS

10. CL-2023-000109 – WILMINGTON TRUST COMPANY (AS OWNER TRUSTEE) v. FIDELIS UNDERWRITING LIMITED & OTHERS

11. CL-2023-000111 – ILFC AIRCRAFT 6 LIMITED & OTHERS v. AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

Clifford Chance Operator Policy Claims

1. Claim No. CL-2023-000491 - AVOLON AEROSPACE (IRELAND) AOE 5 LIMITED & OTHERS v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

2. Claim No. CL-2023-000480 – AVOLON AEROSPACE (IRELAND) AOE 136 LIMITED v AXA XL INSURANCE COMPANY UK LIMITED & OTHERS

3. Claim No. CL-2023-000474 – AVOLON LEASING IRELAND 3 LIMITED v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

4. Claim No. CL-2023-000481 – SAPPHIRE LEASING I (AOE 5) LIMITED & OTHERS v CONVEX INSURANCE UK LIMITED & OTHERS

5. Claim No. CL-2023-000482 – WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED & ANOTHER v FIDELIS UNDERWRITING LIMITED & OTHERS

6. Claim No. CL-2023-000476 – BOC AVIATION LIMITED v LANCASHIRE SYNDICATES LIMITED & OTHERS

7. Claim No. CL-2023-000478 – BOC AVIATION (IRELAND) LIMITED & ANOTHER v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

8. Claim No. CL-2023-000479 – BOC AVIATION (IRELAND) LIMITED & ANOTHER v CONVEX INSURANCE UK LIMITED & OTHERS

9. Claim No. CL-2023-000487 – GY AVIATION LEASE 1702 CO., LIMITED v AXA XL INSURANCE COM-PANY UK LIMITED & OTHERS

10. Claim No. CL-2023-000488 – GY AVIATION LEASE 1856 CO., LIMITED v ALLIANZ GLOBAL CORPO-RATE & SPECIALTY SE, UK BRANCH & OTHERS

11. Claim No. CL-2023-000486 – GY AVIATION LEASE 1712 CO., LIMITED & Another v CONVEX INSURANCE UK LIMITED & OTHERS

12. Claim No. CL-2023-000475 – DAE 4 IRELAND LIMITED v LANCASHIRE SYNDICATES LIMITED & OTHERS

13. Claim No. CL-2023-000470 – DAE LEASING (IRELAND) 16 LIMITED & Another v CONVEX INSURANCE UK LIMITED & OTHERS

14. Claim No. CL-2023-000468 – DAE LEASING (IRELAND) 39 LIMITED & OTHERS v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE, UK BRANCH & OTHERS

15. Claim No. CL-2023-000469 – AWAS AVIATION TRADING DAC v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

16. Claim No. CL-2023-000472 – AWAS 19 IRELAND LIMITED & OTHERS v LANCASHIRE SYNDICATES LIM-ITED & OTHERS

17. Claim No. CL-2023-000467 – FALCON 2019-1 AIRCRAFT 3 LIMITED v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

18. Claim No. CL-2023-000489 – HERMES AIRCRAFT A1264 LIMITED (FORMERLY KNOWN AS JETAIR 1 LIMITED, FORMERLY KNOWN AS SKY AIRCRAFT A1264 LIMITED) & OTHERS v GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

19. Claim No. CL-2023-000490 – TOBOL AVIATION LEASING LIMITED & Another v CONVEX INSURANCE UK LIMITED & OTHERS

20. Claim No. CL-2023-000473 – KDAC AIRCRAFT TRADING 2 LIMITED v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

21. Claim No. CL-2023-000485 – NAC AVIATION 29 DAC & Another v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE, UK BRANCH & OTHERS

22. Claim No. CL-2023-000755 – SMBC AVIATION CAPITAL LIMITED v AXA XL INSURANCE COMPANY LIMITED & OTHERS

23. Claim No. CL-2023-000756 – SMBC AVIATION CAPITAL LIMITED v AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

24. Claim No. CL-2023-000757 – SMBC AVIATION CAPITAL LIMITED v ALLIANZ GLOBAL CORPORATE & SPECIALTY SE & OTHERS

25. Claim No. CL-2023-000758 – SMBC AVIATION CAPITAL LIMITED & Anor. v CONVEX INSURANCE UK LIMITED & OTHERS

Fieldfisher Operator Policy Claims

1. CL-2023-000097 – DEEP SKY LEASING ONE LIMITED AND OTHERS v FIDELIS UNDERWRITING LIMITED & OTHERS

SES Operator Policy Claims

1. CL-2023-000093 – SHANNON ENGINE SUPPORT LIMITED v. GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

2. CL-2023-000094 – SHANNON ENGINE SUPPORT LIMITED v. GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED & OTHERS

3. CL-2023-000095 – SHANNON ENGINE SUPPORT LIMITED v. CONVEX INSURANCE UK LIMITED & OTHERS

4. CL-2023-000096 – SHANNON ENGINE SUPPORT LIMITED v. AMERICAN INTERNATIONAL GROUP UK LIMITED & OTHERS

Genesis Operator Policy Claims

1. CL-2023-000444 - GASL IRELAND LEASING A-1 LIMITED V. AXA XL INSURANCE COMPANY UK LIMITED & OTHERS

ANNEX B: LP PROCEEDINGS CAUSATION/LOSS ISSUES

1. AIG's Re-Amended Defence dated 22 March 2023, *qua* all risks defendant to the LP Claims, includes the following averments regarding the cause of the loss of the aircraft:

> "**The government (civil, military or de facto) and other public authorities**
>
> 30. The President of the Russian Federation is the head of state of the Russian Federation. The President's formal constitutional responsibilities include ...
>
> 31. The President is de facto and/or de jure the ultimate head of government who asserts and exercises the central authority of the state. The formal constitutional limits to the President's powers and responsibilities do not limit the scope of the power and authority exercised by the President as de facto head of government. Subject to limited political and/or informal constraints, reflecting the need to cultivate and/or maintain support from Russian elites and Russian society as a whole, President Putin exercises power without constitutional or legal or meaningful practical restraint.
>
> 32. The President utilises the following (amongst other) organisations and individuals to govern the Russian Federation, regardless of any formal legal or constitutional constraints or other formal organs of government (such as the Prime Minster or the legislature):
>
> 32.1 The Presidential Administration, which, amongst other things, coordinates policy and the drafting of legislation and Presidential decrees, communicates the President's will by giving informal and/or verbal orders, and ensures that his exercise of power is implemented by and/or through and/or despite the formal organs and ministries of the Russian government (formally constituted as such). In practice, no significant governmental law-making or policy-making takes place in Russia without the knowledge, approval and/or control of the Presidential Administration;
>
> 32.2 The Security Council, which is a body established under the Russian Constitution and by Presidential Decree dated 6 May 2011 (as amended by Decree dated 16 January 2020) as a collegiate consultative body chaired by the President. In practice the Security Council is dominated by the President personally, operates as an instrument for the consolidation of the President's rule, and that implements the President's decisions on matters of national security and strategic interest;

32.3 The ministries and agencies responsible for intelligence, security and national security, which report directly to the President (and including, specifically, the Ministry of Defence, the Ministry of the Interior and the Federal Security Service ("FSB"));

32.4 The regulatory and tax authorities, which may be and as necessary are deployed as instruments of persuasion, coercion, oppression and/or punishment;

32.5 Other federal government ministries, agencies and services;

32.6 The judicial system and judges;

32.7 Significant commercial enterprises wholly or partly owned by the state;

32.8 The many individuals with positions or backgrounds in the various federal security and intelligence agencies, including many who, since leaving their agency positions, have been promoted into positions of economic and commercial significance (the so-called "siloviki"); and/or

32.9 Significant business leaders (many of whom are also siloviki) and others with whom the President has personal relationships and/or over whom the President exercises influence.

33. At all material times, the formal government (in the form of the Prime Minister and the Council of Ministers), the Parliament (in the form of the Duma and the Federation Council, in which there are no representatives of any independent political parties) and significant commercial enterprises and business leaders and siloviki operated, and continue to operate, under and in subjection to the President.

34. At all material times, the interests of the state (as determined by the President) take precedence over all private rights and interests, such that whenever an issue of vital policy and/or national security and/or otherwise of significant interest to the President arises, the President can and does utilise all or some of the foregoing (amongst other) organisations and individuals as the instruments of power through which he sets policy, gives orders and/or secures the implementation of those orders.

35. In the context of civil aviation, the following constitute governmental and/or public authorities relevant to the activities

of registered air carriers and/or Russian operators of aircraft (whether for passenger carriage or freight cargo carriage):

> 35.1 The Ministry of Transport of the Russian Federation ("MinTrans"). MinTrans is and was at all material times the ministry of the federal government responsible for developing and implementing government policies in the transport sector, including the civil aviation sector. The head of MinTrans is and was at all material times the Minister of Transport, Mr Vitaly Savelyev (who, prior to his appointment in November 2020, was the CEO of Aeroflot).
>
> 35.2 The Federal Air Transport Agency ("FATA", also known as Rosaviatsiya). … FATA operates under the supervision of MinTrans. First Deputy Prime Minister Andrey Belousov is responsible for coordination of the activity of FATA.

…

37. At all material times, the Russian Federation has operated and has been operated, including by President Putin and/or by those acting on his behalf, in what President Putin has termed 'manual steering' mode (ruchnoe upravleniye) – that is, in a manner whereby President Putin and/or those acting on his behalf personally control all significant economic, business and social activity in the pursuit of what President Putin determines are Russia's interests and objectives. Further, all the resources of the Russian Federation, including those belonging (ostensibly) to significant commercial enterprises, are, and are regarded by President Putin as being, at his disposal and under his control in what he regards as Russia's strategic interests. The President sets policy and issues orders, directives, instructions and guidance in all areas of Russian civil, military, political and economic life which are regarded by him as strategic and/or as significant to Russian political, geopolitical and national security interests.

…

39. On many occasions, President Putin's policies, intentions, objectives, wishes and preferences are sufficiently well-known or made known to the Presidential Administration, others close to him and/or government ministries or agencies for them to be implemented and acted upon without the need for detailed or specific orders, directives, instructions or guidance. Among other things, this can happen at the regular meetings between the President and government ministers, at which the ministers are

required to report on their activities and the President gives orders, insofar as necessary, as to how they ought to proceed, and expects that they will comply with any such orders. On such

occasions, the President's policies and intentions are implemented and acted upon by the Presidential Administration, others close to the President and/or government ministries or agencies themselves giving express or implied orders, howsoever couched, to individuals or commercial enterprises as, and to the extent, necessary to ensure that the President's policy, orders, directives, instructions, wishes, objectives and/or guidance are carried into effect.

…

41. The formal position laid down in Russian law, and any apparent freedom of action which Russian law appears to allow, is an incomplete and inaccurate picture of the real context within which commercial enterprises in Russia must operate and did at all material times operate. The ostensible legal position is therefore insufficient and/or inaccurate as a means of identifying the discretion (if any) which commercial enterprises have in deciding what actions to take and not to take, although decrees, orders and/or legislation were and are often issued or made in order to enable individuals and commercial enterprises to comply with the President's, the government's and/or other public authorities' orders or requirements without violating other laws.

42. In addition to making formal decrees or passing laws, some or all of the following methods were at all material times, and are, often used by the President (whether through unidentifiable individuals acting on his behalf or through formal office-holders, ministries or agencies) and/or by the government and/or by other public authorities or agencies as means of (i) giving governmental orders (express, implied or tacit) to private individuals and corporate entities, and (ii) influencing and/or controlling decision- making so as to ensure action consistent with the governmental orders which have been given:

42.1 Public and private statements, whether of present fact or future fact or expectation or desire.

42.2 Requests that a commercial enterprise act in a certain way, and/or suggestions as to what a commercial enterprise might do, and/or opportunities specifically created for certain types of commercial enterprise of which, ostensibly, they may choose to avail themselves. These may take the form of consultative or advisory meetings, discussions and other communications between private businesses and government officials, at or by which messages are conveyed as to the manner in which those private businesses are expected to act.

42.3 The use of regulatory and governmental institutions (including the judicial system) as instruments of

encouragement, coercion, oppression and/or punishment of any who fail to comply (or exhibit reluctance to comply) with orders, howsoever given.

42.4 The use of the security services as instruments of influence, persuasion, coercion, oppression and/or punishment.

42.5 Attack or threats of attack on the physical well-being and/or property of those (and/or the families of those) who fail or refuse to comply with express, implied or tacit orders (howsoever given), especially in ways regarded as detrimental to the President's policies or Russia's national security interests as determined by the President. Pressure may be applied to individuals including in the form of (or by threats of) the loss of business interests, the seizure of assets, personal bankruptcy, arrest and/or designation as a foreign agent or person under foreign influence (with an attendant restriction upon civil rights).

…

43. As a result of the use of these methods over many years since the start of 2001 and at all material times, combined with the fact that their use is widely known within commercial enterprises operating in Russia, the methods alleged at paragraphs 42.1 and 42.2 above were, and at all material times were reasonably understood and treated by Russian individuals and corporate enterprises (whatever the precise form in which they presented themselves or howsoever they were couched) as amounting to, (i) governmental and/or presidential and/or public authority orders and/or (ii) requests and/or expectations to act according to the government's political objectives and therefore for political purposes, which must not be refused or declined or ignored but, on the contrary, must be complied with such that what they require, demand, request or suggest (or howsoever else their subject-matter may be put) must be brought about, obeyed and/or complied with.

The air transport industry in Russia and the role of the lessees

46. At all material times, the air transport industry in Russia has been, and has been regarded by the President and/or the government as, a sector of the economy of strategic importance, and/or the civil aviation fleet (and its operations) is and is regarded as critical national infrastructure, and/or their preservation is and is regarded as a matter of national security. This is because Russia is highly dependent on its air

transport infrastructure, by reason of the large distances between its regions, the relative isolation of many of its cities and communities, the vulnerability of non-central regions (especially in the east and south of the country) to political and/or socio-economic instability, and the outdated nature of its alternative internal transport networks. The aviation industry is also an essential component of the Russian economy and supports a large number of jobs in Russia.

…

54. The aircraft of which the Claimant [AerCap] (and those it represents) has demanded redelivery account for approximately 10% of the civil aviation fleet being operated within the air transport sector of the Russian Federation. The aircraft of which all Western lessors have demanded redelivery will account for a materially higher percentage of Russia's civil aviation fleet, namely up to about 40% of Russia's entire civil aviation fleet on the basis that all EU-based lessors are likely to have demanded redelivery of all aircraft leased to Russian air operators. Further, Russia does not have the capacity to replace foreign leased aircraft with domestically manufactured aircraft. Thus Russia is and was dependent upon foreign leased aircraft for a functioning civil aviation sector, and the Russian government appreciated this at all material times. The proportion of the fleet which is foreign-leased is such that the mass repossession of such aircraft by foreign lessors would have (i) crippled Russia's domestic and international aviation transport networks, (ii) caused severe problems for the Russian economy, and/or (iii) caused serious instability in Russia's non-central regions as a result of the reduction in their economic, social and political links to the rest of the country.

55. In the premises, the consequences of the EU and/or UK sanctions and/or the actions taken by lessors following those sanctions represented a significant threat to the continued operation of the Russian air transport sector and, therefore, to the economic and/or national security interests of the Russian Federation. The retention in Russia by the lessees of the leased aircraft was, and was perceived by the Russian government as being, critical to the strategic and national security interests of the Russian Federation. This was the case at all material times from the first introduction of sanctions targeting Russian aviation on 25 February 2022, at the latest.

56. Further or alternatively, the confiscation and/or seizure and/or restraint and/or detention and/or appropriation of the Aircraft & Engines by the Russian government and/or other public or local authorities of the Russian Federation and/or by the lessees under the Russian government's orders were a means

of inflicting financial harm on western businesses domiciled within the EU, the UK and/or the US.

Orders and actions of the Russian government in response to Western sanctions

56A. On 26 February 2022, the Minister of Transport, Mr Vitaly Savelyev, held an emergency meeting with the head of FATA, Mr Alexander Neradko, and Russian airline representatives (…). During this meeting, the airline representatives were told, inter alia, not to return their aircraft to foreign lessors and to await further clarifications and/or directions from the Russian government. Those statements would have been understood by the representatives of those airlines as a reflection of the Russian government's position and as a tacit order or prohibition communicated by Mr Savelyev on behalf of the Russian government that foreign-leased aircraft should not be returned to their lessors, either at all or pending further order or direction from the government, and that they should instead continue to be retained and/or operated by the airlines. The meeting was reported in a Kommersant article dated 28 February 2022 and is thereby likely to have come to the attention of airlines which were not represented at the meeting.

…

57. On 28 February 2022, the Deputy Minister of Transport, Mr Igor Chalik, met with senior executives of Aeroflot, S7 Airways, Ural and Utair (…) to discuss the means by which foreign-made aircraft would remain in Russia. The implication of Mr Chalik's involvement and the subject matter of discussion was that the will of the President and/or of the government was for the aircraft to remain in Russia regardless of the lessees' obligations under the leases. This would have been apparent to the lessee representatives at the meeting. This implication was itself a tacit order to the lessees represented at the meeting that the aircraft must not be returned, pending a government decision as to the formal means by which the retention of the aircraft in Russia would be fully secured by the government. The meeting and the discussion at the meeting were reported by Russian media by about 2 March 2022. The will and tacit orders of the President and/or government thereby became known more widely, including to Russian lessees of foreign-leased aircraft not represented at the meeting.

58. In the period between about 2 March and 8 March 2022, the government and/or MinTrans and/or FATA took action and/or gave orders and instructions in relation to the preservation in Russia of foreign leased aircraft. These amounted to orders that the Aircraft & Engines be confiscated, seized, restrained, detained and/or appropriated by not being allowed to leave the

country, and included orders designed to ensure (i) that international flights were suspended, (ii) that steps were taken to register aircraft in the Russian Federation (even though Russian law did not yet permit such registration) and (iii) that airports were physically maintained so as to avoid damage to aircraft. The First Defendant will rely on the actions and/or orders and instructions of the government and/or MinTrans and/or FATA (as summarised below) for their full force, meaning and effect.

…

58F. Also on 4 March 2022, a meeting with operational staff was held at MinTrans in connection with the situation in the civil aviation industry created by the requirement for lessees to return aircraft to the lessors outside the Russian Federation.

58F.1 It was reported that during the meeting the Minister of Transport, Mr Vitaly Savelyev, had "firmly and emotionally voiced the requirements for airports to maintain aircraft in good working condition."

58F.2 The requirements were reported to have been subsequently set out in a letter from Mr Aleksandr Yuryevich Serov, Executive Director of Rostovaeroinvest, a regional company in the airport operations sector, to his colleagues in the following terms, in translation:

"… Today the Minister announced his requirements for airports.

He did it in quite a tough and passionate way.

And it related to damage to aircraft on the ground.

The runways must be cleaned like a mirror, not a single stone should get into the engine and damage the blades, there should be not a single stone cut or thorn on the runway, no birds and no damage to aircraft on the ground during maintenance.

Therefore, we must be extremely careful going forward. We are not allowed to make mistakes. Planes have now become diamonds."

58F.3 The letter sent by Mr Serov in relation to the government's instructions demonstrates that the preservation of the civil aviation fleet available to Russian operators was being regarded by the government as an issue of national importance.

…

60B. On 5 March 2022, during a public appearance at an aviation training centre, President Putin indicated that it was the Russian government's policy that foreign-leased aircraft would not be returned to the foreign lessors:

60B.1 He stated, among other things, as follows (in an official Kremlin translation; emphasis added):

> "Leasing companies and spare parts – I am not going to go into detail right now, but your former CEO, now Minister of Transport, has some ideas, and he reports them to me regularly, calls me almost every morning. On the whole, I support these considerations. Let's give him the opportunity to negotiate with his partners. I hope they will agree on things that overlap with their own interests. But I am certain that we will fly."

60B.2 This statement was made in response to a question by an Aeroflot pilot expressing concern about the future of the Aeroflot fleet, where "the company will not be able to replace Boeing and Airbus overnight" and asking "how will the aviation industry be operating in the near future when leasing companies want to take our aircraft?".

…

61.5 Further or alternatively, it is to be inferred from the other facts and matters set out above and below that the President, those acting on his behalf (whose identity is not known) and/or the government ordered MinTrans, the Federal Customs Service, the Ministry of Defence, the FSB and/or other authorities to ensure that the required approvals and permissions were not given, such that the aircraft were not allowed to leave the Russian Federation.

…

68. On 31 March 2022, President Putin held a meeting about the development of air transport and aircraft manufacturing with, amongst others, the Prime Minister (Mikhail Mishustin), the Chief of Staff of the Presidential Administration (Anton Vaino), the First Deputy Prime Minister (Andrei Belousov), the Deputy Prime Minister (Yuri Borisov), the Minister of Transport (Vitaly Savelyev), other presidential aides and ministers, the Head of FATA (Alexander Neradko) and the heads of various air industry companies, including Aeroflot and the Volga-Dnepr Group (of which AirBridgeCargo is a subsidiary). The First Defendant will rely on President Putin's statements about the aviation industry at the meeting for their full force and effect. Excerpts from a transcript of the meeting were posted on the President of Russia's website and on the English version of the

website at http://en.kremlin.ru/events/president/news/68097. President Putin's statements are likely, therefore, to have come to the attention of airlines which were not present at the meeting including the Lessees.

69. The President's statements at the meeting on 31 March 2022 were only consistent with the air operators retaining the leased aircraft. In the circumstances and in the context of Russian society, his remarks and conclusions were, and were reasonably understood by the air operators as being, (i) only consistent with the leased aircraft being retained and not redelivered, and therefore (ii) an implicit order to retain and not to redeliver leased aircraft and engines. Further or alternatively, in retaining and not redelivering leased aircraft and engines, the air operators were and are acting for political purposes in aid of and in accordance with the policies, objectives and requirements of the Russian government.

70. Also on 31 March 2022, Mr Yuri Borisov, the Deputy Prime Minister of the Russian Federation, stated during a briefing about the development of a Russian domestic aircraft industry that the Russian aviation industry is "systemically important", that the foreign aircraft would stay in Russia, and that they would be operated prior to the launch of production of Russian jets in the required quantities.

…

80C. On 9 February 2023, President Putin and Mr Savelyev met with representatives of the aviation industry in Russia on the occasion of the 100th anniversary of Russian domestic civil aviation. A recording of the event and excerpts from a transcript of the meeting were posted on the President of Russia's website and on the English version of the website, at http://en.kremlin.ru/events/president/news/70484.

80C.1 According to the official translation, Mr Savelyev thanked President Putin for the decision he made to retain aircraft in Russia, to which President Putin interjected that it was Mr Savelyev who retained the aircraft and President Putin merely agreed.

> **Minister of Transport Vitaly Savelyev**: Mr President,
>
> First of all, on behalf of all civil aviation employees and on my own behalf, allow me to thank you for the difficult decision that you made amid the sanctions, that is, to retain aircraft in Russia.
>
> **Vladimir Putin**: It was you who retained them, and I merely agreed.

> **Vitaly Savelyev**: I agree with this correction, but nothing would have come of it without you. Thanks to all this, we saved the civil aviation sector and continued to work stably.

80C.2 The video shows that, in addition to the words included in the official transcript, Mr Savelyev also said, immediately before President Putin's interjection, "*Such a strong decision*…".

Communications from Lessees

80D. Without prejudice to the matters stated above, the Claimant's initial disclosure includes letters and e-mail correspondence between the Insureds and various lessees between March and June 2022. For the avoidance of doubt and pending further disclosure, this represents an incomplete record of the correspondence between the Insureds and the lessees, and it does not include communications from all the relevant lessees. Nevertheless, even from the limited material so far available, it is apparent that the lessees considered themselves to be prevented from returning the Aircraft & Engines by reason of express, implied or tacit orders issued by the Russian government. …

Summary

81. In the circumstances and context set out above, the acts of the lessees in retaining possession of the Aircraft & Engines and/or failing to redeliver the Aircraft & Engines …, and/or the steps taken by the government and/or other public authorities and/or individuals acting on their behalf to cause the lessees so to act, were acts done for political purposes, whether or not the lessees are agents of Russia (which is a sovereign Power).

82. Further or alternatively, the facts and matters set out at paragraphs 56A to 80C above, individually and taken together, amount (in meaning and/or in effect) to confiscation and/or seizure and/or restraint and/or detention and/or appropriation of the Aircraft & Engines (i) by the government (civil, military or de facto) and/or other public authorities; and/or (ii) by the lessees under an order or orders (express and/or implied and/or tacit) of the government (civil, military or de facto) and/or other public authorities that the Aircraft & Engines (amongst other aircraft and engines leased from Western lessors) must not be returned but must be retained in Russia, where they should continue to be operated and maintained and/or, if necessary, be used as a source of spare parts.

83. Further or alternatively, in the context of the facts and matters set out in paragraphs 30 to 49 above, it is to be inferred that the President and/or the government and/or other public authorities

> have, whether by themselves or by intermediaries acting on their behalf, acted, including by inference privately, in such a way as (whatever the precise form of the words or action used) expressly or impliedly or tacitly to order the confiscation, seizure, restraint, detention and/or appropriation of the Aircraft & Engines by their retention in Russia."

2. AerCap Ireland in its Re-Re-Re-Re-Amended Particulars of Claim dated 22 January 2024 makes its primary claim under the all risks section of the LP Policy, but by way of alternative claims under the war risks section, relying on the averments pleaded by AIG including as quoted above:

> "19. Alternatively, if (contrary to the Insureds' position) the Insureds' claims are excluded from Section One of the Policy by reason of the application of the exclusion in respect of war and allied perils, then the Insureds will in that eventuality say that the cause of their loss was the acts of one or more persons done for political purposes and/or confiscation and/or seizure and/or restraint and/or detention and/or appropriation (for the reasons set out in the Defence of the First Defendant dated 5 September 2022 (including as amended hereafter)), such that they are entitled to an indemnity in respect of those claims under Section Three of the Policy. …"

3. The underwriters of the war risks section of the LP Policy (led by Lloyd's Insurance Company S.A.) in turn substantially take issue with those averments, in the Re-Re-Amended Defence of the Second Defendant dated 9 August 2023. Among other defences, the war risks insurers deny the operation of any war or allied peril insured against under Section Three of the Policy and specifically deny (i) the occurrence of any act for political or terrorist purposes or (ii) any confiscation, seizure, restraint, detention or appropriation of any Aircraft or Engine by or under the order of the government of the Russian Federation or other public or local authority. In doing so, they plead *inter alia* as follows, with references to the "*D1 Defence*" being to AIG's Defence mentioned above:

> "24. Without prejudice to the burden of proof which is on the Claimant and without prejudice also to the full ambit of LIC's case as set out below, LIC will say (amongst other things):
>
> > 24.1 Absent a willingness and/or ability on the part of the Insureds to repossess the Aircraft & Engines or otherwise to compel the Lessees to comply with the Lessor Notices terminating the leasing of the Aircraft & Engines whilst the Aircraft & Engines remained in Russia, the Lessees decided: (i) not to comply with such notices, which had been issued only as a result of the imposition of EU and UK sanctions in response to Russia's invasion of Ukraine, but instead (ii) to retain possession of the Aircraft & Engines and to continue to use and operate them for their own commercial purposes and/or consistently with their own economic interests, as they

had done prior to the imposition of EU and UK sanctions and to the issuing by the Insureds of the Lessor Notices.

24.2 The Lessees sought the support of the Russian government for their decisions aforesaid and the Russian government and/or public authorities have supported the Lessees to retain possession of the Aircraft & Engines and to continue to use and operate them for their own commercial purposes and/or consistently with their own economic interests, including by: (i) making public statements supporting the Lessees to retain possession of the Aircraft & Engines and to continue to use and operate them; (ii) providing for Lessees to make lease payments in roubles pursuant to Decree 95 of 5 March 2022, as supplemented by Presidential Decree 179 of 1 April 2022; (iii) introducing (with effect from 12 May 2022), by way of an amendment to Resolution No. 311 of the Russian Federation ("Resolution 311"), an export ban on aircraft being exported for the purpose of their return to lessors located in foreign states which the Russian government had classified as unfriendly to the Russian Federation; and (iv) making provision for the registration of the Aircraft & Engines in the State Register of Civil Aircraft of the Russian Federation and in the Register of Aircraft Rights and Transactions without requiring mandatory provision of documents of title or confirmation of de-registration from the register of the state of previous registration.

24.3 If there had been a genuine will on the part of the Lessees to return the Aircraft & Engines to the Insureds, there were ways for them to do so, including (but not limited to) by (i) returning the Aircraft & Engines to the Insureds at locations outside Russia prior to the introduction of the export ban pursuant to Resolution 311 and/or, once the export ban was in effect, by (ii) applying for permission (if and insofar as it was required) to transfer the Aircraft & Engines outside Russia.

24.4 In the premises, it is denied that the loss claimed by the Insureds has been proximately caused by the operation of any war or allied peril, whether as alleged or at all.

…

29. As to each of the alleged acts of the Lessees (to which LIC makes no admissions):

29.1 The retention of possession of and/or the failure to return and/or the continued use and operation of an Aircraft or Engine by a Lessee do not constitute an "act" within the meaning of the Political or Terrorist Purposes Peril.

29.2 In retaining possession of and/or failing to return and/or continuing to use and operate an Aircraft or Engine, the Lessees were not acting for "political or terrorist purposes" within the meaning of the Political or Terrorist Purposes Peril.

29.3 Further or alternatively, in retaining possession of and/or failing to return and/or continuing to use and operate the Aircraft & Engines, the Lessees were not seeking to "inflict[] financial harm on western businesses domiciled within the EU, the UK and/or the US" (per paragraph 56 of the D1 Defence).

29.4 To the contrary, in retaining possession of and/or failing to return and/or continuing to use and operate the Aircraft & Engines, the Lessees were:

(a) Acting for their own commercial purposes and/or consistently with their own economic interests, as the Claimant contends at paragraph 16 of the D1 Reply, and/or the commercial and/or economic interests of their owners;

and/or

(b) Acting otherwise in their own (perceived) best interests and/or the (perceived) best interests of their owners, directors, officers and employees, including (if and to the extent they did so) by giving effect to any policies, intentions, objectives, wishes, preferences, instructions, guidance, expectations, desires, requests, requirements, demands, suggestions, will, or facilitations (per paragraphs 39, 42.1, 42.2, 43 and 44 of the D1 Defence) of the Russian government and/or public authorities, whether in order to curry favour with such entities and/or to avoid any (perceived) risk of encouragement, influence, persuasion, coercion, oppression, punishment, attack or threats of attack (per paragraphs 42.3 to 42.5 of the D1 Defence) or other negative consequences of failing to do so (per paragraphs 42.6 and 42.9 of the D1 Defence).

…

…

45. LIC admits that the following constitute the de jure Russian government or a Russian public authority: the President of the Russian Federation, the Presidential Administration, the Prime Minister, the Council of Ministers, the Duma, the Federation Council, the Security Council, the intelligence and security agencies including the FSB, MinTrans, the Ministry of Defence, FATA, FSST, SATMC and the Federal Customs Service.

46. As pleaded above, an act of the Russian government or public authority is not within the Political or Terrorist Purposes Peril on its true construction and/or was not the proximate cause of the Insureds' loss in this case. If an act of the Russian government or public authority is to be relied upon to establish the application of exclusion clause 6(b) or cover under Section Three of the Policy, such an act must constitute an order within the meaning of the Confiscation Peril.47. Save as admitted in paragraph 45 above, the relevance of paragraphs 30 to 45 [of the D1 Defence] is denied.

47. Without prejudice to the generality of that denial:

47.1 The portrayal or description of the unfettered power of the Russian President and the operation of the Russian State in paragraphs 30 to 45 is an oversimplified and inaccurate caricature of the Russian political system.

47.2 The powers of the Russian President were at all material times constrained by formal constitutional or legal limitations, by meaningful political and/or informal and/or practical constraints and de facto limitations arising from, inter alia, Russian law and/or practice, the nature of the Russian Federation including ineffective regulation and bureaucracy, endemic corruption, the weakness of the rule of law, the geographic expanse of the Russian Federation, the influence and power of Russian elites and the need for the Russian government to maintain some degree of popular support.

47.3 For the reasons given below, it is denied that any of the alleged informal expressions of policies, intentions, objectives and so forth (per paragraphs 39, 42.1, 42.2, 43 and 44 of the D1 Defence) were tacit orders of the Russian government (including the Russian President), whether as alleged or at all.

…

51. As to paragraphs 32 and 33, it is denied that the Russian President is able to utilise the listed organisations and individuals to "govern" the Russian Federation in the unlimited way alleged by the First Defendant, "regardless of any formal legal or constitutional constraints or other formal organs of government", and it is denied that commercial enterprises (whether significant or otherwise) and/or business leaders operate "under and in subjection to the President". Such entities may act consistently with the President's wishes when it suits their own private or commercial interests to do so, but not otherwise. …

52. Paragraph 34 is denied. The Russian President, as the de jure head of the Russian State, has the power to give orders by way

of Presidential Decrees, which orders have the force of law. The President does not and does not need to "give orders" through the organisations or individuals referred to in paragraph 32 or indeed by the methods listed in paragraph 42. Further and in any event, he is not able to exercise power in the unlimited way alleged by the First Defendant and is therefore unable to subjugate "all private rights and interests" to the "interests of the state" in the informal way alleged or at all. To the contrary, Articles 34 to 36 of the Russian Constitution provide protections for private property and land, and the use of individuals' abilities and property for entrepreneurial and economic activities.

…

54. The government of the Russian Federation is a civil government within the meaning of the Confiscation Peril, not a military or de facto one. Save as aforesaid and save that the acts of the President and entities are acts qua the Russian government and/or public authorities only where they are acting in lawful exercise of their constitutional powers, paragraph 36 is admitted. Acts in a private capacity, or for personal benefit or improper purposes are not acts of a public authority or government. Informal statements are also not acts of a public authority or of the government of Russia.

55. The relevance of paragraphs 37 to 39 is denied. They are also not admitted, save that:

55.1 It is denied, to the extent it is so alleged, that the Russian President is able to "control all significant economic, business and social activity in the pursuit of what President Putin determines are Russia's interests and objectives" or otherwise to exercise power in the unlimited way alleged. It is denied that the resources of commercial enterprises are "at his disposal and under his control in what he regards as Russia's strategic interests", whether as alleged or at all.

55.2 It is denied that a statement (whether express, implied or "tacit") by the Russian President of his policies, intentions, objectives and so forth must be or invariably will be acted upon. It is further denied that any such statement, absent formal implementation by the Russian government and/or public authorities, constitutes an "order" within the meaning of the Confiscation Peril.

55.3 No admission is made as to whether the Russian Federation operates in "manual steering mode". In any event, it is denied that, at the material times, the Russian President engaged "manual steering mode" in respect of Russian civilian aviation matters and thereby assumed "personal control" of such matters. In late February 2022 and thereafter, the Russian Federation had

embarked upon the largest offensive war in Europe since 1945 with the aim of annexing a foreign sovereign state (namely Ukraine). The Russian President was intimately involved in the planning and execution of this war, including on occasion directing battlefield operations. Further, from an early stage, Russia's conduct of the war proved to be poor and Russia suffered early and significant setbacks and later defeats. Yet further, in addition to his involvement in the war, at the material times, the Russian President was also concerned to address other major domestic and international crises including, inter alia, the sanctioning of Russia's foreign currency reserves and the concerted attempt by Western nations to curtail the market for Russian exports of fossil fuels, on which the Russian economy relies. In the premises, it is denied that the Russian President assumed personal control of (or took any substantial interest in) Russian civilian aviation.

…

57. Paragraphs 41 to 45 are not admitted, save that:

57.1 It is denied, if it be alleged, that the Russian government and/or public authorities (including the Russian President) are able to exercise power in the unlimited way alleged by the First Defendant such that Russian individuals and/or corporate enterprises give or have to give precedence to the interests of the State (as determined by the President) over their own private rights and interests.

57.2 The powers of the Russian government and/or public authorities (including the Russian President) are constrained by legal, informal and de facto limitations which enables Russian individuals and/or commercial enterprises to act in what they perceive to be in their own private or commercial interests.

57.3 It is denied that commercial enterprises (including those in which the Russian Federation is a shareholder) are required generally to comply with, or do in fact generally comply with, statements (whether express, implied or "tacit") by the Russian government and/or public authorities (including the Russian President) of any policies, intentions, objectives and so forth.

57.4 It is denied that any such statements constitute an "order" within the meaning of the Confiscation Peril.

57.5 To the extent that commercial enterprises do conduct their affairs in conformity with such statements by the Russian government and/or public authorities (including the Russian President), it does not follow that those enterprises are acting

for "political purposes" within the meaning of the Political or Terrorist Purposes Peril, whether as alleged or at all. To the contrary, those enterprises may equally be acting (and, in this case, were acting) for their own commercial or economic purposes, and/or otherwise in their (perceived) best interests.

…

EU and UK sanctions and their consequences

…

62. Paragraph 54 is not admitted.

…

64. Paragraph 56 is denied. Without prejudice to the generality of that denial, paragraphs 29.2 to 29.4 and 36 above are repeated. There has not been any confiscation or seizure or restraint or detention or appropriation of the Aircraft & Engines by or under any order of the Russian government and/or public authorities. As set out above and in further detail below, no such order has been made.

…

Alleged orders and actions of the Russian government

65. As to paragraphs 56A 57 to 80C:

65.1 The facts pleaded, said to be orders and actions of the Russian government and/or public authorities, are not within the scope of the Political or Terrorist Purposes Peril for the reasons pleaded at paragraph 30 above.

65.2 The First Defendant does not identify any relevant order by the Russian government and/or public authorities for confiscation or seizure or restraint or detention or appropriation within the meaning of the Confiscation Peril which was causative of the Insureds' losses, for the reasons set out at paragraphs 36 to 40 above.

65.3 The relevance of these paragraphs is accordingly denied. The remainder of this section of this Amended Defence is without prejudice to the generality of that denial.

65A. Further or alternatively:

65A.1 The Russian government's response to the challenges faced by Russia's air transport industry following the Russian invasion of Ukraine, including its position with respect to the retention and the continued use and operation by Russian

operators of foreign leased aircraft and engines, was led by Mr Vitaly Savelyev, the Minister of Transport, rather than by President Putin.

65A.2 As the interests of the Russian operators of foreign leased aircraft and engines overlapped with the interests of the Russian government, Mr Savelyev was able to achieve his objectives through a package of support measures for the Russian operators, rather than through any policy of coercion. In particular, given the commonality of interest between the Russian operators and the Russian government, Mr Savelyev had no need to order, and did not order, the Russian operators to retain and to continue to use and operate their foreign leased aircraft and engines. …

…

67F. Paragraph 58F is not admitted, save that:

67F.1 Sub-paragraph 58F.1 is admitted.

67F.2 Sub-paragraph 58F.3 is denied.

67F.3 In any event, the relevance of the alleged meeting and the alleged letter is not stated and is denied.

…

69B. As to paragraph 60B:

69B.1 The fact and terms of the alleged brief remark by President Putin at an aviation training centre on 5 March 2022 is not admitted. It is noted that the translation of the emphasised final sentence of the remark is different from the translation issued by the Kremlin, which instead reads "But I proceed from the fact that we will fly."

69B.2 If (which is not admitted) such a brief remark was made by President Putin in the terms now alleged, it is denied that it is relevant. The remark was informal and did not purport to be a statement of "the Russian government's policy", whether as alleged or at all.

(a) The remark was purportedly made in answer to a question by Yulia Vasilevskaya, an Aeroflot pilot. She started her question by saying that she was worried about the future of the Aeroflot fleet in the circumstances where replacing western-built aircraft with Russian-built aircraft would not be possible overnight. She therefore asked how the aviation industry would carry out transportation in the near future, when leasing companies wanted to take their aircraft back.

(b) In his reply, President Putin focused on the Russian-built MS-21 which, according to him, was "not inferior" but "better in many respects" than any Western-built aircraft. He also referenced the PD14 engine which again he said was not inferior to but "actually better in many respects" than Western-built engines. He said that it would "take some more time, a few months" before these engines could be fitted, at which point the aircraft will be "completely ours, modern and Russian-made."

(c) President Putin referred to leasing companies and spare parts briefly at the end of his answer ("I am not going into details now"). He said that Mr Savelyev, the Minister of Transport, had some "considerations" in this regard which he was reporting to President Putin during regular telephone calls, some (but not all) of which "considerations" President Putin supported. President Putin said that he was giving Mr Savelyev the opportunity to "negotiate with partners" and that he hoped that "they will agree on what lies in the zone of their own interests", before finishing his remark by saying "But I proceed from the fact that we will fly."

(d) The final sentence of the remark, upon which the First Defendant specifically relies, therefore, was made in the context of an answer that saw the solution to the challenges faced by Russia's aviation industry as being the switch to Russian-built aircraft in the medium to longer-term ("a few months") and negotiations with "partners" in the interim.

69B.3 If made (which is not admitted), the remark in fact demonstrates that: (a) the Russian Government's response to the challenges faced by Russia's air transport industry following the Russian invasion of Ukraine, including its position with respect to the retention and the continued use and operation by Russian operators of foreign leased aircraft and engines, was led by Mr Savelyev, rather than by President Putin; (b) whilst Mr Savelyev had some "considerations" that he was sharing with President Putin, neither he nor the Russian government had, at this stage, formulated any settled policy; and (c) Mr Savelyev's idea, as supported by President Putin, was to negotiate with partners rather than to coerce Russian operators.

…

75. Paragraph 61.5 is denied. …

…

86. The first and third sentences of paragraph 68 are admitted and the second sentence is noted. No admissions are made as to the fourth sentence. Paragraph 69 is denied:

86.1 No order (implicitly or otherwise) was made by the Russian President, whether as alleged or at all. The facts alleged do not constitute an order by the Russian government or public authorities within the meaning of the Confiscation Peril.

86.2 In retaining possession of and not returning leased aircraft and engines, the air operators were not acting for political purposes, even if (which is not admitted) such action accorded with the "policies, objectives and requirements of the Russian government". Paragraph 29 of this Amended Defence is repeated.

…

96C. As to paragraph 80C, it is admitted that President Putin and Mr Savelyev attended an event to mark the 100th anniversary of Russian domestic civil aviation on 9 February 2023 at which, according to an official translation posted on the English version of the Russian President's website, President Putin attributed the decision to retain foreign leased aircraft in Russia to Mr Savelyev, rather than himself. This shows that it was Mr Savelyev, rather than President Putin, who led the Russian government's response to the challenges faced by Russia's air transport industry following Russia's invasion of Ukraine and who settled the Russian government's policy with respect to the retention in Russia of foreign leased aircraft. This policy was one of support for the Russian operators of such aircraft, rather than their coercion.

96D. As to paragraph 80D:

96D.1 It is denied that it is apparent from the correspondence between lessees and the Insureds that the lessees considered themselves to be prevented from returning the Aircraft & Engines by reason of express, implied or tacit orders issued by the Russian government, whether as alleged or at all.

96D.2 The exchanges relied upon merely show that some (but by no means all) of the lessees referred to Resolution 311 and/or the need to obtain permission from the Russian government when failing and refusing to return Aircraft & Engines, despite there being no such prohibition as a matter of Russian law at the relevant time. Paragraphs 76 and 77 above are repeated.

> 96D.3 Similarly, the fact that lessees claimed that they had been required or forced to register foreign leased Aircraft in Russia, in circumstances where no one else (including the First Defendant) contends that there was any such mandatory requirement, serves to illustrate the unreliability of the lessees' claims and excuses.
>
> 96D.4 Further, the exchanges are consistent with the Russian government supporting, as opposed to ordering, the retention of foreign leased aircraft and engines by Russian airlines and/or providing a justification which lessees could refer to in correspondence with Insureds. Paragraphs 24 and 38 above are repeated.
>
> 96D.5 In the premises, the relevance of the correspondence between lessees and the Insureds generally and of the matters relied upon in paragraph 80D specifically is denied. Save as aforesaid, no admissions are made.
>
> *Summary*
>
> 97. Paragraphs 81 to 83 are denied for the reasons set out herein. In particular, LIC denies that any loss which the Insureds may have suffered was caused by either (i) any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes, or (ii) confiscation and/or seizure and/or restraint and/or detention and/or appropriation by or under the order of the Russian government or public authorities."

4. In addition to those contentions, the war risks insurers in the AerCap claim contend that the export ban on aircraft, pursuant to Resolution 311 as amended from 12 May 2022, was unlawful under Russian law because it contravened Russia's international obligations under the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, which take precedence over Resolutions pursuant to Article 15(4) of the Constitution of the Russian Federation (Defence §§ 76 and 77).

5. The Claimants represented by Clifford Chance bring their primary claims under the LP Policies but pursue Operator Policy claims in case that is required under the terms of the LP Policies (some LP insurers having taken the position that recoverability under the LP policies depends on recoverability under the OP cover). Three of the Clifford Chance Claimants are LP claimants in England and six are LP claimants in Ireland. Each LP policy has an English or Irish EJC.

6. The Clifford Chance Claimants claim primarily under the war risks cover, alternatively under the all risks cover. As an example, the Amended Particulars of Claim dated 24 April 2023 of Dubai Aerospace Enterprise (DAE) Limited ("***DAE***") and others in the LP proceedings, allege that the loss falls under the following two war perils included in the AVN48B clause incorporated in the LP policy:

> "(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.""

7. DAE's own claim includes the allegations that:

> "18. On 24 February 2022, Russia invaded other territories of Ukraine, giving rise to a full-scale armed conflict between Ukrainian and Russian armed forces. At all material times since that date, the conflict in Ukraine continues. There was at all material times thereafter (and is) no apparent prospect of it ending within a reasonable period of time.
>
> …
>
> 32. … by 23:59 on 8 March 2022 at the latest, key Russian state actors (identified in paragraph 35 below) had determined that foreign-leased aircraft would not be returned to the foreign lessors. In late February and early March 2022 (and by 23:59 on 8 March 2022 at the latest), as set out in paragraphs 36 – 47 below, a series of measures had been formulated and were being implemented to ensure that, despite the aforesaid demands and notices, the aircraft, including the Aircraft, would not be permitted to be returned to their foreign lessors, including the Claimants.
>
> 33. These measures and their implementation were acts committed for political purposes (within the meaning of paragraph (c) of the War Risks Perils) and/or amounted to confiscation, seizure, restraint, detention and/or appropriation and were ones taken by or under the order of the Russian government (including President Putin) (within the meaning of paragraph (e) of the War Risks Perils). A case to this effect has been pleaded by AIG Europe S.A. ("AIG") in its Defence to Claim No. CL-2022-00294 (the "AerCap action"). AIG also has a 10% line on each of the AR and WR Policies. The Claimants will say in the present case that paragraphs 30 – 83 of AIG's Defence to the AerCap action are materially correct.
>
> 34. The gist of the measures was that, instead of being returned, the aircraft would continue to be operated by Russian airlines, and/or retained so that some or all of a given aircraft could be used as spare parts for another aircraft. The retention and

continued operation of the aircraft was to be enabled by state measures that, among other things, facilitated the re-registration of the aircraft in Russia and that permitted aircraft to be operated and maintained in accordance with Russian standards.

35. The individuals and entities involved in the conception, development and/or implementation of the said measures included (i) President Putin; (ii) Prime Minister Mikhail Mishustin; (iii) First Deputy Prime Minister Andrei Belousov; (iv) former Deputy Prime Minister Yuri Borisov; (v) Vitaly Savelyev, the Minister of Transport and former Director General of Aeroflot; (vi) Deputy Minister of Transport Igor Chalik; (vii) other ministers and officials at the Ministry of Transport and the Federal Service for Supervision of Transport ("FSST"), which operates under the supervision of the Ministry of Transport; (viii) officials at the Federal Agency for Air Transport ("FATA"), an agency subordinate to the Ministry of Transport, including its head and former First Deputy Minister of Transport, Alexander Neradko, and the State Air Traffic Management Corporation ("SATMC"), which FATA controls; (ix) the Russian Federal Security Service (the "FSB"); and (x) the Federal Assembly of Russia.

The measures taken

36. On 26 February 2022 there was an emergency meeting at the Ministry of Transport attended by (among others) Vitaly Savelyev, Alexander Neradko and representatives of Russian airlines (which the Claimants are not presently able to identify), at which the Sanctions and the foreign lessors' actual or anticipated demands for the return of their aircraft were discussed. The representatives of the airlines were told (among other things) that Aeroflot (and/or its subsidiaries, Rossiya and Pobeda) would not return foreign aircraft to their lessors, and that the other airlines should likewise not return their aircraft but wait for clarity from the Russian government authorities.

37. In a further meeting at the Ministry of Transport on 28 February 2022, attended by Igor Chalik and by representatives of certain Russian airlines (including Aeroflot, Pobeda and Rossiya, S7 Group, Ural Airlines, and UTair), options were discussed with the objective of keeping foreign-leased aircraft in Russia and continuing to fly them.

38. On 2 March 2022 FATA issued a telegram asking Russian airlines to (i) submit (by no later than 12:00 on 2 March 2022) details of every lessor for its aircraft engaged in commercial air transportation, including the lessor's nationality, (ii) to inform FATA (by no later than 12:00 on 2 March 2022) of any requests from lessors in relation to the termination of leasing agreements and the conditions for the return of the aircraft, and (iii)

immediately to inform FATA if any requests were received from lessors relating to the termination of leasing agreements or the conditions for the return of the aircraft.

39. On 3 March 2022 in a meeting between FATA and certain airlines (the identities of which the Claimants are not presently able to particularise) it was made clear that the state would not assist lessors in the repossession of their aircraft, notwithstanding Russia's obligations as a party to the 2001 Convention on International Interests in Mobile Equipment (the "Cape Town Convention", or "CTC").

…

41. On 4 March 2022 in one or more telegrams FATA advised airlines that should the airlines receive notices asserting that their leases were terminated, they should enter into negotiations with their lessors, and in the event that they failed to reach a "mutually beneficial agreement", the airlines were invited to re-register the aircraft in Russia. Since (i) the premise of the said advice was that the Russian airlines should not agree to return their aircraft, and (ii) the foreign lessors, including the Lessors, could not agree – and have not agreed – that the aircraft might be retained by the airlines, the suggestion that airlines might "negotiate" with the foreign lessors was not an invitation to carry out genuine negotiations. The Russian airlines were, therefore, in effect being asked to re-register their foreign-leased aircraft on the Russian register, in order to continue to operate those aircraft in Russia.

…

43. On 5 March 2022, during a public appearance at an aviation training centre, President Putin indicated that it was the Russian government's policy that foreign-leased aircraft would not be returned to the foreign lessors. He stated among other things, as follows (in an official Kremlin translation …

[there followed a plea of the subsequent legal and regulatory measures taken in Russia]

…

54. Despite the valid demands and notices contained in the Lessors' Notices, the Aircraft have not been returned to the Claimants. Instead: (i) some or all of the Aircraft have been re-registered on the Russian state registry, contrary to the terms of the Leases and in contravention of Art 18 of the Chicago Convention; (ii) the Aircraft continue to be operated by the Lessees and/or have been used, or are at risk of being used, for spare parts to service other aircraft; and (iii) the Aircraft have not

been and will not be maintained in accordance with the applicable standards.

55. The Aircraft are lost to the Claimants.

55.1 By no later than 23:59 on 8 March 2022 the Claimants were irretrievably deprived of the Aircraft.

55.2 Further or alternatively, it was by no later than 23:59 on 8 March 2022 and (if relevant) continues to be unlikely, or alternatively at least uncertain, that the Aircraft would be and (if relevant) will be recovered within a reasonable time or alternatively at all.

55.3 Yet further or in the alternative, the Aircraft were in any event in the grip of a peril (or perils) by 23:59 on 8 March 2022, and subsequently thereto the operation of such peril(s) has proximately caused (i) the Claimants to be irretrievably deprived of the Aircraft and/or (ii) for it to become and continue to be unlikely, or alternatively at least uncertain, that the Aircraft will be recovered within a reasonable time or alternatively at all.

56. The loss was caused by one or more of the War Risk Perils, namely (i) an act of one or more persons for political purposes, and/or (ii) a confiscation, nationalisation, seizure, restraint, detention, appropriation or requisition for title or use by or under the order of the Russian government.

57. Specifically, the matters summarised in paragraph 54 above are a consequence of some or all of the following, whether individually or in combination, as particularised in section D.5 above: (i) positive statements that foreign-leased aircraft would continue to be flown in Russia; (ii) positive directions not to fly aircraft to so-called "unfriendly" countries; (iii) the re-registration of foreign-leased aircraft in Russia; (iv) an export ban; (v) other more indirect forms of political pressure to the same or similar effect; and (vi) measures intended to ensure that the foreign-leased aircraft, including the Aircraft, would continue to operate in Russia and so-called "friendly" countries, and be maintained in Russia, despite the imposition of the Sanctions, the Lessors' ongoing efforts to repossess the Aircraft and any suspension of their airworthiness certificates."

8. The Clifford Chance Claimants say these allegations are supported by factual and expert evidence, including evidence obtained first hand by a DAE representative who visited Russia in early 2022 in order to investigate why the aircraft were not being returned.

9. The all risks insurers in the DAE case allege, among other things, that the Aircraft were lost due to one or more of the war perils set out in AVN48B, with

the result that the loss is excluded from cover under the all risks policy. They contend that strategic decisions of the Russian President and Government are implemented by a variety of means in addition to formal legislation and decree, including the giving of instructions by the Presidential Administration (which are expected to be obeyed), meetings and discussions with private businesses at which messages are conveyed about how they are expected to act, and the application of various types of personal pressure to individuals. They say such events occurred at meetings on 26 and 28 February 2022 and on subsequent occasions, and *"amounted to an order by the President and/or Government and/or other public authority that foreign-leased aircraft be confiscated, seized, restrained, detained and/or appropriated by not being allowed to leave the country"* (§ 45A). Further or alternatively, they invite the inference that the President and/or Government of Russia and/or other public authorities *"have privately acted in such a way as expressly or impliedly or tacitly to order the lessees to confiscate, seize, restrain, detain and/or appropriate foreign-leased aircraft by retaining possession of them in Russia"* (§ 45B). As in the AerCap LP case, specific reference is made to meetings with President Putin.

10. The war risks insurers in the DAE case, by contrast, deny that there was any reason why the Aircraft could not be returned to the lessors at any time before 8 April 2022, as there was no formal, valid legislative prohibition to that effect and a number of aircraft were returned before and after that date. The alleged private determinations are said to be "*irrelevant*" in circumstances where they had not manifested in a formal, valid legislative prohibition.

11. War risk insurers in their Amended Defence take issue with many of the details of the meetings, comments, requests, invitations, advice and recommendations relied on by the claimants (§§ 31 ff). They deny that any of them, or any other events aside from formal executive and legislative action, are relevant on the basis that under Russian law they were *"not made by the Russian government and/or public authorities when acting as such; and/or (ii) not formal mandatory commands made by the Russian government and/or public authorities within the scope of their constitutional jurisdiction, authority and power; and/or (iii) informal and/or non-binding and/or non-mandatory*" (Defence § 49.1.1). They deny that anyone, including the Russian government, considered such informal communications to be directions or requirements that they must follow (Defence § 49.1.2). They contend that the lessees were acting for their own actual or perceived best interests, which might include currying favour with the Russian authorities (Defence § 49.3). Specifically in relation to President Putin, they plead:

> "It is denied that President Putin was able at will and without constitutional, legal, political, informal or practical restraint to act, or procure public authorities in Russia and the Russian government to act, outwith and contrary to the Russian Constitution and Russian law. Any such acts would in any event not be valid acts, and therefore would not constitute "acts" for "political purposes" within the meaning of paragraph (c) of the War Risks Perils, nor "orders" of (or acts by) the Russian

> government or any public authority within the meaning of paragraph (e) of the War Risks Perils." (Defence § 49.4)

12. Similarly to the war risks defendants in the AerCap claims, the war risks defendants to the DAE claim also refer to the Cape Town Convention and related Protocol, and contend that:

> "Resolutions 311 and 312, Presidential Decree 100 and any other Russian municipal law relied upon by the Claimants, is invalid and of no relevant effect insofar as inconsistent with the following obligations thereunder" (Defence § 43.5.4)

and accordingly deny that there is, or was at any material time, any relevant ban on the transfer of aircraft outside Russia under Resolution 311 (Defence § 43.5.5).

13. As regards the losses claimed in the LP Claims, an issue arises as to the date of loss and whether or not it was clear from an early stage whether the aircraft would be detained. For example, Fidelis Insurance Ireland DAC, as defendant to the Merx claim in case CL-2022-000697, pleads that:

> "…it is denied (if intended to be alleged) there was, at all material times after 24 February 2022, no reasonable prospect of the conflict ending in a reasonable period at time. In at least the first few weeks of the conflict, there was a great deal of uncertainty about how long the conflict was likely to last and how it was likely to develop. As at late February and early March 2022, at most a "wait and see" situation had arisen"

Expert evidence will be required in that case about how long it appeared, at that stage, that the war in Ukraine was likely to last.