

UKRAINE'S ATTEMPT TO SEIZE RUSSIAN AIRCRAFT FLYING TO CRIMEA

Following the accession of Crimea to the Russian Federation in March 2014 Ukrainian authorities have formally closed all airports in Crimea as well as its airspace. It was first reported in September 2020 that a Ukrainian court at the request of the prosecutor's office for the Autonomous Republic of Crimea and Sevastopol (currently located in Kiev, Ukraine) issued an order to seize 65 aircraft operated by Russian airlines, as they are flying to Crimea in violation of Ukrainian laws. In November 2020, another 44 aircraft were added to this list of 'seized' aircraft. In this briefing we summarise potential legal implications of these events for English law leases with Russian airlines.

According to publicly available information, the prosecutor's office for the Autonomous Republic of Crimea and Sevastopol is conducting a criminal investigation with respect to the Russian airlines flying to Crimea, as flights to Crimea are prohibited from a Ukrainian law perspective. Although Ukrainian authorities do not disclose the full details of the investigation, it is reported that 109 aircraft were 'seized' by an order of the Ukrainian court. In practice, Ukrainian authorities themselves are not in a position to effectively seize the aircraft, unless the aircraft fly to Ukraine (i.e. the territories controlled by the current government of Ukraine). Nevertheless, it is worth noting that there may still be certain legal implications of which lessors should be aware.

Enforcement abroad

Ukrainian authorities may decide to enforce their local court judgment abroad. The results and likelihood of such enforcement will depend on Ukraine's international treaties and the laws of the jurisdiction where the recognition and enforcement will be sought by Ukraine. If a foreign state does recognise and enforce the Ukrainian court judgment, then the aircraft may be exposed to a risk of being seized when in that state.

Furthermore, Ukrainian authorities may also approach the aviation authorities in the state of registration of the aircraft (most likely the Bermuda Civil Aviation Authority) and, for example, request an order for arrest. We recommend lessors to liaise with their Bermudan counsel to check if this is indeed possible from a Bermudan law perspective.

Contractual provisions

Lessors should carefully consider the relevant provisions of their leases with Russian airlines. In our experience, most of the leases with Russian airlines provide for certain operational undertakings and related events of default which may be triggered in light of the ongoing investigation and the court order. Here are the most relevant provisions to look for.

Most of the leases usually contain an obligation to comply with 'any applicable law of any Government Entity having jurisdiction over the Aircraft', 'any law applicable to the Aircraft' or some variation of this language. Whether or not this obligation is breached will depend on the particular wording used in the underlying leases. It is worth noting here that Russian law and English law would give a different answer to this question. From a Russian law perspective, Ukrainian authorities should not have any jurisdiction over the aircraft when flying to Crimea. However, as a matter of English law, Crimea remains part of Ukraine and the Ukrainian government has jurisdiction over Crimea and, therefore, over the aircraft when in Crimea. Accordingly, if the aircraft are flying to Crimea and that is illegal as a matter of Ukrainian law, then that illegality would be recognised as a matter of English law.

In addition, it is also standard for the leases with Russian airlines to have an obligation not to do anything which may expose the aircraft to seizure, detention or confiscation. This obligation may be stipulated in operational undertakings, provisions on security and liens or as a standalone event of default. To the extent Ukrainian authorities have the powers to seize, detain or confiscate the aircraft, these provisions will most likely be breached. As a practical matter, it is safe to assume that the aircraft are not at risk of seizure, detention or confiscation in Crimea itself. However, they may be at such risk in parts of Ukraine that are under Ukrainian government control. As mentioned above, it seems possible that the aircraft could also be at risk of seizure in jurisdictions which would recognise and give effect to Ukrainian law, depending on the law of those jurisdictions.

In this briefing we have addressed only a few issues which may arise in connection with a potential seizure of the aircraft. Any specific advice should be on a case-by-case basis and will require review of the underlying lease documentation and a local law analysis.

We will continue to monitor this situation. Should you have any questions in connection with the subject matter of this briefing or if you would like to discuss how it may affect aircraft leases with your Russian customers, please contact the authors of this briefing for specific advice.

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