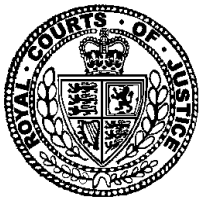

Neutral Citation Number: [2024] EWHC 1365 (Comm)

Case No: CL-2023-000547
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: 06/06/2024

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

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

Between:

AERCAP IRELAND CAPITAL DESIGNATED ACTIVITY COMPANY and others	**Claimants**
- and -	
PJSC INSURANCE COMPANY UNIVERSALNA and others	**Defendants**

- -
- -

Tony Singla KC and Charlotte Tan (instructed by **Herbert Smith Freehills LLP**) for the **AerCap Claimants**
Derrick Dale KC, Christopher Langley and Tiffany Tang (instructed by **Hausfeld & Co LLP**) for the **Hausfeld Claimants**
Matthew Reeve KC and Joseph England (instructed by **McGuireWoods London LLP**) for **Genesis Ireland Aviation Trading 3 Limited**
Christopher Hancock KC and Robert Ward (instructed by **Weightmans LLP**) for the **Weightmans All Risk Defendants**
Andrew Neish KC, Kate Livesey and Rangan Chatterjee (instructed by **Holman Fenwick Willan LLP**) for the **HFW War Risks Defendants**

James Brocklebank KC and Niamh Cleary (instructed by **DLA Piper UK LLP**) for the **DLA Piper War Risks Defendants**
Akhil Shah KC, Nick Daly and Max Kasriel (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **CMS War Risks Defendants**
James Hatt (instructed by **DAC Beachcroft LLP**) for the **DACB All Risks Defendants**
Daniel Schwennicke (instructed by **Dechert LLP**) for the **Chubb European Group SE**

Hearing dates: 19, 20 and 21 March 2024
Further written submissions: 25 March 2024
Draft judgment circulated to parties: 23 May 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 Ukraine following the Russian Federation's February 2022 invasion of Ukraine. The Claimants are owners and lessors, financing banks or other persons with an interest in aircraft and/or aircraft engines which were leased (with one exception) to Ukrainian airlines under leases governed by English or Irish law.

2. The defendants represented on these applications ("***the Defendants***") apply to set aside the relevant claim forms, alternatively for a stay of the proceedings, on the basis that the Claimants' claims have been issued in breach of exclusive jurisdiction clauses ("***EJCs***") in favour of the courts of Ukraine.

3. It is common ground that the English court will stay proceedings brought in England in breach of an EJC in favour of an overseas court, unless the claimant can satisfy the court that "*strong reasons*" exist to allow them to continue (*Donohue v Armco Inc* [2002] 1 All ER 749 §§ 24-25).

4. The Claimants dispute that the proceedings are brought in breach of EJCs, and in the alternative contend that there are strong reasons for allowing the cases to proceed here. The Claimants contest the applications on three main grounds:

i) that the EJCs are not binding on the Claimants and/or applicable to the claims which they advance;

ii) that the EJCs are unenforceable because they fail to specify a specific Ukrainian court; and

iii) that even if the EJCs are enforceable, binding, and applicable to the Claimants in respect of any of their claims, there are strong reasons not to enforce them by staying the proceedings.

5. In summary, the Defendants' position is that:

i) the EJCs apply to the Claimants in respect of all of the claims made and are enforceable notwithstanding the matters relied on by the Claimants; and

ii) the factors relied upon by the Claimants as 'strong reasons' do not come close to surmounting the high bar required to justify the claims proceeding in England despite EJCs nominating the courts of Ukraine.

6. There is, in addition, a debate about whether the Defendants are entitled to argue on these applications that, quite apart from the EJCs, Ukraine is clearly the more convenient forum for resolution of these disputes; and, if so, whether or not that is the case.

7. 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).

8. I have come to the conclusion that the EJCs are binding on the Claimants and enforceable, and apply to all their claims; and that there are not strong reasons to allow the claims nonetheless to proceed here. The claims must therefore be stayed (if not struck out). I shall hear counsel on the appropriate form of relief.

(B) BACKGROUND

(1) The claims

(a) AerCap

9. The AerCap Claims are:

i) Case CL-2023-000547 (the "***AerCap/Azur Claim***") brought by AerCap Ireland Capital Designated Activity Company ("***AerCap Capital***"), and

ii) Case CL-2023-000679 (the "***AerCap/Celestial Claim***") brought by Celestial Aviation Trading 69 Limited ("***Celestial***").

10. AerCap Capital is the lessor of a Boeing 777-300ER that was leased to Azur Air LLC (a Russian domiciled entity). The lease was novated to Azex Leasing Limited ("***Azex***") (an Irish entity). The aircraft was subleased to Skyline Express Airlines LLC, formerly

Azur Air Ukraine Airlines LLC ("***Azur***"), a Ukrainian airline. Azur is the insured under the relevant insurance arrangements. AerCap Capital brings its claim against:

i) PJSC Insurance Company Universalna ("***Universalna***"), the Ukrainian insurer who underwrote the insurance policy, and

ii) the reinsurers who reinsured 99.99% of the risk pursuant to an Airline Hull (Including Spares and Equipment) and Hull Total Loss Only War and Allied Perils Insurance and Reinsurance policy with unique market reference number B1752GE2100345000 ("***the FIN Group Policy***").

11. The Defendant reinsurers subscribing to the FIN Group Policy who challenge the jurisdiction are Lloyd's syndicates or insurance companies domiciled or with branches in England. The lead reinsurers are Lloyd's Syndicate 1880 TMK and Lloyd's Syndicate 510 KLN, which are managed by Tokio Marine Kiln Syndicates Limited, a Lloyd's managing agent domiciled in London.

12. Celestial is the lessor of an Embraer EMB195-LR that was leased to PJSC Ukraine International Airlines ("***UIA***"), a Ukrainian airline which is the insured under the relevant insurance arrangements. Celestial brings its claim against:

i) PJSC BUSIN Insurance Company ("***Busin***"), the Ukrainian insurer who underwrote the insurance policy, and

ii) the reinsurers who reinsured 99.99% of the risk pursuant to the FIN Group Policy.

13. The AerCap Claimants each assert claims as:

i) an "*Additional Insured*" under the insurance policies between the lessee and the insurer, and

ii) "*an additional insured and/or as the person to whom settlement must be made under and/or pursuant to a cut-through clause*" or "***CTC***" contained in the FIN Group Policy.

14. Universalna and Busin are named as defendants to the claims but have not yet been served with the proceedings.

(b) Genesis

15. The Genesis Claim is Case CL-2023-000445, brought by Genesis Ireland Aviation Trading 3 Limited ("***Genesis***").

16. Genesis claims as owner and lessor of an Airbus A320-214 that was leased to Wind Rose Aviation Company LLC ("***Wind Rose***"), the lessee and original insured under an insurance policy underwritten by Universalna.

17. Genesis brings its claim against Talbot Underwriting Ltd ("***TUL***"), American International Group UK Limited ("***AIG UK***") and Chubb on their own behalf and (in relation to TUL and AIG UK) as purported representatives of:

i) the War Risks and All Risks reinsurers, respectively, who reinsured the underlying risk, and

ii) Universalna in respect of the War Risks and All Risks cover provided by Universalna under the underlying insurance policy.

18. Genesis asserts claims:

i) for payment under the insurance, as a party to the insurance policy and/or pursuant to a collateral contract with Universalna and/or as assignee of the benefit of the policy (or the entitlement to be paid under it) and/or pursuant to the Contracts (Rights of Third Parties) Act 1999 ("***the 1999 Act***"); and

ii) for payment under the reinsurances, as a party to the reinsurance policies pursuant to a CTC and/or pursuant to a collateral contract with the reinsurers and/or as assignee of the benefit of the policy (or the entitlement to be paid under it) and/or as beneficiary of a trust of the benefit of the reinsurances and/or pursuant to the 1999 Act.

(c) Hausfeld Claimants

19. The Hausfeld Claimants' claims are:

i) Case CL-2023-000576 ("***the Serendip Claim***") brought by Serendip LDA ("***Serendip***") as lessor and Wind Rose as lessee,

ii) Case CL-2023-000769 ("***the Wind Rose Claim***") brought by Wind Rose, as lessee, and

iii) Case CL-2023-000770 ("***the Overstar Claim***") brought by Overstar S.R.L. ("***Overstar***") as lessee.

20. The Hausfeld claims are brought in respect of thirteen aircraft leased by various lessors (including Serendip) to Wind Rose and Overstar. Wind Rose and Overstar were the original insureds under insurance policies underwritten by Universalna. At all material times, the Hausfeld Claimants say, Wind Rose acted for and on behalf of Overstar pursuant to an agency agreement between them.

21. The claims are variously brought against AIG UK, XL Insurance Company SE ("***XL***"), TUL and Chubb on their own behalf and (in relation to AIG UK, XL and TUL) as purported representatives of:

i) the All Risks and War Risks reinsurers who reinsured the underlying risk, and

ii) Universalna in respect of the All Risks and War Risks cover provided by Universalna under the underlying insurance policy.

22. The Hausfeld Claimants each assert claims:

i) for payment under the insurance, either in a capacity as lessee and operator of the aircraft (in the case of Wind Rose and Overstar) or on the basis that Serendip

is named as a loss payee and/or an owner, loss payee and additional insured in respect of the aircraft; and

ii) for payment under the reinsurances: (a) by virtue of CTCs in the reinsurance contracts, which they claim they are entitled to enforce in their own right (including pursuant to the 1999 Act); and/or (b) on the basis that the CTCs evidence an equitable assignment of Universalna's rights under the reinsurance contracts to the Hausfeld Claimants, such that they are entitled to an indemnity from the reinsurers under the reinsurance contracts as assignees.

23. The Defendants to the Hausfeld Claims are as follows:

i) AIG UK is a defendant to the Serendip and Wind Rose Claims. AIG UK is the lead All Risks reinsurer in respect of nine of the aircraft.

ii) XL is a defendant to the Wind Rose and Overstar Claims. XL is the All Risks reinsurer in respect of four of the aircraft.

iii) TUL is a defendant to the Serendip, Overstar and Wind Rose Claims. TUL is the lead War Risks reinsurer in respect of all (thirteen) of the aircraft.

iv) Chubb is a defendant to the Serendip and Wind Rose Claims. Chubb is an All Risks reinsurer in respect of nine of the aircraft, and was previously represented by AIG UK in the Serendip and Wind Rose Claims.

(d) Fortress

24. There was also a jurisdiction challenge in relation to CL-2023-000162 ("***the Fortress Claim***"), brought by WWTAI AIROPCO II DAC and others, represented by Morgan Lewis & Bockius LLP, against Global Aerospace Underwriting Managers Limited and Tokio Marine Underwriting Limited. This claim, which is not presently before the court, has both Russian and non-Russian (Ukrainian and Irish) aspects. The relevant claimants have now withdrawn their opposition to the non-Russian jurisdiction challenges and agreed a stay of those aspects of their claim (whilst maintaining their resistance to the Defendants' Russian jurisdiction challenges). It follows that the Ukrainian aspects of the claim must be pursued, if at all, in Ukraine.

(2) The aircraft leases

(a) AerCap

25. AerCap leased the Boeing-777 to Azur Air LLC pursuant to a lease dated 4 September 2017, which was novated to Azex (the "***Azex Lease***"). The aircraft was subleased to Azur pursuant to a lease dated 9 December 2021 (the "***Azur Lease***").

26. AerCap leased the Embraer to UIA pursuant to a lease dated 20 April 2018 (the "***UIA Lease***").

27. The Azex Lease is governed by Irish law, and the Azur and UIA Leases are governed by English law. Each Lease required the lessee airline to maintain insurance and/or reinsurance cover in respect of the aircraft, providing that: (i) the insurance must name AerCap as an additional insured and must or may incorporate AVN 67B; and (ii) the

reinsurance must contain a CTC in a prescribed form or as otherwise satisfactory to AerCap.

(b) Genesis

28. At the time of the Russian invasion of Ukraine on 24 February 2022, Genesis's aircraft was under lease from Genesis to Wind Rose, which is a Ukrainian passenger airline, pursuant to a lease dated 9 April 2019 as amended. The lease is governed by English law and the parties submitted to the jurisdiction of the courts of England and Wales.

29. Pursuant to clause 9 and Schedule 4 of the lease, there was a detailed scheme regulating the insurance and reinsurance which Wind Rose was required to obtain and maintain for the benefit of Genesis as owner and lessor, including for Hull All Risks and Hull War and Allied perils. Where the local direct insurer does not retain the risk (i.e. the local insurer 'fronts' the cover), Article 9.1 required that the reinsurance be placed *"in the leading international insurance markets… through reinsurance brokers of recognized standing and acceptable to [Genesis] for a percentage acceptable to Lessor of all risks insured."* Genesis states that this scheme was in accordance with the practice in the London market, familiar to all relevant parties. Article 2(a) of Schedule 4 to the lease required Genesis to be named as the sole loss payee in respect of any total loss of the aircraft, and Article 6(c) required that all reinsurances should contain a CTC in a form satisfactory to Genesis.

(c) Hausfeld Claimants

30. The lessor Claimants involved in the Hausfeld Claims leased the aircraft to the Hausfeld lessee Claimants pursuant to various English-law governed lease agreements. The terms of the leases are contained in General Terms Agreements ("***GTAs***") and individual Aircraft Operating Lease Agreements.

31. Pursuant to clause 8 of the GTAs, the lessee Claimants were required to effect and maintain in full force and effect insurance (and, where required, reinsurance) meeting the requirements set out in Schedule 6 to the GTAs.

32. Schedule 6 to the GTAs included the following provisions:

    i) The lessee Claimants were required to maintain insurance providing All Risks and War Risks cover. The insurance was *inter alia* required to (i) name the lessors as additional insureds, (ii) provide that any losses would be settled jointly with the lessor and lessee, (iii) include a 50/50 provision in accordance with market practice, and (iv) include the endorsement AVN67B (or its then current equivalent);

    ii) If reinsurance was required for the insurance to be acceptable under the leases, such reinsurance was to be on the same terms as the original insurances, would include the provisions of Schedule 6, and would contain a CTC in a form satisfactory to the lessor.

    iii) All insurance payments received as the result of a 'Total Loss' would be paid to the lessor, who would pay the balance to the lessee Claimants. To the extent that insurance proceeds were paid to the lessee Claimants, they agreed to comply

with the foregoing provision and apply or pay over such proceeds as required, holding them in trust in the meantime.

(d) Generally

33. The Claimants point out that none of the leases set out any requirements as to, or otherwise mentioned, choice of court and/or choice of law agreements in the insurance and reinsurance.

34. The Defendants respond that the Claimants are all either sophisticated international airline lessors, or Ukrainian airlines (with the exception of Overstar, which is a San Marino company) who leased aircraft from them. The insurance and reinsurance contracts were placed because the leases required them to be placed. The lessor Claimants had the opportunity to influence, and did influence, the terms on which the aircraft were insured and reinsured. They chose, however, not to make any stipulation as to the jurisdiction in which claims under the resulting policies were to be brought. That was the case even though (whether they actually knew it or not) reinsurance policies almost always contain jurisdiction provisions, apparently without inquiring as to which jurisdiction(s) had been chosen.

35. The Defendants emphasise the following further points about the leases.

36. First, the aircraft are valuable assets, each of which has an agreed value of several million dollars. The rent charged pursuant to the leases was typically in the millions of dollars per annum.

37. Secondly, the leases contain clauses in broadly similar terms requiring the operators to insure (and, if necessary, reinsure) the aircraft against All Risks and War Risks perils. Whether reinsurance was necessary would depend on which market the underlying insurance was taken out on – if it was not an internationally recognised insurance market (e.g. London or New York), then reinsurance with particular characteristics would have to be procured by the lessee.

38. Thirdly, the leases either required such insurance to incorporate the terms and conditions of AVN67B, or provided that the lessor consented to its incorporation. AVN67B is a standard aviation insurance endorsement under which additional parties are stated to be covered by the policy "*subject to all terms, conditions, limitations, warranties, exclusions and cancellation provisions thereof*".

39. Fourthly, by virtue of those requirements of the leases, the lessor Claimants required (and, the Defendants submit, authorised) the lessees to enter into contracts of insurance and/or reinsurance, and specified certain of the terms of such (re)insurances.

40. Fifthly, neither the terms of the Leases nor AVN67B makes any stipulation regarding the law and jurisdiction applicable to the insurance or the reinsurance. It follows that the lessors left it to the Ukrainian airline lessees to agree those matters with the insurers (in respect of the insurance) and left it to the Ukrainian insurer to agree them with any reinsurers (in respect of the reinsurance).

(3) The insurances and reinsurances

(a) AerCap

41. Separate War Risks insurance policies were issued in relation to the two AerCap Aircraft. In relation to the aircraft leased to Azur, the Insurer was Universalna. In relation to the aircraft leased to UIA, the insurer was Busin.

42. The Defendants note that AerCap's position in the AerCap/Celestial Claim is that the Busin insurance policy does not contain a jurisdiction clause. The Defendants point out that § 2.9 of the policy provides (in translation):

> "The Insurer will ensure reinsurance of the risks accepted for insurance under this Agreement on such terms (the "Terms of Reinsurance") and with such reinsurers (the "Reinsurers") as agreed with the Insured, for the entire term of insurance under this Agreement. The insurance shall be carried out in accordance with [various standard AVN wordings] as well as subject to other Terms of Reinsurance. In cases where this Agreement contradicts the Terms of Reinsurance, the relevant provision of the Agreement will be deemed to have been replaced and/or supplemented by the Terms of Reinsurance so that the Agreement complies with the Terms of Reinsurance." (my emphasis)

The Defendants submit that (if it matters) that was sufficient to incorporate the EJC in the reinsurance contract into the insurance contract.

43. The vast majority of the risk under the Universalna and Busin insurance policies was reinsured in the London and international markets under the FIN Group Policy. The FIN Group is a group of airlines brought together by the insurance broker, Gallagher, for the purposes of providing operator policy ("***OP***") insurance and/or reinsurance cover to multiple airlines in different countries. In some instances, the FIN Group Policy operates by way of direct insurance between the airlines and the insurers; in other instances (including in relation to Azur and UIA) it operates as a reinsurance, with local insurers providing local policies on the basis that they cede the vast majority of the risk to the reinsurers.

44. AerCap's evidence is broadly to the effect that (a) it was not provided with a copy of the FIN Group Policy at the time that it was entered into but, in accordance with the terms of the leases, AerCap was provided with certificates of reinsurance, which do not contain any governing law or jurisdiction clause; (b) it had no reason to consider what jurisdiction clause might be included in the slips, and (c) it was not aware of any market practice of reinsurances containing EJCs in favour of the lessee airline's domicile.

45. In the course of these proceedings, it says, AerCap has been provided with a copy of the slip, which contains:

    i) a CTC;

ii) in the list of the "*Conditions*", a reference to the incorporation of AVN 67B; and

iii) a choice of law clause and EJC in the following terms:

> "This Insurance shall be governed by and construed in accordance with the law of the country of domicile of the Insured as specified in the ADDRESS section of this Contract, and each party agrees to submit to the exclusive jurisdiction of the Courts of the country of domicile of the Insured in any dispute hereunder."

46. For the purposes of the jurisdiction challenges only, AerCap accepts that there is a good arguable case that the reinsurance contains an EJC as set out in the slip.

(b) Genesis

47. Pursuant to its lease, Wind Rose arranged, for the period 7 June 2021 to 6 June 2022:

i) direct 'fronting' insurance with Universalna, and

ii) 99.99% Hull All Risks reinsurance and War Risks reinsurance entirely subscribed by London Market reinsurers incorporated or established in England.

48. Genesis's evidence is that the direct insurance policy was not provided to it on placement and was only obtained, after the loss was suffered, when Genesis approached Universalna's parent in Canada. The insurance policy:

i) incorporates at least 24 London Market standard wordings;

ii) identified United Insurance Brokers ("***UIB***") as the reinsurance brokers, giving their London address;

iii) requires the reinsurance premium to be transferred to the reinsurers within 5 days, to the account of UIB or its representative office;

iv) records the parties' agreement to cooperate to obtain the reinsurance indemnity (Article 6.17);

v) provides that Universalna will pay only after the indemnity sums have been received from reinsurers and converted into local currency:

> "6.18 Insurance indemnity shall be paid in any case after receiving the reinsurance indemnity from the reinsurer (reinsurers). Part of the insurance indemnity, received from reinsurers non-residents, shall be paid in hryvnia in amount, derived from the sale of foreign currency, received from such reinsurers, in the interbank currency market of Ukraine, unless the Parties agree otherwise by signing an additional agreement to this Contract, or unless otherwise is provided by the laws."

vi) states (in Article 2.4) that the beneficiaries are identified in Supplemental Agreement No. 2 and gives Genesis the right to appoint beneficiaries (Article 8.2.3); and

vii) provides in Article 9.3 that "*Disputes, arising between the Parties, shall be resolved by negotiation, and if not resolved – in accordance with the current laws.*"

49. As regards the reinsurances, the relevant reinsurer Defendants have (after the commencement of this action, according to Genesis's evidence) disclosed two slips apparently placed by UIB in the London Market, in each case for 99.99% of the risk: the All Risks Slip, led by AIG UK and including Chubb among the subscribers, and the War Risks Slip, led by TUL.

50. In both slips:

i) there is a claims control clause, in London Market standard form AVN41A, giving (as between Universalna and reinsurers) sole control to the reinsurers of any claims, including "*sole right to appoint adjusters, assessors, surveyors and/or lawyers and to control all negotiations, adjustments and settlements in connection with such loss or losses*";

ii) there is provision for a CTC worded as follows:

a) in the All Risks Slip, "*Cut-through Clause automatically included hereunder as per expiring policy or to be agreed Slip Leader only*"; and

b) in the War Risks Slip, "*Cut-through Clause automatically included hereunder as per Hull and Spares Risk Policy*"; and

iii) there is a choice of law and jurisdiction clause:

> "This Reinsurance shall be governed by and construed in accordance with the law of Ukraine and each party agrees to submit to the exclusive jurisdiction of the Courts of Ukraine in the event of a dispute arising hereunder."

51. It is Genesis's case that the slips were not provided to Genesis on placement and that Genesis was at no time aware of the law and jurisdiction clause.

52. Genesis's evidence is that on placement it was provided with the following documents:

i) Universalna Certificate of Insurance No. 5200/293/000241/242/UR-WRW dated 1 June 2021;

ii) UIB's Master Certificate of Reinsurance along with a Schedule Identifying Terms for the Aircraft issued by UIB dated 4 June 2021 (the ***"UIB Certificate***");

iii) UIB's Master Letter of Undertaking in respect of the reinsurance, issued by UIB dated 4 June 2021 (the ***"UIB Master LOU***"); and

iv) UIB Certificate A01/WIND ROSE/SITUATION dated 17 November 2021 (setting out requirements for the prior approval by reinsurers of flights to Cuba, Iran, North Korea, Syria and Crimea).

53. None of those documents referred explicitly to a choice of law or jurisdiction agreement. All of them were written in English, containing London Market standard terms and forms.

54. The UIB Certificate is dated 4 June 2021 and is on a UIB letterhead giving its London address. It is entitled *"Certificate of Reinsurance"* and is addressed "*To: TO WHOM IT MAY CONCERN*". It has the reference "*C01/WINDROSE/MASTER AVN67B*" and the heading "*MASTER CERTIFICATE OF REINSURANCE 2021 WIND ROSE AVN67B*". The substantive text begins as follows:

> "BASIS:
>
> This Certificate is issued by United Insurance Brokers Limited in our capacity as Reinsurance Brokers to PJSC INSURANCE COMPANY UNIVERSALNA in respect of certain insurance policies issued by them to the Original Insured.
>
> DESCRIPTION OF COVERAGE:
>
> Subject to the coverage, terms, conditions, limitations, exclusions, excesses and cancellation provisions of the relative policy(ies).
>
> ORIGINAL INSURED:
>
> WIND ROSE AVIATION COMPANY LLC. and associated and managed and subsidiary companies as in existence or hereafter acquired/created jointly and severally for their respective rights and interests.
>
> REINSURED:
>
> PJSC INSURANCE COMPANY UNIVERSALNA.
>
> PERIOD OF REINSURANCE:
>
> From 7th June 2021 to 6th June 2022 both days inclusive at Local Standard Time at the address of the Original Insured.
>
> GEOGRAPHICAL LIMITS:
>
> Worldwide excluding United States and United Nations sanctioned countries and the regions of Donetsk and Luhansk in Ukraine but in respect of Hull/Spares War Risks and Allied Risks subject to Tokio Marine Kiln Geographic Areas Exclusion Clause LSW617H as follows:

> 1. Notwithstanding any provisions to the contrary and subject to clauses 2 and 3 below, this Policy excludes any loss, damage or expense howsoever occurring within the geographical limits of any of the following countries and regions:
>
> …
>
> 2. However coverage pursuant to this Policy is granted:
>
> (a) for the overflight of any excluded country where the flight is within an internationally recognised air corridor and is performed in accordance with I.C.A.O. recommendations; or
>
> (b) in circumstances where an insured Aircraft has landed in an excluded country as a direct consequence and exclusively as a result of force majeure.
>
> 3. Any excluded country may be covered by Reinsurers at terms to be agreed by Reinsurers prior to flight.
>
> COVERAGE
>
> 1. (a) HULL ALL RISKS:
>
> In respect of the Original Policy covering:
>
> Loss of or damage to Aircraft owned or operated by the Insured or for which the Insured has agreed to be responsible, as shown in the Schedule of Identifying Terms. Cover is arranged on an Agreed Value basis and is subject to deductibles in respect of all losses (other than Total Loss and/or Constructive Total Loss and/or Arranged Total Loss) of the amount as shown in Section 2(a) of the Schedule of Identifying Terms attached.
>
> The policy is subject to the War, Hi-jacking and Other Perils Exclusion Clause (Aviation) AVN48B.
>
> Reinsured Amount: As shown in the Schedule of Identifying Terms.
>
> …"

55. This is followed by the sections on "*Coverage*" regarding Hull All Risks/Spares and Equipment, Hull Deductible Reinsurance, Hull/Spares War and Allied Perils Risks, Liabilities and Aviation War, Hijacking and Other Perils Liability. At the end of the "*Coverage*" sections is a paragraph stating:

> "Coverage is subject to DATE RECOGNITION EXCLUSION CLAUSE AVN2000A, DATE RECOGNITION LIMITED

> COVERAGE CLAUSE AVN2001A and AVN2002A as applicable and to the coverage, terms, conditions, limitations, exclusions, excesses and cancellation provisions of the relative policy(ies)."

56. The UIB Certificate goes on to state:

> "Reinsurers have noted that the Original Insured has entered into a Lease/Finance Contract in respect of the Equipment detailed the Schedule of Identifying Terms attached and in connection therewith Reinsurers note that Airline Finance/Lease Contract Endorsement AVN67B has been included in the Original Policy as follows:-"

followed by the text of AVN67B, which begins by noting that the "*Contract Party(ies)"* have an interest in respect of the "*Equipment*" under the *"Contract(s)"*.

57. The UIB Certificate continues:

> "The following provisions are included herein:-
>
> (i) Fifty/Fifty Provision Claims Settlement Clause AVS103.
>
> (ii) It is hereby noted and agreed that the following Cut Through Clause shall apply in respect of Hull/Spares Risks and Hull/Spares War and Allied Risks coverages:-
>
> Reinsurers hereby agree 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 Contract Parties 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 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 Government of the country of
>
> Subject to the policy coverage, terms, conditions, limitations and exclusions."

58. There follows a Non-Aviation Liability Clause, and then a "*Schedule Identifying Terms*" stated to attach to and form part of the Certificate. The Schedule lists as "*Contract Party(ies)*" a Deutsche Bank entity *"as sole loss payee",* Genesis Ireland Aviation Trading 3 (as Lessor and Owner) and Genesis Funding Limited (as Owner Participant); and it lists under the heading *"Contract(s)"* the lease and the various financing documents to which those entities are parties. These details indicate the parties and contracts to which the AVN67B endorsement applies (cf § 56 above).

59. Under the UIB Master LOU, UIB undertook:

> "In relation to the Hull and Hull War Risks reinsurances, to hold 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, but subject always to our requirements to operate the Fleet Policy in so far as it relates to any other aircraft reinsured thereunder.
>
> …
>
> This letter shall be governed by English Law."

60. Genesis notes that, under these arrangements, Universalna has a limited, if any, commercial interest. It is not obliged to pay any loss until it receives indemnity from reinsurers (Article 6.18 of the direct insurance). Its retention, after receipt of such indemnity, is 0.01% (or a maximum of $20,000, assuming a total loss at the Agreed Value of $20m). Further, Universalna has unequivocally surrendered "*sole*" control of any claims by Wind Rose and/or Genesis to the London reinsurers under AVN41A. In the circumstances, Genesis suggests:

> "there would seem to be little or no practical purpose in suing Universalna as a party in its own right, merely for reinsurers (in London) to take over control. Universalna's maximum $20,000 retention would be overtaken by the legal costs of its separate representation in a matter of days, if not hours. From any logical commercial perspective, what matters is Genesis's direct claim against reinsurers. It is most unlikely that formal proceedings against Universalna as a separate defendant (in any jurisdiction) to collect the $20,000 retention would be justified on any sensible litigation analysis. Accordingly, reinsurers are sued, as representatives of Universalna, with sole claims control."

(c) Hausfeld Claimants

61. The Hausfeld lessee Claimants insured their aircraft with Universalna pursuant to two insurance contracts dated 1 June 2021. Under those contracts, the lessor Claimants are named as Owners, Loss Payees and/or Additional Insureds.

62. Clause 9.3 of the insurance contract in the Overstar Claim provides that:

> "Disputes, arising between the Parties, shall be resolved by negotiation, and if not resolved – in accordance with the current laws.
>
> This Insurance Contract shall be governed by and construed in accordance with the Law of Ukraine and each Party agrees to submit to the exclusive jurisdiction of the Courts of Ukraine in the event of a dispute arising hereunder".

Clause 9.3 of the Insurance Contract in the Serendip and Wind Rose Claims contains only the first of those paragraphs. The Defendants submit that Wind Rose and Universalna (the parties to the Wind Rose insurance policy) are both Ukrainian commercial entities who would reasonably and legitimately expect any disputes under the insurance policy to be subject to Ukrainian jurisdiction (where both parties reside) and to be determined in accordance with the current laws of Ukraine. Thus, one would also expect the terms of back-to-back reinsurance to provide for any disputes to be litigated in Ukraine.

63. The insurance contracts were reinsured in the London and international markets via UIB. Hausfeld suggest that the reinsurance contracts are "*contained in and/or evidenced by*" a Master Certificate of Reinsurance dated 4 June 2021 and/or separate Risk Details issued in respect of All Risks and War Risks Cover.

64. The Risk Details set out the jurisdiction clauses relied upon by the Defendants. In particular:

    i) (relied on by AIG UK, TUL and Chubb): "*This Reinsurance shall be governed by and construed in accordance with the law of Ukraine and each party agrees to submit to the exclusive jurisdiction of the Courts of Ukraine in the event of a dispute arising hereunder."*

    ii) (relied on by XL): "*This Reinsurance shall be governed by and construed in accordance with the law of the Original Insured's country of domicile, as per the Address shown herein, and each party agrees to submit to the exclusive jurisdiction of the Courts of the Original Insured's country of domicile."*

65. The reinsurance contracts contained CTCs as follows:

> [1] "Reinsurers hereby agree 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 Contract Parties 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 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 Government of the country of domicile of the Reinsured.
>
> Subject to the policy coverage, terms, conditions, limitations and exclusions"
>
> (quoted or, the Hausfeld Claimants suggest, contained in the Master Certificate)
>
> and:
>
> [2] "The Reinsurers hereby agree, at the request and with the agreement of the Reinsured, that if a valid hull or aircraft spares claim arises hereunder the Reinsurers shall pay to the order of the party(/ies) entitled to indemnity under the original insurance effected by the Insured that portion of any loss which the Reinsurers would otherwise be liable to pay to the Reinsured, subject to the following provisions:
>
> (1) such loss payment shall be in lieu of payment to the Reinsured or its successors in interest and assigns, and shall fully discharge and release the Reinsurers from any and all liability in connection with such a claim under the hull and aircraft spares insurances;
>
> (2) such loss payment shall be made notwithstanding non-payment of the Reinsured's portion under the original insurance;
>
> (3) the Reinsurers reserve the right to set off against such payment any outstanding premiums due on the subject hull or aircraft spares;…"
>
> (pursuant to AVN109)

66. As with Genesis, the Schedules of Identifying Terms to the Master Certificate of Reinsurance identify the relevant lessor Claimants as Contract Parties.

(d) The Defendants' position

67. The Defendants do not admit the Claimants' various contentions about when they were provided with documents or first became aware of their terms. The Defendants make the following further points (among others) as to the facts:

    i) The reinsurance policies were placed on the London market through London brokers, and all contain, among other things, both a Ukrainian EJC and a CTC. The normal practice in the London market is for the broker to act as agent for

the insured/reinsured (see, e.g., *Colinvaux on Insurance* (13th ed.) § 16-057). There is no evidence that the brokers here were acting as agents of the reinsurers in placing the reinsurance. Since the lessees/insureds were acting as agent of the lessors, they were authorised by them to place the insurance and procure the placement by local insurers and their brokers of any reinsurance required. The Claimants therefore consented to and are bound by the (re)insurance terms which the lessees agreed or procured in compliance with their obligations under the Leases. They could, had they wished to do so, have asked to see (re)insurance slips.

ii) The placement of the contracts of reinsurance in the London market was in accordance with normal practice in that market following the London market reforms, described in *Colinvaux* at §§ 1-067 to 1-071 in a passage approved (albeit as stated in an earlier edition) in *AIG Europe SA v John Wood Group PLC* [2021] EWHC 2567 (Comm) §§ 49-51. The principal reform was that the proof of the contract of insurance is the policy slip, which has to include certain details of the cover, one of which is the law and jurisdiction governing the insurance. Here, the insurance placement followed that pattern.

iii) The contract was concluded at the moment the slip was executed, neither earlier nor later.

iv) There is nothing unusual about the contract including a foreign jurisdiction clause such as the one in this case – the Defendants' evidence is that the vast majority of aviation reinsurance contracts contain a clause conferring jurisdiction on the courts of the aircraft operator's domicile.

v) The lessee Claimants cannot say they did not know about the jurisdiction clauses in the insurance or the reinsurance policies. Overstar, for example, was party to an insurance policy with an express Ukrainian EJC.

vi) It was open to any other Claimants to ask to see the slip. As sophisticated commercial parties, they must have known that the insurances were being placed on the London market, and would be placed in the normal manner. Moreover, the Claimants had the contractual right under the leases to request from the lessees information concerning the insurance of the aircraft, which necessarily included the insurance and reinsurance policies.

vii) Each certificate of reinsurance recorded that it was subject to the terms, conditions, limitations and exceptions of the *"relative policy(ies)"* – i.e. the reinsurance contract itself as contained in the reinsurance slip. The jurisdiction clause and choice of law clause was one such term.

viii) It is the Defendants' case that the Claimants are not parties to the reinsurance contracts. However, they accept that the jurisdiction issues must be determined on the basis of the claims the Claimants assert.

ix) The Defendants have adduced evidence that the inclusion of an EJC selecting the governing law and courts of the domicile of the underlying local insurer and insured operator (here, Ukraine) is a commonplace feature of international aviation reinsurance. The Claimants, as lessees and operators, are experienced

users of the aviation insurance market in their own right, and knew or ought to have known that the reinsurance contracts contained EJCs.

(4) Alleged loss of the aircraft

68. The following gives an overview of the claims made, as summarised in the Claimants' submissions. For the avoidance of doubt, I make no findings on any of these matters.

(a) AerCap

69. Following Russia's invasion of Ukraine, the AerCap aircraft were grounded at Boryspil International Airport in Kyiv. On 24 February 2022, the Ukrainian government closed Ukrainian airspace in light of safety concerns following the Russian invasion. On the same date, Russian attacks hit the airport, resulting in the evacuation of all passengers and staff. Since that date, the airport has remained closed and AerCap was unable to regain possession of the aircraft.

70. On 19 December 2023, the Boeing-777 was flown from the airport to Tarbes in France. The aircraft remains in that location and is under AerCap's control. The Embraer aircraft remains grounded at Boryspil Airport.

(b) Genesis

71. In response to signs of building tension between Russia and Ukraine in early 2022, on about 24 January 2022, Genesis contacted Wind Rose to request that the aircraft be relocated to safety in Lithuania. On 24 or 25 January 2022, Wind Rose told Genesis that the aircraft was undergoing a maintenance C-Check at Dnipro airport. Genesis asked for the C-Check to be expedited but was informed that there was a shortage of manpower, and also that there was a problem with one of the engines rendering it unserviceable. Genesis sourced an engine in Lithuania and made arrangements for it to be carried by truck to Dnipro, so that it could be fitted to allow the aircraft to fly to safety. The truck and engine had arrived at the Poland/Ukraine border when, on 24 February 2022 Russia invaded Ukraine. Dnipro was struck with missiles and the airport was closed. The truck turned back.

72. On the same day, martial law was imposed in Ukraine and Dnipro airport (where the aircraft was located). Ukrainian airspace was closed to civilian air traffic and remains closed today. A further missile attack on 10 April 2022 destroyed the airport and nearby infrastructure. So far as Genesis is aware, the aircraft remains in a hangar at Dnipro airport with an unserviceable engine. The Dnipropetrovsk Oblast has been described as being "*surrounded on three sides by fighting*".

73. Genesis's position is that neither it nor Wind Rose is able to recover the aircraft, nor was/is there a plausible means of recovery and restoration of the aircraft within a reasonable time.

74. Genesis claims that there is a total loss of the aircraft for the agreed value under the War Risks reinsurance, alternatively under the All Risks reinsurance; and/or under the insurance.

75. Genesis also has its own Contingent and Possessed ("***LP***") policy. Genesis has made claims under the LP cover for a leased aircraft lost in Russia (to be determined at the LP trial fixed to commence in October 2024 in this court) but has, as yet, not commenced LP proceedings in respect of the loss of the aircraft leased to Wind Rose.

(c) Hausfeld Claimants

76. At the time of Russia's invasion of Ukraine on 24 February 2022, ten of the Hausfeld Claimants' aircraft were located at Dnipro airport. The remaining three aircraft were located at Boryspil airport. Due to the invasion, the imposition of martial law and the closure of Ukrainian airspace, the aircraft have remained at Dnipro and Boryspil airports since then. The lessee Claimants claim that they have been unable to move the aircraft to safety and/or to return them to the possession of, *inter alia*, the lessor Claimants. Some of the aircraft have subsequently suffered damage as a result of missile attacks. The Hausfeld Claimants say that there is no prospect of the conflict ending (and, accordingly, the ending of martial law and the re-opening of Ukrainian airspace) within a reasonable period of time, and that the aircraft have accordingly been lost.

(C) THE EXPERT EVIDENCE

77. The parties have served expert evidence on the functioning of the Ukrainian court system, and on matters of Ukrainian law and procedure.

78. The Claimants rely on four expert reports on matters of Ukrainian law and procedure: two prepared by Mr Serhii Uvarov and two prepared by Judge Kushnir. Mr Uvarov is a qualified Ukrainian lawyer, partner and co-head of cross-border litigation at the firm Integrites in Kyiv. Judge Kushnir served as a judge of the Commercial Court of Chernihiv Region from 2004 to 2017 and then as a judge of the Commercial Cassation Court of the Supreme Court from 2017 to 2020.

79. The Uvarov reports are *prima facie* specific to the claims advanced by the Claimants in the AerCap claims, and the Kushnir reports to the Serendip Claim. However, the Claimants in the AerCap, Genesis, Serendip, Wind Rose and Overstar Claims seek to rely on the evidence in the Uvarov and Kushnir reports so far as it is of general application.

80. The Claimants have served two reports from Mr Vadim Medvedev about the functioning of the Ukrainian court system since the Russian invasion. Mr Medvedev is an attorney at law and head of the litigation and tax practices at the firm AVELLUM.

81. The Defendants have served two reports from Mr Sergiy Gryshko, one (his 1st report) about the functioning of the Ukrainian court system, and the other (his 2nd report) on matters of Ukrainian law and procedure. Mr Gryshko is manager and principal of the law firm Queritius Ukraine, which is the Kyiv office of international dispute resolution firm Queritius.

82. I am satisfied that each expert had the necessary expertise to provide the information and opinions he has, and that each has sought to assist the court to the best of his ability.

83. The appropriate ambit of experts' reports in cases such as this was considered in *Byers v The Saudi National Bank* [2022] EWCA Civ 43 § 104, which among other things indicates that the English court needs to be educated about the system of law, the relevant provisions, and the principles of contractual interpretation (if relevant); and that the expert's task is to assist the court in determining how the overseas court would answer the questions that arise for determination, rather than himself/herself to determine the 'ultimate issue'.

84. In *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) § 908, Calver J provided the following summary:

> "(1) The court is not entitled to construe a foreign code itself; it is the function of the expert witness to interpret its legal effect.
>
> (2) The task for the English court is to evaluate the expert evidence of foreign law and to predict the likely decision of the highest court in the relevant foreign system of law, rather than imposing his/her personal views as to what the foreign law should be, or allowing the expert to press upon the English judge his personal views of what the foreign law might be.
>
> (3) This court may decide what conclusion a foreign court would reach on a developing area of law but it is not, however, seeking to make findings which go beyond the present state of foreign law and to anticipate a rational development of it.
>
> (4) The more senior the court which gives the relevant court decision, or the greater the number of foreign court decisions to a particular effect, the more difficult it will be for the English court to conclude that, nonetheless, those decisions do not reflect the law of the relevant jurisdiction.
>
> (5) If there is a clear decision of the highest foreign court on the issue of foreign law, other evidence will carry little weight against it. That is generally so even if the decisions are unworkable in commercial practice or their reasoning illogical or inconsistent. When it falls to an English court to ascertain the content of foreign law, that means the law with whatever imperfections, policy-orientated determinations and impracticalities it manifests."

(D) EFFECT OF THE EXCLUSIVE JURISDICTION CLAUSES

(1) Principles

85. Where there is a dispute between the parties as to whether there is a valid and binding exclusive jurisdiction clause, the party relying on the existence of the clause bears the burden of proof. It must demonstrate a "*good arguable case*", which requires application of the three stage test articulated in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 § 7 and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 § 9, as explained in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV*

[2019] 1 WLR 3514 per Green LJ (and applied in the context of a stay based on alleged breach of a foreign jurisdiction clause in *Clifford Chance LLP v Société Générale S.A.* [2023] EWHC 2682 (Comm) § 79). The Court of Appeal in *Kaefer* elucidated the three limbs as follows:

i) In applying limb (i) the question is whether the claimant has discharged the burden of showing a plausible evidential basis indicating that he has the better argument (though not 'much' the better argument); this does not require proof on the balance of probabilities and is a context specific and flexible test (*Kaefer* §§ 71-76).

ii) Limb (ii) ("*if there is an issue of fact about it, 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"*) is:

> "… an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence" …. It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening up the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses." (*Kaefer* § 78)

iii) Limb (iii) (if "*the nature of the issue and the limitations of the material available at the interlocutory stage [are] such that no reliable assessment can be made"* then "*there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it"*) arises where the court is unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument (*Kaefer* § 79). As to this situation:

> "… In [*WPP Holdings Italy Sarl v Benatti* [2007] EWCA Civ 263] Lord Justice Toulson stated that the Court could still assume jurisdiction if there were "*factors which exist which*

> *would allow the court to take jurisdiction*" … and in [*Antonio Gramsci Shipping Corp v Recoletos Ltd* [2012] EWHC 1887 (Comm)] Teare J asked whether the claimant's case had "*sufficient strength*" to allow the court to take jurisdiction (ibid paragraph [48]). The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits." (*Kaefer* § 80)

86. The Claimants submit (and I agree) that these principles should be applied to the present case as follows:

    i) Pursuant to the first limb of the test, the Defendants must show that they have the better of the argument that the relevant EJC is valid and binding on each of the Claimants. The second limb of the test is an instruction to the court to seek to overcome any evidential difficulties using judicial common sense and pragmatism and that it must take a view on the material available if it can reliably do so.

    ii) If, however, the court concludes that no reliable assessment of the evidence can be made, then, pursuant to the third limb, there is a good arguable case for the existence of the agreement if there is a plausible (albeit contested) evidential basis for it.

87. The key issues on this part of the applications are:

    i) whether the EJCs are binding on the Claimants and/or applicable to the claims which they advance; and

    ii) whether the EJCs are unenforceable because they fail to specify a specific Ukrainian court.

88. It is common ground that these issues are governed by Ukrainian law. The Defendants contend, though, that an aspect of the first of them is governed by English law (or, in some cases, presumably Irish law) as the governing law of the leases. The Defendants' position is that, by the terms of the leases and the manner in which the reinsurance contracts were concluded, the brokers placing the insurance and reinsurance contracts were doing so on instructions from Ukrainian lessees and/or their local insurers acting with the authority and knowledge of the Claimants and in compliance with their insurance obligations under the respective leases. At the same time, it is clear that Ukrainian law must govern the questions of whether consent to the EJCs was necessary, and (if so) whether such consent as may be derived from the leases was sufficient.

(2) Applicable Ukrainian private international law provisions

89. The Law of Ukraine No. 2709-IV *"On Private International Law"* (*"**the PIL**"*) applies to, among other matters, the jurisdiction of the courts of Ukraine in cases involving a foreign element (Article 2(3)). One situation where a "*foreign element*" exists is where

"at least one participant in legal relations is a citizen of Ukraine residing outside of Ukraine, a foreigner, a stateless person or a foreign legal entity" (Article 1(2)).

90. Article 76 of the PIL includes these provisions:

> "**Article 76**. **Grounds for determining the jurisdiction of Ukrainian courts**
>
> 1. Courts may* take over and hear any cases with a foreign element in the following cases:
>
> 1) if the parties by their agreement provided for the jurisdiction of a case with a foreign element to the courts of Ukraine, except for the cases provided for in Article 77 of this Law;
>
> 2) if, on the territory of Ukraine, a defendant in a case has a place of residence or location, or movable or immovable property that can be recovered, or there is a branch or representative office of a defendant, if a foreign legal entity;
>
> 3) in cases on compensation for damage if caused on the territory of Ukraine;
>
> …
>
> 7) an action or event that was the basis for filing a claim took place on the territory of Ukraine;
>
> …
>
> 12) in other cases determined by the law of Ukraine and an international treaty of Ukraine."

(There is some controversy about whether the correct translation is "*may*" or "*shall*". I return to this point later.)

91. Article 77, to which Article 76(1)(1) refers, confers exclusive jurisdiction on the courts of Ukraine in a number of types of case involving a foreign element.

92. Article 366 of the Commercial Procedure Code of Ukraine No.1798-XII dated 6 November 1991 ("***ComPC***") states:

> "**Jurisdiction of courts in cases involving foreign persons**.
>
> 1. The jurisdiction of cases involving foreign persons is determined by this Code, a law or an international treaty ratified by the Verkhovna Rada of Ukraine.
>
> 2. In the cases provided by law or an international treaty ratified by the Verkhovna Rada of Ukraine, the court of competent jurisdiction to hear cases involving foreign persons may be determined by agreement between the parties."

The PIL is a 'law' for these purposes. Paragraph 2 was added pursuant to Law No. 2627-IX dated 21 September 2022.

93. On 15 October 2022, the Choice of Court Law amended the PIL by introducing Article 4-1:

> "**Article 4-1. Choice of court**
>
> 1. Parties to a private legal relationship with a foreign element may enter into a choice of court agreement, which determines jurisdiction of courts of a certain state or one or several specific courts of a certain state in disputes which have arisen or may arise between them in connection with such legal relationship.
>
> 2. The agreement on the choice of court shall be concluded in writing regardless of the place of its conclusion. The agreement on the choice of court, by which the court of Ukraine is chosen, shall be concluded in writing in accordance with the law of Ukraine.
>
> 3. The agreement on the choice of court cannot provide for a change in the exclusive jurisdiction of the courts of Ukraine over a matter with a foreign element.
>
> 4. The invalidity of the transaction, of which the agreement on the choice of court is the constituent part, does not entail the invalidity of the agreement on the choice of court."

94. The insurance and reinsurance policies involved in the present case predate the introduction of Article 4-1. Neither Article 4-1 nor the Choice of Court Law provides guidance as to its temporal application, and, in a few cases decided by Ukrainian courts after 15 October 2022, the courts have referred to Article 4-1 even though the relevant choice of court agreements had been concluded before 15 October 2022 (Resolution of the Northern Appellate Commercial Court in case No. 910/14391/22 dated 18 October 2023; and Resolution of the Rivne Appellate Court in case No. 570/240/22 dated 18 August 2023). The courts in those cases did not analyse in detail the temporal application of Article 4-1. Mr Uvarov nonetheless suggests that it appears from them that the Ukrainian courts consider Article 4-1 applicable to choice of court agreements concluded before 15 October 2022. Mr Uvarov also points out that ComPC Article 3(3) provides that:

> "Proceedings in the commercial court shall be conducted in accordance with the law that is in force at the time when a particular procedural action is taken, case is considered and decided."

95. Article 58(1) of the Constitution of Ukraine generally prohibits retroactive application of statutes:

> "Laws and other legal regulatory acts shall not have retroactive effect save when they mitigate or revoke responsibility of a person."

Similarly, Article 5 of the Civil Code of Ukraine ("***CC***") provides:

> "**Article 5. Effect of acts of civil legislation in time**
>
> 1. Acts of civil legislation regulate relations that have arisen since the date of their entry into force.
>
> 2. An act of civil legislation does not have retroactive effect in time, except when it mitigates or revokes civil responsibility of a person.
>
> 3. If civil relations arose earlier and were regulated by an act of civil legislation that has lost its validity, the new act of civil legislation applies to the rights and duties arising from the moment of its entry into force."

96. Mr Gryshko accordingly expresses the view that Article 4-1 does not apply to choice of court agreements concluded before its entry into force. Their formal and substantive validity must be determined based on the applicable rules of law, as discussed in section (D)(3) below. He states that Article 4-1 does apply to determine procedural rules of the courts for claims commenced after its introduction (consistently with ComPC Article 3(3) quoted above), but for present purposes the only relevant procedural aspect of Article 4-1 is that Ukrainian courts can be allocated jurisdiction by a choice of court agreement (which was already the position prior to the enactment of Article 4-1).

97. Similarly, Judge Kushnir considers it *"questionable"* that Article 4-1 applies to the contracts at issue here, since under the general rule legal norms do not have retroactive force.

98. In my view, the Defendants have the better of the argument on the evidence on this point. Insofar as Article 4-1 applies substantive requirements as regards choice of court agreements, the provisions referred to in § 95 above indicate that it does not have retroactive effect. Nothing in Article 4-1 itself suggests that it has such effect, and the cases to which Mr Uvarov refers contain no analysis supporting the view that Article 4-1 retrospectively alters the requirements for a valid choice of court agreement. I mention at this stage (as a point of general application) that under the Ukrainian legal system, decided cases do not serve as binding precedents. The exception, or quasi-exception, is that Article 13(6) of Law No. 1402-VIII dated 2 June 2016 *"On the Judiciary and the Status of Judges"* provides, under the heading *"The binding nature of court decisions",* that *"[c]onclusions on the application of legal norms set forth in rulings of the Supreme Court shall be taken into account by other courts when applying such legal norms".*

99. For completeness, as indicated in the ensuing sections below, I consider that the ultimate outcome in the present case would be no different even if Article 4-1 did apply.

(3) Ukrainian requirements for jurisdiction clauses

(a) Formal requirements

100. Article 31(3) of the PIL contains formal requirements for any transaction with a foreign element:

> "3. A foreign economic agreement, if at least one party is a citizen of Ukraine or a legal entity of Ukraine, is concluded in the form prescribed by law, regardless of the place of its conclusion, unless otherwise established by an international treaty of Ukraine. The legal consequences of non-compliance with the requirement regarding the written form of a foreign economic agreement are determined by the law applicable to the content of the transaction."

101. Article 208.1(1) of the CC provides for the 'written form' in transactions between legal entities:

> "1. The following shall be done in writing:
>
> 1) transactions between legal entities."

102. The meaning of "*in writing*" is elaborated in Article 207:

> "**Article 207. Requirements for the written form of the transaction**
>
> 1. A transaction is deemed to have been concluded in writing if its content is recorded in one or more documents (including electronic ones), in letters, telegrams exchanged by the parties, or sent by them to the information and telecommunications system used by the parties. If the content of the transaction is recorded in several documents, the content of such a transaction can also be recorded by referring to other documents in one of these documents, unless otherwise provided by law.
>
> A transaction is deemed to have been made in writing if the will of the parties is expressed by teletypewriter, electronic or other technical means of communication.
>
> 2. A transaction is deemed to have been made in writing if it is signed by its party (parties).
>
> A transaction concluded by a legal entity is signed by persons authorised to do so by its constituent documents, power of attorney, law or other acts of civil legislation.
>
> …"

Mr Uvarov explains that this provision includes two cumulative requirements: the content (terms) of the contract must be in writing, and the parties' consent to them must be expressed in writing.

103. The general rule about the legal consequences of failure to use written form is in CC Article 218:

> "Failure of the parties to comply with the written form of a transaction established by law shall not result in its invalidity, except in cases established by law.
>
> Denial by one of the parties of the fact of the transaction or contestation of its individual parts may be proved by written evidence, audio, video recording and other evidence. The court decision may not be based on the testimony of witnesses.
>
> If a transaction, for which the law establishes its invalidity in case of non-compliance with the requirement of written form, is concluded orally and one of the parties has performed an action and the other party has confirmed its performance, in particular by accepting the performance, such a transaction may be recognised by the court in case of dispute."

104. Mr Gryshko considers that Article 218 applies generally, including to choice of court agreements. Mr Gryshko cites two decisions of the Supreme Court of Ukraine about Article 218. In Case No. 927/718/17 dated 13 August 2020, the court stated:

> "Pursuant to Article 218 of the Civil Code of Ukraine, failure of the parties to comply with the written form of a transaction required by law does not result in its invalidity, except in cases established by law. Disputing by one of the parties the fact of the transaction or contesting its individual parts may be proved by written evidence, audio, video recording and other evidence. The court decision cannot be based on the testimony of witnesses."

Similarly, in Case No. 924/985/21 dated 18 April 2023 the court held that:

> "the absence of a seal could be regarded solely as non-compliance with the requirements of the written form of the transaction, which does not result in its invalidity within the meaning of Article 218 of the Civil Code of Ukraine, which defines the legal consequences of non-compliance with the requirement of the written form of the transaction."

105. Mr Uvarov notes that ComPC Article 366 *"allows for disputing parties to interfere with the jurisdiction of Ukrainian courts (as set forth by law) by agreeing on jurisdiction only "in cases established by law or treaty""*. The relevant law, he says, is Article 4-1 of the PIL. Since Article 4-1 requires a choice of court agreement to be concluded in writing, the proviso to Article 218 *"except in cases established by law"* means that the remainder of Article 218 does not apply. However:

i) As set out in section (D)(2) above, I consider the Defendants to have the better of the argument on the evidence that PIL Article 4-1 does not apply.

ii) Even if it did apply, Article 4-1 requires the choice of court agreement to be *"concluded in writing in accordance with the law of Ukraine".* Mr Uvarov states that, with respect to agreements choosing Ukrainian courts, Article 4-1 *"does not contain an autonomous definition of written form. Rather, it refers to the general requirements as to written form in Ukrainian civil law".* He does not explain why Article 218, relating to the effect of lack of written form, should not equally apply. Nothing in Article 4-1 gives any express or specific indication that Article 218 should not apply to a choice of court agreement as it does to contracts in general.

106. Mr Uvarov also suggests, in his second report, that even if PIL Article 4-1 does not apply, Article 218 still does not apply to choice of court agreements. He notes that the two Supreme Court cases cited by Mr Gryshko were not about choice of court agreements. He also refers to a Letter issued by the High Specialised Court for Civil and Criminal Matters No. 24-754/0/4-13 dated 16 May 2013 (the "***HSCCM Letter***") stating that *"[m]atters involving a foreign element fall within the jurisdiction of Ukrainian courts if the parties applied contractual jurisdiction. The parties' agreement on jurisdiction must be reached in writing."* Mr Uvarov further refers to the case *Ant Yapi v. LG* (Ruling of the High Specialised Court for Civil and Criminal Matters in case No. 761/605/17 dated 9 November 2017), in which Mr Gryshko represented LG. The case concerned a suretyship agreement between LG as creditor and Ant Yapi as guarantor. The parties entered into an addendum to the suretyship agreement, providing for resolution of disputes under the suretyship agreement in arbitration seated in Ukraine. The addendum was bilingual (Russian and English) with Russian text prevailing. However, the parties signed the addendum only under the English text. LG commenced arbitration and obtained the award in its favour. The court set aside the award, concluding that because the parties had not signed the prevailing Russian text of the addendum, the arbitration agreement was invalid.

107. Given, though, that arbitration agreements are governed by an independent legislative regime, and, in any event, neither the HSCCM Letter nor the *Ant Yapi* decision contains any consideration of whether Article 218 could apply, I do not find these points made in Mr Uvarov's second report sufficient to negate Mr Gryshko's view that Article 218 is of general application and can apply to a choice of court agreement as much as to any other type of contract.

108. This issue is, though, of limited import since there is no doubt that the EJCs set out in the reinsurance contracts were in written form. However, insofar as it may be suggested that under Ukrainian law the Claimants could not become bound by the EJCs without an agreement in writing, I would not accept that suggestion.

(b) Substantive requirements

109. Mr Gryshko sets out the substantive requirements for a jurisdiction clause in the following terms. Their content is not in dispute, though Mr Uvarov's position is that the source of some of them is PIL Article 4-1.

110. First, a transaction must comply with the requirements of Article 203 of the CC, which is fundamental to the validity of any transaction under Ukrainian law:

> "**Article 203**
>
> 1. The content of a transaction cannot contradict this Code, other acts of civil legislation, as well as the interests of the State and society, its moral principles.
>
> 2. The person who enters into a transaction must have the required amount of civil legal capacity.
>
> 3. The will of a party to transaction must be free and correspond to his inner will.
>
> 4. A transaction must be performed in the form established by law.
>
> 5. A transaction must be aimed at the actual occurrence of legal consequences caused by it.
>
> 6. A transaction committed by the parents (adoptive parents) cannot conflict with the rights and interests of their minor, minor or incapacitated children."

111. Secondly, a foreign economic transaction must have a "*foreign element*", defined by the PIL as including the following situations:

> "at least one participant in the legal relationship is a citizen of Ukraine who lives outside Ukraine, a foreigner, a stateless person or a foreign legal entity;
>
> the object of the legal relationship is located on the territory of a foreign state;
>
> the legal fact that creates, changes or terminates legal relations took place or takes place on the territory of a foreign state"

112. Thirdly, with respect to choice of court agreements, Article 76(1)(1) specifically requires that they must not interfere with the Ukrainian rules of exclusive jurisdiction set out in Article 77 of the PIL.

113. It is not in dispute that these requirements are satisfied in relation to the insurance and reinsurance contracts here.

114. Mr Uvarov in his first report made the additional point that as PIL Article 4-1 allows a jurisdiction clause with respect to *"disputes, which have arisen or may arise <u>between them</u>"* (emphasis added), a choice of court agreement cannot apply to third parties who have not consented to the jurisdiction clause. However, in his second report Mr Uvarov goes further, expressing the following opinions (in summary):

i) Ukrainian law on this point, as expressed in PIL Article 4-1, is a *"notable derogation"* from the definition of "*exclusive choice of court agreement*" under the Hague Choice of Court Convention. Article 3(a) of the Convention refers to "*disputes which have arisen or may arise in connection with a particular legal relationship*", without saying that they must be disputes between the parties to the choice of court agreement. Paragraph 97 of the Explanatory Note to the Convention states that *"[p]rovided the original parties consent to the choice of court agreement, the agreement may bind third parties who did not expressly consent to it, if their standing to bring the proceedings depends on their taking over the rights and obligations of one of the original parties. Whether this is the case will depend on national law"*.

ii) Article 4-1 was introduced into Ukrainian law in the context of ratification of the Convention. Ukrainian law thereby gives a clear answer, Mr Uvarov says, to this question by requiring that choice of court agreements may concern only disputes between the parties to such agreements.

iii) Moreover, while this principle was most clearly articulated in PIL Article 4-1, Ukrainian law already took the same approach. ComPC Article 23 provides that:

> "In cases envisaged by law or by an international treaty, ratified by the Verkhovna Rada of Ukraine, a dispute falling within the jurisdiction of a commercial court may be referred by agreement of the parties [*storony* in Ukrainian] to a court of another state" (emphasis added)

Similarly, ComPC Article 366(2) (quoted earlier) allows the jurisdiction over cases involving foreign persons to be determined "*by agreement of the parties [storony in Ukrainian]*". PIL Article 76(1)(1) likewise applies where *"the parties by their agreement provided for the jurisdiction of a case with a foreign element to the courts of Ukraine"* (emphasis added). The references in these provisions to the parties (*storony*) are to the disputing parties, i.e. the claimant and defendant, reflecting Ukrainian procedural law's definition of "*storony*" as the claimants and defendants in the particular matter (ComPC Article 41(1)).

iv) Accordingly, one must analyse whether the Claimants and Defendants have entered into the relevant choice of court agreement. This involves analysis as to whether the Claimants at all consented to the choice of court agreement and whether such consent was duly expressed in writing under Ukrainian law such that a contract is formed between them.

v) Under general rules of Ukrainian civil law on contract formation, a contract is deemed concluded if the parties have reached agreement on all essential terms of the contract. The contract is formed by one party's offer to conclude a contract, and acceptance of the offer by the other party. The acceptance must be complete and unconditional, and not contain new terms.

vi) It follows, among other things, that the Claimants cannot be regarded as having consented to the choice of court agreement found in the reinsurance policy by requiring in the relevant lease contracts that lessees must maintain insurance of

the aircraft and that such insurance must cover them "*subject to all terms, conditions, limitations, warranties, exclusions and cancellation provisions thereof*". Even if a Claimant agreed to be covered by the policy subject to all its terms and conditions, that cannot be viewed as a valid consent to the choice of court agreement found in the reinsurance policy that makes the Claimant a party to such choice of court agreement. On the facts Mr Uvarov has been asked to assume, there is no corresponding offer and acceptance or expression of consent to the choice of court agreement passing between the Claimants and the reinsurers in this case because:

a) The leases do not contain the essential terms of the putative contract (the choice of court agreement) – they contain a general requirement that AerCap must be covered by the policy subject to all terms and conditions thereof, which is not sufficient.

b) Blank consent to unspecified terms cannot amount to either offer or acceptance. It is necessary that a reasonable person in the position of the relevant party understand to which specific terms it is agreeing. For example, a person who signs a blank page and gives it to the other party cannot be viewed as having agreed to the terms which the other party would print on that page. Equally, a person who generally agrees to the benefit of being insured cannot be presumed to have agreed to all terms of the insurance policy (including its dispute resolution provisions).

c) In any event, the leases could not be a relevant offer or expression of consent as between a Claimant and the reinsurers because the lease is a contract between the Claimant and the airlines; and (on the evidence provided) in general reinsurers do not receive copies of leases and do not request them. Thus nothing passed between the Claimant and the reinsurers whereby the Claimant agreed to its disputes with the reinsurers being submitted to the Ukrainian courts' jurisdiction.

d) Even if the reinsurance policy itself could be construed as an offer (or a counteroffer), it was never communicated to and never accepted by the Claimant, who (Mr Uvarov is asked to assume) did not see the reinsurance until after the proceedings were commenced.

vii) Further, a third-party beneficiary, if it expresses its intention to exercise its rights, does not thereby express its consent to all the components of such rights, including dispute resolution mechanisms:

a) Mr Gryshko does not provide any authority for that proposition.

b) Exercise of the right by a third party is exactly that and nothing more. By exercising the right envisaged for it in the contract, the beneficiary does not become a party to the contract or to the dispute resolution clause in the contract.

c) Even if the contract containing a dispute resolution clause is viewed as an offer to the beneficiary to enter into a choice of court agreement, which is accepted by exercise of its right by the beneficiary, it would

have been necessary to demonstrate that the terms of the choice of court agreement were communicated to the Claimants (because no acceptance can occur if the offer has not been previously communicated to the offeree, and the offeree is not aware of the terms to which it is 'consenting').

d) In any event, such purported acceptance would not comply with the written form requirement, and there would be no choice of court agreement in writing formed.

115. Because Mr Uvarov developed this line of argument only in his second report (save in the limited respect mentioned in the body of § 114 above), Mr Gryshko did not have an opportunity to respond to it. Mr Uvarov does not cite any authority in support of his approach, and I find it unpersuasive.

i) As to the language of ComPC Articles 23 and 366, and PIL Article 76(1)(1) and new Article 4-1, it would be natural for any provision allowing a contractual choice of jurisdiction to refer to the "*parties*". Such reference would not pre-empt the question of whether the effect of the clause can be extended to other persons who have or acquire legal rights and/or duties under the contract.

ii) Mr Uvarov does not explain why a person cannot in principle acquire rights and/or duties under a contract by virtue of having given consent in general terms to another person who is to form the contract (of whom an agent might be an example), nor why a person cannot acquire rights and/or duties under a contract that has already been formed by reason of a decision to exercise rights which that contract may have conferred on him. Nor does Mr Uvarov cite any authority on such matters.

iii) Mr Uvarov's argument proves too much. He does not appear to dispute that a third party can become bound by a jurisdiction clause as a result of having taken an assignment of rights under the contract (see further section (D)(4)(c) below). CC Article 512 provides that a creditor in an obligation may be replaced by another person as a result of *inter alia* "*assignment of its rights to another person under a transaction (assignment of the right of claim)"*, and Article 514 provides that (in the translation Mr Gryshko exhibits):

> "The rights of the original creditor in the obligation are transferred to the new creditor to the extent and on the conditions that existed at the time of the transfer of these rights, unless otherwise provided by agreement or law." (my emphasis)

or, in the translation Mr Uvarov exhibits:

> "The rights of the initial creditor in an obligation shall be transferred to the new creditor in the scope and on the terms existing at the time of transfer of these rights, unless otherwise provided by the contract or law." (my emphasis)

On Mr Uvarov's approach, the various provisions governing choice of court clauses would preclude such clauses applying to parties who had not (a)

expressly and specifically consented to them in writing and (b) become parties to them by a new process of offer and acceptance over and above the offer and acceptance between the original parties to the contract. That prohibition would be *"provided by … law"* within Article 514, preventing the assignee from benefitting from or being subject to the choice of court clause. However, as discussed later, an assignee does become subject to a choice of court clause in the original contract.

iv) Similarly, where a person claims rights under a contract as a third party beneficiary (as discussed in section (D)(4)(e) below), the original contracting parties have already formed the contract by means of offer and acceptance. The rules governing how a third party may then exercise the right which the contract confers on him are not said by the experts to be framed in terms of some further offer and acceptance process. Rather, the third party beneficiary exercises his rights by expressing his intention to do so (see, e.g., § 148.iv) below). The question then is the nature of the rights acquired and, in the present case, whether they are qualified by or subject to the dispute resolution provisions of the contract.

116. For these reasons, I consider the Defendants to have the better of the argument, on the evidence, that the EJCs do not fail vis-à-vis the Claimants for lack of substantive validity.

(4) Whether the jurisdiction clauses *prima facie* bind the Claimants

117. It is common ground that a contract cannot impose duties on a third party without its consent, by reason of CC Article 511(1):

> "**Article 511: Third party in an obligation**
>
> Obligation shall not create duties for a third party. In cases envisaged by contract, obligation may give rise to third party's rights vis-à-vis obligor and (or) obligee".

Mr Uvarov also refers to Article 629 ("*Binding force of the contract*"), the first paragraph of which states "*A contract is binding on the parties*", and to the Resolution of the Supreme Court in case No. 910/5253/18 dated 14 August 2018, which stated:

> "In accordance with Article 629 of the Civil Code of Ukraine, the contract is binding on the PARTIES [emphasis in the original]. Not a single act of legislation mentioned by the Commercial Court of Appeal, […] provide for the binding nature of the terms of transactions concluded between business entities (including foreign ones) upon other persons who are not participants (parties) to such transactions. In this case, as can be seen from the circumstances established by the courts, the Claimant was not a party to the Contract, and therefore, any terms of the latter were not binding on the Claimant. This also applies to the provision of the Contract on resolution through arbitration of all disputes related to this contract […]"

albeit Mr Uvarov makes clear that that case did not involve a third-party beneficiary.

118. The issue here is whether, in the various capacities in which the Claimants claim under the reinsurance contracts, they are entitled to sue without regard to the EJCs. Consideration of that issue includes deciding:

i) whether the Claimants are to be characterised as third parties to the reinsurance agreements so as to engage the consent principle;

ii) if so, whether the EJCs impose duties on those bound by them, triggering the requirement for consent under the consent principle; and

iii) if so, whether, by the terms of the leases (which fall to be construed as a matter of English or Irish law) and the manner of the placement of the reinsurance, the Claimants provided the required consent to the EJCs.

(a) Types of interest in insurance and reinsurance contracts

119. There are three potential categories of persons who might be entitled to indemnity under a contract of insurance (or reinsurance) under Ukrainian law:

i) "*strakhuvalnyyk*" – contract party insureds, who conclude the contract with the insurer and are parties to the insurance contract;

ii) "*zastrakhovani osoby*" – third-party insureds who would fall within the definition of Article 3(2) of the Insurance Law and who are not contracting parties to the insurance contract but can acquire rights and obligations under it; and

iii) "*vygodonabuvachi*" – third-party beneficiaries under Article 3(4) of the Insurance Law, who are entitled to receive a payment from the insurer in the event of an occurrence of the insured event, but who do not assume the duties of the insured. They too are not parties to the contract of insurance.

120. These categories are reflected in Article 3 of the Insurance Law:

> "1. Legal entities and persons with legal capacity natural persons who have entered into insurance contracts with insurers or are insured in accordance with the legislation of Ukraine are recognized as contract party insureds ['strakhuvalnyky'].
>
> 2. Contract party insureds ['strakhuvalnyky'] may enter into contracts with insurers for the insurance of third parties (insured persons ['zastrakhovani osoby']) only with their consent, except for cases provided for by current legislation. Insured persons ['zastrakhovani osoby'] may acquire the rights and obligations of the insured in accordance with the insurance contract.
>
> 3. When concluding personal insurance contracts, contract party insureds ['strakhuvalnyky'] have the right to appoint individuals or legal entities (beneficiaries ['vygodonabuvachi']) with the consent of the insured person ['zastrakhovani osoby'] to receive

> insurance payments, as well as to replace them before the occurrence of an insured event, unless otherwise provided for in the insurance contract.
>
> 4. Contract party insureds ['strakhuvalnyky'] have the right when concluding contracts insurance other than personal insurance contracts, to appoint individuals or legal entities (beneficiaries ['vygodonabuvachi']) who can suffer losses as a result of an insured event, for receiving insurance compensation, as well as replacing them before the occurrence of an insured event, unless otherwise stipulated by the insurance contract."

121. A reinsurance contract is defined in Ukrainian law as a contract under which an insurer that has entered into an insurance contract insures the risk of fulfilling part of its obligations to the insured with another insurer (reinsurer) (CC Article 987(1); Article 12(1) of the Insurance Law). Article 12(1) defines reinsurance as:

> "insurance by one insurer (assignor, reinsured) under the conditions of the risk of performance of part of its obligations to the insured by another insurer (reinsurer) resident or non-resident, who has the status of an insurer or reinsurer, according to the legislation of the country in which it is registered, under the conditions specified in the contract."

122. The Claimants claim, in different combinations, to be entitled to sue under the insurance and reinsurance contracts in one or more of five capacities:

i) as parties to the insurance contracts;

ii) as assignees of rights under the reinsurance contracts;

iii) as additional insureds under the insurance and/or reinsurance contracts;

iv) pursuant to the CTCs in the reinsurance contracts; and

v) (in the case of Genesis) as parties to collateral contracts with the Defendant reinsurers.

123. The Claimants have advanced claims in their Particulars of Claim or Claim Forms without reference to Ukrainian law. Insofar as they claim as additional insureds, there is some debate as to whether they would be classified as (putative) third-party insureds within Article 3(2) of the Insurance Law or third-party beneficiaries within Article 3(4). For example, insofar as AerCap brings a claim as an additional insured under AVN 67B, Mr Gryshko says that AerCap is to be categorised as a third party insured within Article 3(2) of the Insurance Law. Mr Uvarov maintains that AerCap may bring this claim as a third party beneficiary, under Article 636 of the CC:

> "**Article 636. Contract for the benefit of a third party**
>
> 1. A contract for the benefit of a third party is a contract in which the obligor is obliged to fulfil his obligation for the benefit of a

> third party, which is established or not established in the contract.
>
> 2. Performance of a contract for the benefit of a third party can be demanded both by the person who concluded the contract and by the third party for whose benefit performance is provided, unless otherwise established by the contract or the law or follows from the essence of the contract.
>
> 3. From the moment a third party expresses his intention to exercise his right, the parties cannot terminate or change the contract without the consent of the third party, unless otherwise established by the contract or the law.
>
> 4. If a third party waived the right granted to him on the basis of the contract, the party that entered into the contract for the benefit of a third party may invoke this right himself, unless otherwise follows from the essence of the contract."

Mr Uvarov suggests that AerCap in substance claims pursuant to this provision, as a third party beneficiary, whether it is strictly categorised as a third party insured (Article 3(2)) or an insurance beneficiary (Article 3(4)).

124. AerCap invites the court not to reach a concluded view on this point, which may affect the underlying merits, but merely to decide (a) whether claims brought qua third party beneficiary under Article 636 would be subject to the EJC, and (b) whether claims brought qua third party insured under Article 3(2) would be subject to the EJC. Since (for the reasons given in this judgment) it does not affect the outcome of the jurisdiction challenges, I am content to take that course.

125. There is also a debate about whether or not Genesis is in substance seeking to claim as an assignee, for Ukrainian law purposes, in light of its claim:

> "As legal and/or equitable assignee of the benefit of the Reinsurances and/or the entitlement to be paid under them. The assignment and/or notice of it were given in writing in the Direct Policy and/or the Reinsurances and/or the LoU and/or the materials provided on placement." (Genesis Amended Particulars of Claim § 27(3))

Genesis says that under Ukrainian law its claim should be characterised as that of a third-party beneficiary, since it does not allege that it replaced Universalna as the reinsured under the reinsurance policies. The Defendants take issue with that. Given my conclusions on the position of third-party beneficiaries, I find it unnecessary to resolve that dispute.

126. I further record that:

i) Judge Kushnir in some respects proceeds on assumptions as to the capacities in which Claimants are claiming, and does not (for example) make clear on what

basis he considers Wind Rose to be claiming under the reinsurance contracts in its cases.

ii) Judge Kushnir also suggests that, despite Serendip's and Wind Rose's pleaded assignment claims, they are not assignees because there is no written assignment agreement as required by Ukrainian law. However, for present purposes I proceed on the basis of the claims as put forward (noting that if Judge Kushnir were correct on this point, then such claims would fail in any event).

iii) Judge Kushnir questions, in his second report, whether a corporate entity can be a third-party insured. However, if they cannot, then those claims must fail in any event. Similar considerations to those in (ii) above apply.

127. Mr Gryshko has considered the position of all of the Claimants and the claims they advance from a Ukrainian law perspective, to determine whether Ukrainian law would treat each Claimant as a contract party, a third-party insured or a third-party beneficiary. He explains that, having regard to the capacities in which each of the Claimants purports to advance their claims under the reinsurance contracts, they are to be categorised under Ukrainian law as one or more of (i) parties, (ii) assignees, (iii) third-party insureds or (iv) third-party beneficiaries, and that in each case the Claimants would be regarded as being bound by the EJCs (albeit his analysis differs according to the capacity in which the claims are advanced). I consider below each of these four capacities. As regards Genesis's claim that rights to sue for the reinsurance indemnity arise from a collateral contract, Mr Gryshko categorises this (and other ancillary claims such as trust claims and those based on English statute) for the purposes of his analysis as claims by a non-party alleging that a benefit is conferred on them, and to whom the EJC does apply. However, Genesis suggests that its collateral contract claim is governed by English law, and I consider it separately in section (D)(4)(f) below.

(b) Claims as parties to insurance contracts

128. Insofar as the Claimants claim to be parties to the contracts (albeit the Defendants deny this), there can be no doubt that they are bound by the EJCs. For example, §27(1) of the Amended Particulars of Claim in the Genesis Claim states that Genesis claims, "*As a party to the Reinsurances… pursuant to the Cut-Through Clause and/or AVN67B and/or AVS103*". That appears to be a claim that Genesis is a party to the reinsurance contract itself, from which it would follow that it is bound by the EJC in that contract.

(c) Claims as assignees

129. CC Articles 511, 512 and 514 provide:

> "**Article 511. Third party to an obligation**
>
> Obligation shall not create duty for a third party. In cases envisaged by contract, an obligation may give rise to a third party's rights vis-à-vis obligor and (or) obligee."

> "**Article 512. Grounds for replacement of a creditor in an obligation**
>
> 1. A creditor in an obligation may be replaced by another person as a result of:
>
> 1) assignment of its rights to another person under a transaction (assignment of the right of claim);
>
> 2) legal succession;
>
> 3) performance of the debtor's obligation by a guarantor or pledgor (property guarantor);
>
> 4) performance of the debtor's obligation by a third party.
>
> 2. The creditor in an obligation may be replaced in other cases established by law.
>
> 3. A creditor in an obligation may not be replaced if it is provided for by an agreement or law."

> "**Article 514. Scope of rights transferred to the new creditor in the obligation**
>
> 1. The rights of the original creditor in the obligation are transferred to the new creditor to the extent and on the conditions that existed at the time of the transfer of these rights, unless otherwise provided by agreement or law.
>
> …"

130. No Ukrainian case has been found which decides whether an assignee is bound by a jurisdiction clause. However, the position has been settled as regards arbitration clauses.

131. In the Resolution of the Supreme Court of Ukraine in case No. 910/8318/16 dated 18 October 2017 (*Industrial-Innovation Union v Ukrnafta*), a Ukrainian company, Ukrnafta, owed a debt under a contract containing an arbitration clause. The original creditor, InterbusinessConsult, assigned the debt to another company, Industrial-Innovation Union. The assignee then brought a claim in court against Ukrnafta under the assigned contract. Ukrnafta sought to terminate the proceedings and refer the dispute to arbitration. The Supreme Court dismissed Ukrnafta's plea and said:

> "where there is no consent exactly of the parties to the dispute to have it resolved in arbitration court (arbitration), which consent should be recorded in the respective arbitration clause, this excludes possibility for such court to consider this dispute, irrespective of the prior agreement about it".

132. However, in the Resolution of the Civil Cassation Court of the Supreme Court dated 23 May 2018 in Case No. 910/21409/16 ("*Ferrosplav*"), a different conclusion was reached. In that case, Ferrosplav assigned to InterbusinessConsult a debt owed by Ukrnafta arising under a contract containing an arbitration clause. Mr Gryshko notes that the assignment was of only the rights under the contract. The court of the first instance upheld the claim. However, the appellate court, whose decision was further upheld by the Court of Cassation, held that the proceedings in the courts should be terminated as the claimant was bound by the arbitration clause. The claimant then challenged the decision of the Court of Cassation, contending that it was not in line with the previous decision of the Supreme Court in *Ukrnafta*. The Supreme Court rejected that argument, saying:

> "Despite the fact that case No. 910/21409/16 has similar legal relations to case No. 910/8318/16, in particular, in the part that the arbitration clause provided for in clause 7.2 of the Contract was concluded between PJSC Ukrnafta and LLC FERROSPLAV INDUSTRY; [t]here was no agreement between INTERBUSINESSCONSULT LLC and PJSC Ukrnafta on the referral of disputes to the ICAC at the Ukrainian CCI; only one of the defendants applied for termination of the proceedings on the grounds of referral of the dispute to arbitration, the panel of judges notes that the conclusion on the legality of the refusal to satisfy the motion of PJSC Ukrnafta to terminate the proceedings on the basis of para. 5 of Article 80(1) of the Commercial Procedural Code of Ukraine directly contradicts the provisions of Article 514 of the Civil Code of Ukraine, since the requirement of the law on the transfer to INTERBUSINESSCONSULT LLC as a new creditor under the Contract dated 26.06.2013 No. 180/2013, the rights and obligations of the initial creditor in the obligation in the scope and on terms existing at the time of the transfer of these rights will be violated.
>
> [...] The decisions of the court of appeal and cassation established that on 20.10. 2014 the Limited Liability Company "FERROSPLAV INDUSTRY" (the initial creditor) and the Limited Liability Company "INTERBUSINESSCONSULT" (the new creditor) concluded an assignment agreement, under which the initial creditor transfers its right of claim in full under the Contract and under the Surety Agreement, including the proper fulfillment by Defendant 1 and Defendant 2 of their obligations to reimburse the debt in the amount of USD 998,634.87, to pay 3% per annum on the overdue amount, as well as the amount of the debt adjusted for inflation, to pay a penalty, to reimburse the creditor for losses or lost profits incurred, and to terminate the Contract and the Surety Agreement, and the Claimant assumes the right of claim due to the initial creditor under the Contract and the Surety Agreement.

> Thus, taking into account the established factual circumstances of the case regarding the legal succession of INTERBUSINESSCONSULT LLC to the right of claim of FERROSPLAV INDUSTRY LLC in full under the Contract, as well as guided by the rule of law and the provisions of Art. 514 of the Civil Code of Ukraine, which establish the transfer to the new creditor of the rights of the initial creditor in the obligation in the scope and on terms existing at the time of the transfer of these rights, the panel of judges concluded that the decision of the Kyiv Commercial Court of Appeal dated 18.05.2017 and in the decision of the Higher Commercial Court of Ukraine of 30.08.2017 were rendered with correct application of the provisions of paragraph 5 of Article 80(1) of the Commercial Procedural Code of Ukraine in connection with the application of Defendant 1 to terminate the proceedings in case No. 910/21409/16, in the presence of an arbitration clause provided for in clause 7.2. of the Contract."
>
> (my emphasis)

(Article 80(1)(5) requires the commercial court to terminate proceedings with prejudice if the parties have concluded an agreement to refer the dispute to arbitration.)

133. Thus the Supreme Court held the assignee to be bound by the arbitration clause on the basis that, pursuant to CC Article 514, it acquired the claim *"in the scope and on the terms existing"* at the time of the transfer.

134. Similarly, in its Order dated 7 August 2019 in Case 910/11287/16, submitting the case for the consideration of the Grand Chamber of the Supreme Court (a body within the Supreme Court whose purpose is to secure uniform application of the law), for the purpose of addressing the question of whether an arbitration clause set forth in the terms of the underlying agreement is transferred under an assignment agreement, the Commercial Cassation Court of the Supreme Court said:

> "The assignment of a claim does not entail any changes in the terms of the underlying agreement, except for those related to the substitution of the initial creditor by a new creditor and provided for in the assignment agreement. The new creditor receives the right to claim under the underlying agreement to the extent and on the terms and conditions that existed at the time of the transfer of these rights. One of the terms under which the right of claim is transferred is the preservation of the contractual dispute resolution procedure between the debtor and the creditor. This procedure is not inextricably linked to the identity of the previous creditor, corresponds to the debtor's will, and allows for the debtor to choose the method of protecting its interests."

The Grand Chamber itself did not elaborate further on the matter. However, the passage quoted above makes clear that the Cassation Court considered the arbitration clause to bind the assignee because it acquired its rights on the terms in the contract, including the contractual dispute resolution mechanism. Moreover, the court made clear that the

arbitration clause was not inextricably linked to the identity of the original contracting parties.

135. Mr Gryshko's view is that the same principles would be applied to choice of court provisions, so that Claimants in the present case claiming as assignees are bound by the EJCs. Judge Kushnir agrees (2nd report § 47), albeit, as already noted, he denies that the Claimants are in fact assignees even where they purport to claim as such. Mr Uvarov does not explicitly address the point, possibly because he was retained by AerCap, who do not claim as assignees. I accept the evidence of Mr Gryshko and Judge Kushnir that an assignee is bound by an EJC in the contract assigned, which I consider to be cogent and consistent with the language of Article 514 and the preponderance of the cases mentioned above.

136. I therefore conclude that, to the extent that the Claimants claim as assignees of rights under the reinsurances, the Defendants have the better of the argument that the Claimants are bound by the EJCs.

(d) Claims as third-party insureds

137. Claims as additional insureds under the relevant reinsurances fall within Article 3(2) of the Insurance Law, quoted earlier, under which:

> "Contract party insureds ['strakhuvalnyky'] may enter into contracts with insurers for the insurance of third parties (insured persons ['zastrakhovani osoby']) only with their consent, except for cases provided for by current legislation. Insured persons ['zastrakhovani osoby'] may acquire the rights and obligations of the insured in accordance with the insurance contract"

138. Mr Uvarov expresses the view that third-party insureds are nonetheless not necessarily bound by any jurisdiction clause in the contract of insurance (or reinsurance), for the following reasons:

i) The basic rule is that obligations do not create duties for third parties: see Article 511 quoted earlier. A special legislative provision would be required in order to derogate from that principle.

ii) Article 3(2) of the Insurance Law provides that third party insureds only <u>may</u> acquire duties of a contracting party insured, but not that they necessarily will. It does not operate so as to override the general rule that duties may be imposed on a third party only with their consent. Moreover, Article 3(2) is not itself the source of third-party insureds' rights: those derive from CC Article 636, quoted earlier, i.e. the provision under which contracts can confer benefits on third parties.

iii) Article 3(2) provides that contracting party insureds may enter into contracts for the insurance of third party insureds only with their consent, unless the law provides otherwise. So a third party insured may be bound by a duty under the contract only if it was aware of the duty and willingly consented to be bound by it.

iv) Merely agreeing to being insured (as the Claimants may have done through the lease provisions), without specific knowledge of and specific consent to all the terms of the insurance policy, including the (distinct and severable) choice of court agreement, is insufficient. There is no concept of presumed consent in Ukrainian law.

v) The contracting party insured does not act on behalf of the third-party insured and is not authorised to bind it.

vi) Further (it seems from Mr Uvarov's second report), the third-party insured's consent must involve offer followed by complete and unconditional acceptance, as discussed earlier (see §§ 114.v) and 114.vi) above).

vii) In any event, any duty will not bind the third-party insured unless the contractual wording clearly extends both to the contracting party insured and to the third party insured.

viii) There is no provision of Ukrainian law envisaging that obligations of the contracting party insured under a choice of court agreement in the insurance contract must be extended to a third-party insured.

139. Mr Gryshko's view, on the other hand, is that Article 3(2) does not require the insured's consent to have any specific form or manner, or even scope (whether general consent or consent to specific clauses of an insurance contract). For example, in cases of voluntary medical insurance of employees, which is a classic example of a contract under Ukrainian law where third-party insureds are involved, Mr Gryshko is not aware that the employees give consent to any specific terms of an insurance agreement. It is, rather, a mere agreement "*to the benefit of being insured*" (in the words of Mr Uvarov) in its entirety. In the Article 3(2) scenario, Mr Gryshko says, the contracting party insured effectively acts as an agent for the third-party insured. A party who claims to be an additional insured is claiming to be a third-party insured within Article 3(2) and its consent to being insured on certain terms, including any jurisdiction clause, should be presumed. Mr Gryshko does not agree with Mr Uvarov that specific knowledge and consent are required, and considers it to be sufficient if the Claimants gave the lessee airlines general permission to conclude insurance contracts in their favour.

140. Mr Gryshko in any event does not agree that jurisdiction clauses should be characterised as imposing duties: I consider this issue in section (D)(4)(e) below.

141. Mr Gryshko accordingly considers that, if the Claimants in any case are correct that they are additional insureds under the reinsurance contracts and, therefore, third party insureds within the meaning of Article 3(2), they would be bound by the EJCs in the reinsurance contracts.

142. In my view, Mr Gryshko's evidence on this matter is to be preferred.

i) Article 3(2) clearly contemplates that third-party insureds may acquire both rights and duties under the contract of insurance.

ii) It contains an express requirement of consent, but in no way prescribes the form or content of such consent, including whether it must be general or specific,

whether it must be in writing, or whether it must explicitly address any dispute resolution provisions (which one might reasonably expect to be common in contracts of insurance, particularly in commercial contexts).

iii) Mr Uvarov does not cite any cases in support of his view that specific individual knowledge of and consent to each and every term of the insurance contract is necessary (still less, that there must be a process of offer and acceptance as between the insurer and the third-party insured, separate from that between the insurer and the contracting party insured).

iv) Mr Uvarov's approach cannot be reconciled with the common example of employee medical insurance which Mr Gryshko cites, but to which Mr Uvarov does not respond in his second report.

v) It is unclear how Mr Uvarov's approach would operate. If the third-party insured did not know of and consent to each and every term of the contract, or if not every such term expressly stated that it applied equally to the third-party insured, would the contract, or the third-party insured's rights under it be invalidated? Or would the third-party insured take the benefit of rights without regard to any terms of which he was unaware or which did not expressly state that they applied to him: even if, for example, they clearly qualified the rights (such as limits of cover, exclusions, excesses, notification requirements or requirements as to the handling of losses and claims)? Any of those outcomes would appear commercially absurd.

vi) It would seem equally absurd for a third party insured to be permitted to advance a claim under a contract of insurance whilst simultaneously denying that it had consented to the placement of the insurance.

vii) In any event, as discussed in section (D)(4)(e) below, I do not accept Mr Uvarov's evidence that jurisdiction clauses are to be classified, for these purposes, as simply imposing duties.

143. Consistently with Mr Gryshko's views summarised in § 139 above, I consider the Defendants to have the better of the argument that Claimants claiming as additional insureds did in fact give the consent required by Article 3(2).

i) In the leases, they required the lessees to place insurance and, where appropriate reinsurance, as explained earlier. They stipulated certain requirements for those insurances and reinsurances, but left other matters to the lessees or their insurers (and their respective brokers), including the contents of any jurisdiction clause. The Claimants had the right to ensure that the insurance/reinsurance was "*satisfactory*" to them, but elected (it appears) neither to find out on what terms they had been placed or to require insurance/reinsurance on any terms other than those in fact put in place. The Claimants thereby consented to the placement of the insurances and reinsurances in which they were (on their case) third party insureds, and to the terms of such insurances/reinsurances. The point can also be expressed as saying that the Claimants authorised the placement of the insurances and reinsurances on those terms (though I do not think it necessary to seek to analyse the point in terms of agency). Indeed, Genesis's Particulars of Claim specifically aver at § 21 that *"the Claimant will, insofar as necessary*

say that, under the lease and the Direct Policy, the Claimant conferred authority on Windrose, Universalna and/or the reinsurance brokers, and/or required them, to obtain cover of its distinct interests as owner and lessor from reinsurers as set out below".

ii) In the case of the Hausfeld Claims, the claimants are or include the lessees who themselves obtained or procured the insurance and reinsurance in question. There can be no doubt that they consented to the terms of the policies. Indeed, in the Overstar Claim, not only the reinsurance policy but also the insurance policy (which Overstar itself executed) both contain Ukrainian EJCs.

iii) In any event, by seeking to exercise rights now as third party insureds (either knowing of the EJCs or by choosing to claim without enquiring as to the policy terms), all the relevant Claimants have consented to the terms on which the insurances/reinsurances provide cover, including the EJCs.

144. I therefore conclude that, to the extent that the Claimants claim as additional insureds under the reinsurances, the Defendants have the better of the argument that the Claimants are bound by the EJCs.

(e) Claims as third-party beneficiaries

145. Insofar as the Claimants claim pursuant to CTCs, the expert evidence indicates that they are probably to be regarded as third-party beneficiaries within Article 3(4) of the Insurance Law:

> "Contract party insureds ['strakhuvalnyky'] have the right when concluding contracts insurance other than personal insurance contracts, to appoint individuals or legal entities (beneficiaries ['vygodonabuvachi']) who can suffer losses as a result of an insured event, for receiving insurance compensation, as well as replacing them before the occurrence of an insured event, unless otherwise stipulated by the insurance contract."

146. The Defendants accept that the consent principle is, in principle, engaged in relation to third-party beneficiaries, but submit that: (i) the consent principle is not triggered in relation to the EJCs (because, as a matter of Ukrainian law, the EJCs do not impose duties), and (ii) the consent principle was satisfied in any event.

147. Mr Gryshko's evidence is that a contractual dispute resolution procedure, such as that contained in the EJCs, is a condition on which a third party's rights under the contract may be exercised, rather than an independent duty. On that basis, where a third party acquires rights under a contract, it does so subject to the conditions on the exercise of those rights, including any choice of court agreement. It follows that the consent rule is not triggered by the EJCs since they do not impose a duty (or do not merely impose a duty) on the Claimants in their capacities as third-party beneficiaries.

148. The logic of Mr Gryshko's position may be summarised as follows:

i) Neither the CC nor the Insurance Law addresses explicitly whether a choice of court agreement should be characterised as imposing a duty on the contracting parties to the insurance contract.

ii) The CC and the Insurance Law list the respective duties of insurer and insured in substantially similar terms and in some detail, but do not refer to dispute resolution procedures or anything analogous to them. The identified duties are mainly concerned with matters such as the payment of premiums, the provision of information, and the duty to mitigate. In principle Mr Gryshko agrees that these duties, as such, do not bind third-party beneficiaries (as illustrated by a case cited by Judge Kushnir, Case 910/25362/15).

iii) The third party's rights derive from a specific contract. If it wishes to exercise its rights under the contract, it must act in accordance with the framework and limits of that contract. When a third-party beneficiary decides to protect its right under the contract, it steps into the shoes of the contracting party insured in terms of rights and the means of their realisation.

iv) Specifically, Article 636(3) of the CC provides that a contract may not be modified after the "*expression of the third party's intention to exercise its right*". The meaning of a third-party beneficiary expressing its intention to exercise its rights is illustrated by the Resolution of the Civil Cassation Court of the Supreme Court dated 28 November 2018 in Case No. 750/12893/16-ts. That case was about the rights of a third-party beneficiary under a bank deposit contract concluded in its favour. Although separate statutory provisions apply, such a contract is still a contract in favour of third-party beneficiary. The court stated that:

> "from the moment a third party submits the first claim to the bank arising from the depositor's rights or otherwise expresses its intention to exercise such rights, it acquires the full range of rights under the bank deposit contract. The law does not contain any requirements for the manner in which a third party may express its intention to exercise the depositor's rights. Therefore, unless otherwise provided for in the contract, the form of expression of such intention may be either oral (direct application to the bank with a request to receive a deposit or interest, deposit of funds, etc.) or written (in particular, by sending a letter to the bank institution indicating his/her name). From the moment a third party expresses its will with respect to a deposit, the subject is replaced, which results in the loss of the depositor's rights by the person who entered into the bank deposit agreement and their acquisition by the person in whose favour the agreement was concluded."
>
> (emphasis added)

As both Mr Gryshko and Mr Uvarov point out, a specific provision (CC Article 1063(1)) provides for the third party to acquire the depositor's rights once it presents a claim to the bank. It follows that the last passage of the above quotation (regarding replacement of the original party) is not of general

application; and CC Article 636 does not refer to the third party 'acquiring' the rights of the original contracting party. However, the point about the manner in which the third party may express its intention to exercise rights can be applied more broadly.

v) To the extent that the third-party beneficiary acquires rights, the conditions applying to the rights acquired are the same as for the party which entered into a contract. "*A third-party beneficiary cannot be compelled to exercise its right against its will, but if it expresses its intention to exercise its rights then it thereby expresses its consent to all the components of such rights, including dispute resolution*": Gryshko 2nd report § 222, citing an extract from an academic work:

> "In an agreement for the benefit of a third party, the third party is called a beneficiary […] and acquires an independent claim against the debtor, which is independent of the creditor's claim and, presumably, also against the creditor. At the same time, such a claim is subject to all the objections that the debtor could raise against the creditor, and arises not at the time of conclusion of the contract, but from the moment the third party agrees to exercise the right granted to him." (V. Sloma, thesis entitled "*Obligations with the plurality of entities in the civil law of Ukraine*", West Ukrainian National University, Ternopil, 2020, p.356) (my emphasis)

> "Thus, in expressing its intention to exercise its rights under the contract, the third party takes the place of the creditor in the obligation (part 1 of Article 636 of the Civil Code of Ukraine). However, in this case, we cannot speak of the creditor's removal from the relevant legal relationship, since according to part 2 of Article 636 of the Civil Code of Ukraine, the performance of the contract for the benefit of a third party may be demanded by both the person who entered into the contract and the third party in whose favour the performance is agreed unless otherwise provided by the contract or law or if otherwise follows from the essence of the contract." (*ibid*., p.367)

vi) The entitlement to a remedy for breach of a civil right is closely connected with the civil right itself. There is ample support for that proposition, at a general level, in both Ukrainian academic writing and in case law. For example, the Civil Cassation Court of the Supreme Court has in Case No. 645/3265/13-ts (a case about inheritance of property) stated that:

> "the legislator retains the creditor's right of claim in the event of the debtor's death. In this case, there is a legal succession, which is translative, i.e. it transfers rights and obligations to the new debtor.
>
> The right to legal remedy is a component of any personal right. By recognizing a certain civil right for a person, the legislator

> thereby recognises the creditor's right to seek protection, including in court."

Thus an entitlement to a remedy is an indispensable element of a civil right. In Mr Gryshko's view, the same applies to a civil right belonging to a third-party beneficiary under Article 636 of the CC of Ukraine. Because the legal remedy is a component of the right, the rights under the contract are not absolute, but are subject to the relevant terms and conditions of the contract which condition that right just as much for the third-party beneficiary as for the contracting parties. This applies to any relevant choice of court provisions, because such agreements define and limit the rights under the contract, both for the contracting parties and for any third-party beneficiary.

vii) Under Ukrainian law, the right that the third party obtains under a contract is the same as the right enjoyed by the initial creditor.

viii) The Supreme Court in Case No. 398/1113/18 *(Person 1 v Universalna)* said:

> "if a beneficiary rejected the right granted to it under a contract, a party that concluded a contract in favour of the third party, may exercise this right itself, then a third-party beneficiary would be a third party [in the procedural meaning] in the dispute, if the beneficiary itself is not a proper claimant."

Following that logic, the right vested in a third-party beneficiary is the same right that the original creditors enjoyed and is subject to the same conditions. (I consider this case further in §§ 172-174 below.)

ix) The reasoning above is supported by the analogy of the assignment cases discussed earlier where assignees were held to be subject to arbitration clauses. Mr Gryshko says the Supreme Court has held that to be the case even where the assignment was of rights only, for example in Case No. 910/21409/16 (*Ferrosplav*) where it was noted that the initial creditor "*transfers its right of claim in full*", and the transferred right was subject to an arbitration clause even though the assignee did not have transferred to it the duties under the contract. As noted earlier, the Supreme Court held the assignee to be bound by the arbitration clause on the basis that, pursuant to CC Article 514, it acquired the claim "*in the scope and on the terms existing*" at the time of the transfer. That language, used twice in the passages quoted above, is more consistent with Mr Gryshko's view that the arbitration clause was regarded as a qualification upon the right than with the notion that it operated (or merely operated) as a 'duty'. The same applies, in Mr Gryshko's view, to a jurisdiction clause.

x) A similar result was reached in Case No. 873/18/19 (Supreme Court, 26 June 2019) where an assignment of the right of claim under loan agreements containing arbitration clauses stated:

> "Pursuant to clauses 2, 3, 4 of Agreement No. 2018-1402VPV, the initial creditor assigns and the new creditor accepts the right of claim to the debtor due to the initial creditor and becomes a creditor under the principal agreements from the date of signing

> this agreement. The Debtor does not object to the substitution of the initial creditor by the new creditor in the principal agreements and, by signing this Agreement, agrees to the corresponding assignment of the right of claim in the manner and on the terms and conditions specified in this Agreement."

The Supreme Court upheld an arbitration award which the assignee had obtained, stating:

> "Given that Largo Trade Company LLC became the legal successor of Odeskyi Korovay LLC under Contract No. OK-OK/BDP, and guided by the rule of law and the provisions of Article 514 of the Civil Code of Ukraine, the panel of judges considers that the arbitral tribunal considered the case within its competence in the presence of an arbitration clause in Contract No. OK-OK/BDP."

149. Pausing there, I consider Mr Gryshko's analysis to be cogent and consistent with the general thrust of the relevant Ukrainian cases and provisions.

150. Mr Gryshko also refers to the decision of the Grand Chamber of the Supreme Court dated 1 November 2023 in case No. 910/3208/2244 (*Grain Power*), cited by Mr Uvarov in his first report. In that case, a Ukrainian seller entered into a contract with a foreign buyer, which included a GAFTA arbitration clause. Soon after conclusion of the contract, the seller, the buyer, and another company – Grain Power – entered into an additional agreement pursuant to which Grain Power as guarantor assumed all obligations of the buyer under the sale contract. The additional agreement was signed by all three parties. The buyer failed to pay the purchase price. The seller sued Grain Power, which sought to refer the dispute to arbitration. The Grand Chamber concluded that the arbitration agreement was binding upon all three parties and granted Grain Power's application, reversing the decision of the Court of Appeal that the arbitration clause did not bind Grain Power because it was not a party to the clause. The Grand Chamber said:

> "9.27. … Clause 1 of the Additional Agreement signed by "Grain Power" LLC, [the buyer] and [the seller] provides: "1. Having familiarised itself with the terms of the Contract, [Grain Power] assumes all obligations of the Buyer arising from the Contract, taking into account all changes and additions to the Contract, both existing and future.
>
> 9.28. The Grand Chamber of the Supreme Court concludes that the arbitration clause contained in the Contract was a term agreed to by the parties and a term accepted by [Grain Power] by entering into the Additional Agreement to the Contract.
>
> …
>
> 9.32. Taking into account the above, the Grand Chamber of the Supreme Court concludes that the inclusion of an arbitration clause by the parties as a term in the contract results in extension

> of the effect of this arbitration clause to the legal relations under this contract with the participation of another person who entered into these legal relations as a party, assumed the respective rights and obligations of the party to this contract, and at the same time the parties did not terminate the effect of the arbitration agreement, did not exclude a particular dispute from its scope, did not deprive it of the binding force for such party, and the arbitration agreement did not lose its validity due to other circumstances".

151. The experts agree that *Grain Power* is not directly analogous to the present cases, because there was an additional agreement in which Grain Power expressly undertook to assume all the buyer's existing and future obligations; and also because the court made reference to a policy of pro-arbitration 'bias'. The case is nonetheless of interest (a) because it shows a willingness to extend the effect of an arbitration clause to a third party and (b) because of the order of the Commercial Cassation Court of the Supreme Court dated 19 July 2023 when referring the case to the Grand Chamber. The Cassation Court said:

> "Therefore, in our view, the effect of the arbitration agreement can be extended to persons who are directly involved in the performance of the contract, since the provisions of the additional agreement give reason to assume that the parties were aware of the existence and scope of the arbitration agreement.
>
> The panel of judges notes that the issue of extending the validity of the arbitration clause to persons who did not sign it is quite difficult and extremely relevant today. Thus, as a general rule, an arbitration agreement, like other agreements, is binding only for its parties. However, in some cases, third parties who did not actually sign the arbitration agreement may be bound by it and be able to directly invoke it (for example, but not limited to, assignment, including singular, the "group of companies" doctrine, the "alter ego", the doctrine of "piercing the corporate veil" (piercing the corporate veil)).
>
> In our view, a change in the formal approach to solving similar issues will also exclude the possibility of abuse of procedural rights (for example, the sole purpose of concluding a suretyship agreement as the creation of artificial grounds for circumventing the arbitration clause was noted by the complainant in case No. 910/18436/16, paragraph 6 of the resolution dated 01.11.2018). The above, in an extremely difficult time for the state, will undoubtedly not contribute to the strengthening of confidence in Ukrainian business as a whole and the attraction of foreign investments, which will have a significant impact on the state and dynamics of the Ukrainian economy.
>
> Therefore, in our view, the question of whether the arbitration clause applies to a person who is not specified in the contract is a problem that must be resolved depending on the specific

> circumstances, with an analysis of the actual and presumed intentions of the parties to participate in the arbitration agreement persons who did not sign the contract, but who are involved in the performance of the main contract, in connection with the performance of which the dispute arose"

152. I agree with the Defendants that that reasoning indicates a move away from formalism towards a fact-specific approach focussing on the "*actual and presumed intentions*" of the parties and seeking to avoid circumvention of arbitration agreements on technical grounds. It is hard to reconcile with, for example, Mr Uvarov's sweeping assertion that Ukrainian law knows no concept of presumed consent.

153. Moreover, Mr Gryshko points out that the Ukrainian courts favour not only arbitration agreements but, more generally, the upholding of bargains as expressed in the *favor contractus* principle that:

> "Taking into account the principles of civil law, in particular, good faith, fairness, and reasonability, doubts about the validity, effectiveness, and enforceability of an agreement (transaction) should be interpreted by the court in favour of its validity, effectiveness, and enforceability." (Resolution of the Supreme Court dated 10 March 2021 in Case No. 607/11746/17)

See also the statement in the Resolution of the Supreme Court dated 7 October 2021 in Case No. 904/4137/20 that:

> "In applying procedural rules, domestic courts should avoid both excessive formalism, which may affect the fairness of the proceedings, and excessive flexibility, which would lead to the nullification of the requirements of procedural law."

154. I accept Mr Gryshko's evidence that, in the light of the approach illustrated in these cases, the Ukrainian courts would be unlikely to take a narrow approach when deciding whether a third party was bound by a jurisdiction clause. I do not accept Mr Uvarov's suggestion that the earlier decision, of a lower court, in *Ant Yapi* (see § 106 above) shows the Ukrainian courts still to be wedded to formalism.

155. Mr Uvarov makes the point that the Grand Chamber in *Grain Power* had to decide whether to derogate from its earlier opinion in *Ukrnafta*¸ but found no grounds for doing so. The court said:

> "9.40. For the purpose of ensuring legal certainty, the Grand Chamber of the Supreme Court should deviate from the previous conclusions of the Supreme Court only when there is a proper ground therefor. Thus, it may completely reject a specific conclusion in favour of another one or specify the previous conclusion by applying relevant methods of interpreting legal norms. In order to ensure the unity and consistency of judicial practice, reasons for deviating from the earlier conclusion may include defects in the previous decision or group of decisions …; changes in the social context, due to which the approach applied

> in these decisions should obviously become obsolete due to the development of social relations in a particular sphere or their legal regulation …
>
> 9.41. The Grand Chamber of the Supreme Court points out significant changes in legal regulation that have occurred since the expression of the above-mentioned conclusion by the Supreme Court of Ukraine, namely the direct inclusion in the ComPC of Ukraine and the Civil Procedure Code of Ukraine (in the version effective from 15.12.2017) of the pro-arbitration approach to resolving issues of the validity, effectiveness, and enforceability of the arbitration agreement (part 3 of Article 22 of the ComPC of Ukraine, part 2 of Article 21 of the Civil Procedure Code of Ukraine).
>
> 9.42. At the same time, in deciding the question of deviation, the Grand Chamber of the Supreme Court takes into account that the conclusion of the Supreme Court of Ukraine was expressed regarding the existence of grounds for terminating the proceedings in an commercial case based on paragraph 5 of part 1 of Article 80 of the ComPC of Ukraine in the version effective up until 14.12.2017, while the conclusions in this case relate to the existence of grounds for leaving the claim without consideration under paragraph 7 of part 1 of Article 226 of the ComPC of Ukraine in the version effective from 15.12.2017. Thus, it concerns different procedural consequences under conditions of different legal regulations, although under similar grounds for the respective procedural actions in both cases.
>
> 9.43. Therefore, considering the dissimilarity of legal relations subject to different legal regulation in this case and in the case in which the Supreme Court of Ukraine formulated its conclusion, the Grand Chamber of the Supreme Court deems that there are no grounds to deviate from the conclusion of the Supreme Court of Ukraine set out in the resolution dated 18.10.2017 in case No. 910/8318/16."

This passage in my view reflects a reluctance overtly to overrule *Ukrnafta* rather than a ringing endorsement of it. Moreover, Mr Gryshko is clear in his evidence that the Supreme Court had already derogated from *Ukrnafta* in the cases I refer to in §§ 132 and 148.ix) above, and that by doing so it confirmed that the contractual dispute resolution mechanism *"shall be treated as conditions on which the right exists"* (2nd report § 210). I accept that evidence.

156. Mr Uvarov's view is that a third-party beneficiary is not bound by a jurisdiction clause to which it has not specifically consented, and (absent such consent) has *"no duty to refrain from bringing proceedings before any court other than the one determined in the choice of court agreement"*. Judge Kushnir's view is to similar effect. They set out a number of arguments against Mr Gryshko's reasoning.

157. First, Mr Uvarov points out that the statutory duties of insureds set out in the CC and the Insurance Law are not exhaustive, and maintains that a jurisdiction clause is a distinct agreement and imposes duties. Judge Kushnir expresses the same view. In his second report, Mr Uvarov states that *"[t]he court in case No. 910/21409/16 [Ferrosplav] did not find that the arbitration clause is a condition "on which the right exists", nor did it find that arbitration agreement does not give rise to any duties"*. Mr Uvarov also cites the statement in the Resolution of the Supreme Court in case No. 920/241/19 dated 3 March 2020 that:

> "An arbitration agreement has a positive and a negative effect: it obliges the parties to submit disputes to arbitration and to vest the arbitral tribunal with jurisdiction over disputes covered by the arbitration agreement (positive effect). If a dispute arises that falls within the scope of the arbitration agreement, any of the parties may refer it to the arbitral tribunal. On the other hand, the arbitration agreement prevents the parties from trying to resolve their disputes in court (negative effect)."

158. Such an analysis is familiar to an English lawyer too. However, it does not follow that an arbitration or jurisdiction clause operates only as a duty. It can also be regarded as a qualification on the rights conferred by the contract (including what would otherwise be the right to sue, or to sue in any court having jurisdiction), whether or not it is also regarded as a freestanding agreement. It is notable that the court in both Case 910/21409/16 (*Ferrosplav*) and in Case 910/11287/16, in holding that the assignee must proceed by way of arbitration, spoke not in terms of the imposition of duties on the assignee but, rather, in terms of the terms on which the right had been acquired (see §§ 132-134 above). Moreover, on Mr Gryshko's evidence (2nd report §§ 172 and 173), which Mr Uvarov does not (at least expressly) dispute in his responsive second report, the assignee in *Ferrosplav* acquired only rights. The logic of these decisions is that the assignee is bound by the arbitration clause because, in acquiring rights, it takes them "*in the scope and on the terms*" (or "*to the extent and on the conditions*") of the contract at the time of the assignment. In that sense, the arbitration clause is treated as qualifying the acquired rights; and Mr Gryshko's point is that the same logic applies to a jurisdiction clause.

159. Secondly, Mr Uvarov disputes Mr Gryshko's view that when a third-party beneficiary elects to exercise its rights, it steps into the shoes of the original contracting party as regards those rights, including the conditions under which they can be enforced. He maintains that a third-party beneficiary is not bound by *"any obligations or other terms"* to which they have not consented. He cites academic commentary to the effect that the third-party beneficiary acquires rights under the contract which are independent of those of the original creditor, rather than being transferred from him, and the original contracting party remains a party to the transaction. Mr Uvarov's explanation and the extracts he quotes do not, however, explain how the arrangement is said to operate. They do not address the commercial absurdity I discuss earlier, in the context of third-party insureds, of the third party taking the benefit of rights, without regard to any terms of which he was unaware or which did not expressly state that they applied to him, even if they clearly qualified the rights (such as limits of cover, exclusions, excesses, notification requirements or requirements as to the handling of losses and claims). Moreover, it is difficult to see how the fact (assuming it to be the fact) that the original

contracting party is not replaced (in the sense of being removed) affects the logic of Mr Gryshko's views. True it is that assignment pursuant to Article 514 may involve replacement of the original contracting party, but Mr Gryshko relies on assignment only as an analogy. The continuing presence of the original party means that that party remains liable to perform duties; it does not follow, though, that a third party claiming rights under the contract can do so without regard to the conditions or other limitations subject to which they are granted.

160. Thirdly, Mr Uvarov and Judge Kushnir dispute Mr Gryshko's suggestion that a third-party beneficiary which expresses its intention to exercise its rights thereby consents to all the components of such rights, including dispute resolution mechanisms. They revert to the notion that in order for a Claimant to be affected by an EJC, there would have to be, in substance, a fresh transaction between the Claimant and the reinsurer, with offer and acceptance and the use of written form. They note that a jurisdiction clause is generally regarded under Ukrainian law as a separate contract incorporated into the reinsurance contract. I do not find these contentions to be a persuasive answer to Mr Gryshko's point. Mr Uvarov and Judge Kushnir cite no cases directly in support of their contention, and in my view they miss Mr Gryshko's essential point. His point is not that the third-party beneficiary enters into a fresh transaction with the counterparty (here, the reinsurer). Rather, it has a right under the existing contract, but that right (likely many rights) is hedged about by restrictions and conditions. One of those conditions is the EJC. Further, the fact that an EJC can survive as a severable obligation does not logically detract from the fact that (like an arbitration agreement) it is also a term of the main contract which qualifies or conditions the rights which the main contract confers.

161. Mr Uvarov also cites a number of other cases said to bear on this topic. One such case is the Resolution of the High Commercial Court of Ukraine in case No. 34/154 dated 4 October 2011 (*Atem*). The claimant was a Ukrainian LLC, Atem, which had a contract for the purchase of certain equipment from a French supplier. To finance this contract, Atem entered into a loan agreement with a Ukrainian bank. The Ukrainian bank, in turn, entered into a Framework Agreement with a French bank as regards export financing of contracts between the French sellers and the Ukrainian buyers. The Framework Agreement provided that the French bank would disburse funds directly to the account of the French supplier. Thus, Mr Uvarov says, Atem was a 'beneficiary' under the Framework Agreement, because the Agreement provided for the French bank to make payment in discharge of Atem's own liabilities to the supplier.

162. Atem sought partially to invalidate the Framework Agreement in the Ukrainian court. The Framework Agreement contained an ICC arbitration clause and the Ukrainian bank sought to terminate the proceedings on this basis. All courts, including the High Commercial Court of Ukraine dismissed this plea concluding that:

> "claimant is not a party to the Framework Agreement and is not a party to the said arbitration agreement, which provide for rights and obligations of the respondents [the Ukrainian bank and the French bank] only".

163. Mr Uvarov states that, in the absence of any other case directly on point, *Atem* reflects the approach the Ukrainian court would take to the extension of an arbitration agreement to a third-party beneficiary.

164. I am unable to accept that evidence. Atem had a commercial interest in, and derived a commercial benefit from, the Framework Agreement but had no legal rights under it and was not seeking to exercise any such rights. As Mr Gryshko says, Atem was not a third-party beneficiary at all, and the dispute was (in the court's words) *"not related to its personal right"*. Atem was merely an interested party, of the kind contemplated by CC Article 215, which gives standing to the parties *"or another interested person"* to challenge a transaction's validity. The case is in my view of no assistance.

165. Mr Uvarov also cites, in his second report, a case not mentioned in his first report and which he explains he had only recently discovered. This is Case No. 824/181/1963 (*Galicia*), which arose from a Sales Contract between a US seller ("*Litco*") and a Ukrainian buyer ("*Galicia*"). The Sales Contract was governed by Californian law and contained an arbitration clause. Galicia failed to pay the price. Later, the parties entered into the Amendment to the Sales Contract in which Galicia (i) acknowledged the debt and (ii) was required to pay the debt to the third party New Alternative Oak LLC ("*New Alternative*"). New Alternative was not a party to the Sales Contract, and signed the Amendment merely as a "*Third Party*". The judgment indicates that there was an express agreement that New Alternative would <u>not</u> be bound by the arbitration clause:

> "In clause 3 of the Additional Agreement No. 2, the parties stipulated that all other terms and provisions of the Contract No. 07/2013 dated 08.07.2013 (including clause 10.2 regarding the arbitration clause) shall remain valid and binding <u>only</u> on the Seller and the Buyer, i.e. Litco Beverages and Galicia Distillery PJSC." (my emphasis)

166. Galicia later defaulted again. New Alternative commenced an arbitration and obtained an award against Galicia. The Kyiv Appellate Court and the Supreme Court concluded that the dispute between New Alternative and Galicia was not subject to the arbitration clause. The Kyiv Appellate Court in its ruling dated 9 December 2019 said:

> "Pursuant to clause 10.2 of the Contract, any dispute or claim arising out of or relating to the subject matter of this Contract shall be settled by binding arbitration to be held in Placerville, California, in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
>
> At the same time, the court has found that New Alternatives Oak Limited Liability Company is not a party to the Contract and, accordingly, is not a party to the arbitration agreement between Litco Beverages and Galicia Distillery PJSC.
>
> According to the Additional Agreement No. 2 to the Contract No. 07/2013 dated 03.06.2014, the parties agreed on the existence of the debt arising under the Contract in the amount of USD 707,279.77, as well as stipulated the duty of Galicia Distillery PJSC to pay the said amount for the benefit of New Alternatives Oak Limited Liability Company.
>
> In other words, in this way, the parties merely changed the procedure for making settlements by the debtor. In clause 3 of

> the Additional Agreement No. 2, the parties stipulated that all other terms and provisions of the Contract No. 07/2013 dated 08.07.2013 (including clause 10.2 regarding the arbitration clause) shall remain valid and binding only on the Seller and the Buyer, i.e. Litco Beverages and Galicia Distillery PJSC.
>
> At the same time, the status of New Alternatives Oak Limited Liability Company is defined in the said document as the "third person". The terms of the Additional Agreement No. 2 do not stipulate that the applicant acquires the rights and duties of the party (seller) under the Contract No. 07/2013 or that it is the legal successor of Litco Beverages with respect to all rights and duties of the seller arising from the said Contract.
>
> In such circumstances, since New Alternatives Oak Limited Liability Company is not a party to the Sales Contract No. 07/2013 dated 08.07.2013 concluded between Litco Beverages and Galicia Distillery PJSC, there are no grounds to consider that there is an arbitration agreement between Galicia Distillery PJSC and the applicant as regards settlement of disputes arising from the performance of the disputed Contract.
>
> The presence of an arbitration clause in clause 10.2 of the Contract No. 07/2013 dated 08.07.2013 indicates the will of Galicia Distillery to arbitrate disputes that may arise with Litco Beverages. The arbitration agreement does not contain the expression of will of Galicia Distillery PJSC to arbitrate disputes that may arise with New Alternatives Oak Limited Liability Company.
>
> The court cannot accept the applicant's arguments that the arbitration clause remains effective even in the event of a replacement of a party to the contract, referring to the court practice of the Supreme Court in similar legal relationships, since the judgements provided for comparison conclude that the effect of the arbitration clause is preserved in the event of assignment of the right of claim under the contract. However, in this case, the parties have not concluded a transaction regarding the assignment of the right of claim under the Sales Contract No. 07/2013 dated 08.07.2013, and the content of the Additional Agreement No. 2 dated 03.06.2014 does not indicate the replacement of the seller under the contract."

167. The Supreme Court upheld the decision, also making reference to clause 3 of the Additional Agreement, and agreeing that there was no relevant arbitration agreement between Galicia and New Alternative and no assignment.

168. Mr Uvarov suggests that New Alternative would under Ukrainian law have been regarded as a third-party beneficiary, and says the paragraph quoted above shows that rules applicable to assignments are significantly different from those relating to third-party beneficiaries.

169. However, the contract involved was governed by Californian law, not Ukrainian law, and contained an express agreement that the arbitration clause did not apply to New Alternative. In those circumstances, it cannot be regarded as providing any real guidance on the position of a third-party beneficiary under a contract governed by Ukrainian law and not containing any express disapplication of the arbitration clause to the third-party beneficiary. I would also note that it is unclear how the statement that *"[t]he arbitration agreement does not contain the expression of will of Galicia Distillery PJSC to arbitrate disputes that may arise with New Alternatives Oak Limited Liability Company"* can be reconciled with the statement of the Commercial Cassation Court of the Supreme Court in Case 910/11287/16, quoted in § 134 above, that *"the contractual dispute resolution procedure between the debtor and the creditor … is not inextricably linked to the identity of the previous creditor, corresponds to the debtor's will, and allows for the debtor to choose the method of protecting its interests"*.

170. Mr Uvarov refers to findings in the Country Report for Ukraine on local requirements for the extension of an arbitration clause to, and enforcement of an arbitral award against, a non-signatory, dated 12 November 2021, prepared by the Subcommittee on Recognition and Enforcement of Arbitral Awards of the IBA Arbitration Committee ("***the IBA Report***"):

    i) With regard to the relevant provisions of Ukrainian law, the IBA Report generally observes: "*Under the Ukrainian legislation, extension of an arbitration agreement to non-signatories is only possible through incorporation by reference and/or assignment. … Other than that, there is nothing in the Ukrainian legislation that in general permits the extension of an arbitration clause to non-signatories*".

    ii) With regard to the relevant court practice, the IBA Report provides examples of cases that dealt with assignment of a contract or incorporation of arbitration agreement by reference. However, it notes: "*Apart from that, the Ukrainian courts take a formalistic approach and interpret legislation quite literally, while being reluctant to apply legal theories not provided for in the legislation*".

    iii) In response to the specific question whether an arbitration clause can commit a non-signatory third-party beneficiary of a contract to international arbitration, the IBA Report says "*No*". It further explains that "*Ukrainian legislation and jurisprudence do not provide for committing a non-signatory third-party beneficiary of a contract to international arbitration*".

171. Mr Uvarov states that he agrees with these statements in the IBA Report and believes they apply equally to jurisdiction agreements. However, as Mr Gryshko points out, the IBA analysis is limited to considering whether there is any legislative provision or jurisprudence providing for the extension of an arbitration agreement to "*non-signatories*". It does not consider the concept of consent more generally and does not claim that arbitration agreements cannot be extended to third-party beneficiaries in principle (in circumstances where there is to date no case directly on point). The IBA Report is in any event not an authority but a guide, prepared in relevant part by one Ukrainian law firm partner and one associate. I further note that the report also includes the following statement:

> "Ukrainian legislation and jurisprudence do not provide for committing a non-signatory third-party to international arbitration through piercing of the corporate veil or the alter ego doctrine."
>
> (my emphasis)

That statement may be contrasted with the subsequent Order of the Commercial Cassation Court of the Supreme Court in *Grain Power* last year, quoted earlier:

> "The panel of judges notes that the issue of extending the validity of the arbitration clause to persons who did not sign it is quite difficult and extremely relevant today. Thus, as a general rule, an arbitration agreement, like other agreements, is binding only for its parties. However, in some cases, third parties who did not actually sign the arbitration agreement may be bound by it and be able to directly invoke it (for example, but not limited to, assignment, including singular, the "group of companies" doctrine, the "alter ego", the doctrine of "piercing the corporate veil" (piercing the corporate veil))."

Viewed in the light of that statement, the contents of the IBA Report can properly be regarded as reflecting the older formalistic attitude to this topic rather than the Ukrainian courts' more modern approach.

172. Mr Uvarov and Judge Kushnir take issue with Mr Gryshko's reliance on a statement in Case No. 398/1113/18 (*Person 1 v Universalna*) (see § 148.viii) above) as supporting the view that the right vested in a third-party beneficiary is the same right which the original creditors enjoyed and is subject to the same conditions. Mr Uvarov points out that the passage Mr Gryshko quotes is merely a paraphrase of Article 636(4) of the CC ("*If a third party waived the right granted to him on the basis of the contract, the party that entered into the contract for the benefit of a third party may invoke this right himself, unless otherwise follows from the essence of the contract*"); and that the issue about conditional rights did not arise in the case. The case concerned a car insurance where a bank (which held a pledge over the car as security for the loan used to purchase it) was designated as a beneficiary of the policy. The car was damaged in a traffic accident and the car owner (contracting party insured) sued the insurer. The Supreme Court dismissed the claim, first of all, by reason of a policy exclusion, as the owner had been using winter tyres in spring/summer.

173. However, the court also addressed an argument to the effect that only the bank, as beneficiary, could bring the claim, rather than the contracting party insured, because the bank had not waived its rights (this being the context in which the Supreme Court referred to Article 636(4)). The court did not accept that argument, saying:

> "Pursuant to part one of Article 636 of the Civil Code of Ukraine, a contract for the benefit of a third party is a contract in which the obligor is obliged to fulfil his obligation for the benefit of a third party, which is established or not established in the contract.

The possibility of concluding insurance contracts in favour of third parties is provided for in Article 985 of the Civil Code of Ukraine, according to which the insured has the right to conclude with the insurer a contract for the benefit of a third party, to whom the insurer is obliged to make an insurance payment in the event of reaching a certain age or the occurrence of another insured event. When concluding an insurance contract, the insured has the right to appoint a natural person or a legal entity to receive the insurance payment (beneficiary), as well as to replace it before the occurrence of an insured event, unless otherwise established by the insurance contract. The specifics of concluding an insurance contract for the benefit of a third party are determined by law.

Pursuant to part two of Article 3 of the Law of Ukraine "On Insurance", insureds may enter into contracts with insurers for the insurance of third parties (insured persons) only with their consent, except for cases provided for by current legislation. Insured persons may acquire the rights and duties of the insured under the insurance contract.

Pursuant to parts two and four of Article 636 of the Civil Code of Ukraine, performance of a contract for the benefit of a third party can be demanded both by the person who concluded the contract and by the third party for whose benefit performance is provided, unless otherwise established by the contract or the law or follows from the essence of the contract.

If a third party waived the right granted to him on the basis of the contract, the party that entered into the contract for the benefit of a third party may invoke this right himself, unless otherwise follows from the essence of the contract.

The resolutions of the Supreme Court of Ukraine in case No. 591/3429/15-ts dated April 17, 2019, in case No. 910/18954/17 dated November 13, 2018, and the resolution of the Supreme Court of Ukraine in case No. 6-2112ts16 dated June 14, 2017, conclude that if the beneficiary waives the right granted to it under the contract, the party that entered into the contract in favour of a third party may exercise this right itself, in which case the beneficiary will be a third party to the case, otherwise the beneficiary should be the proper claimant.

[…]

However, we cannot agree with this conclusion of the courts, since PJSC Ukrsotsbank, as the beneficiary, failed to file a claim for payment of insurance indemnity to PJSC "Insurance Contract Universalna" within the time limit stipulated by the agreement. In other words, the courts did not take into account that the bank,

> as the beneficiary, did not exercise its right to receive insurance payments."

174. It is implicit in the statement in the last paragraph quoted above that, in order to exercise its right to claim under the policy, the bank would have had to comply with the policy time limit for claims. That was, in substance, a condition attached to the right of the bank, albeit it was only a third party, to recover under the policy. In my view the case does, therefore, support Mr Gryshko's point that a third party takes rights subject to any conditions that may attach to them: even if those conditions could also be framed as duties: here, a duty to present any claim within a certain time. Whilst they both seek to dismiss the case as irrelevant, neither Mr Uvarov nor Judge Kushnir addresses this aspect of the case.

175. Viewing the matter in the round, I find Mr Gryshko's approach the more cogent one, for the reasons given above. I do not accept the submission made on behalf of the Claimants that Mr Gryshko's opinion sets out a novel theory not representing the current law of Ukraine. It is common ground between the experts that there is no authority directly on point. However, Mr Gryshko's approach in my view is more consistent with the approach underlying the preponderance of the cases, and reflects the conclusion that the courts of Ukraine would be likely to reach on these issues.

176. I therefore conclude that the Defendants have the better of the argument, on the evidence, that the Claimants are bound by the EJCs insofar as they claim pursuant to the CTCs or on other bases that Ukrainian law would classify as claims by third-party beneficiaries.

177. Finally, if and to the extent that it might matter, I would conclude that the Claimants have consented to the EJCs, for reasons somewhat similar to those set out in § 143(i)-(iii) above in relation to third party insureds:

    i) The Claimants required the lessees to place insurance and, where appropriate, reinsurance, stipulating certain requirements but leaving other matters to the lessees or their insurers (and their respective brokers), including the contents of any jurisdiction clause. The Claimants had the right to ensure that the insurance/reinsurance was "*satisfactory*" to them, but elected neither to find out on what terms they had been placed or to require insurance/reinsurance on any terms other than those in fact put in place. The Claimants thereby consented to the placement of the insurances and reinsurances in which they were (on their case) third party beneficiaries, and to the terms of such insurances/reinsurances.

    ii) In the case of the Hausfeld Claims, the claimants are or include the lessees who themselves obtained or procured the insurance and reinsurance in question. There can be no question that they consented to the terms of the policies. Indeed, in the Overstar Claim, not only the reinsurance policy but also the insurance policy (which Overstar itself executed) both contain Ukrainian EJCs.

    iii) In any event, by choosing to exercise rights now as third party beneficiaries, the Claimants have consented to all the components of such rights, including dispute resolution: see § 148.v) above.

(f) Collateral contract claims

178. In addition to the bases of claim discussed above, Genesis seeks to claim pursuant to a collateral contract said to have been contained and/or evidenced in the UIB Certificate (issued in accordance with a very long standing and well-known market practice) securing Genesis's interests as the identified lessor and owner of the Aircraft; and that that collateral contract was not subject to the EJC in the underlying reinsurance contract between the reinsurer and the Ukrainian insurer. Genesis contends that the collateral contract is governed by English law.

179. Genesis suggests that, at trial, expert evidence would be required to explore the collateral contract issues further. However, for present purposes it refers to certain published texts as indicating the relevant market practice and understanding.

180. These include an Aviation Working Group ("***AWG***") Memorandum on Aviation Insurance Financing and Leasing, July 2010, which includes a short historical description of the insurance of aircraft lessors' and financiers' insurable interests in 2010, albeit aimed at direct aviation insurances by London Market insurers rather than reinsurance. (Genesis says the developing practice of London Market reinsurance of foreign local insurer "*fronts*" is not the subject of comment in the Memorandum.) The AWG Memorandum refers to the shift to leasing and financing as the means for airlines to acquire aircraft, and the essential commercial purpose of securing the lessors' insurable interests. In that context, it explains the introduction of the London Market Airline Lease Finance Endorsements AVN67, AVN67A in 1991 and AVN67B in 1994 and the direct claims they afforded lessors/financiers against insurers. A key reason for the introduction of AVN67/A/B was to relieve underwriters, brokers and lessors of the administrative burden of the back-and-forth communications constituting the offer and acceptance of the terms of insurance of lessors' interests, which had become unacceptable (§ 13). The new clauses aimed:

> " … to simplify and streamline the process and introduce a standard form of endorsement which would be instantly available for use with aircraft financing and leasing, while clarifying the extent of the cover that they were prepared to provide to financiers and lessors." (§ 14)

The intention was not to undermine the lessors' interests, but to simplify and streamline the process of securing insurance of those interests. The AWG Memorandum said it was intended that AVN67B would insulate a Contract Party from any acts or omissions, including, any misrepresentation or non-disclosure, of the primary insured both prior to inception and during the policy.

181. The Memorandum summarised the later stages of the process as involving the following steps, taken after the broker and insured were satisfied that the insurance cover was sufficient bearing in mind the requirements of the aircraft lease:

> "28. …
>
> - The lease/finance parties will then review and either approve or advise of its required amendments to the draft certificate of (re)insurance. Discussions will normally centre on

ensuring that the relevant contract details and contract parties are correct.

- Once the draft certificate of (re)insurance is in final agreed form, the insurance broker will prepare the AVN67B endorsement document and present this to the lead insurer for approval. A copy of the finance/lease contract itself is not normally provided.

- Once the AVN67B endorsement has been approved and stamped by the lead insurer, the insurance broker will sign and issue the final certificate of (re)insurance incorporating the AVN67B endorsement.

29. In some cases, it is possible for certificates of (re)insurance to be issued by the insurance broker without obtaining the prior approval and stamp of the insurer (within certain parameters).

30. Whether such delegation of authority is provided to the insurance broker depends on the relationship between the insurer and insurance broker. The delegation is normally agreed at the time of inception of the policy and will be evidenced in writing as part of the slip wording. A number of large insurance brokers have obtained this delegation, including Marsh Ltd and Willis Limited."

182. Genesis also refers to "*Aviation Insurance: A Plane Man's Guide*", 2nd edn., 2012, P. Viccars FRAeS. Mr Viccars was an aviation broker for 30 years and was instrumental in the introduction of AVN67B. His book recognised the developing phenomenon of aviation risks coming to the London Aviation Insurance Market as reinsurance of foreign local 'fronting' companies, rather than as direct insurance, leading to the use of reinsurance CTCs to secure the insurable interest of lessors. Viccars stated that a CTC, agreed by the domestic insurer and its reinsurers, was used to provide that hull claims are paid by the reinsurers direct to the loss payee nominated under the policy issued by the domestic insurer(s). He referred to the London Market wording AVN109 introduced in 2009:

"CUT THROUGH ENDORSEMENT

The Reinsurers hereby agree, at the request and with the agreement of the Reinsured, that if a valid hull or aircraft spares claim arises hereunder the Reinsurers shall pay to the order of the party(/ies) entitled to indemnity under the original insurance effected by the Insured that portion of any loss which the Reinsurers would otherwise be liable to pay to the Reinsured, subject to the following provisions:

(1) such loss payment shall be in lieu of payment to the Reinsured or its successors in interest and assigns, and shall fully discharge and release the Reinsurers from any and all liability in

connection with such a claim under the hull and aircraft spares insurances;

(2) such loss payment shall be made notwithstanding non-payment of the Reinsured's portion under the original insurance;

(3) the Reinsurers reserve the right to set off against such payment any outstanding premiums due on the subject hull or aircraft spares;

(4) if the Reinsured is declared insolvent, bankrupt, in liquidation, in dissolution or in administration by a court of competent jurisdiction to which the Reinsured is subject, the Reinsurers shall only be obliged to make payment under this Endorsement if the court consents to such payment and confirms that such payment fully discharges and releases Reinsurers from further liability in relation to such a claim under the hull or aircraft spares insurances, such consent and confirmation being in a form satisfactory to the Reinsurers. The Reinsurers shall take reasonable steps to obtain such consent and confirmation at Reinsurers' cost. If there is a dispute as to such matters, then the Reinsurers' liability shall be determined by such court at Reinsurers' cost, prior to payment;

(5) Reinsurers shall not be obliged to make a payment under this Endorsement if such payment would contravene the laws of the jurisdiction to which the Reinsured is subject. The Reinsurers and the Reinsured shall each take all reasonable steps at their own cost to obtain any necessary governmental consent or licence in order to permit such payment to be lawfully made." (Viccars, p. 96)

183. As to certificates of insurance, Viccars stated:

"It is important that the Contract Party(ies) receives evidence of insurance and, in particular, the protections afforded to them in respect of the lease (see Section 4.5). This is normally achieved by means of a Broker's Certificate of Insurance. The format of this may vary according to the firm that issues it, but it should conform to a standard approach, ie a recital of the basic coverages arranged and limits etc applicable thereunder, followed by confirmation of the AVN 67B coverage and the various defined terms." (p. 120)

"In the absence of seeing the policy, the lessor or financier is wholly dependent upon the accuracy of the certificate to verify that the insurance provisions of the agreement have been complied with. At Insurers' insistence, all certificates are normally qualified *"subject to the policy terms, conditions, limitations and exclusions*". This is to indicate that all other

general terms and conditions of the policy have not been varied."
(p. 92)

184. Viccars quoted a "*typical example of a Certificate of Insurance*", similar to the UIB Certificate in the present case (albeit the latter is a certificate of reinsurance, not insurance) which, like the UIB Certificate, contained no reference to any choice of law jurisdiction clause. Viccars also referred to the market practice of "*Letters of Undertaking*" being given by the brokers (p. 92).

185. Genesis's essential submissions, so far as relevant to the present applications, may be summarised as follows.

i) In the light of the context outlined above, the UIB Certificate (issued in accordance with a very long standing and well-known market practice) contained and/or evidenced a collateral contract securing Genesis interests as the identified lessor and owner of the Aircraft.

ii) There is an unambiguous binding "*agreed*" promise by reinsurers to Genesis in the CTC contained in the UIB Certificate that, in the event of any valid claim arising, "*Reinsurers shall in lieu of payment to the Reinsured… pay to the person(s) named as Contract Parties under the original insurance… that portion of any loss for which the Reinsurers would otherwise be liable to pay to the Reinsured (subject to proof of loss)…"*. The word "*shall*" describes an obligation assumed by the reinsurers. It is a promise both (a) to pay to the Contract Parties (i.e. Genesis or its financier nominees as loss payees) and (b) not to pay the money away to the reinsured in a foreign country.

iii) The CTC is set out only in the UIB Certificate, and not in the Slips. The All Risks Slip states "*Cut-through Clause automatically included hereunder as per expiring policy or to be agreed Slip Leader only*." The War Risks Slip states "*Cut-through Clause automatically included hereunder as per Hull and Spares Risk Policy*". It is reasonably to be inferred that the reinsurers authorised the offer to Genesis of the CTC in the form contained in the UIB Certificate either because it was in the expiring policy or because the brokers obtained the specific approval of AIG UK (as All Risks Slip leader), between the time when AIG UK put its line down on 27 May 2021 and the issue of the UIB Certificate on 4 June 2021. In any event, in the case of Genesis, it is the UIB Certificate (addressed to Genesis) which appears to contain the CTC.

iv) The CTC appears to be a modified version of AVN109. The first sentence in AVN109 has been altered to delete the following words: "*The Reinsurers hereby agree, ~~at the request and with the agreement of the Reinsured~~, that if…"*. That deletion was clearly designed to indicate that the intended contracting counterparties in respect of the Cut-Through promise were not (or, at least, were not limited to) the reinsureds but included Genesis (as the party with the real commercial interest in the promise). Even without that deletion, Genesis was the obvious intended counterparty who would rely on and benefit from the promise.

v) Whilst the first promise is about payment, the CTC goes further to protect the lessor. It affords the independent right to the lessor to establish the validity of

the claim even (or especially) in circumstances where the reinsured cannot or will not. It operates expressly in circumstances where the reinsured would be disabled from making the claim because of insolvency or even where the reinsured has been dissolved: "*Payment shall be made under this Reinsurance notwithstanding (i) any bankruptcy, insolvency, liquidation or dissolution of the Reinsured…*" These words are different from those contained in AVN109. In such circumstances, it falls to the lessor to establish the validity of the claim, and it must also have that right. Genesis says that that right exists whether or not the reinsured is disabled ("*notwithstanding*"). It would apply, for example, where the reinsured has no motive to claim. Under AVN41A, the reinsurers have claims control in any event.

vi) Probably for this reason, the following words have been added immediately below the CTC in the UIB Certificate incorporating the reinsurance coverage terms:

> "Subject to the policy coverage, terms, conditions, limitations and exclusions."

Genesis says those words incorporating the reinsurance policy coverage terms into the Cut-Through promise make sense only if Genesis has an independent right to establish the validity of the claim for the purpose of the CTC. They would not be necessary if Genesis's right were limited to receiving payment in the event that the reinsured had separately established coverage under the reinsurance.

vii) Those general words are obviously not sufficient to incorporate any jurisdiction clause (of which Genesis was unaware in any event) and would not have been sufficient even if they had not been limited to "*coverage*" terms (see e.g. in the reinsurance context, *Prifti v Musini* [2004] 1 CLC 517 § 17; and, in other contexts, *Dornoch v Mauritius Union Co* [2006] EWCA Civ 389 and *Herculito Maritime v Gunvor International (The "Polar")* [2024] UKSC 2). There was nothing in this provision to put Genesis on notice that London reinsurers were excluding their home jurisdiction, especially in respect of Genesis's direct claims against reinsurers under the CTC.

viii) In the absence of any express choice of law, the proper law of the collateral contract on the terms of the CTC, affording Genesis a direct claim against reinsurers, is English law as the law with the closest connection. The relevant factors include the fact that the Cut Through promise (a) was made by London reinsurers in England, (b) was written in English, and (c) was contained in a certificate containing London Market wordings issued in London by London placing brokers, where (d) the essential promise (of payment) would be performed in London according to London Market practice and (e) claims control resides with London reinsurers, not the foreign reinsured. The obvious place to enforce that promise by way of court proceedings would be in London against the reinsurers and (probably) the London brokers.

ix) It is not necessary to determine now what law applies to the particular question of coverage for the purposes of establishment by Genesis of the validity of the underlying reinsurance claim where Genesis exercises that right under the CTC.

> Whilst Genesis reserves its position for the future, it is prepared to concede for the purposes of the present applications that the Defendants have a good arguable case that the words of incorporation of "*coverage*" terms into the CTC in the UIB Certificate incorporate the law chosen in the reinsurance so far as it regulates the coverage terms of the reinsurance.

x) It is the UIB Certificate that is the source of the collateral contract, not the LOU. They have different fields of application. The LOU is more in the form of a secondary incomplete security for the promises made by reinsurers. The main significance of the LOU is its implicit acknowledgment of the direct right of lessors such as Genesis to enforce the payment obligations under the CTC, allowing them to take action against the brokers (as well as against reinsurers) if there is a threat not to comply with the Clause or to make a payment to someone other than Genesis or its nominated loss payee.

186. Genesis submits that the collateral contract analysis is consistent with the real commercial considerations in its case. The real end customer for the insurance of the full value of the hull (generating the hull premia) was Genesis as lessor and owner, as everyone must have been aware. The collateral contract is the means by which the London Market gave, and Genesis received, reliable security for its insurable interests by way of its direct claims against the Defendant reinsurers. Genesis also cites a recent law journal article written by two experienced aviation finance lawyers "*Cut-Through Clauses in Aviation Insurance and Reinsurance Policies*", Beale & Graham-Evans, Air & Space Law (2022) 47, No. 1, which adopts the collateral contract analysis as a means of directly enforcing the reinsurance cut-through clause in AVN109:

> "Similarly, 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." (p.69)

187. It is not necessary to decide, for the purposes of the present application, whether Genesis is entitled to claim under a collateral contract of this kind. It is necessary only to decide whether the Defendants have the better of the argument that Genesis is not entitled to claim under a collateral contract that excludes the terms of the EJC. In my view they do.

188. First, the UIB Certificate is not expressed to contain or evidence a freestanding contractual agreement between the reinsurers and Genesis. It is addressed to *"To Whom It May Concern"* and includes a *"Description of Coverage"* that states *"Subject to the coverage, terms, conditions, limitations, exclusion, excesses and cancellation provisions of the relative policy(ies)".* It reads more naturally as a confirmation summarising terms of the underlying cover than a contractual document in itself. The "*subject to*" wording makes clear that the Certificate itself does not set out all the terms of the reinsurance cover.

189. Page 7 of the Certificate states that reinsurers *"have noted"* that the original assured has entered into a lease/finance contract in respect of the aircraft *"detailed the Schedule*

of Identifying Terms attached", and that reinsurers note that endorsement AVN67B has been included in the original policy. Then, as noted earlier, the Schedule of Identifying Terms lists as "*Contract Party(ies)*" a Deutsche Bank entity *"as sole loss payee",* Genesis Ireland Aviation Trading 3 (as Lessor and Owner) and Genesis Funding Limited (as Owner Participant); and lists under the heading *"Contract(s)"* the lease and the financing documents to which they are parties. However, all of that remains consistent with the Certificate itself being a document confirming the existence of arrangements contained in or evidenced by other documents.

190. Secondly, more specifically, the CTC wording set out in the Certificate is itself expressly stated to be *"Subject to the policy coverage, terms, conditions, limitation and exclusions"*. Again, that proviso suggests that the Certificate is summarising a CTC to be found in the policy documentation, rather than itself containing or evidencing a freestanding CTC.

191. Thirdly, I would not accept Genesis's suggestion that the CTC is contained only in the Certificate and not in the slip. The slip wording quoted in § 185.iii) above plainly incorporates the CTC into the reinsurance contract.

192. Fourthly, the UIB Certificate is expressed to be issued by UIB *"in our capacity as Reinsurance Brokers to PJSC INSURANCE COMPANY UNIVERSALNA in respect of certain insurance policies issued by them to the Original Insured".* It does not purport to be issued as agent for the reinsurers.

193. Fifthly, the Defendants' evidence is that the reinsurers did not see or approve the UIB Certificate. The Defendants further deny the market practice that Genesis alleges.

194. Sixthly, I do not accept Genesis's submission (in its Reply Note § 10(3)) that it is at odds with the obvious commercial purpose of a CTC to deny that the Certificate contains a direct promise by the reinsurer to the lessor. The question of whether the lessor has a direct right against the reinsurer, for example as a third party on whom the reinsurance contract confers a benefit, will be a matter for trial. The question for present purposes is the strength of the case that there is/is not a direct contract (a) contained in or evidenced by the Certificate and (b) which does not contain the EJC.

195. Seventhly, even if the Certificate did contain or evidence a contractual promise, it would be one that is, as indicated in the *"Description of Coverage", "[s]ubject to the coverage, terms, conditions, limitations, exclusion, excesses and cancellation provisions of the relative policy(ies)".*

196. Eighthly, the same applies to the CTC, since it is expressed to be *"Subject to the policy coverage, terms, conditions, limitation and exclusions"*.

197. Ninthly, I find unpersuasive Genesis's suggestion that the 'subject to' wording in the Description of Cover and CTC wording should be construed as referring only to the "*coverage terms*", "*coverage conditions*" and so on. That suggestion ignores the comma which appears after "*coverage*" in both cases, indicating that *"coverage"* forms part of the list rather than qualifying all the ensuing words. In addition, it would make little sense to speak of, for example, *"coverage excesses"* or *"coverage cancellation provisions"*. Moreover, there is no apparent commercial reason why the Certificate should refer to terms and conditions relating to *"coverage"* (whatever that might

include) yet not any of the other provisions which qualify or delimit the terms of the reinsurance.

198. Tenthly, the policy terms, conditions and limitations referred to in both clauses of the Certificate are wide enough to cover the EJC. I do not agree that *Prifti v. Musini* [2003] EWHC 2796 (Comm) provides a good analogy, essentially for the reasons given by the Defendants. In that case, which was decided under Community law, it was held that the parties to a reinsurance slip contract had not reached a consensus that an ancillary jurisdiction clause contained in the underlying insurance policy was incorporated into the reinsurance slip which included wording 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*". The question was thus whether a jurisdiction clause in an underlying contract of insurance could be incorporated into a contract of reinsurance by that wording. Here, on the other hand, the Certificate refers to the provisions of the reinsurance contract, and makes clear that it is 'subject to' all of the terms and conditions of that same reinsurance contract. Conversely, *The "Polar"* concerned the special case of a bill of lading, which among other things can serve as a negotiable instrument; and *Dornoch* was decided as a matter of the construction of the particular policy terms.

199. That view is also consistent with the Viccars work Genesis relies on, which (as quoted above) states that *"At Insurers' insistence, all certificates are normally qualified "subject to the policy terms, conditions, limitations and exclusions". This is to indicate that all other general terms and conditions of the policy have not been varied"* (my emphasis). That accords with what one would naturally expect. It would be surprising if, having entered into a written contract containing carefully delineated terms – including law and jurisdiction as well as excesses, limitations, exclusions, conditions and so on – the reinsurer were held to have bound itself to a contract with the aircraft lessor on terms which leave out material parts of those provisions.

200. Moreover, Genesis is prepared to accept, for the purposes of the present applications, that the incorporation of what it calls *"coverage terms"* is effective to incorporate the choice of Ukrainian law provision of the reinsurance contracts *"so far as it regulates the coverage terms of the reinsurance"*, leaving the Certificate as a whole governed by English law. Genesis says:

> "There is no difficulty in principle in the direct claims under the collateral contract being subject to English law on the one hand, whilst another law applies specifically to interpretation of the wordings regulating loss coverage on the other hand."

201. It is not surprising that Genesis feels constrained to make that concession: it would be absurd if the reinsurer, having agreed to a written contract expressly under one system of law, were found to be bound by the same text as construed under a different system of law (not least, though not only, because obligations vis-à-vis the Ukrainian insurer would be subject to Ukrainian law, but its obligations arising from the very same provisions would be subject to English law vis-à-vis the lessor). However, it is equally absurd to suggest that the governing law provision applies to only some of the provisions of the reinsurance. Genesis seeks to reconcile this to the language of the Certificate by using the strained construction to which I refer in § 197 above, which I would not accept. The problem then is why, if the governing law clause applies to the

alleged collateral contract, the EJC does not also apply. I see no rational basis for drawing a distinction, either in the language of the Certificate or in its purpose. A jurisdiction clause often goes hand in hand with a choice of law provision, conferring the task of applying the chosen law to the courts whose home law it is.

202. Eleventhly, on Genesis's case the Certificate is governed by English law, apart from the coverage provisions. On that footing, it is appropriate to construe the Certificate in the light of English law principles. Those principles include the conditional benefit principle, under which 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 §§ 85-97; *The Jay Bola* [1997] 2 Lloyd's Rep 279, 286; *The Prestige* [2015] 2 Lloyd's Rep. 33 §§ 10-16; *Aspen Underwriting Ltd and others v Credit Europe Bank NV* [2020] UKSC 11, §§ 26-27). As I noted in *Russian Aircraft Operator Policy Claims (Jurisdiction Applications)* § 554, it seems counter-intuitive to think that Genesis could be entitled to make claims which in substance amount to claims to entitlements arising by reason of the reinsurance contracts (albeit, on its case, not under those policies), yet could advance such claims without reference to the dispute resolution mechanisms contained in the contracts.

203. Twelfthly, Genesis's primary case is that it is a party to the reinsurance contracts. If it is, then as a matter of construction the Defendants have a good arguable case that the EJCs are wide enough to cover Genesis's collateral claims in any event. The EJC in the Genesis slip applies *"in the event of a dispute arising hereunder".* Under English law, jurisdiction agreements should be broadly construed according to a presumption that rational parties intend all questions arising out of their legal relationship to be determined in the same forum so as to capture all parties' related claims (*Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 §§ 6 and 7). The alleged collateral contract claims are based on the same facts as the claims brought under the reinsurance contracts themselves (by the third party beneficiary route), and are intricately connected with it since the alleged collateral contract is said largely to mirror the reinsurance contract.

204. For completeness, I mention a further point raised, at least in oral submissions, about the relative timing of the issues of the Certificate and the writing of lines on the slip. The Defendants submitted that the Certificate came after the reinsurance had been placed. Genesis stated that by the time the Certificate was issued, only the leader (AIG UK) had scratched the All Risks slip and no line had yet been subscribed to the War Risks slip. Genesis submits that that supports its case about market practice. It is unclear whether Genesis thereby suggests that would-be reinsurers can be bound by a collateral contract on the terms of a Certificate before they have even subscribed the slip: that would seem surprising. In any event, even if the Certificate is issued before lines are subscribed, I do not consider that that affects the analysis set out above. The relationship between the Certificate and the reinsurance contracts remains as I have indicated; or, at the very least, the Defendants have the better of the argument to that effect.

205. Finally, and in any event, even if the Defendants did not have the better of the argument that Genesis's collateral contract claim falls within the EJCs, it does not follow that parallel proceedings need or should take place in Ukraine and in England, giving rise to a multiplicity of proceedings and a risk of inconsistent judgments. The collateral claim could be stayed pending the outcome of Genesis's other claims (cf *Sodzawiczny*

v. Ruhan [2018] EWHC 1908 (Comm) § 44). Although such case management stays are rarely granted (*Pacific International Sports Club Ltd v Surkis* [2009] EWHC 1839 (Ch) § 114 citing *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173, 186C), this would be an appropriate case for such a stay.

206. For the reasons set out above, the Defendants have the better of the argument that Genesis's collateral contract claim is subject to the EJC.

(5) Construction of the jurisdiction clauses

207. The Claimants submit that even if the EJCs bind them, as a matter of construction they do not apply to disputes between them and the Defendants.

208. It is common ground that the Ukrainian law principles on the interpretation of contracts are set out in CC Article 213:

> "**Article 213. Interpretation of the content of a transaction**
>
> 1. The content of a transaction may be interpreted by the party (parties).
>
> 2. At the request of one or both parties, the court may issue a decision on the interpretation of the content of a transaction.
>
> 3. When interpreting the content of a transaction, the meaning of words and concepts, which are the same for the entire content of the transaction, as well as the generally accepted meaning of terms in the relevant sphere of relations, are taken into account.
>
> If literal meaning of words and concepts, as well as the generally accepted meaning of terms in the relevant sphere of relations, does not make it possible to clarify the meaning of individual parts of the transaction, their meaning is established by comparing the relevant part of the transaction with the content of its other parts, all its content, the intentions of the parties.
>
> 4. If, according to the rules established by part three of this article, it is not possible to determine the true will of the person who entered into the transaction, the purpose of the transaction, the content of previous negotiations, the established practice of relations between the parties, business customs, subsequent behaviour of the parties, the text of a standard contract and other relevant circumstances are taken into account."

209. The EJC in AerCap's reinsurance, for example, provides:

> "This Insurance shall be governed by and construed in accordance with the law of the country of domicile of the Insured as specified in the ADDRESS section of this Contract, and each party agrees to submit to the exclusive jurisdiction of the Courts of the country of domicile of the Insured in any dispute hereunder."

210. AerCap submits that, adopting the required textual approach, the clause does not cover disputes between the reinsurers and a third party such as AerCap.

i) The EJC provides that "*each party*" agrees to submit to certain courts "*in any dispute hereunder*" (viz. *"[t]his Insurance*" as referred to in the opening words of the clause). On a literal reading of those words, the clause is limited to providing that each party to the reinsurance agrees to submit to the specified jurisdiction. In the context of the reinsurance of Universalna and Busin, that means the insurers and the reinsurers. AerCap is not a "*party*" to the reinsurance (it is claiming as a third party whether under AVB 67B or pursuant to the CTC) and it therefore does not fall within the scope of the EJC.

ii) That literal reading is supported by the generally accepted meaning of the terms in the context of insurance contracts. It is common ground between the experts that under Ukrainian law there is a distinction between a "*party*" to an insurance contract and third-parties who are not parties to the insurance.

iii) Accordingly, where the EJC refers to "*each party*" it is referring only to the original contracting parties as that term is understood in Ukrainian insurance law (i.e. *strakhuvalnyyk*). It does not refer to AerCap, whether claiming as a third party beneficiary or even as a third party insured.

iv) As it is possible to ascertain the meaning of the EJC by considering the literal meaning of the words and the generally accepted meaning of terms in the relevant sphere of relations, it is not necessary or permissible to resort to any of the other methods of interpretation identified in Article 213, such as the purpose of the transaction or other circumstances.

211. I disagree. The term "*party*" as used in the EJC is general, and not expressly limited to contracting parties. It is capable of extending to persons claiming rights under the contract as third-party insureds or third-party beneficiaries. At the very least, the contractual language does not clearly point to the result AerCap proposes, and it is proper to have regard to the wider context. The question of construction arises on the footing that AerCap is bound by the EJC as a condition of the exercise of its rights under a commercial contract. It would be absurd in those circumstances for AerCap nonetheless to escape its consequences by virtue of a literalist and entirely uncommercial reading of the EJC.

212. Moreover, AerCap's approach would mean, for example, that an assignee would not benefit from or be bound by any provisions of a contract that happened to refer to the original contracting parties by name. It is also hard to reconcile with the outcome of *Grain Power*, where the arbitration clause made repeated reference to the term "parties":

> "In the circumstances of this case, the Seller and the Buyer entered into a Contract, the terms of which specifically stipulate that any disputes arising from or within the scope of this Contract are subject to resolution through arbitration in accordance with GAFTA Arbitration Rules No. 125 (arbitration rules) in force on the date of this Contract. These rules are considered as integral part of this Contract, and both parties are deemed to be informed

> about them. Arbitration proceedings will be conducted in London in the English language, applying English procedural law (Subsection 12.1 of the Contract). Neither party to the Contract or any person bringing a claim on behalf of any of the parties should initiate any action or take any other legal action against the other party regarding any dispute until such dispute is considered and resolved by the arbitrator(s) or appellate body, as the case may be, in accordance with the Arbitration Rules, and there is no specific agreement and it is not declared that obtaining a decision from the arbitrator(s) or appellate body, as the case may be, may be a precondition to the right of each party under this contract or any persons bringing a claim on their behalf or taking any other legal action against the other party regarding any such dispute (Subsection 12.2 of the Contract)."
>
> (Judgment § 9.26, my emphasis)

On AerCap's approach, the Supreme Court should have held that Grain Power was not entitled to benefit from the arbitration clause, and the seller was entitled to sue Grain Power, because Grain Power was not a "*party*" to the original contract. AerCap's approach would also rule out, save in cases of very vaguely drafted arbitration clauses, any question of such clauses being binding on persons by virtue of the "group of companies", "alter ego" or "piercing the corporate veil" doctrines, as contemplated by the Commercial Cassation Court of the Supreme Court in the passage quoted in § 151 above.

213. Genesis makes a similar submission, also citing a summary of the English law position set out in *Team YR and Cavendish v Ghossoub* [2017] EWHC 2401 (Comm) § 82 (Laurence Rabinowitz KC) and cited with approval by Andrew Burrows QC (later Lord Burrows JSC) in *Clearlake Shipping v Xiang Da Marine* [2019] EWHC 2284 (Comm) § 24: "*In expressing the correct approach in the way I have just done, I accept that Laurence Rabinowitz QC in the Ghossoub case was correct that, absent express words as to the jurisdiction clause extending to claims against non-parties, the starting point in interpreting a jurisdiction clause (covering, let us say, 'all disputes arising out of the contract') will be that only the parties to the contract are covered*." However, the summary in *Team YR* was of the principles applicable where a party to the contract seeks to sue a non-contracting party. The position is different where a third party seeks, as the Claimants do here, to enforce rights under a contract containing an EJC, yet seek to do so without regard to the EJC. As Mr Burrows QC said in *Clearlake*, it is no more than a starting point to say that, under English law, only the parties are covered. Any other view would be entirely inconsistent with the established English law principle of conditional benefit.

(6) Lack of express reference to Ukraine in certain jurisdiction clauses

214. Mr Uvarov suggests that one of the "*uncertainties that may hinder enforceability*" of the EJCs in the AerCap Claims before Ukrainian courts is that the EJCs do not refer to the courts of Ukraine but rather to the exclusive jurisdiction of "*the Courts of the country of domicile of the Insured*". Certain other policies also use this form of wording. Mr Uvarov suggests that this gives rise to "*a real risk*" to enforceability as the Ukrainian Courts may not accept this wording as a sufficiently clear reference to

Ukraine. That reflects his view that Ukrainian courts may still continue to follow a formalistic approach.

215. Mr Gryshko's view is that the Ukrainian court can readily identify the jurisdiction the parties have agreed on, provided it is clear from the claim which (re)insured entity is the relevant one for the purposes of the EJC. Here, there is no ambiguity as to which is the relevant "*Insured*" and no uncertainty as to the country in which that entity is domiciled.

216. I consider that Mr Gryshko's evidence reflects how a Ukrainian court would approach this matter, and is to be preferred. Mr Uvarov's view is tentative, and does not appear to be shared by Judge Kushnir. Mr Gryshko's view is consistent with the Ukrainian principles of contractual interpretation, including that the court can establish the meaning of a provision "*by comparing the relevant part of the transaction with the content of its other parts, all its content, the intentions of the parties*", and that a contractual provision should be interpreted "*in favour of its validity, effectiveness, and enforceability*". Further, Mr Uvarov cites no court decision illustrating his doubt, and it is at odds with the more modern move against formalism discussed earlier.

(7) Failure to name a specific court in Ukraine

(a) The Claimants' evidence and submissions

217. The Claimants submit that the EJCs are unenforceable as a matter of Ukrainian law because they do not identify a specific court within Ukraine. There are three main components to their submission.

218. First, Judge Kushnir states that the judicial system in Ukraine is organised around the principle of territorial jurisdiction. There are 27 local commercial courts in Ukraine (although only 24 are currently operating given the impact of Russia's invasion), each of which has its own territorial jurisdiction within Ukraine. Judge Kushnir refers to the following provisions:

i) Article 19(2) of the Constitution of Ukraine, which states that "*bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine*".

ii) Article 125(1) of the Constitution of Ukraine states that "*the judiciary system in Ukraine is based on the principles of territoriality and specialisation and is defined by the law*".

iii) Article 19(3) of the Law of Ukraine "*On the Judiciary and Status of Judges*", provides that the "*location, territorial jurisdiction and status of the court is determined having regard to the principles of territoriality, specialisation and instances*".

iv) Article 6(1) of the European Convention on Human Rights (to which Ukraine is a signatory) guarantees the right to a fair hearing to a "*court established by law*", which phrase has been interpreted by the Grand Chamber of the Ukrainian Supreme Court as including compliance with all rules of jurisdiction and

> territorial jurisdiction (Grand Chamber of the Supreme Court in Case No. 910/23028/17, § 6.4).

219. Judge Kushnir says there is a conceptual separation between the notion of state jurisdiction and the territorial jurisdiction of a particular court (i.e., whether the specific local court in which the proceedings are issued has its own jurisdiction and therefore has authority under Ukrainian law to determine the dispute). This is, the Claimants say, also illustrated by the Resolution of the Ukrainian Supreme Court in Case No. 947/18611/21 (*Helikon*):

> "In international civil procedure, the jurisdiction of civil cases involving foreign persons (international jurisdiction) means the competence of the judicial authorities of a state to consider and resolve certain categories of civil cases with a foreign element and to perform certain procedural actions in relation to the foreign element. Therefore, it is first necessary to decide whether a particular case is subject to consideration in the territory of the state to which the applicant has applied, and only then a specific court with the authority to resolve such civil cases should be determined."

220. The Claimants say Article 76 of the PIL, quoted in § 90 above, provides for jurisdiction at the state level, and that if one of the gateways under Article 76(1) can be established, it is then necessary to consider whether a particular commercial court has territorial jurisdiction over the dispute under the rules set out in the ComPC. The Claimants refer to the statement in ComPC Article 366(1) that:

> "The jurisdiction of the courts in cases involving foreign nationals shall be determined by the Commercial Procedure Code, law or international treaty ratified by the Verkhovna Rada of Ukraine".

It is true that the ComPC in Article 3(1) refers *inter alia* to the PIL:

> "The proceedings in commercial courts shall be administered in accordance with the Constitution of Ukraine, this Commercial Procedure Code, the Law of Ukraine "*On Private International Law*", the Law of Ukraine "*On Restoring a Debtor's Solvency or Recognising It Bankrupt*", as well as international treaties agreed by the Verkhovna Rada of Ukraine to be binding." (emphasis added)

Nonetheless, the Claimants say, it remains necessary for the territorial jurisdiction of a local commercial court to be established independently in accordance with the ComPC. The default rule under the ComPC for establishing territorial jurisdiction is Article 27(1): "*A claim shall be filed with the commercial court at the location or place of residence of the defendant, unless provided for by this Code*".

221. Secondly, the Claimants submit that Article 76(1)(1) of the PIL:

> "If the parties stipulated in their agreement that the case with a foreign element be subject to the courts of Ukraine, except for the cases provided for in Article 77 of this Law".

provides a gateway at the state level based on a jurisdiction agreement, but does not address (or seek to address) the separate territorial question as to which specific court has jurisdiction. That is a separate question. Judge Kushnir expresses the view that there must also be a sufficient and proper basis for a particular court to hear the claim; and that that will depend on whether the jurisdiction of the particular court in question has been specified in the clause in sufficient detail and correctly. If the jurisdiction agreement does not refer to a specific court or territorial jurisdiction, then whether a given local court has jurisdiction to hear the dispute will be determined by the general rules of territorial jurisdiction.

222. Judge Kushnir concludes, or at least assumes, that the facts of the present cases do not fall within any of the gateways set out in ComPC Article 27 (filing a claim at the location or place of residence of the respondent), Article 29 (jurisdiction of cases at the claimant's choice) or Article 30 (exclusive jurisdiction). Accordingly, he says:

> "… if the Claim was brought to a Ukrainian local commercial court, the latter would face a situation where (i) the prorogation agreement in the form of the Jurisdiction Clause contained in the Reinsurance Contracts did not stipulate a concrete commercial court of Ukraine, to which the parties had agreed to submit disputes arising under the Reinsurance Contracts, and (ii) the Defendants did not have a registered place of business, or representative office, or branch, or property in Ukraine, which would prevent the Ukrainian Court from following the general territorial jurisdiction rule prescribed by Article 27 of the Commercial Procedure Code. I am of the opinion that in these circumstances the Ukrainian Court must refuse to open the proceeding on the Claim as a judge would be unable to identify, following existing legal rules for determination of territorial jurisdiction, which particular local commercial court out of the 24 ones currently operating in Ukraine is authorised to consider the Claim."

223. Judge Kushnir refers in this connection to the Explanatory Memorandum of the Presidium of the Higher Economic Court of Ukraine No 04-5/608 dated 31 May 2002 (as amended and supplemented up to November 2009) (the "***Explanatory Memorandum***"), made *"for the purpose of securing the same and correct practice of consideration by commercial courts of Ukraine of cases involving foreign enterprises and organisations",* emphasising the last paragraph quoted below:

> "1. …issues arising in the field of private legal relations with a foreign element….including the jurisdiction of Ukrainian courts over cases with a foreign element, are resolved in accordance with the Law of Ukraine "On Private International Law.
>
> …

> Pursuant to Article 76 of the Law of Ukraine "On Private International Law", courts may accept and consider any case with a foreign element, in particular, if the parties have provided by their agreement for the jurisdiction of the case with a foreign element to the courts of Ukraine…
>
> Thus, if the parties have agreed that the courts of Ukraine shall have jurisdiction over a case with a foreign element….(para 1 76(1)(1) of the Law of Ukraine "On Private International Law"), the dispute shall be resolved in the commercial courts of Ukraine, subject to the requirements of Section III of the Commercial Procedural Code. …
>
> …
>
> Local commercial courts are also entitled to resolve disputes in cases where an international agreement provides for the possibility of concluding a written prorogation agreement between a Ukrainian business entity and a foreign business entity (agreement on contractual jurisdiction).
>
> When choosing a local commercial court of Ukraine as the dispute resolution body, the parties to the prorogation agreement must comply with the requirements of international agreement and Article 16 of the CPC regarding the exclusive competence of the commercial courts of Ukraine. Therefore, in case of lack of jurisdiction over a dispute involving a foreign enterprise or organisation, the commercial court must dismiss the claim based on Article 62(1)(1) of the Commercial Procedural Code. For the same reason, the commercial court must refuse to consider the claim if the parties incorrectly stated in the prorogation agreement the name of the court or indicated the court whose existence is not provided for by the Law Of Ukraine "On Judiciary of Ukraine"…"

By way of explanation, the reference to Section III of the Commercial Procedural Code was to the precursor of what is now Chapter 2 of the ComPC, which includes rules as to subject jurisdiction, instance jurisdiction (levels of court) and territorial jurisdiction. The reference to Article 16 was to the exclusive jurisdiction provision, now Article 30.

224. The Claimants point out that the Explanatory Memorandum has been applied even in recent cases, such as the decisions of the Commercial Court of the City of Kyiv dated 25 March 2019 in Case No. 910/1621/19 and dated 5 May 2023 in Case No. 910/6712/23, and of the Kyiv Commercial Court of Appeal dated 20 June 2018 in Case No. 911/892/18. Judge Kushnir says the same approach is taken to arbitration agreements, citing the 2018 decision of the Grand Chamber of the Supreme Court in Case No. 906/493/16 (*Tenachem*), holding to be unenforceable a clause which did not specify the name of an arbitral tribunal nor the location of such a tribunal:

> "…the court may recognize the agreement as unenforceable due to an essential error of the parties in the name of the arbitration

> to which the dispute is referred (referral to a non-existent arbitration institution), provided that the arbitration agreement does not indicate the place of arbitration or any other provisions, which would make it possible to establish the valid intentions of the parties regarding the selection of a certain arbitration institution or the regulation according to which the arbitration should be conducted."

225. Judge Kushnir refers to some of his own decisions applying jurisdiction clauses that did specify a particular court within Ukraine, namely the Commercial Court of Chernihiv Region in which Judge Kushnir sat: Case No. 927/1205/13, Case No. 927/1470/14 and Case No. 927/1888/14.

226. Thirdly, Judge Kushnir cites cases in which Ukrainian courts have found jurisdiction clauses to be unenforceable where they did not specify a particular Ukrainian court:

    i) The Commercial Court of Ivano-Frankivsk Region in Case No. 909/376/15 (*Derevo-Styl*) refused to hear a case where the jurisdiction clause provided that a dispute "*shall, upon application of one of the parties thereto, be submitted to the Commercial court of Ukraine*" and there was no other basis to found jurisdiction against the Slovakian defendant.

    ii) The Commercial Court of Donetsk Region in Case No. 905/228/16 (*Golden Seeds*) refused to accept jurisdiction where the clause provided that "*the parties shall refer the dispute to the judicial bodies of Ukraine*".

    iii) The Commercial Court of the City of Kyiv in Case No. 910/1135/20 (*Vivet*) refused to give effect to a jurisdiction clause which provided that "*all disputes and differences shall be settled by a commercial court in Ukraine*" and there was no other means of establishing territorial jurisdiction because the defendant was a non-resident without a place of business in the territory of the court.

227. Mr Uvarov's evidence on these matters is less categorical. He identifies as a "*further uncertainty*" that, where there is no territorial nexus linking the dispute to the court's jurisdiction, "*the court may face difficulties in accepting its jurisdiction (this is particularly so in the context of a claim under the Reinsurance Policy, because reinsurers are not domiciled in Ukraine, and it can be problematic to find any other relevant territorial nexus of this dispute with Ukraine)"*. Like Judge Kushnir, he refers to the Explanatory Memorandum, but acknowledges that more recently some courts have given effect to jurisdiction clauses in the absence of an indication of a specific court, and he appears to regard PIL Article 4-1 as allowing the parties to confer jurisdiction on the courts of a state in general:

> "More recently, some courts sought to give effect to the parties' agreement in favour of Ukrainian courts even in the absence of indication of a specific court (in particular, by relying on the claimant's choice of a specific court in Ukraine, place of performance of the contract, place where the factual circumstances underlying the claim occurred etc)[FN]. This is in line with the newly introduced Article 4-1 of the PIL Law, which expressly allows the parties to choose by their agreement either

> the courts of a certain state generally, or a specific court of a certain state. In any event, because such change of approach has not yet been clearly confirmed by the highest Ukrainian judiciary, some degree of practical uncertainty in this respect persists."
>
> [Footnote] See, for example, Resolution of the Western Appellate Commercial Court in case No. 926/356/20 dated 16 November 2022, …. The jurisdiction clause in this case provided for resolution of contractual disputes by the Commercial Court in accordance with Ukrainian law; the appellate court accepted this as a valid jurisdiction clause and ruled that the dispute falls within the jurisdiction of the particular local court bearing in mind the place of contract performance. See also Ruling of the Zhytomyr Region Commercial Court in case No. 906/1231/22 dated 26 December 2022 (accepting its jurisdiction based on the jurisdiction clause in the contract providing for "courts of Ukraine" and bearing in mind that the place of receipt of cargo for transportation was in Zhytomyr region)

228. As noted earlier, Mr Uvarov's view is that PIL Article 4-1 applies here, whereas I consider the better view to be that it does not apply retrospectively and that the position is governed by Article 76. Article 4-1 refers to a jurisdiction clause conferring jurisdiction on "*courts of a certain state or one or several specific courts of a certain state*", whereas Article 76(1)(1) refers to a clause conferring jurisdiction on "*the courts of Ukraine*". Thus Mr Uvarov's view about the effect of Article 4-1 is at odds with Judge Kushnir's view that a jurisdiction clause must select a court in a particular locality. Further, despite the difference in wording, no reason has been provided as to why Article 76(1)(1) too does not – as its language suggests – allow a clause to confer jurisdiction on the courts of Ukraine as a whole.

(b) Analysis: PIL Article 76(1)(1) applied alone

229. Although the Claimants appear to suggest that PIL Article 76 confers jurisdiction only at the state (national) level, that does not appear consistent with Judge Kushnir's approach, nor with the contents of the legislation. It is implicit in Judge Kushnir's approach, as summarised in § 221 above, that a choice of court provision can in itself found jurisdiction at all necessary levels.

230. The structure of the legislation indicates that that must be correct, since there is no provision in ComPC Chapter 2 Section 3 (Territorial jurisdiction) making provision for local jurisdiction to be founded on a choice of court agreement. ComPC Articles 27 and 29 are as follows:

> "**Article 27. Filing a claim at the location or place of residence of the respondent**
>
> 1. A statement of claim shall be filed to the commercial court at the location or place of residence of the defendant, unless otherwise provided for by this Code.

2. For the purposes of determining the jurisdiction under this Code, the location of a legal entity and an individual entrepreneur shall be determined in accordance with the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations.

For the purposes of determining the jurisdiction under this Code, the place of residence of an individual who is not an entrepreneur shall be the place of their residence or stay registered in accordance with the procedure established by law."

"**Article 29. Jurisdiction of cases at the claimant's choice**

1. The right to choose among the commercial courts, within the jurisdiction of which a case falls under this Article, shall belong to a plaintiff, except for the exclusive jurisdiction established by Article 30 of this Code.

2. Claims in disputes involving several defendants may be filed to the commercial court at the location or place of residence of one of the defendants.

3. Claims in disputes arising from the activities of a branch or a representative office of a legal entity, as well as a separate structural unit of a public authority without the status of a legal entity may also be filed at their location.

4. Claims to the claimant concerning recognition of the notary's executive writ as unenforceable or for the return of the notary's fee collected under the executive writ may also be filed at the place of its execution.

5. Claims in disputes arising from contracts, in which the place of performance is determined or which due to their specifics can be performed only in a certain place may also be filed at the place of performance of these contracts.

6. Claims against a defendant, whose place of registration or residence is unknown, shall be filed at the location of the defendant's property or at the last known registered place of residence or stay or their permanent activity.

7. Claims for damages caused by claim protection measures may also be filed at the place of application of claim protection measures (to the court that applied the relevant measures).

8. Claims for damages to property may also be filed at the place of damage.

> 9. Claims for compensation for damage caused by a collision of vessels, as well as for recovery of compensation for rescue at sea, may also be filed at the location of the defendant's vessel or the port of registration of the vessel.
>
> 10. Claims against a defendant who does not have a location or place of residence in Ukraine may be filed at the location of their property,"

Article 30 deals with exclusive jurisdiction, but there is no suggestion that the present cases could fall within any of its provisions.

231. Accordingly, if PIL Article 76(1) were not sufficient to found jurisdiction, then there would be an obvious lacuna: jurisdiction clauses would be ineffective save in cases where the court happened to have territorial jurisdiction under one of the subheads of ComPC Articles 27ff. None of the experts suggests that to be the position. Rather, as Mr Gryshko says, Article 76(1) provides Ukrainian courts with a number of equally effective free-standing jurisdiction nexuses in cases with a foreign element, which, in addition to choice of court agreements, include the domicile of the defendant, the location of the defendant's property, the place of infliction of damage and the domicile of the injured claimant.

232. Accordingly, this issue must turn on the correct interpretation of PIL Article 76(1)(1).

233. As a preliminary point, there is some controversy between the parties about whether PIL Article 76(1) provides that courts "*may*" or "*shall*" assume jurisdiction over cases with a foreign element in the cases specified in the ensuing subparagraphs. Judge Kushnir exhibited a translation using the word "*shall*", and in his first report said the courts are "*mandated*" to consider cases in the circumstances listed in Article 76(1). However, counsel for the Hausfeld Claimants at the hearing handed me what was said to be an official translation from the website of the Parliament of Ukraine. I shall err on the side of caution and assume the word used is "*may*".

234. As Mr Gryshko points out, Article 76(1)(1) does not by its terms require a jurisdiction clause to identify any specific court. It applies where the parties have by agreement provided for the jurisdiction of *"the courts of Ukraine"*. Accordingly, in his view, a jurisdiction clause such as those in the present case entitles a claimant to sue in any of the 24 operating commercial courts in Ukraine.

235. As to certain further points relied on by the Claimants and Judge Kushnir:

i) Nothing in the Explanatory Memorandum requires a jurisdiction clause to select a particular local court. The prohibition in the last paragraph quoted earlier from the Memorandum is directed at clauses that select non-existent or incorrectly named courts. Moreover, Mr Gryshko points out that the Supreme Court much more recently has made clear that even where a clause names a court inaccurately, a choice of court agreement can be applied if the court can be identified (Resolution of the Supreme Court dated 2 November 2020 in Case No. 916/364/20 (*Danube*)). In that case, a clause provided for disputes to be "*resolved through the District Court of Bratislava (Saratovska 1/A, 844 54 Dubravka) in accordance with the procedure and rules of court*". Even though

the "*District Court of Bratislava*" was an incorrect name, the Supreme Court considered it to be obvious which court was being specified because the clause expressly indicated the address where the dispute was to be resolved.

ii) The provisions referred to in § 218 above are not directed at any distinction between state level and regional level territorial jurisdiction.

iii) The quotation from the *Helikon* case in § 219 above does not support the proposition that, when considering the enforceability of an EJC nominating the courts of Ukraine in general terms, it is necessary to consider state jurisdiction and then identify a specific court. The case appears to have concerned a dispute over non-contractual obligations: there was no jurisdiction agreement and Article 76(1) of the PIL was not in issue.

iv) Neither Article 3 nor Article 366(1) of the ComPC indicates that it requires territorial jurisdiction to be independently established once Article 76(1)(1) of the PIL has been satisfied. Both indicate that jurisdiction can be founded alternatively on a law (such as the PIL), a treaty or the ComPC.

236. As all the experts point out, there are decisions post-dating the Explanatory Memorandum in which Ukrainian courts have accepted jurisdiction based on clauses that do not specify a local court. The following cases in particular have been cited:

i) The High Commercial Court of Ukraine in Case No. 917/2572/13 (*Alfatex*) on 20 August 2014 upheld a choice of court agreement which provided for dispute resolution by "*the commercial court at the location of the seller*", citing § 1 of the Explanatory Memorandum and Article 76(1)(1) of the PIL. As Judge Kushnir points out, the court in this case was able to identify the court intended by the parties by reference to the location of the seller. However, it is notable that the court cited Article 76(1)(1) only, without further reference to the ComPC.

ii) The High Commercial Court of Ukraine in Case No. 910/12532/15 (*Flash Tour*) on 16 November 2017 upheld a jurisdiction clause providing for dispute resolution "*in a court in the country of the plaintiff*", citing Article 76(1)(1) of the PIL only. Judge Kushnir suggests that the decision is insufficiently explained, and should be disregarded as contrary to his view that Article 76 PIL alone is "*insufficient for any Ukrainian Court to establish its jurisdiction over any case*". However, that objection assumes the correctness of Judge Kushnir's own view. It is true that any issue of specificity was not argued, the main debate instead concerning the time at which jurisdiction is established. Nonetheless, the decision provides an example of a Ukrainian court enforcing a jurisdiction agreement nominating the courts in Ukraine, without specificity, by reference to Article 76(1)(1) PIL only. The fact that no objection was taken to the lack of reference to a particular court in Ukraine may be because no-one regarded that as arguably being a problem.

iii) The Commercial Court of Lviv Region in Case No. 914/2131/18 ("*Kolodii*"), a case involving a UK defendant, enforced a jurisdiction clause that simply referred to "*the commercial court of Ukraine*", citing PIL Article 76(1)(1) (only). Judge Kushnir suggests that little weight can be placed on that decision

when no explanation was given in the ruling as to how or why the court considered itself to have territorial jurisdiction without it being identified in the clause. However, once again, that objection assumes that Judge Kushnir is correct to consider such identification necessary. The case suggests, rather, that it is not.

iv) The Mykolaiv Region Commercial Court in Case No. 915/1443/20 (*Energoatom*) on 12 January 2021 upheld against a foreign defendant a jurisdiction clause providing for resolution "*in accordance with the current legislation of Ukraine*". The judgment also mentioned that the place of performance of the contract was the city of Yuzhnoukrainsk. The court accepted jurisdiction, citing only Article 76(1)(1) of the PIL. Judge Kushnir suggests that the basis for the decision appears to have been the place of performance of the contract, such that the court might have taken jurisdiction on the basis of Article 29(5) (quoted earlier). However, that is hard to square with the court's reliance, solely, on PIL Article 76(1)(1).

v) In Case No 910/6156/20 (*Adoria III*), a decision dated 30 September 2021 of the Kyiv City Commercial Court, cited by Mr Uvarov, the defendant was an overseas company. The jurisdiction clause provided for disputes to be "*resolved in court at the location of the claimant*", the claimant being located in Kyiv. The case is of interest for present purposes because the court cited only PIL Article 76(1)(1) on the issue of jurisdiction.

vi) The Mykolaiv Region Commercial Court in Case No. 915/1480/21 (*Organic Systems*) on 25 October 2021 accepted jurisdiction over a foreign defendant based on a clause providing for disputes to be "*finally resolved in a competent court of Ukraine*", citing PIL Article 76(1)(1) alone. Judge Kushnir objects that the decision does not explain why the court considered itself to be the "*competent court of Ukraine*", or refer to the relevant provisions of the ComPC. However, as noted earlier, there is no ComPC dealing with cases where jurisdiction is founded solely on a jurisdiction clause: that is one of the problems with Judge Kushnir's approach. The fact that the court accepted jurisdiction based on PIL Article 76(1)(1) alone suggests that no reference to the ComPC was considered necessary.

237. In all these circumstances, I consider the Defendants to have the better of the argument, on the evidence, that the EJCs will be treated as enforceable even though they do not refer to a particular court within Ukraine.

238. Finally, the EJC in the reinsurance contract under which the AerCap Claimants claim provides that the relevant court is to be determined by reference to the country of domicile of the insured (defined in each case as the original insured under the insurance) and, in each case, sets out the address of the insured (in Ukraine) in the reinsurance slip. The same applies to the All Risks policies placed with XL in respect of the Overstar and Wind Rose Claims. These policies contain an additional element of specificity that allows a particular Ukrainian court to be identified, to the extent necessary.

(c) Analysis: PIL Article 76(1)(1) applied with ComPC Article 29(2)

239. Even if jurisdiction cannot be established on the basis considered above, it is necessary to consider whether it can be established by reason of the EJCs in combination with the location of the direct insurer, Universalna or Busin.

240. As quoted earlier, ComPC Article 27(1) provides that a claim can be filed at the location or place of residence of the defendant, unless the Code otherwise provides. Articles 29(1) and (2) provide that:

> "1. The right to choose among the commercial courts, within the jurisdiction of which a case falls under this Article, shall belong to a plaintiff, except for the exclusive jurisdiction established by Article 30 of this Code.
>
> 2. Claims in disputes involving several defendants may be filed to the commercial court at the location or place of residence of one of the defendants."

241. All of the Claimants advance claims under the insurance policies, either (1) against Ukrainian insurers directly as named defendants who have yet to be served (as in the AerCap claims), or (2) against the Defendants as purported representatives of the Ukrainian insurers (as in the remaining claims). The experts agree that Ukrainian law does not recognise the concept of a representative defendant. Therefore, the Defendants submit, if the actions proceed in Ukraine then the Ukrainian insurers will have to be sued in their own right in Ukraine. That in turn will allow the courts to exercise jurisdiction over the reinsurers pursuant to Article 29(2).

242. Insofar as the Claimants' experts suggest that Ukrainian insurers' domicile is "*irrelevant*" because the Ukrainian insurers have not been named as Defendants in these English proceedings, I do not agree. That is not the case in relation to the AerCap claims. As regards the other claims, the question is what would happen were the present claims brought in Ukraine. The Claimants accept that, in order to claim under the reinsurance contracts, they will need to establish that they are entitled to be indemnified by the Ukrainian insurers under the insurance policies. For example, Serendip's Particulars of Claim make explicit claims against Universalna and seek an indemnity from it. Genesis suggested in submissions that it had sued Universalna in a representative capacity only because it was simple to do so, rather than because it needed to. (See also the Genesis submission quoted earlier about the alleged lack of practical purpose in suing Universalna.) However, I consider the appropriate counterfactual to be the position if the claims currently brought here, which include claims against the insurers, were instead to be brought in Ukraine.

243. On that footing, the EJCs would require the Claimants to sue in Ukraine, and would confer jurisdiction on the courts of Ukraine pursuant to PIL Article 76(1)(1); and any problem about identification of the local court could be solved by suing the Ukrainian insurers in their local court pursuant to ComPC Article 27(1) and joining the other Defendants pursuant to Article 29(2). Mr Gryshko states that a competent local commercial court would be *"effortlessly identified"* by these means.

244. The Claimants submit that Mr Gryshko is in this respect asking the wrong question, which is whether the EJC is enforceable. Implicitly, therefore, the Claimants submit that a jurisdiction clause remains unenforceable for failure to specify a local court, even if a particular local court has jurisdiction pursuant to a provision of Articles 27 and/or 29. However:

    i) Judge Kushnir's evidence does not support that view. On the contrary, as noted earlier, he says that in the absence of a jurisdiction clause specifying the local court, the courts will be guided by their general rules as to territorial jurisdiction (which include Articles 27 and 29).

    ii) The Claimants' submission is inconsistent with Mr Uvarov's point, and the cases he cites, referred to in § 227 above. Those cases illustrate that the court will, at the very least, uphold jurisdiction clauses referring to the courts of Ukraine in general terms in circumstances where a particular court has jurisdiction on another ground.

    iii) The Claimants' approach is illogical. The Ukrainian courts will undoubtedly have jurisdiction in the circumstances contemplated. The EJC will therefore not be unenforceable: it can be given effect by requiring the Claimants to sue in the court in Ukraine that has jurisdiction under Articles 27 and 29. There is no principled basis, in these circumstances, for permitting the Claimants to sue in England in disregard of the jurisdiction clause.

(d) Analysis: PIL Article 76(1)(1) applied with Article 76(1)(7)

245. By way of further alternative, Mr Gryshko explains that the location of the allegedly lost aircraft (the insured event) can supply the necessary factual nexus with a specific Ukrainian court, so as to enable effect to be given to the EJCs pursuant to Article 76(1)(1) and 76(1)(7) of the PIL. Article 76(1)(7) confers jurisdiction on the Ukrainian courts, in cases with a foreign element, where *"an action or event that was the basis for filing a claim took place on the territory of Ukraine".* The relevant locations would be Kyiv or, for some aircraft, Dnipro.

246. Mr Gryshko refers to the Supreme Court's November 2022 decision in Case No 916/3350/20 (*Aviadynamics*). The case involved contract parties not resident in Ukraine who had agreed a dispute resolution clause stipulating that "*the parties must apply in accordance with the procedural legislation of Ukraine to the Ukrainian court, which is authorized to resolve the dispute on the basis of the current procedural and substantive legislation of Ukraine*". The claim was for the invalidation of the contract. The court quoted PIL Article 76, highlighting each of subparagraphs (1), (2) and (7), and went on to say:

> "As evidenced by the case file, the parties between whom the disputed contract was concluded are not resident in Ukraine.
>
> Taking into account the above rules of the current legislation, based on the fact that the dispute in the case arose over the legality of concluding a contract in economic activity, which provides that all disputes related to mutual relations regarding the disputed aircraft are resolved in accordance with the

> provisions of the legislation of Ukraine, as well as taking into account the location aircraft (no party to the case disputes the fact that both at the time of the filing of the claim and at the time of consideration of the case by the local commercial court, the civil aircraft … was located in Ukraine, in the city of Odesa) and that the aircraft was registered in the State Register of Civil Aircraft of Ukraine … as of the date of the conclusion of the disputed contract, as well as in view of the fact that the act that became the basis for filing the lawsuit took place on the territory of Ukraine (the place of conclusion of the disputed contract, Odesa, Ukraine), the plaintiff correctly filed a lawsuit with the Commercial Court of the Odesa region, the courts lawfully determined the jurisdiction of the courts of Ukraine over the said dispute, as well as determined the territorial jurisdiction over this case in accordance with Article 27 of the Commercial Procedure Code." (emphasis added)

247. Given the court's reliance in this passage on both the jurisdiction clause and the location of "*the act that became the basis for filing the lawsuit*", Mr Gryshko is in my view correct to say that the court applied Article 76(1)(1) in combination with Article 76(1)(7), using the latter as a basis for establishing jurisdiction in the Commercial Court of the Odesa region. That approach is also consistent with Mr Uvarov's approach referred to in §§ 227 and 244.ii) above. I do not accept Judge Kushnir's suggestion that the jurisdiction clause (to which the court makes express mention as part of its grounds) was not a decisive factor.

248. As to the application of that approach to the present case, Judge Kushnir suggests that the act that became the basis for filing these claims, for the purpose of Article 76(1)(7) was not the loss of the Aircraft, nor even the place where payment was due under the contracts of insurance/reinsurance, but the place where the Defendants decided not to pay (which he assumes to be London). Judge Kushnir refers to the decision of the Northern Commercial Court of Appeal in Case 910/11131/21 (*Promin*). That case concerned an insurance claim under property insurance following fire damage. The issue was whether the claimant could sue at the place where the insurance indemnity should have been paid, pursuant to ComPC Article 29(5), or whether the court for the place where the property was located had exclusive jurisdiction under Article 30(3), which applies to *"[d]isputes arising regarding immovable property"*. The court said:

> "To determine the jurisdiction of this case, the jurisdiction at the choice of the Plaintiff under Part 5 of Article 29 of the Commercial Procedural Code of Ukraine and the exclusive jurisdiction of commercial cases on claims concerning real estate under Part 3 of Article 30 of the Commercial Procedural Code of Ukraine cannot be applied, since:
>
> - immovable property is not considered in this case as an independent subject of dispute, but only as the subject of an insurance contract in respect of which an event occurred that can be qualified as an insurance event;

> - the Plaintiff's demands do not arise out of damage caused as a result of a dispute over real estate, but out of the Defendant's performance of its obligations under the insurance contract concluded between the parties;
>
> - the status of the immovable property will not be changed as a result of a court decision to pay or refuse to pay insurance indemnity, etc., and therefore the legal regime of the immovable property and the rights and obligations of the parties and third parties related to the insured immovable property will not be changed;
>
> - Clause 2.12.2 of the Insurance Agreement provides for the obligation of the Insurer, which is PZU Ukraine Insurance Company, to pay the insurance indemnity, and therefore the place of payment of such indemnity is the location of the Defendant (Kyiv)."

249. The decision in *Promin* made no mention of Article 76(1)(7) of the PIL, and I am unable to accept Judge Kushnir's view that it applies by analogy. The question in *Promin* was whether it was a dispute *"regarding real property"*. The court noted that, in a previous decision, the Grand Chamber of the Supreme Court had said those words should be understood to refer to disputes concerning rights and obligations related to real property. Further, in its resolution dated 16 May 2018 in case No. 640/16548/16-ц, the Civil Court of Cassation had indicated that those words included, in particular, (a) claims regarding title to such property, (b) the right to possess and use such property, (c) division of real property held in joint divided ownership and allocation of a share of such property, (d) division of real property held in joint fractional ownership and allocation of a share of such property, (e) the right to use real property (determination of the procedure for using it), (f) rights arising out of residential lease agreements, etc., (g) invalidation of a real property transaction, (h) foreclosure on mortgaged or pledged real property, (i) termination of a land lease agreement, (j) collection of rent if a dispute was over real property, (k) deprivation of the right to inheritance and (l) determination of an additional term for accepting the inheritance.

250. Against that background, it is not difficult to see why the court in *Promin* did not consider an insurance claim relating to property damage to fall within Article 30(3). The decision could be regarded as supporting the view that insurance claims in general <u>can</u> be pursued before the court for the place of payment. The decision does not, however, provide any support for the view that the loss of an object (here, an aircraft) is not *"an action or event that was the basis for filing a claim"*. As a matter of common sense it is, even if jurisdiction might also be based on the place of performance of the obligation to indemnify. Indeed, the Claimants' claims are pleaded on the basis that it is the loss of aircraft that forms the basis of their claims. In my view, nothing in *Promin* supports the view that the relevant act or event for Article 76(1)(7) is, <u>solely</u>, the place of the insurer's prior decision to refuse to pay.

251. For completeness, the place of performance of the obligation to indemnify is Kyiv in respect of the claims made by Wind Rose and Overstar, who are located there. Similarly, clause 6.17 of the underlying insurance policy in the Serendip Claim in substance provides for a place of payment in Ukraine, since the parties there agree to

cooperate with the reinsurance broker (which operates in Ukraine through a representative office) in order to receive indemnity from reinsurers not resident in Ukraine. I see no relevance in the points (highlighted by Judge Kushnir) that clauses 6.18 and 6.19 of the insurance contract defer payment of the insurance indemnity until receipt of the reinsurance indemnity, and that the reinsurance policy places claims control in the hands of the reinsurers.

252. The Claimants object that this approach to jurisdiction is incorrect because the heads of jurisdiction in PIL Article 76 are freestanding, and the existence of jurisdiction under Article 76(1)(1) cannot render enforceable a jurisdiction clause that would otherwise be unenforceable. I do not agree. If a particular court needs to be identified, and can be identified under Article 76(1)(7), then there is no principled reason for allowing the Claimants to sue in England without regard to the EJC. *Aviadynamics* appears to be an example of Articles 76(1)(1) and (7) being used in combination.

253. The Claimants also object that Article 76 does not determine territorial jurisdiction: the rules on territorial jurisdiction are set out in the ComPC. That objection is wrong, for the reasons I have outlined earlier. The ComPC does not contain provisions adequate to cover the range of cases, with a foreign element, over which PIL Article 76 confers jurisdiction on the Ukrainian courts (including, not least, cases where there is a Ukrainian jurisdiction clause but no other connection such as might fall within the territorial jurisdiction provisions of the ComPC). It could hardly be supposed that the courts of Ukraine are unable to take jurisdiction over such cases, despite the clear wording of Article 76. On the contrary, as discussed earlier, there are several examples of courts accepting jurisdiction based solely on Article 76.

254. Accordingly, I consider the Defendants to have the better of the argument that the EJCs could, if necessary be given effect via this further alternative route too.

(e) Conclusion on failure to identify specific court

255. For all these reasons, I consider the Defendants to have the better of the argument, on the evidence, that the EJCs are not unenforceable due to failure to identify a specific court in Ukraine.

(8) Conclusion on EJCs

256. For the reasons given in the foregoing sections, the Defendants have the better of the argument, on the evidence, that the EJCs are binding on the Claimants, apply to the claims they seek to bring, and are enforceable.

(E) STRONG REASONS FOR DECLINING TO STAY PROCEEDINGS

257. The Claimants submit that there are "*strong reasons*" justifying them proceeding in England despite the EJCs, relying in particular on (a) the ongoing conflict in Ukraine, (b) the inconvenience of the claims being tried in Ukraine, (c) a risk of multiplicity of proceedings, and (d) the suggestion that the Represented Defendants have no genuine desire to have the cases tried in Ukraine.

(1) Principles

258. Since the hearing in the present cases, I have summarised the basic principles in §§ 106 ff. of my judgment in the *Russian Aircraft Operator Policy Claims (Jurisdiction Applications)* [2024] EWHC 734 (Comm). The following are the key points relevant to the present applications.

259. Where an EJC applies, 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 forum 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 forum (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…".

260. The same applies 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).

261. 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).

262. 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)."

263. 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).

264. As Lord Bingham indicated in *Donohue* § 24, the list of factors in *The Eleftheria* is non-exhaustive. The consequences of a war are capable of being strong reasons to decline a stay. It was stated in *Beazley v Horizon Offshore Contractors Inc* [2004] EWHC 2555 (Comm) that:

> "If the parties have freely agreed upon a place for the resolution of any dispute that may arise between them, they must be treated as having taken into consideration in reaching that agreement the difficulty that one or the other might have in coping with that situation. Obviously an event such as the outbreak of war might make it unreasonable to hold a party to his bargain, but a bargain is what it is and there is no reason why there should be implied into that bargain some weighting factor that has the potential to

> negate the clause in the event of real but entirely foreseeable difficulty." (my emphasis)

Briggs, *Civil Jurisdiction and Judgments* (7th ed.) p535 states, in the context of *forum conveniens*:

> "…if the alternative court were to be in a State in civil war…it would be open to an English court to find that England is the proper place to bring the claim. If the claimant cannot travel to the foreign country because no sane person would go there and no insurer would underwrite the risk of the journey, and for that reason cannot obtain a trial there, this may allow it to be argued that England is the proper place to bring the claim."

The words *"and for that reason cannot obtain a trial there"* should not be overlooked.

265. 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. …"

266. 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) In *Import Export Metro v CSAV* [2003] 1 Lloyd's Rep 405 § 15, Gross J said:

"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. Even then, it cannot simply be assumed that the Court will automatically exercise its discretion so as to release one party from its contractual bargain."

iv) *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."

v) 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))."

267. 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); and *Clifford Chance LLP v Société Generale SA* [2023] EWHC 2682 (Comm) § 81.

268. The authorities summarised in §§ 259-267 above, taken as a whole, support the following propositions relevant to whether the effects of war in the country 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 §§ 266-267 above).

    viii) The effects of a war can constitute a strong reason to decline a stay (§ 263 above).

269. The quotations above from *Mercury Communications* and *Konkola* include reference to the jurisdiction clause having been freely adopted. The Claimants in the present cases submit that the requirement for a strong reason to justify the refusal of a stay is diluted, or less rigidly applied, in cases where one of the parties did not act freely in adopting it; and that there is *"a spectrum of situations in which free negotiation is recognised for these purposes"*. For example, in *Mercury Communications* the contract as a whole had been the subject of weeks of negotiation.

270. Waller J in *British Aerospace plc v Dee Howard Co.* [1993] 1 Lloyd's Rep 368, 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).

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

> "I recognise 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)

272. 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)

273. As I said in *Russian Aircraft* (§ 149), I think 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))

274. 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).

275. At the same time, there is force in the view that a party who has effectively delegated to the principal contracting parties the agreement of any provision as to law and jurisdiction cannot subsequently complain that it did not act freely. For instance, the Privy Council applied the 'strong reasons' test in *The Pioneer Container* [1994] 2 AC

324, 347 in circumstances where the claimants had granted a wide authority to sub-contract the whole or any part of the carriage of their goods "*on any terms*" and, by doing so, were found to have consented to the application of the jurisdiction clause in the bill of lading agreed between the carrier and its sub-contractor. The court said that: *"where, as here, the consent is very wide in its terms, only terms which are so unusual or so unreasonable that they could not reasonably be understood to fall within such consent are likely to be held to be excluded"* (p.346).

276. Joseph, *"Jurisdiction and Arbitration Agreements and their Enforcement",* (3rd ed.) § 10.13 states:

> "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.

277. As indicated in *Russian Aircraft* §§ 153 and 155, 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. The same applies to the fact that in some cases, as here, a claimant was not one of the original parties to the contract containing the EJC. However, both types of consideration have some relevance when considering, in a 'strong reasons' context, whether it was foreseeable that the agreed forum would have the features now complained of. In that context, it can be taken into account 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 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) Ukrainian law and jurisdiction would apply, and alleged foreseeability of what are said to be the problems of having to pursue these cases in Ukraine. The significance of that difference may, though, be limited if (for example) the claimant was 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 leases containing no stipulations about law and jurisdiction clauses (§ 275 above and *Russian Aircraft* §§ 41 and 155). I bear all these considerations in mind when considering, below, whether or not 'strong reasons' exist to decline to give effect to the EJCs by granting a stay.

(2) Russian strikes on Ukraine

278. The facts relied on by the Claimants in this regard can be summarised as follows.

279. Russia commenced an invasion of Ukraine in February 2022. It was and has been the largest attack on a European country since the Second World War.

280. On 24 February 2022, martial law was introduced in Ukraine.

281. On 2 March 2022, the Ukrainian Judicial Council published its non-binding recommendations on the administration of justice during the martial law period (the "***Recommendations***"), stating that when determining the terms for the functioning of the courts during martial law "*the actual current situation in the region shall be taken into account*" and introducing prospective measures including "*[i]n case of a threat to the life, health and safety of court visitors, court staff, and judges – to promptly make decisions to temporarily suspend the proceedings of a particular court until the circumstances that led to the suspension of the proceedings are eliminated*" (§ 2) and "*to postpone the consideration of cases (except for urgent court proceedings)*" (§ 5).

282. The Council of Judges of Ukraine in August 2022 approved Decision "*On Approval of Recommendations on the Operation of Courts under Martial Law*" No. 23 dated 5 August 2022, according to which the heads of organisations, institutions, enterprises and other employers should develop a clear algorithm of actions in case of air raid or other danger notifications from civil protection authorities, and in the absence of appropriate protective structures nearby or the inability to ensure reliable protection of employees in the workplace, adopt decisions on transferring employees to remote work.

283. Focussing on more recent months leading up to the hearing before me, the experts and the Claimants referred to data from public websites, https://air-alarms.in.ua/public/en and https://alerts.in.ua/en. The Defendants point out that to the extent that these record air alarms or alerts, as opposed to air raids, there is a risk of double counting. An explanation on the first website explains:

> "What does 'alarm' mean in terms of your statistics?
>
> We operate with the concept of "the fact of the announcement of an alarm".
>
> For example, if an alarm is declared in Boryspil and then 10 minutes later in the Kyiv region, we count it as two separate alarms with their start and end times.
>
> Since alarms in specific cities can overlap with alarms announced in the entire region (as in the example above), each alarm has its own actual total duration, as well as a "net" duration (the time interval that is not included in the part of the alarm that overlaps with another alarm)."

However, the available information does not enable me to measure the extent of any such double counting, and the Claimants point out that it may apply (if at all) only in relation to one of the two websites. I therefore disregard the double counting point for present purposes.

284. Mr Gryshko in his first report, dated 29 September 2023, indicated that the alerts.in.ua website recorded a total duration of air raid alerts of 67 hours in May 2023, 35 hours in

June 2023, 23 hours in July 2023, 36 hours in August 2023 and 18 hours from 1-29 September 2023.

285. The pages from the air-alarms website exhibited by Mr Medvedev (whose second report was dated 15 December 2023) give the following details:

i) In October 2023, there were 6 air raid alerts in Kyiv, of average duration 55 minutes, which occurred on 5 days during the month. Tuesday was the day on which alerts were most frequently announced.

ii) In November 2023, there were 23 air raid alerts in Kyiv, of average duration 1 hour 33 minutes, which occurred on 15 days during the month. Saturday was the day on which alerts were most frequently announced, and 12 noon was the time at which alerts were most frequently announced. There were 10 media reports of explosions.

iii) From 1 to 14 December 2023, there were 16 air raid alerts in Kyiv, of average duration 1 hour 5 minutes, which occurred on 10 days during the period. Thursday was the day on which alerts were most frequently announced, and 12 noon was the time at which alerts were most frequently announced. There were 4 media reports of explosions.

286. On 24 November 2023, Russia was reported as having launched "*a record number of drones*" at Ukraine since the start of the invasion, most of which were launched at Kyiv. The air raid alert was in effect for over 6 hours. On the next day, Ukrenergo reported that the main overhead power lines and distribution lines of regional power distribution companies in the central region were damaged as a result of the overnight attack, which affected the reliability of the power supply and led to emergency power outages. The reported effect of the drone attack was that 16,000 households in the Kyiv region, and 151 residential buildings, 75 private houses and 12 institutions in Kyiv, did not have any power — in addition to the injuries sustained as a result of the attack.

287. The British Ministry of Defence ("***MoD***") said:

> "Between 18-19 November 2023 Russia launched around 50 Iranian-designed Shahed one way-attack uncrewed aerial vehicles, primarily towards Kyiv. These were launched in waves on two axes -from the Kursk to the east, and from Krasnodar to the south-east.
>
> One of Russia's objectives was likely to degrade Ukraine's air defences, to shape the battlespace ahead of any concerted winter campaign of strikes against Ukraine's energy infrastructure.
>
> Russia has now refrained from launching its premier air launched cruise missiles from its heavy bomber fleet for nearly two months, likely allowing it to build up a substantial stock of these weapons. Russia is highly likely to use these missiles if it repeats last year's effort to destroy Ukraine's critical national infrastructure."

288. The Kyiv Commercial Court in a decision dated 14 November 2023 (Case No. 910/16388/23), after quoting the August 2022 Decision referred to above, said:

> "…due to the intensity of air raids in Kyiv during November 2023 and the threat of missile strikes, judges and court staff are forced to suspend their work and go to the nearest shelter located at Universytet metro station at Taras Shevchenko Boulevard.
>
> In view of the above, this significantly adjusts the work of the court and the above affects the observance of deadlines during the consideration of cases in the Commercial Court of Kyiv…"

The court issued a similarly worded judgment in Case No. 910/4634/23 on 24 November 2023. On 5 December 2023 the Lviv Commercial Court in Case No. 914/671/20 stated:

> "On 2 March 2022 the Council of Judges of Ukraine published recommendations on the work of courts under martial law, according to which all courts of Ukraine are recommended to postpone consideration of cases (except for urgent trials) and withdraw them from consideration, taking into account that many trial participants are not always able to file an application for postponement of the case due to their involvement in the functioning of critical infrastructure, joining the Armed Forces of Ukraine, territorial defence, volunteer military formations and other forms of protection. Cases that are not urgent shall be considered only with the written consent of all trial participants. In view of the above, taking into account the impossibility of carrying out a court hearing in connection with the announcement of air alert throughout Ukraine, the introduction of martial law, to ensure a full, objective and comprehensive consideration of the case, protection of their rights and interests, the court concluded to schedule a court hearing for another date."

289. Press reports indicated that the following attacks on Kyiv took place within one week in December 2023:

i) On 8 December 2023, Russia launched an air attack on Kyiv with cruise missiles, which lasted for almost 2 hours.

ii) On 11 December 2023, Russia launched a second air attack on Kyiv and the Kyiv region with ballistic missiles. The overnight attack damaged power grid facilities in the Darnytskyi district of Kyiv, and led to casualties, and power outages for more than a hundred households for several hours.

iii) On 12 December 2023, there was a cyber-attack by a Russian hacker collective on Kyivstar, which is one of the largest internet providers and mobile network operators in Ukraine (with more than half of Ukraine's population as mobile subscribers). This led to a major disruption of mobile and internet services, which in turn put millions of people in danger of not receiving air raid alerts.

iv) On 13 December 2023, Russia launched a third air attack on Kyiv with ballistic missiles. The missile strike injured 53 people in Kyiv and damaged kindergartens and hospital buildings.

v) On 14 December 2023, there were explosions in Kyiv.

290. The MoD said:

> "On the night of 7 December 2023, the Russian Air Force conducted a major wave of strikes towards Kyiv and central Ukraine using its heavy bomber fleet, for the first time since 21 September 2023.
>
> These aircraft, highly likely Tu-95 BEAR H, likely launched at least 16 air-launched cruise missiles (ALCMs) from their typical operating area over the Caspian Sea. The missiles were highly likely AS-23a KODIAK, Russia's premier ALCM. Russia has almost certainly been stockpiling these missiles for use in the winter campaign.
>
> This was probably the start of a more concerted campaign by Russia aimed at degrading Ukraine's energy infrastructure. However, initial reports indicate the majority of these missiles were successfully intercepted by Ukrainian air defence. Despite at least one civilian reported killed, the damage currently appears to have been minimal"

291. Using the internet sites I mention above, the Claimants provided updated data for the number and duration of air raid alarms in Kyiv from October 2023 to February 2024:

Month	Number of air raid alarms	Average duration (hrs)	Longest air raid alarm (hrs)
October 2023	6	1:01	2:02
November 2023	23	1:35	6:08
December 2023	37	1:15	4:15
January 2024	35	1:13	3:53
February 2024	16	1:09	2:54

292. The Claimants also referred to media reports of attacks on Kyiv from late November 2023 to February 2024, including several post-dating the experts' reports, in particular on the following dates:

i) 25 November 2023: the largest drone attack since the beginning of the invasion, during the night of 24/25 November, with an air-raid warning in effect for over 6 hours, resulting in 5 persons injured and treated on the scene, and debris damage in four districts of Kyiv;

ii) 8 December 2023: anti-aircraft defence systems shot down cruise missiles targeted at Kyiv, in an attack lasting nearly two hours, with early reports as of 8.45am indicating damage to residential buildings in the Kyiv Oblast (province);

iii) 11 December 2023: Ukrainian air defences destroyed eight missiles heading towards Kyiv at around 4am;

iv) 13 December 2023: ten ballistic missiles were shot down over Kyiv, in an attack starting at about 3am, leaving 53 people injured and buildings damaged;

v) 14 December 2023: two explosions were heard in Kyiv and explosions were also heard in the Khmelnytskyi Oblast in western Ukraine during the afternoon;

vi) 22 December 2023: a residential building in the Solomianskyi district of Kyiv was damaged in a drone attack (either from a strike or from debris following the downing of the drone), in what was reported to be *"a rare breach of the Ukrainian capital's air defences*"; one man was admitted to hospital. The Solomianskyi district borders the Shevchenkivskyi district, where the Kyiv Commercial Court and Court of Appeal are located, and the Pecherskyi district where the Supreme Court is located;

vii) 29 December 2023: 9 people were killed in Kyiv and 30 wounded as part of a larger attack on Kyiv and other cities, during the evening, reportedly involving 18 strategic bombers and 158 missiles (of which 114 were said to have been shot down) and killing at least 30 people altogether. Among other things, a metro station acting as an air raid shelter was struck, and a warehouse was struck by a missile in the Shevchenkivskyi district (where, as noted above, the Commercial Court and Court of Appeal are located);

viii) 2 January 2024: Russia launched at least 99 missiles targeting Kyiv, the surrounding region and Kharkiv, during the morning rush hour, preceded by a wave of Shahed "kamikaze" drones; Ukrainian critical infrastructure and industrial, civilian, and military facilities came under attack; four civilians were killed and 92 injured in Kyiv, including two deaths and 49 injuries in the Solomianskyi district; altogether, 5 persons were killed and 130 injured; Kyiv's mayor reportedly said that gas pipelines had been damaged in Kyiv's Pecherskyi district, and electricity and water had been cut off in several districts of the capital;

ix) 3 January 2024: the BBC reported that, over the preceding five days, at least 32 people had been killed in Kyiv (30 of them in the attack on 29 December);

x) 23 January 2024: Russia attacked Ukraine with 41 missiles of different types including cruise missiles (entering the capital in two waves) and land-based missiles aimed at Kyiv; air defence forces hit air targets but debris caused casualties and destruction; in Kyiv a person was killed and 22 wounded; there was damage to buildings in three Kyiv districts, and cars were set on fire; most casualties were reported to have been in Kyiv's central Solomianskyi and western Sviatoshynskyi districts, and the Pecherskyi district was also attacked; altogether 18 people were killed across the country and more than 130 injured;

xi) 7 February 2024: there were attacks across Ukraine including on Kyiv; 15 out of 20 drones and 29 out of 44 missiles were intercepted; four people were killed in Kyiv; it was reported that Russia used the Zircon hypersonic missile for the first time; and

xii) 15 February 2024: Russia launched missile attacks on Kyiv and other Ukrainian cities, targeting seven regions altogether; at least eleven people were injured across the country, and there was damage to infrastructure, residential and commercial buildings. It was said that all missiles targeting Kyiv had been shot down and no major damage was reported.

293. It should be noted that the press reports on which (vi) to (xii) above are based were not formally adduced in evidence, and none of the experts has had an opportunity to comment on them in their reports. Mr Gryshko's only report on this topic was dated 29 September 2023 and Mr Medvedev's reports were dated 29 June 2023 and 15 December 2023.

294. Dnipro, where Genesis's aircraft is located, is near the front line. An International Legal Assistance Consortium (ILAC) Rule of Law Report dated 27 July 2022 said:

> "Home to Dnipro, Ukraine's fourth-largest city, the Dnipropetrovsk oblast is a major industrial center in Ukraine. Since the expansion of hostilities on February 24, 2022, the oblast thus far has stood as an island of relative safety surrounded on three sides by fighting. Though numerous locations within the oblast have been shelled or hit with missile attacks, there have been no reports of damage to court buildings or prosecutor's offices." (footnotes omitted)

Genesis does not adduce any other evidence relating specifically to the military situation in Dnipro. However, it makes the point that it is within a hundred or so miles of the active ground hostilities at the front line, and by reason of its location one of the first places which Russia would occupy if it made significant advances.

(3) Impact on the court system

295. The Claimants submit that conflict has several implications for litigation in Ukraine.

(a) Air raids

296. The first concerns the direct potential impact of the Russian strikes. Mr Medvedev in his first report said:

> "34. From the experience of AVELLUM's attorneys, the beginning of the full-scale invasion led to the postponements of hearings which AVELLUM attorneys were supposed to attend. In particular, the hearings scheduled for 28 February 2022 at Holosiivskyi District Court of Kyiv, 3 March 2022 at Kyiv Commercial Court and Supreme Court, 9 March 2022 at Kyiv Commercial Court, 14 March 2022 at Kyiv Commercial Court, 28 March 2022 at Holosiivsky District Court of Kyiv, and 4 April 2022 at Kyiv Commercial Court were adjourned for later dates. These adjournments led to average delay of three months in consideration of cases.

35. The overall situation with access to justice began to improve throughout 2022. However, it would be an exaggeration to state that over this time things have fully recovered. As in press-release of the Supreme Court of 3 February 2023: "*it is not always possible to ensure the continuous operation of a court during the war. In wartime, judges face serious difficulties*."

36. In my experience and that of my colleagues at AVELLUM, the courts continue to prioritize certain proceedings and postpone others on the basis of the recommendations of the Ukrainian Judicial Council …, although the number of postponements has fallen since the beginning of the war. However, as I explain below, the nature and features of this case means that a court would be more likely to postpone it."

"*Air raids*

46. Another significant hindrance to the timely administration of justice are regular air raid alerts, which are announced when there is a threat of Russian missiles being launched against Ukraine and which occur more or less daily (on average – some days there are several alerts per day, whereas other days there are no alerts). The considerations of the safety of judges, parties, court employees, and all other participants in the judicial process require the courts to suspend its proceedings during the air raid and urge all those present to proceed to the safety of a nearby shelter.

47. The courts in Ukraine have issued orders obliging the judges to suspend court proceedings in case of air raid alerts, immediately leave the court premises, and proceed to the nearest bomb shelter. After the air raid alert stops, judges must decide to either resume or postpone the interrupted court hearing, taking into account other hearings scheduled for consideration. From my experience, the courts usually reschedule the hearings for a different day.

48. Air raid alerts may significantly jeopardise the court's schedule, especially if they last for a long period of time, with an average length amounting to 60 minutes. The Mayor of Kyiv, Vitaliy Klitschko, reported via his Telegram channel that in one year of the full-scale war (from 24 February 2022 to 24 February 2023) air raid alerts sounded 680 times in Kyiv, equivalent to 24 full days of air raid alerts.

49. For the period from 24 February 2023 to 15 June 2023 there were 5003 air raid alerts in Ukraine, with an average length of 62 minutes 42 seconds. For example, in Kyiv region air raid alerts sounded 303 times with a cumulative duration of 257.7 hours, or more than 10 days.

> 50. Ukrainian courts usually schedule a high number of cases per day (from 10 to 120 depending on the number of judges and overall workload of the court). In practice, if such a tight schedule of hearings is interrupted by an air raid alert, it can result in significant delays. From my experience as well and that of my colleagues at AVELLUM, depending on the court, hearings may be rescheduled for six months or more following a single air raid. That said, I am also aware of instances when the courts, in particular commercial ones, were sometimes able to postpone the hearing for a later time on the same day when the air raid alert sounded in the morning and for a short period of time. As I explain above, the Ukrainian courts do not generally hear cases in one, lengthy hearing. Rather, there will be several hearings spread out over several weeks, months or even years. There is a significant risk that some of these hearings would be delayed because of air raids, power outages (which I address below) or some other unforeseen development in the war.
>
> 51. Recently, Russia had yet again increased the rate of air attacks on Ukrainian cities since the very start of May 2023. For example, in May 2023 Russia conducted 17 missile attacks on Kyiv. Even though majority of those attacks were performed at the nighttime, in reality that meant that Kyiv residents, including judges and court staff, were significantly sleep deprived for 17 out of 31 May nights"

and:

> "*Proximity to active war zones*
>
> 60. The actual ability of the courts to consider cases in wartime depends on a number of factors, including the region where such courts are located.
>
> 61. As the former Head of the Supreme Court explained, "a lot of courts in the occupied territories or in the combat zone cannot administer justice at all."…
>
> 62. Ukrainian courts located in the areas which are not in close proximity to war zones indeed gradually resumed the consideration of non-urgent cases, including commercial claims.
>
> 63. At the same time, there are heavily affected areas where it is not possible to currently conduct justice at all. Even courts located in the territories where no active hostilities are taking place are being exposed to missile threats on a daily basis, especially those located near governmental or infrastructure buildings.
>
> 64. In view of this, in 2022 the Head of the Supreme Court changed the territorial jurisdiction of 135 local and appellate

> courts that could no longer administer justice. The jurisdiction of 50 courts was eventually restored.
>
> 65. At the same time, some of the courts which jurisdiction was relocated have still not resumed their operation even following termination of occupation. For example, the Commercial court of the Kherson region stopped its operations since 18 March 2022.37 Even though the area where the court is located was liberated from the Russian occupation by the Ukrainian forces on 11 November 2022, the Commercial court of the Kherson region has not resumed its operations to date.
>
> 66. This means that the workload of some still-functioning courts has significantly risen. Cases that would have been heard in certain courts that are no longer functioning will now be heard in courts in areas other than those where active hostilities take place, which further adds to the backlog of cases. Of course, I am not in a position to comment on how the military situation in Ukraine might progress. However, I would like to point out that it cannot be excluded that there might be a temporary heavy disruption of justice in any given region, including Kyiv, resulting in new territorial re-distributions of courts' jurisdictions. Thus, there remains a high degree of unpredictability, which may severely affect the ability of the justice system to function properly."
>
> (footnotes omitted in each case)

297. In section VI of his report, Mr Medvedev summarised procedural difficulties to which the present case might give rise, arising from the need to apply foreign law, service of parties outside Ukraine, examination of foreign witnesses (see below) and collection of evidence from abroad. He expressed the view that:

> "Although many of the difficulties involved in conducting complex multi-party disputes involving foreign defendants in Ukraine discussed in this section did exist even before Russia's invasion, the backlog and disruption caused by the invasion means that these difficulties have been significantly exacerbated. Judges are more likely to deprioritize or "shelve" a case which involves difficult procedural complexities of the kind I describe below, particularly if it also raises complex and unfamiliar legal issues" (§ 77)

298. Mr Gryshko's evidence included the following:

> "34. Following the standstill of the first months of the Russian unprovoked and unjustified aggression against Ukraine, which broke out on 24 February 2022, when Kyiv was under siege and the courts in Kyiv were largely non-operational, the Kyiv City Commercial Court has now resumed its normal operation. That the Kyiv City Commercial Court is now functioning effectively

at the pre-war level is amply demonstrated by the August 2023 statistics published on its official webpage. In particular, in August 2023 alone: (i) the Kyiv City Commercial Court sent 18,177 pieces of outgoing correspondence, including 3,598 by e-mail; (ii) 1,705 court hearings took place in August, of which 351 court hearings were conducted in the videoconference mode. The number of pieces of outgoing correspondence and court hearings conducted via videoconference in August 2023 even exceeded the same indicators for August 2021.

35. Similarly high figures are reported for July 2023. Moreover, according to the Results of the Court's Work in the First Half of 2023: "*compared to the same period last year, the level of document turnover increased by almost 37%. [. . .]; in the first half of 2023, the number of cases and materials received by the court doubled". The number of court hearings held in the first half of 2023 increased by almost 58.6 % compared to the same period of year 2022*."

"**B. Physical disruption caused by war**

81. In my opinion, Mr Medvedev's description in paras. 30 to 39 of his report was only fair for the first months of the full-scale war, that is until June 2022.

82. I disagree that the prioritisation and postponement of cases as described by Mr Medvedev is applicable to the current functioning of the Ukrainian courts which are far from the frontline, in particular those in Kyiv. Furthermore, I am of the opinion that such prioritisation and postponement are hardly applicable to the commercial courts. Unlike the general courts, the commercial courts deal with commercial disputes only and have no criminal cases. Meanwhile it is the latter that need to be prioritised according to the Recommendations."

"87. However, following the first months and *"[a]way from the active hostilities, most courts have maintained a relatively routine schedule"*. My perception is that since May-July 2022 most such courts, in particular in Kyiv, have resumed consideration of all types of cases in more or less the usual order.

88. This is applicable to the current situation in all Ukrainian territories which are at safe distance from the frontline.

89. If it was not for air raid sirens on certain days, I would even say that the operation of the Ukrainian justice system, at least in Kyiv where I am practising, has returned more or less to the pre-war routine."

"*1 Proximity to active warzones*

90. The main difference concerns the situation where the relevant court is located in the temporarily occupied Ukrainian territory and/or on the frontline.

…

104. Since the liberation of the Kyiv Region in early April 2022, Kyiv has not had any active war zones in its proximity.

105. I stress that the territorial jurisdiction of the Kyiv City Commercial Court has never been transferred, meaning no objective impediments exist which preclude it from delivering justice. I also note that the Kyiv City Commercial Court has never officially suspended its operation following 24 February 2022.

106. In the unlikely event that Kyiv happens to be under siege again the law provides that the court in question will suspend its operation and the case files will be transferred to the court designated by the relevant law or decision (as of today such decision could be rendered only by the High Council of Justice) on suspension of the court's operation. If such court is not designated, the case files will be transmitted to the court which is in the nearest territorial proximity to the Kyiv City Commercial Court.

2. Air raids

107. I generally agree with Mr Medvedev's summary of the impact of air raids on court proceedings. This summary is applicable to commercial court proceedings as well.

108. Still, I note that there is no uniform approach to dealing with the adjournment of court hearings that are interrupted by an air raid siren.

109. I am aware that the Supreme Court, located in Kyiv, recommended to its judges to postpone the hearing until the end of the siren so that the hearing could still take place on the same day. Another approach suggests that the hearing be postponed to a different day. I personally have experienced both approaches.

110. My understanding is that the judges of the Kyiv City Commercial Court tend to apply the following approach: if the air alert ends before 2 p.m., the scheduled hearings are heard in order of priority some time after the termination of the air alert (in some cases it was merely 15 minutes after the termination of the air raid). If the alert lasts longer, the hearings are rescheduled for another date.

> 111. The situation differs throughout regions of Ukraine: the western regions experience fewer air raid sirens (and concomitant disruptions) and regions near the frontline (e.g., Kharkiv, Odesa, Mykolaiv, Dnipro) – more."
>
> (footnotes omitted in each case)

299. Mr Medvedev in his second report, after referring to the information summarised earlier regarding increased air raids in Kyiv in November and December 2023, said:

> "22. Although it is impossible to predict the course of the air campaign, a significant and anticipated risk remains that the air raids will intensify, further disrupting court schedules."

and:

> "33. Since my First Report, the High Council of Justice has changed the territorial jurisdiction of 2 courts and restored the territorial jurisdiction of 1 court. The territorial jurisdiction of the Kyiv Commercial Court has not changed during this period." (footnotes omitted)

300. Mr Medvedev accepted in his second report that the further a court is away from the front line, the less relevant some parts of the Recommendations are.

> "For instance, paragraph 7 of the Recommendations on conducting urgent court proceedings is indeed nowadays not quite relevant for the courts located in Kyiv." (§ 10)

Further:

> "… commercial courts have no grounds to give priority to some cases over others based on the Recommendations. At the same time, in the situation of an escalation of the hostilities in Ukraine and significant obstacles to the conduct of justice in a particular region, the consideration of commercial cases in general will not be a priority (as it was not a priority during the first months of the invasion)." (§ 13)

301. The Claimants accept that the courts in Ukraine have not ceased to function. However, they make these submissions:

i) It is common ground that from February 2022 to (at least) June 2022, during the initial phases of the war, many courts in endangered areas temporarily suspended work and other courts mostly resolved urgent cases (e.g. criminal cases). Even now, the actual ability of the courts to consider cases in wartime depends on various factors (including the region where the courts are located, changes of territorial jurisdiction, and the resulting implications for the workload of other courts), which during wartime are inherently unpredictable. As of 11 October 2023, 124 premises of 118 judicial institutions had suffered damage of varying degrees, including the destruction of 15 court facilities.

ii) Whilst most missile strikes have to date been intercepted, whether that will remain the case will depend on a multitude of factors including the capabilities of Ukrainian air defence systems. There is no certainty that attacks will continue to be intercepted at the same rates of success as in in recent months.

iii) It is common ground that when there are air raid alerts, Ukrainian judges are obliged to suspend court proceedings, immediately leave the court premises, and proceed to the nearest bomb shelter. Once the air raid alert has ended, both experts agree that judges have discretion as to whether to resume or postpone the interrupted hearing, which can include postponement to a different day. There were three air strikes on Kyiv in a single week in December 2023.

iv) The conflict makes it impossible for their personnel to travel to Ukraine to participate in the proceedings. If the Claimants are required to proceed in Ukraine, they will be confined to remote conduct of very high value litigation with no ability to attend hearings or meet with their local lawyers.

v) Although away from the frontline, Kyiv is very much still a warzone, and warfare is inherently uncertain. There will be offensives and counter-offensives with the lines and prospects shifting over time. Given that proceedings in Ukraine would take several years to be completed, the material question is whether the Claimants should be obliged to enter into that forum, when there is no certainty as to the prospective stability or safety of the relevant court through the lifetime of the case (and clear evidence that whilst matters might look stable at one time, they may escalate at any moment thereafter). No rational businessman would agree to litigate disputes in a city where there is a daily risk of the courthouse being struck by missiles and drones, where court participants need to evacuate the court to take shelter in nearby metro stations and where there is every risk of escalation in the future.

302. Although those points deserve serious consideration, there are significant counter-arguments.

i) The evidence indicates that, outside of the conflict zones themselves, including in particular in the Kyiv City Commercial Court where these claims would most likely be heard, the Ukrainian court system is functioning almost to the same level as in the pre-war period.

ii) There is some disruption from air raids, but the evidence does not suggest these have been frequent in Kyiv during the daytime. As noted above, in the event of an air raid, the court will suspend its business until the alert ends. This may involve resumption on the same day or a delay of some months. However, there does not appear to be any statistical information as to what proportion of cases interrupted by air raid alerts have been postponed to subsequent days, or about the average length of such postponements.

iii) When considering the extent of delay introduced into court proceedings by such alerts, and other effects of the Russian invasion, the most relevant information is the rate and speed at which the Ukrainian courts clear the cases brought before them. The overall time taken for cases to be dealt with in Kyiv appears to compare favourably with the English courts. Mr Gryshko states that the average

duration of cases there was back at pre-war levels in the first half of 2023 (97 days compared with 100 days in the first half of 2021 and 122 days in the first half of 2022); and that even for cases progressing through all three tiers of the Ukrainian Commercial Courts (up to the Supreme Court), the time between filing a statement of claim and the decision of the Supreme Court was only 210 calendar days on average in 2022.

iv) There is a risk that the court system could be adversely affected if the ground war extended to a larger area of Ukraine (which would need to be a much larger part, if Kyiv were to be affected). However, no evidence has been adduced, such as military or geopolitical evidence, that would enable the court to assess the extent of that risk or when it might be most likely to eventuate. At most, it can be said that there is a risk of uncertain dimensions.

v) The Claimants' data for air raid alerts since mid-December 2023 is a limited data set and one on which the experts have not had an opportunity to comment (as regards, in particular, the impact on relevant courts).

vi) There is no reason to believe that any of the non-Ukrainian Claimants would spend any appreciable amount of time in Ukraine, or indeed that they would have done so even if the war was not ongoing. Legal representatives and experts can be contacted by video conference (as is now commonplace in all jurisdictions). AerCap and the Hausfeld Claimants have evidently been able to instruct Mr Uvarov and Judge Kushnir, who are both based in Ukraine. Court hearings can also be conducted by videoconference. Mr Gryshko states that most courts in Ukraine, including the Commercial Courts, have appropriate facilities to hold videoconferences with the parties, witnesses and experts. For instance, in 2022, the Commercial Cassation Court of the Supreme Court held 1,350 hearings via videoconference. During the first 6 months of 2023, the figures at the same court already reached 805 hearings via videoconference. The Kyiv City Commercial Court, which Mr Gryshko regards as the court most likely to consider the present dispute, is quite well-equipped to hold videoconferences, and during the first six months of 2023 held 2,567 hearings via videoconference.

vii) As explained later, it is unlikely that witnesses from abroad would be required to attend court in Ukraine in this case even in the absence of the war.

(b) Power outages

303. The Claimants refer to an ongoing risk of power outages impacting on the functioning of the courts and Ukrainian lawyers.

304. Mr Medvedev in his first report said the Ukrainian court system was highly affected by frequent and often unexpected power cuts due to severe damage caused to Ukraine's energy infrastructure by Russian missile strikes against it; and, as reported by the Prime Minister of Ukraine, targeted Russian missile strikes in November 2022 destroyed nearly half of the country's energy system, leading to blackouts that sometimes lasted for days. According to the data of the Ukrainian electricity grid operator DTEK, the average length of power cuts in Kyiv in January 2023 was 4 to 5 hours every day. The

court is unable to continue performing its normal functions in case of a power outage, and the work of Ukrainian lawyers is also disrupted.

305. Mr Medvedev refers to the effects of two outages in November 2022, and says *"[b]ased on my subjective experience, currently the situation with the power outages in Kyiv has improved significantly; however, any new attacks may cause new waves of power disruptions"*. He refers to Russia's destruction on 6 June 2023 of the Nova Kakhovka Hydro Power Plant, which was generating electricity and provided water supply to Zaporizhzhia Nuclear Power Plant. The destruction deprived the Ukrainian grid of 5% of its general capacity to produce electricity via hydro power plants, and led to power outages in the Kherson and Mykolaiv regions.

306. Mr Gryshko agreed that power outages were common in Kyiv from October 2022 to February 2023, but said that in Kyiv and most of Ukraine there have been no major outages since then. He noted that in late 2022 the Ukrainian government legislated to ensure that courts were categorised as critical infrastructure facilities likely to be given priority treatment in case of power shortages. Mr Medvedev agreed, and noted that in late 2023 it was reported that the State Judicial Administration would source 511 power generators for Ukrainian courts (though he did not know whether these measures had borne fruit).

307. In his second report (15 December 2023), Mr Medvedev said that the situation may worsen over the coming months due to likely attacks on power infrastructure. Mr Medvedev referred to outages in the Kyiv area caused by an air raid and drone strikes in late November 2023, and to statements by senior Ukrainian officials (including the President and the head of the national grid operating company) that the upcoming winter situation was not likely to be better than in the previous year. The Claimants say the risks of power outages have stepped up since Mr Gryshko served his report on 29 September 2023, given Russia's winter campaign against Ukraine's energy system, the MoD press release quoted earlier and a recent report of the International Energy Agency stating (as of January 2024) that:

> "For the second consecutive winter, Russia has increased military attacks on Ukraine's energy system, significantly undermining the security of the country's power supply. The bombing campaign – which lasted throughout the 2022/23 heating season and resumed in recent months – has targeted a wide range of energy infrastructure, from power plants to oil refineries and district heating facilities. The World Bank recently estimated that Ukraine's energy sector has sustained USD 12 billion in damages during the war."

308. On the other hand, as the Defendants point out, the Claimants have been able to identify only one attack on energy infrastructure since Mr Medvedev's 2nd report, and have adduced no evidence that it affected the functioning of the courts in Kyiv or elsewhere. Bearing in mind the lack of major power outages in Kyiv since early 2023 and the fact that the courts are now prioritised as critical infrastructure by the Ukrainian state, I do not consider it would be correct to assume that power outages will cause any significant disruption to the hearing of the present claims.

309. The Claimants also refer to reports of major cyber-attacks against Ukraine, with a recent attack in December 2023 on Kyivstar, one of the largest internet providers and mobile network operators, leading to major disruption of its services. However, the evidence does not go beyond this single incident, which has not been shown to have affected the courts and was expected to be resolved within a few days.

(c) Witness evidence

310. The Claimants suggest that one consequence of the war is that witnesses outside Ukraine would not be able to travel to Ukraine to give evidence; and that it is not possible for such witnesses to give remote evidence from abroad. However, three factors make those suggestions less than compelling.

311. First, Mr Gryshko explains that oral evidence is rare in the Ukrainian Commercial Courts. Witness statements were introduced only in 2017, and remain a comparatively rare occurrence in the Commercial Courts. If a case can be decided based solely on documents, it will be decided on the basis of documents only. Even if a party finds it necessary to submit witness evidence, oral evidence is not necessarily required. Pursuant to Article 88 of the ComPC, a witness's testimony is set forth in writing in a notarised witness statement. Pursuant to Article 89(1), oral testimony is necessary only where (i) there is a contradiction between the witness statement and other evidence on the record, or (ii) the court has doubts about the content, reliability or completeness of the witness statement (as confirmed in the Resolution of the Commercial Cassation Court of the Supreme Court dated 27 April 2023 in Case No. 927/738/19). Based on Mr Gryshko's experience and that of his colleagues from Queritius Ukraine, oral testimony of witnesses is a rather rare occurrence in Ukrainian commercial cases. Mr Medvedev does not seek to challenge these points in his 2nd report.

312. Secondly, it is doubtful whether witness evidence from persons outside Ukraine would be required in the present cases. Not all the claims have been pleaded out yet, but Genesis's Amended Particulars of Claim plead a series of events in Dnipro airport, the sourcing of an engine from Lithuania (including the movements of the truck carrying the engine through Poland and Ukraine), the invasion of Ukraine and various missile strikes, the closure of Ukrainian airspace and the present condition of the relevant aircraft in Dnipro Airport. Serendip's Particulars of Claim plead the Russian invasion of Ukraine, the imposition of martial law in Ukraine as set out in a number of Ukrainian decrees, the closure of Ukrainian airspace and a number of events at Dnipro Airport. The claims of Wind Rose and Overstar are somewhat similar, except that Wind Rose's claim also pleads events at Boryspil (Kyiv) airport. A witness statement served on AerCap's behalf includes the following summary of facts: *"Both aircraft are grounded at Boryspil International Airport in Kyiv, Ukraine ("KBP Airport"). On 24 February 2022, the Ukrainian government closed the Ukrainian airspace in light of safety concerns following the Russian invasion. On the same date, Russian attacks hit KBP Airport resulting in the evacuation of all passengers and staff. Since that date, KBP Airport has remained closed. I am instructed that, as far as AerCap is aware, the security situation at KBP Airport will not change in the foreseeable future so as to enable the return of the Boeing 777 and E-Jet to AerCap"*.

313. Insofar as witness evidence, as opposed to documentary evidence, may be required at all, it seems likely to come from persons with first-hand knowledge of the state of and access to/control over the aircraft, who are likely to be based in Ukraine. At any rate,

the Claimants have not given details of why, if it is the case, they say they are likely to need significant witness evidence from outside Ukraine, particularly in circumstances where (as described above) the Ukrainian court will only rarely require oral evidence. Genesis suggests that evidence would be given by "*lessor employee witnesses*", but it is difficult to see how any such witness would have relevant evidence to give. Genesis also suggests that "*extensive broking expert evidence is likely to be required*", presumably in relation to its collateral contract claim, but, again, there is no particular reason to believe that any such evidence would need to be given orally. Genesis also suggests that underwriting evidence may be necessary, but does not explain why. The Defendants point out that no issue has been identified as to the presentation of the risk or the placement of the policies.

314. Thirdly, it is likely to be possible for oral witness evidence to be given by video link. Article 197(7) ComPC states that a witness "*may participate in a court hearing via videoconference only in the premises of a court*". Mr Medvedev says his view, and the common practice and understanding in Ukraine, is that the reference to *"a court"* does not include a court abroad. Mr Gryshko does not agree, and refers to two cases where Ukrainian courts have ordered examination of witnesses located in different countries. For example, the Kirovskyi district court for the Dnipro region ordered, pursuant to Article 2 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, that the claimant (on the claimant's request) could be examined as a witness via videoconference from the competent court of Braunschweig in Germany. (Mr Medvedev notes that the order never appears to have been carried out, for unknown reasons, though it was not opposed by any part of the court.) It is true that the cases Mr Gryshko mentions are not commercial cases but, as he points out, the lack of commercial examples may be because witnesses do not often given evidence in commercial cases. In my view, the Claimants have not established that witnesses would be unable to give evidence by video link from a court outside Ukraine. I note also that in in *WWRT Limited v Zhevago* [2024] EWHC 122 (Comm), Jacobs J held, by reference to two Ukrainian cases, that the Ukrainian courts were willing to receive video evidence from overseas, albeit the evidence-taking did not proceed (§ 156). It is not clear whether the two cases seen by Jacobs J were the same as those referred to by Mr Gryshko.

315. Mr Medvedev suggested that where a witness is examined from abroad, there would be practical difficulties with ensuring that the witness may be held criminally liable for perjury, and with administering an oath. However, this point was raised for the first time in his second report, so Mr Gryshko did not have an opportunity to respond to it. It seems unlikely to be insuperable in practice.

(d) Backlog and understaffing

316. It is common ground that the Ukrainian courts have a backlog of cases (including 654 unresolved insurance cases in 2022), and problems with understaffing. Both of these problems existed prior to the war, but Mr Medvedev says they have inevitably been exacerbated by the war. The Claimants say the particular impact of the war on the functioning of the Commercial Courts is shown by the fact that as of 5 June 2023 around 7% of Commercial Court judges have ceased to administer justice since the invasion.

317. In areas of Ukraine close to active warzones the courts are not functioning, and their jurisdiction is transferred to other operational courts. Mr Medvedev states that the

workload of functioning courts has significantly risen as a result of other courts in active warzones being taken out of operation. However, he does not seek to quantify this effect. The evidence indicates that only a small number of Commercial Courts were rendered inoperative by the war. Further, the jurisdiction of inoperative courts is normally transferred to the nearest operational court.

318. The problem is therefore unlikely to affect Kyiv, which is a long way from a warzone. There have been no active warzones near Kyiv since April 2022 and Mr Gryshko states that the Kyiv courts have largely resumed their pre-war routine. He refers to the August 2023 statistics published on the Kyiv Commercial Court's official webpage, including that in August 2023 alone (i) the court sent 18,177 pieces of outgoing correspondence, including 3,598 by e-mail; and (ii) 1,705 court hearings took place, of which 351 were conducted in videoconference mode. These figures exceeded the same indicators for August 2021. The number of court hearings held in the first half of 2023 increased by almost 58.6 % compared to the same period of year 2022, and the number of cases considered on the merits in the first half of 2023 was significantly higher compared to the same period of 2021. As at 11 September 2023, 74 of the 77 judicial posts in the court were filled.

319. As to understaffing, statistics published by the High Council of Justice indicate that staffing levels remained relatively consistent between January 2021 and January 2023, and there was an increase in the percentage of first instance positions filled in Commercial Courts in that period. The Kyiv City Commercial Court is operating at almost full capacity, with 74 of 77 judicial posts filled as of 11 September 2023. Mr Medvedev's 7% figure is based on the total number (44) of Commercial Court judges at all levels and in all localities who ceased to administer justice between the commencement of the war and 5 June 2023. However, that does not reflect vacancies in Kyiv.

320. The backlog of cases is relevant if and insofar as it results in delays in resolving cases. The English courts have tended not to regard delays even of several years as amounting to 'strong reasons' (see, e.g., *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382, 391 (3-4 years) and *Československá Obchodní Banka AS v Nomura International Plc* [2003] IL Pr 20 § 16 (5-6 years)). There was a 30% decline in issued decisions in insurance cases by courts of first instance between 2021 (1907 decisions) and 2022 (1396 decisions). However, in the Kyiv City Commercial Court the number of cases received in the first half of 2023 was almost at the pre-war level recorded in the first half of 2021 (16,081 cases compared with 17,536 cases), and the ratio of resolved to incoming cases in 2022 was 97.6% compared to 98.2% in 2021. Further, the overall duration of cases in the Ukrainian courts is relatively low: see § 302.iii) above.

(e) Conditions in Dnipro

321. Genesis makes the point that Dnipro, where its aircraft is located, is near the front line, and it relies on the ILAC Report quoted in § 294 above. Genesis also points out that the territorial jurisdiction of 57 neighbouring courts was transferred to Dnipro after the hostilities intensified. However, the ILAC report does not establish the extent of any disruption to the Dnipro courts, and the Claimants do not adduce any evidence on that topic (such as evidence of delays caused by the transfers of cases from nearby courts). Genesis refers to estimates said to have been given by Mr Medvedev in another case, *WWRT Limited v Zhevago*, that before the war a claim in the Shevchenkivskyi district

court of the city of Kyiv might take 3-4 years from the date of filing of the claim to final decision and, since the war, 5-6 years. However, that evidence is not before this court, and *WWRT* concerned a major fraud case about events leading to the collapse of PJSC Finance & Credit Bank. Further, the Shevchenkivskyi district court in Kyiv is a general court and not a Commercial Court (the Commercial Courts having fewer backlogs according to Mr Gryshko's evidence).

322. In addition, it is likely that Genesis's claims can (and will) be tried in Kyiv rather than in Dnipro. As indicated in §§ 241-244 above, Genesis will almost certainly need to sue the insurer, Universalna, based in Kyiv, and should therefore be entitled to proceed in Kyiv pursuant to ComPC Articles 27(1) and 29(2).

(f) Service

323. Mr Medvedev states that the war has affected service of documents in that it led to unprecedented waves of internal and international migration and relocation of its population, which continues. Such movement of people complicates the process of finding case parties and other case participants such as witnesses. Additional problems arise if they have moved outside Ukraine and so have to be served abroad.

324. Mr Gryshko says service has to some extent become practically more difficult since February 2022, but such problems mainly concern sending summonses to areas close to the war zones (or in the temporarily occupied territories, where service is impossible). He adds:

> "Another practical difficulty regarding sending summons and/or procedural documents via post outside the occupied territories may be the lack of funding for the courts that impacts the court's ability to effect service via post, which unfortunately may from time to time occur in the courts. However, whenever that has happened the courts have used all possible means to notify the case participants, including mobile phones, emails, etc. The information about the case appointed for consideration is published on the courts' websites. However, as far as I am aware, there have not been serious disruptions in sending post from the Kyiv City Commercial Court in 2023." (1st report § 157)

325. However, the Claimants do not identify any witnesses they would in fact wish to call who would be affected by service issues in Ukraine (and the AerCap Claimants' position is that they do not intend to call any witnesses based in Ukraine).

326. The other points made about service do not arise from the war and are considered later.

(g) Overall view on impact of Russian strikes

327. I have given this part of the applications particularly anxious consideration, since it has been put forward at least in part as raising questions of safety. However, I am not persuaded that it raises strong reasons for declining to give effect to the EJCs by granting stays. The evidence I have discussed above indicates that, even in the absence of the war, it is unlikely that individuals from outside Ukraine would need to attend court to give oral evidence, and that even if they did, then they would probably be able

to attend remotely. Further, parties can attend hearings and instruct lawyers remotely without the need for individuals to travel to Ukraine and risk putting themselves in danger. In addition, the evidence about the effect of the war on the court system, especially on the Commercial Courts in Kyiv and elsewhere, does not indicate that the war is likely to result in substantial delays or other problems in litigating these claims effectively in the courts of Ukraine.

(h) WWRT v Zhevago

328. The parties noted that in *WWRT Limited v Zhevago* [2024] EWHC 122 (Comm), a *forum non conveniens* case, Jacobs J concluded in January 2024 that the evidence before him (including evidence from Mr Medvedev) regarding the position in Ukraine as at May 2022 was "*a long way*" from showing that that case should not proceed in Ukraine, its natural forum (§§ 191-196). In reaching that decision, Jacobs J considered evidence post-dating May 2022 insofar as it might shed light on the position in May 2022. However, his decision related to the position at a different time, and was based on evidence not presently before the court, which the parties have therefore not had the opportunity directly to challenge. I have therefore not relied on the outcome of that case when considering the issues in the present case.

(4) Multiplicity of proceedings and the "Cambridgeshire" factor

329. The Hausfeld Claimants suggest that, if these proceedings had to be litigated in Ukraine, there would be a risk of multiplicity/inconsistent findings because other OP claims will be heard in England, some involving certain of the Defendants to the Hausfeld Claims, and very similar issues of fact and law. However, the Defendants point out that six of the seven issued claims are the subject of the present jurisdiction challenges and the other has been stayed (and presumptively would need to proceed in Ukraine if pursued).

330. Genesis submits that:

i) depending on the court's decision on the validity and effect of the EJC, it is possible that at least some of Genesis's claims will proceed here as of right (such as the collateral contract claim); and

ii) there is a real chance that Genesis will bring a claim against its LP insurers in England (under the LP English jurisdiction clause) in respect of its Ukraine/Wind Rose loss, for example if some or all of the Genesis OP Defendants suggest that Genesis has no title to sue reinsurers under Ukrainian law (which will open up a claim under the contingent cover of the LP insurance, which is supposed to operate as a "back up" to the OP cover). If Genesis does make an LP claim, then it is likely that the LP insurers will raise all the same issues of OP recoverability that will arise in the present action.

331. However:

i) I have concluded in section (D)(4)(f) above that Genesis's collateral contract claim, if available, is subject to the EJCs. Even if that were not the case, the fact that Genesis's collateral contract claim could proceed in London, if not stayed or struck out, could not in my view be a 'strong reason' to refuse to give effect to the EJCs binding the other Claimants, and to that extent multiplicity would

arise anyway. I also doubt that it could be a strong reason for declining to stay Genesis's other claims, since the risk of multiplicity would have arisen from Genesis's own breach of the EJCs as regards those other claims (cf *Lungowe v Vedanta* [2020] AC 1045 § 75).

ii) The mere prospect that Genesis might in future bring an LP claim in England, resulting in possible overlap of issues, is not a strong reason for declining to give effect to the EJCs. It would also count against Genesis, to a degree, that any multiplicity risk was inherent in the contractual structure it entered into: because the LP Policies are subject to English jurisdiction whereas Genesis left the jurisdiction provisions of the OP policies to be determined by the lessees and their insurers (cf *Konkola Copper Mines plc v Coromin [2006] EWHC 1093* (Comm) § 42).

332. For completeness, I do not consider there to be a risk of multiplicity vis-à-vis the Russian OP claims and LP claims proceeding in London. The main factual and legal issues in those claims are radically different from those in the present cases.

333. An important factor in a *forum non conveniens* analysis can be whether there are similar proceedings already taking place within England, where there is a commonality of legal teams on both sides of the litigation and an accumulation of knowledge and expertise that would contribute to "*efficiency, expedition and economy*" if the claims were heard in England, and would assist the court to reach a just resolution and promote a possibility of settlement (the "*Cambridgeshire*" factor): *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 486A. However, an EJC inherently creates the foreseeable possibility that there will be similar litigation, not subject to an EJC (or subject to an EJC in favour of a different jurisdiction), that will have to proceed in parallel using different legal teams. In any event, in the present cases I would not accept that there is significant knowledge or expertise transferrable from the Russian OP Claims or the Russian LP Claims, both proceeding in London, to the present claims. The Russian claims involve wholly different issues of fact and law from the present claims and arise from the alleged loss of aircraft for entirely different reasons from those arising in the present case.

(5) Genuine desire for trial in Ukraine

334. The Hausfeld Claimants say the Defendants to their claims have consistently and continuously refused to indemnify them for nearly 2 years since notices of claims were sent, and have refused to engage with them, causing severe financial hardship. They suggest that the Defendants' reliance on the EJCs is an attempt to take advantage of the difficulties and delays in the Ukrainian court, bearing in mind also that the Defendants are reinsurers operating in the London market and domiciled in England or Ireland with no material connection to Ukraine.

335. 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: see *The Eleftheria* [1970] P 94, 99–100; *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.

336. The Defendants submit that this is not a legally material factor where there is an EJC, 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)

337. However, as I said in *Russian Aircraft Operator Policy Claims (Jurisdiction Applications)* (§§ 529-530), the point cannot be so easily disposed of, bearing in mind that *The Eleftheria* and *Donohue v Armco Inc* [2001] UKHL 64 (in which the *Eleftheria* criteria were approved) involved exclusive jurisdiction clauses, as did the cases cited in § 335 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. Nonetheless, (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 a sufficiently valid reason for wishing the trial to occur there; and (c) where the agreed forum is the court 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). Lack of genuine desire is most likely to be relevant where the party seeking a stay is acting abusively or in bad faith (cf. *Euromark* § 41, and *Vinmar Overseas v PTT International* [2018] SGCA 65 § 130, a case cited by the Defendants in the present applications).

338. In the present case, the Hausfeld Claimants' point about delays in Ukraine carries little weight in circumstances where (a) I have concluded that the expert evidence does not support the view that Ukrainian proceedings are likely to be slow and (b) it was open to the Claimants to sue in Ukraine at any time, e.g. in August 2023 after the HFW Defendants set out their position on jurisdiction. There is no sufficient basis on which to infer bad faith or abuse. Moreover, there are cogent reasons (over and above the contractual agreement to Ukrainian jurisdiction) why the Defendants might legitimately wish the cases to proceed in Ukraine, including the importance of Ukrainian law to the issues and availability of appeals, the location of evidence and witnesses, the avoidance of duplicative litigation (e.g. if, having failed in London, the Claimants were to sue the insurers in Ukraine who in turn would be likely to join the present Defendants), the desirability of the Ukrainian insurers' knowledge and experience being brought to bear in the same proceedings in which the Defendants are sued, and likely lower legal costs in Ukraine: see *WWRT v Zhevago* § 166 ("*I would expect that the costs of proceedings*

in England would be a high multiple of the figures for proceedings in Ukraine"), and *PJSC Bank "Finance and Credit"* [2021] EWHC 2522 (Ch) § 154.

(6) Other factors

339. The Claimants submit that there would be further significant difficulties and inconvenience if the claims were determined in Ukraine, as a result of (i) difficulties about service of documents on parties outside Ukraine, (ii) the structure and timetable of Ukrainian proceedings, (iii) the Ukrainian courts' inexperience with applying foreign law and with aviation insurance disputes, (iv) procedural barriers to the examination of foreign witnesses, and (v) other procedural difficulties with collecting and submitting evidence.

340. These considerations are, however, foreseeable considerations of 'convenience' that in principle cannot constitute strong reasons for declining to give effect to the EJCs, albeit that point is attenuated to a degree by the considerations discussed in § 277 above. They may nonetheless be regarded as part of the context in which the alleged 'strong reasons' considered earlier arise, and I therefore address them briefly here.

341. [i] Service: Defendants in Ukraine (such as the Ukrainian insurers) can be served by sending the summons to their registered office in Ukraine. There is also a new procedure for sending summonses to registered email addresses (introduced on 23 January 2023), though only to registered participants. Ukrainian lawyers have since 18 October 2023 been required to register accounts to which the courts can serve procedural documents (pursuant to Law no. 3200-IX). The same has applied to private companies in Ukraine since 20 February 2024.

342. Defendants abroad can be served via the Hague Convention on parties in participating states. As the UK has not objected to service pursuant to Article 10(a) of the Convention, documents can be served there by post by a Ukrainian court, and Ukrainian courts have done so. Service can also be effected on a Ukrainian lawyer authorised to accept service of proceedings and of all documents in the proceedings. If that has not occurred, the courts can take measures to avoid the delay that might otherwise arise from having to serve every document via the Hague Convention, by changing the procedure for notifying the defendants (Gryshko 1st report § 174 citing Resolution dated 21 December 2022 of the Supreme Court of Ukraine in Case No. 905/947/21). I agree with the Defendants that, in practice, the lack of a representative action in Ukraine (resulting in the need to serve multiple defendants) is likely to be addressed by these various means. In particular, it seems likely in practice that individual Lloyd's Names will allow Ukrainian lawyers to be instructed on their behalf to accept service.

343. [ii] Structure and timetable of proceedings in Ukraine: The Claimants suggest that proceedings in Ukraine may be lengthy for a number of reasons. One is that orders made during the preparatory stage of proceedings are subject to appeal, and Mr Medvedev cites two cases where the preparatory stage remains incomplete two years after the cases were commenced. However, the possibility of interlocutory appeals also arises in other jurisdictions, including England and Wales. The official statistics of the State Judicial Administration of Ukraine indicate, as noted earlier, that the average case duration in the Kyiv City Commercial Court has been of the order of only 100 days for the last three years. The Claimants note that Ukrainian courts would not block out full days or weeks for one hearing but would schedule shorter hearings and adjourn to a

later date if the trial could not be completed. However, that is a legitimate procedural approach and is linked to the fact that Commercial Courts in Ukraine focus on documentary evidence, which in itself may save time. Ukrainian courts sometimes appoint three-judge panels in harder cases, which can make the scheduling of hearings more difficult, but Mr Gryshko states that this rarely happens and that the Commercial Courts tend to honour the official time limits set forth in the ComPC anyway (preparatory stages to be conducted within 60 days of commencement, subject to a possible 30-day extension, and trial to be completed within 30 days of the commencement of trial).

344. In his second report Mr Medvedev states that Ukrainian courts do not have the case management tools to allow for the consolidation of multiple claims or the adoption of test cases. Mr Gryshko has not had the opportunity to comment on this evidence. However, ComPC Article 173(2), which Mr Medvedev cites, permits consolidation of claims by different claimants against the same respondent or by the same claimant against different respondents. Mr Medvedev's point is that merger of cases with multiple parties on both sides is *"unlikely"*. However, as the Defendants point out, there are multiple claims in the present proceedings which are purportedly brought on the same insurance and/or reinsurance contracts against the same Defendants. By way of example, the Serendip and Genesis Claims are presently brought against the same set of Defendants. I do not consider the Claimants to have established that the Ukrainian courts could not manage these claims efficiently.

345. [iii] Foreign law and aviation disputes: Mr Medvedev has been able to identify only about 100 cases since 2006 in which the Ukrainian Commercial Courts have applied foreign law, and says the application of foreign law can cause significant delays. In addition, aviation insurance claims are infrequent in the Ukrainian courts, and the Claimants say the Ukrainian courts are unfamiliar with disputes arising out of London market insurance and reinsurance contracts. Mr Medvedev explains that aviation insurance claims are "*very rare*", with only about 40 cases since 2006, and that he has not been able to identify any case in which Ukrainian courts have considered London market clauses (e.g., AVN 67B).

346. However, most of the legal issues in these cases are governed by Ukrainian law (which may be a significant factor pointing towards Ukrainian jurisdiction). The reinsurance contracts are stated to be governed by Ukrainian law (or the law of the domicile of the insured) and Mr Gryshko's evidence is that as a matter of Ukrainian conflicts law they are governed by Ukrainian law. It is not disputed that the insurance contracts are governed by Ukrainian law, in some cases by virtue of an express choice of law, even if they include some London Market clauses in English with Ukrainian translations. Even if Genesis's collateral contract claim is governed by English law, it is only one of several bases on which Genesis brings its claims. Ukrainian law will govern issues about title to sue, insured loss and insured perils (including by reference to the Ukrainian legislation and regulations giving rise to closure of Ukrainian airspace and the grounding of the aircraft). Interpretation of the leases, governed by English (or Irish) law, is unlikely to be a significant issue in these cases. The Ukrainian courts are obviously best equipped to deal with questions of Ukrainian law, and Ukrainian law can be appealed as an issue of law. To the extent that evidence of English or other foreign law is required, the experts agree that it is typically given by means of experts' reports.

347. The provisions of the contracts have been in common use internationally for a long time, and in the context of these policies are governed by Ukrainian law. The evidence indicates that that there have been cases where the Ukrainian court has dealt with such clauses. For example, in the Resolution of the High Commercial Court dated 27 June 2017 in case No. 908/1393/16, the court considered clause AVN 47A; and in the Decision of the Commercial Court of Kyiv dated 25 July 2011 in case No. 50/200-53/324, the court considered numerous clauses commonly used in the London market, including AVN 46B, AVN 48B, AVN 71. Even if required, insurance experts could give evidence by means of experts' reports: and, should it be necessary, probably be cross-examined remotely: see § 314 above. More generally, the Kyiv City Commercial Court dealt with 1,346 insurance-related disputes in 2022. It would, moreover, sit uneasily with comity for this court to assume jurisdiction on the basis that the Ukrainian court is less able to adjudicate on standard form insurance clauses used in international aviation insurance, even though originally devised in the London aviation insurance market.

348. [iv] Witnesses abroad: I have addressed this in §§ 311-315 above.

349. [v] Collection of evidence: The Claimants suggest that there are several complications with collecting and submitting evidence in Ukraine, including (a) the requirement to legalise official documents from abroad, (b) the requirement for all documents submitted to the court to be translated into Ukrainian and certified by a notary, (c) delays associated with enforcing court orders on foreign parties for the submission, production or preservation of documents, and (d) the requirement to present original documents if the parties or the court questions the authenticity of a document.

350. However, I agree with the Defendants that most of the documentary and witness evidence is likely to be in Ukraine. I have outlined in § 312 above the way in which the claims are put. The evidence (including documentary evidence) about whether, and if so how, the Claimants have been deprived of the aircraft is likely to come mainly from Ukraine, including evidence about the physical/legal restrictions imposed on access to and control of the aircraft, and whether the Claimants could have secured their release (as subsequently happened with an AerCap Boeing 777 in December 2023). Equally, evidence about the maintenance and condition of the aircraft, or about the effect of airstrikes, is likely to be held in Ukraine by the lessees. The Claimants can voluntarily adduce documents they hold outside Ukraine, and only official documents such as court documents will need to be legalised. It is true that the Claimants may need to have notarised translations made of documents they hold outside Ukraine, but translation of documents would be needed wherever the cases were heard given the likely amount of relevant documentary evidence in the Ukrainian language; and Mr Gryshko's evidence is that notarisation of translations is not burdensome.

(7) Conclusion on 'strong reasons'

351. For the reasons given above, and even bearing in mind the extent to which the Claimants may plausibly argue lack of actual awareness of the EJCs (§ 277 above), I do not consider there to be strong reasons to decline to give effect to the EJCs by granting a stay.

(F) FORUM NON CONVENIENS

352. In their written and oral submissions, the Defendants sought by way of alternative to argue that, even if they did not have the better of the argument that the EJCs applied, the claims should be stayed on the ground that Ukraine is clearly and distinctly the more appropriate forum. However, with the exception of XL, the Defendants had not sought a stay on *forum non conveniens* grounds in their application notices or the accompanying evidence. They argued that, in view of the way in which matters had subsequently developed, and given the degree of overlap between the 'strong reasons' issues and *forum non conveniens* considerations, they were entitled to advance this argument; and, if necessary, should be permitted to amend their application notices accordingly.

353. In the light of my findings on the EJC and 'strong reasons' issues, it is unnecessary for me to address this part of the arguments. In addition to the merits of the Defendants' contentions, it would raise difficult questions about whether the Claimants had had fair notice of a *forum non conveniens* argument; the impact (if any) of the fact that some but not all Claimants had in their evidence put forward a case that Ukraine was the appropriate forum; whether (as submitted by AerCap in particular) there was additional expert evidence that the Claimants could and would have advanced had *forum non conveniens* been squarely put in issue; (if so) whether the Claimants should now have a chance to adduce such evidence or whether the affected Defendants should simply be precluded from advancing the argument; and what the position would be if some, but not all, Defendants were able to advance a *forum non conveniens* argument and succeeded on it. In my view it would be undesirable to seek to address these rather complex points by way of alternative findings, particularly when time at the hearing allowed them to be addressed only relatively briefly in oral argument, and I decline to do so.

(G) CONCLUSIONS

354. The Defendants have the better of the argument that the exclusive jurisdiction clauses in the reinsurance contracts are binding and enforceable, and apply to the claims which the Claimants wish to advance. There are not strong reasons to decline to give effect to the EJCs by staying these claims in favour of proceedings in the courts of Ukraine. The Defendants' applications therefore succeed.

ANNEX A: CLAIMS

1. **CL-2023-000445** – Genesis Ireland Aviation Trading 3 Limited v Talbot Underwriting Ltd for and on behalf of all the Underwriting Members of Talbot Syndicate 1183 for the 2021 Year of Account & Ors

2. **CL-2023-000547** – AerCap Ireland Capital Designated Activity Company v PJSC Insurance Company Universalna & Ors

3. **CL-2023-000576** – Serendip LDA & Anor v American International Group UK Limited & Ors

4. **CL-2023-000679** – Celestial Aviation Trading 69 Limited v PJSC Insurance Company Busin & Ors

5. **CL-2023-000769** – Wind Rose Aviation Company LLC v American International Group UK Limited & Ors

6. **CL-2023-000770** – Overstar S.R.L. v XL Insurance Company SE & Anor