Neutral Citation Number: [2022] EWHC 1247 (TCC)

Case No: HT-2022-000037

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT
QUEEN'S BENCH DIVISION

Date: **26 April 2022**

Before :

Mr Justice Waksman

- -

Between :

Qatar Airways Group Q.C.S.C.	**Claimant**
- and -	
Airbus S.A.S.	**Defendant**

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- -

Philip Shepherd QC, Bajul Shah and Harrison Denner (instructed by **Crowell & Moring**) for the Claimant
Sonia Tolaney QC, Rupert Allen, and Oliver Butler (instructed by **Clifford Chance LLP**) for the Defendant

Hearing date: 7 April 2022

APPROVED JUDGMENT

INTRODUCTION

1. This is an application for an interlocutory injunction made by Qatar Airways ("Qatar") v Airbus SAS ("Airbus"). The underlying dispute between them is well known to the parties and beyond, and I do not intend to rehearse it in detail here. suffice to say that by a written Aircraft Specific Purchase Agreement ("ASPA") made on 18 June 2007 ("the A350 Agreement"), Airbus agreed to manufacture for, and sell and deliver to Qatar 80 (later changed to 76), A350 Airbus aircraft. 53 such aircraft have been delivered. By a further ASPA made between the parties on 7 December 2017 ("the AA321 Agreement), Airbus agreed to manufacture for, and sell and deliver to Qatar, 50 Airbus A321 Neo aircraft. None of those aircraft have yet been delivered.

2. Both the A350 and the AA321 Agreements are in similar form and they both contain the same set of detailed Common Terms ("the Common Terms"), which, by the Common Terms Aircraft Purchase Agreement (the "CT Agreement") made on 8 December 2003, became incorporate in all future ASPAs. Thus each of the A350 and AA321 Agreements are to be read as containing the Common Terms and indeed they expressly state that they do.

3. In late 2020, Qatar discovered that one of the delivered A350s had developed premature and accelerated degradation on parts of the surface of its airframe. The same problem later manifested itself in other A350s. Subsequently, the Qatar Civil Aviation Authority withdrew the airworthiness certificates of 23 of the delivered aircraft and will not grant certificates for any further new A350 aircraft until what has been described by the parties as the Condition has been fully investigated. The European Union Aviation Safety Agency ("EASA") has not taken similar steps with regard to any A350, whether delivered to Qatar or any other airline. Qatar was the first airline to take delivery of the A350.

4. On 31 December 2020 Qatar and Airbus entered into Supplementary Commitment Letter ("the SCL"), in relation to its A350 aircraft and the Condition. It is not directly relevant to the instant application.

5. On 17 December 2021, Qatar commenced proceedings in this court against Airbus in relation those matter("the A350 proceedings"). This followed Airbus's attempted tender of delivery in Toulouse of two further A350 aircraft; Qatar maintained it was not contractually obliged to accept them by reason of the Condition, which Airbus had not shown would not also present in those aircraft. Airbus in turn contends that the actual or putative presence of the Condition did not entitle Qatar to refuse delivery and, accordingly, Qatar was in breach of A350 Agreement and in particular the Common Terms.

6. On 17 January 2022, and without any notice, Airbus issued a termination notice in respect of the entirety of the AA321 Agreement on the basis that Qatar was in breach of the A350 Agreement, so Airbus was now entitled to terminate the AA321 Agreement pursuant to clause 17.4 of the Common Terms, being a cross-default clause (“the AA321 Termination”).

7. As at that date, the first AA321 was due to be delivered in the first quarter of 2023. As a result of Airbus' actions, Qatar, which did not accept the validity of the AA321 Termination, issued further proceedings relating to that termination on 11 February 202 (“the AA321 proceedings”). Since the AA321 proceedings are parasitic on the A350 proceedings, they are now proceeding in tandem and will be managed and ultimately tried together.

THE INJUNCTION APPLICATION

8. On 11 February, Qatar also applied for interim injunctive pending trial, which was first, to restrain the defendant (that is Airbus) from implementing or in any way acting on the AA321 termination notice; secondly, to restrain Airbus from marketing or selling or otherwise disposing of any aircraft manufactured pursuant to the AA321 Agreement and any delivery slots associated with them; and, thirdly, to require Airbus to continue to perform all of its obligations under the AA321 Agreement. That is the application which is now before me. I should add that on 18 February I made an order, pending this hearing, and without prejudice to any action that Airbus may already have taken, that it should not between then and now take any steps which would materially worsen its ability to comply with any order sought by Qatar whose effect would be to require Airbus to comply with all or part of the AA321 Agreement.

EVIDENCE

9. The following evidence is before me which also deals with the various applications made in the A350 proceedings which will follow immediately after this judgment:

    a. two witness statements from Robert Weekes, Qatar's solicitor, dated 17 December 20221 and 10 February 2022;

    b. a witness statement from Andrew Flower, Qatar's accountant, dated 11 March 2022;

    c. a witness statement from Karl Hennessee, Airbus' head of litigation dated 11 March 2023;

    d. a witness statement from Julian Acratopulo, Airbus' solicitor; dated 11 March 2022;

    e. two witness statements from Ali Al-Hilli, Qatar's chief technical officer, dated 25 March and 5 April 2022;

f. a witness statement from Morten Loej, Qatar's senior vice president of corporate planning, dated 25 March 2022;

g. a witness statement from Krunoslav Krajacevic, senior management for production oversight at Qatar; and

h. a witness statement from Benjamin Peiron, Airbus' head of commercial planning of 5 April.

10. Various points were made to me about the adequacy of the sources of information in some of the witness statements. These have either been rectified or are not significant. The hearing took place on 7 April.

11. I have read and considered all of the evidence just mentioned, just as I have all of the oral and written submissions, even if I do not address each and every point arising from them in this judgment. I have, however, considered and confined myself to the key points.

THE INJUNCTION SOUGHT

12. On any view it is plainly of vital importance that the present issues between these long-standing business partners are resolved either by agreement or by the court as soon as practicable. There is a difference between them as to how best to do that, which is for later today. As with any other interlocutory injunction, I am concerned here with what should or should not be done in the interim period between now and trial. While framed in negative terms, the injunction sought is in effect a mandatory injunction whose effect will be to compel Airbus to continue with its production and planning process for delivery of aircraft under the AA321 Agreement, as if it had not been terminated.

13. The potential problem for Qatar is the non-arrival of the first ten AA321 aircraft, which are now, on present estimates, are due to be delivered as from Q4 2023, assuming the AA321 Agreement had not been terminated. In fact, by that time (and well before, in my view), both it and Qatar will know the outcome of the AA321 and A350 proceedings. If Qatar loses, then any relief going forward is irrelevant. If it wins, it may be relevant, depending on whether the court orders specific performance of the AA321 Agreement after trial or not. For present purposes, what Qatar needs to be planning and providing for are aircraft which could be available from Q4 2023 onwards. There is, therefore, no urgent need for aircraft right now but I, of course, accept that Qatar now needs to be making provision for aircraft to be delivered in the future.

14. It is common ground that I should deal with this application on conventional *American Cyanamid* principles, although there is an additional element here which relates to the question of the availability of specific performance at trial.

SERIOUS ISSUE TO BE TRIED

15. Qatar contends as follows: first, there is a serious issue to be tried as to whether Qatar was in breach of the A350 Agreement by refusing to take delivery of two A350 aircraft. This much is common ground. Second, there is a serious issue to be tried as to Airbus' entitlement (or not) to rely on clause 17.4 of the Common Terms so as to entitle it to terminate the AA321 Agreement by reason of Qatar's breach of the A350 Agreement. Airbus agrees, though it says it has much the better of the argument here. Third, there is also a serious issue to be tried as to whether, if it succeeds at trial, Qatar would be entitled to specific performance of the AA321 Agreement. It so contends if, as a matter of law, it needs to show this now, in order to obtain the mandatory interim relief which it seeks.

16. For its part, Airbus says that Qatar does need to show the latter present purposes, but there is <u>no</u> serious issue to be tried here. That is because there is no real prospect of a court awarding specific performance after the trial. If Airbus is correct on this point, it would be fatal to Qatar's present application. If Airbus is not correct, then the question becomes essentially of one of balance of convenience. I deal first with specific performance, then breach of the A350 Agreement, then clause 17.4.

Specific performance

17. As a preliminary, it is plain from the particulars of claim in the A321 proceedings that a core element of the relief sought amounts to a specific performance of the AA321 Agreement, although the words "specific performance" only come as item 6 in the prayer. That is because of the declarations sought that the termination of the AA321 Agreement is invalid. Those declarations are of no use unless they entail the continuation of the AA321 Agreement, and the same goes for the mandatory injunction sought there (as here), that Airbus must not act on the termination and the order restraining it from not performing the obligations under the A321 contract.

18. Airbus contends that there is no real prospect that Qatar would, at trial, obtain an order for specific performance in relation to the AA321 Agreement for a number of reasons. On that basis, it says, that as a matter of law it must follow that there can be no equivalent or similar mandatory injunction at this stage. Accordingly, considerations of the balance of convenience are not even reached. In the light of my conclusions below on adequacy of damages for Qatar, so far as the present application is

concerned, Airbus' contention here is academic. However, I still need to consider it, at least to some extent.

19. First, Airbus contends that unlike other aspects of the claim going to liability, the test here is not serious issue to be tried but a real prospect of success, which it suggests is a different and in some way a higher hurdle. Reliance is placed on how Mr Justice Tomlinson, as he then, was put it in *Vertex v Powergen* [2006] 2 Lloyds Rep. 465. This was a case where the claimant provider of outsourced management materials for the defendant brought a claim against Powergen for wrongful termination of the contract. It also sought a declaration that the termination was invalid and a permanent injunction to prohibit Powergen from acting on its termination, failing to continue to perform the contract, or preventing Vertex from performing the contract. Leaving aside that the primary performer there was the claimant and not the defendant, as here, that case has some similarities to this one.

20. At paragraph 8 of his judgment, Mr Justice Tomlinson observed that not only did Vertex need to show a serious issue to be tried on the question of termination, but there was a threshold question as to whether there was a real prospect of Vertex obtaining at trial its permanent injunction. He referred to the judgment of Lord Diplock in *Cyanamid* itself ([1975] AC 396) at page 408. Airbus similarly relies upon the real prospect concept here. The passage relied upon was all part of Lord Diplock's analysis as to sort of merits test, if any, is required before dealing with the balance of convenience. Having referred to the concept of a serious question to be tried, he went on to point out that it was no part of the court's function to decide questions of fact or difficult points of law which could only be done at trial, so it should not express any opinion on the merits. And then, he said:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose the plaintiff has any real prospect of succeeding in his claim for a permanent injunction ... the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought."

21. In my judgment, that was not seeking to draw some distinction with serious question to be tried as if the former were a higher hurdle to surmount. Certainly in this context I would not draw any distinction between the two concepts anyway. Nor do I think that Mr Justice Tomlinson was so doing in *Vertex*. This was in a context where Powergen had submitted that it was obvious that the contractual relationship in question was inherently inappropriate for specific performance or mandatory relief. Moreover, it is plain from his later findings that whatever concept was employed, the court at trial would not countenance the grant of a mandatory injunction or specific performance and that at the interim stage it was manifestly inappropriate as well. I did not draw any distinctions between those

concepts in paragraph 58 of my own judgment in *Palmerston v Brocket Hall* [2016] EWHC 2018 (Comm).

22. There are cases where it has been said that before the court grants a pre-trial mandatory injunction it should consider if it had a high degree of assurance the claimant would succeed in trial, although this was not a necessary condition.

23. Two of those case, *Nottingham Building Society v Eurodynamics* [1993] FSR 468, and *Zockoll v Mercury* [1998] FSR 354 are in the parties' bundle of authorities, but they were not cited to me or, at least not in any detail, in argument. In any event, the position is more nuanced, given the observations of Lord Hoffmann in *National Commercial Bank of Jamaica v Olint* [2009] 1 WLR 1405 Here he stressed that the ultimate question which the court is concerned with is which course of action would cause the least irremediable prejudice to one side or the other it would be wrong to apply mechanically a wrong merits threshold to a prohibitory injunction and a higher one to mandatory injunction. Accordingly, the proper question to ask is whether there is a serious issue as to whether Qatar would obtain specific performance at trial or something like it. As it happens, my conclusion would be the same if the test were real prospect if (which I do not accept), this was meant to denote some higher threshold.

24. Finally, even if there is a serious issue as to the grant of specific performance at trial, that conclusion, of course, does not entail that it necessarily follows that there must be a mandatory injunction pre trial. That is still a separate question.

25. All of that said, I now turn to the question of the availability of specific performance at trial. Airbus says that the extent and complexity of its relationship with Qatar for the purpose of rolling out the A321 aircraft means that it is inherently inappropriate to grant specific performance at the end of the day. Continuation of the contract over a number of years would require constant supervision and lead to many likely post-trial applications to the court where disputes arise and where Airbus would be driven to check that the court approved of what it was doing, lest it be in contempt of court. Moreover, there could be considerable uncertainty, especially given that the ASPAs contain many references to "best reasonable efforts", "best endeavours", "close cooperation", "work in good faith" and so on.

26. Secondly, Airbus points to the level of customisation available for the A321s. This would include buyer furnished equipment (BFE) and seller furnished equipment (SFE), which have to be specified. There are other potential areas for change or variation or choice: see the summary given at paragraph 66 of Airbus' skeleton. I see all of that and clearly, the construction and delivery of an aircraft such

as the A321 is hardly the same as the manufacture and delivery of a thousand widgets. However, the aircraft is still a A321 at the end of the day, not some other model, and in truth its core elements are fixed, with only a limited choice of engines. It is not a bespoke aircraft. It is one which has a limited number of options.

27. I accept that there can and have been arguments, for example, over seat configuration that have caused some delays here. Nonetheless, the truth is that Airbus has a production line and it would be manufacturing AA321s for a range of customers in any event. So if compelled to do so for Qatar, where a number of variables have already been agreed, it is not as if it is forced into a one-off type of contract not replicated elsewhere. I am also not convinced that if ordered to continue with the contract even over a period of years and notwithstanding this litigation, it necessarily follows that the present disharmony between the parties would continue, especially at manufacturing level. There is also the fact that on the basis of leasing A321s, which is an option for Qatar (see below), Airbus itself says that the aircraft which could be leased can be customised so as to fulfil Qatar's particular requirements. That, too, would surely involve with Qatar dealing one way or another directly or indirectly with Airbus. Qatar and Airbus have been working together since 2003.

28. As to whether the A321 Agreement is really a contract for services, as opposed to a contract for a result which is said to be relevant in this context, I would have thought, at least as presently advised, it was a contract for a result. True it is there is a very substantial ongoing maintenance obligation post delivery of any particular aircraft, as with every aircraft manufacturer, but that does not alter the essential nature of the contract.

29. All I need say at this stage is that I do not take the view that the co-operation required between the parties here is so fraught with risk and imprecision that it must follow that for this reason alone no court would contemplate making an order for specific performance.

30. Airbus also submits, indeed primarily submits, that as this is a case outside section 52 of the Sale of Goods Act 1979, the court will not order specific performance of the A321 contract here unless the A321s are effectively unique, and they are not. In particular, Airbus relies on what Phillips LJ said sitting as a first instance judge in *VTB v Antipinsky* [2020] 1 WLR 1227. He said at paragraph 77:

> "The rationale for refusing specific performance of contracts for future unascertained goods goes beyond the fact that damages will usually be an adequate remedy, thought that is an important aspect of rule. It also turns a contractual claim into a quasi proprietary right in respect of goods which could not have been allocated to the contract and may have been sold to a third party and that gives rise to conceptual difficulties. There is a strong presumption that specific performance will be limited to cases of specific or ascertained goods."

31. And in paragraph 79, he approved the statement in Snell's Equity (33rd edition) at para 17-009 that:

> "In practice courts are reluctant to exercise the discretion unless the goods are effectively unique. However, in very exceptional circumstances in which the normal market is not functioning the courts may be more flexible about specific remedies even for goods that are not specific or ascertained."

32. The application of that principle is not or would not be at trial, a straightforward matter. Understandably, none of the cases deal with the question of the particular type of aircraft that are sold by only one manufacturer. Ships are a closer comparison than commodities like gas oil, but even then, although they are usually regarded as specific, ascertained goods and so within section 52, specific performance is not automatically ordered (see, for example, *The Stena Nordica* [1982] 2 Lloyds Rep. 336).

33. Furthermore, and as contemplated by Phillips LJ, there are cases where the goods are not actually unique and can be sourced by another manufacturer, yet the consequences for the buyer of not obtaining the goods may be so catastrophic, and incalculably so, that the court will nonetheless order specific performance (See, for example, *Land Rover v UPF* [2003] BCLC 222). Another exceptional case would be where the buyer can only obtain the goods from the supplier in question, albeit that they are not intrinsically unique (see *Sky v VIP* [1974] 1 WLR 576 for an example of a non-functioning market).

34. Airbus contends in short that the normal principle should apply, which would rule specific performance, since the A321s are not unique. This is because they can be obtained from other sources, namely lessors or, alternatively, Qatar can purchase Boeing 737 MAXs. While they are not exactly comparable - and indeed, of course, unsurprisingly, Airbus emphasises the particular features of A321, which it says the Boeing 737 MAX does not have - they are sufficiently comparable for the purpose of assessing uniqueness.

35. The reliance on the availability of A321s under lease or Boeing 737 MAXs is advocated here in the context of specific performance at the end of a trial, not in the context dealt with below of a relatively short-term position up until trial. Obviously to some extent it depends on how one categorises the goods. If one talks about narrow-bodied two-engine jets with a maximum notional capacity of 200 seats and a range of around 6,000 kilometres, it is easier to say the A321s are not unique than if one considers the A321 as the goods.

36. In my judgment, these are not necessarily straightforward questions, and at trial, if specific performance was still an option, much more detailed evidence on markets and routes, technical qualities and so on may be adduced than is before me. What I am not prepared to do at this stage is to say that in this particular context it is plain that the A321 not unique for the purposes of the operation

of specific performance, and I go no further than that because it is otherwise a matter for the trial judge.

37. Then finally in relation to specific performance, damages as an adequate remedy, this is to some extent interlinked with uniqueness, though not wholly so in the context of specific performance. Here, of course, the court at trial is going to be considering that issue in the context of Qatar's putative deprivation of a long-term contract for a minimum of 50 aircraft. It is possible, just enough for present purposes, that the court might conclude that ultimately damages are not an adequate remedy. For the purposes of specific performance, again, therefore, I would not rule it out as a serious issue for American Cyanamid principles on the basis that it plainly cannot be shown that damages are not an adequate remedy so as to remove any question of specific performance. However, that is a very different matter from the consideration of damages as an adequate remedy in respect of the period between now and trial and the instant application.

38. I do not propose to say more about specific performance at this stage. First, it is not necessary in the light of what I say below. Second, concluding, as I do, that I should not dismiss it as a real possibility at trial if Qatar wins or a serious issue or a real prospect, I need go no further. However, for today's purposes, this means that it is necessary to proceed with the further elements of the *American Cyanamid* analysis. I therefore turn next and briefly to the second serious issue to be tried, breach of the A350 Agreement.

Breach of the A350 Agreement

39. Since both sides accept there is a serious issue to be tried here, I do not need to say much more about it. Although in its written submissions Airbus suggested that its case on breach was particularly strong, so that, if necessary, I could and should take that into account when considering the balance of justice in the round, I do not do so. That is not least because this issue is substantial and complex, and probably the less I say about it on this application, the better. In the end, Airbus did not in its oral submissions take a different approach.

Clause 17.4.

40. Qatar contends that this is not in fact a cross-default clause at all, which would otherwise permit Airbus to rely upon Qatar's putative breach of the A350 Agreement so as to terminate the AA321 Agreement. Airbus says it plainly is.

41. Qatar does not suggest that its position here is so clearly right that I should determine clause 17.4's scope here and now, in Qatar's favour. That being so, the issue is in fact academic, since it is common ground that there is a serious issue to be tried on Qatar's breach of the A350 Agreement. However, I should say something more about clause 17.4, since I have heard argument about it. In my view, at least as presently advised, it is strongly arguable that it is a cross-default clause which operates here. What it says is that if the buyer fails to perform payment obligations with respect to any payments of pre-delivery payment or with respect to taking delivery of any aircraft, "under any existing aircraft purchase agreement with the seller", and such failure is not remedied within 15 business days, the seller may give notice to terminate, "all or part of this Agreement and the aircraft specific purchase agreement".

42. As a matter of language, it seems to apply where there is a breach of <u>any</u> existing aircraft purchase agreement, in other words, not the underlying agreement containing the Common Terms. It is hard to see that the A350 Agreement is not any other agreement for these purposes. Moreover, the position of clause 17.4 within clause 17 as a whole makes logical sense. It is all about termination rights. Clause 17.1 is all about insolvency generally. Clause 17.2 concerns the buyer's failure to make pre-delivery payments under the instant agreement. Clause 17.3 is all about the buyer's failure to take delivery under the instant agreement. On that basis, if clause 17.4 was just about termination for breach of obligations under the instant agreement, it would appear to be otiose. To avoid that conclusion, Qatar contends that clause 17.3 only permits Airbus to terminate that part of the ASPA that relates to the particular aircraft that has not been paid for. (I should add in parentheses that although clause 17.3 as written does not make any reference to termination, that is plainly a drafting error, it should be implied, and neither side has suggested to the contrary). Qatar's argument, therefore, is that, given limited scope of clause 17.3, clause 17.4 has further work to do because it confers a further right on Airbus where there has been non-payment under the instant agreement except that Airbus can here terminate the whole of the agreement.

43. At the moment, I very much doubt that those arguments are correct. First, clause 17.3's scope is not on its face limited.. Secondly, clause 17.4 itself applies to all or part of the instant agreement. I need not refer to other points made by Airbus. For present purposes, Qatar's construction is not plainly correct. It has not sought a final ruling and there is a serious issue to be tried, albeit one which at the moment seems to me to be more likely to be resolved in Airbus' favour than Qatar's.

BALANCE OF CONVENIENCE

44. Here, I need deal with the facts in somewhat more detail.

Delivery of A321s

45. Qatar has an option to purchase either the standard A321 or the A321LR (long range), or the A321XLR (extra long range). As matters stand today, of the 50 to be delivered, 10 will be the A321LR and the balance will be the standard A321. The delivery schedule specifies that the ten A321LRs will be delivered first. Delivery was originally to commence in December 2019 but the parties agreed to reschedule this, with the first aircraft being due in January 2023. However, as already noted, the first delivery will now not be possible until Q4 2023. The delivery rate is six aircraft per year, which means, as currently projected and in the absence of any termination, all 50 would be delivered by around the first quarter or possibly the second quarter of 2032. Airbus has a very healthy order book for the A321s. It is said that if a new order was placed now for such aircraft, the first delivery could be expected in 2028 if Airbus maintained its current delivery schedule for its existing customers. That said, and as clarified following the hearing, commercial planning at Airbus is a highly dynamic inflexible process. Customers regularly ask for deliveries to be accelerated or to be delayed for various reasons as, for example, happened here with the agreed postponement of the delivery to Qatar. That much is already in evidence. Airbus' planning is also based on demand, which in fact exceeds supply on the basis that some of the demand will in event disappear over time. Accordingly, a new aircraft order may provide for delivery before 2028.

46. I interpose here to say that one of the reasons why there was a focus on 2028 was that Qatar submitted that if no injunction as sought was granted now, and yet at trial Qatar both succeeded on liability and obtained an order for specific performance it would necessarily have to join the queue all over again, as it were, so that it could not expect its first aircraft until 2028.

47. There are two answers to that point. First, for the reasons just given, deliveries may begin before 2028 anyway. Secondly, and more fundamentally, any putative order for specific performance would be on the basis that there is an existing A321 Agreement still in place with obligations on Airbus to deliver. If the court in its discretion ordered specific performance and without, of course, tying the hands of the trial judge in any way, it seems to me, as presently advised, to be unlikely that Airbus could be permitted to put Qatar to the back of the queue.

48. I would have thought it more likely that Qatar would be readmitted to the queue on the basis of the deliveries that should have been started in Q4 2023. If, by the time of trial, Airbus had elected to remove planning for delivery under the AA321 Agreement altogether, it would have to fast track

Qatar back in. If that then disrupted and/or delayed deliveries for other customers, that is a price which Airbus would have to pay, having now lost the case.

The Boeing MOU

49. There are currently four versions of the Boeing 737 MAX; being the 7, 8, 9 and 10. On Monday, 31 January 2022, Qatar signed a memorandum of understanding for the purchase of 25 MAX 10s, which are the largest in the range in terms of seating capacity, with the option for another 25. This is a provisional not binding order. Nonetheless, it represents a significant commitment by Qatar.

50. There is a question as to whether the MOU was a response to the A321 termination letter sent just two weeks earlier. Mr Weekes for Qatar said that it was not, but Qatar has refused to disclose the MOU itself or any relevant documentation which would have revealed its genesis. Qatar says that it would be very surprising if an MOU could arise in just two weeks and that, anyway, relevant documentation may be commercially sensitive and confidential. Perhaps, but Qatar could always have proposed a confidentiality ring to deal with such concerns.

51. I do not exclude the possibility that the MOU was indeed a response, either in and of itself or because it had already been contemplated but was now being brought forward. However, I cannot resolve that issue now. What is clear, however, is that Qatar is (a) highly likely to begin pilot training for the Boeing 737 MAX or at least is very prepared to contemplate such training in the near future in any event, and (b) considers that such aircraft are appropriate parts of its narrow body fleet.

Ranges and destinations

52. It is common ground that because of Qatar's particular specifications and configurations for ordered A321s, their ranges will be somewhat less than their stated maximum. The figures are as follows with the maximum ranges in brackets in kilometres. The LR’s maximum stated range is 7,400km, and its actual range is 6,500km. The Standard’s stated maximum is 6,450km and actual is 4,900km. Just by way of comparison, the standard 320 aircraft, which also currently form part of Qatar's fleet, have an actual range of around 4,000km. As for the MAX ranges, I do not have figures for any reduction in Qatar's configurations but the maxima are 6,110km for the MAX 10, and 6,570km for the 8 and 9.

53. On that basis, and simply comparing the maximum ranges for the moment, it is correct that the MAX 8 to 10s have a lesser range than the A321LR but are otherwise comparable with the A321 standard. Leaving aside for one moment the possibility of using alternative aircraft than the A321LRs ordered from Airbus, I accept for present purposes that the A321LR would have about another hour's potential

flying time than the A321 standard or the Boeing 737 MAX 8 to 10. As to what that means in terms of Qatar's routes, Mr Loej produced a diagram at page 68 of the exhibit to his witness statement. This purported to show which destinations not presently flown could be achieved by the A321LR, as opposed to the Boeing 737 MAX 10. However, he used the wrong ranges, because they had not been reduced to take account of Qatar's configurations. The diagram is also somewhat unclear because there are destinations within the purple circle which are not presently served by direct flights along with others that are. On the other hand, there are destinations within the larger blue circle which are currently served, presumably with wide-bodied jets.

54. The only new direct routes within the blue circle that are highlighted or emphasised by Mr Loej are Bergen, Bilbao, Tolouse and Lyon. In his paragraph 12.1, he says the difference of range is critical because "deploying a wide body aircraft to such destinations is not forecast to be profitable". A number of points arise here. First, the A321LR might not reach them anyway, given its true maximum range. Second, this is all about possible new routes which do not appear to be that significant. Third, they are routes that could be plainly served by wide bodied aircraft. Mr Loej does not suggest that such aircraft would not be available for those routes, rather he says that flying them would not be profitable. That may well be so, but then this is all a question of money, pointing towards damages being an adequate remedy. It is not suggested in this or any other context where costs could be greater than anticipated, that Qatar's cash flow would not stretch that far. That would be a hopeless suggestion, largely for the reasons that Qatar itself advances as to why it would be plainly able to satisfy any liability under a cross-undertaking as to damages.

55. I should add that on any view, Qatar uses its present fleet of A320s on routes which are well inside the range of the A321 or variants, something about 2,500km.

Other aircraft available to Qatar from leasing

56. An obvious source of aircraft to replace, at least *pro tem* the A321s due from Q4 2023, is the leasing market. If that market can satisfy Qatar's temporary need, then while that might prove more expensive than having the ordered A321s coming on stream from Q4 2023, that is all a question of extra incremental costs and no more. Qatar does not seriously engage with the question of leasing in its evidence. Instead it concentrates briefly on its ability otherwise to purchase A321s from Airbus or a comparable fleet from another manufacturer (see paragraph 71 of Mr Weekes' second witness statement). As to the former, of course the only first-time seller of A321 is Airbus itself. In present circumstances, it is not likely to sell directly to Qatar pursuant to some new contract and it is not

suggested that it could or it would. However, Mr Hennessee does engage on the question of leasing (see paragraph 123 of his witness statement), explaining that operating lessors have already contracted with Airbus to take 48 A321s and 80 A320s in 2023 and more in successive years where no lessee airlines have yet been placed. He also makes the point that they could be manufactured according to Qatar's specifications to be used for the aircraft subject to the A321 agreement. In his first witness statement for Qatar dated 25 March, Mr Loej disagrees with that evidence to the extent that he contends it is not verified, it cannot be checked and, anyway, it would cost more to lease. He also questioned whether the aircraft referred to were A321 Neos or not. If he was suggesting that Qatar cannot itself make full investigations into the leasing market, that is, in my view, absurd. 156 of Qatar's own fleet are subject to leasing arrangements and even if some or many may be internal finance leases, Qatar, as one of the world's major airlines, would clearly know where to look if it wished to acquire aircraft from a third party lessor, as opposed to directly from the manufacturer.

57. In answer to Mr Loej's essentially negative evidential points, Mr Peiron made a witness statement for Airbus on 3 April. It is worth reciting the essential parts of his statement from paragraphs 5 to 12. He sets out in paragraph 5 the available aircraft which are going to lessors where airlines have not already been contracted for, and then he says that this has all been extracted from Airbus' own database showing aircraft that have been sold to lessor customers, and many of them are very well known and would be familiar to an airline. It is frequently updated by its commercial planning team. He says there is no single document because it is all on the internal planning system, which is a large database. He confirms that it is indeed the A321 Neo. And while he says lessor customers do not always inform Airbus immediately, upon placement of an aircraft for the lessee airline, they need to do so in sufficient time to allow Airbus to configure the aircraft into the lessee airline's customer specification. Airbus will, therefore, be aware of a lessor's placement to an airline customer well in advance of the scheduled delivery. He also makes a supplementary point that it is possible to convert the A320 into an A321 and vice versa.

58. The next day a witness statement from Mr Al-Hilli for Qatar was served. As will be seen, it remains the case that Qatar adduced no evidence of its own enquiries of the leasing market. Instead, the essential points made at paragraphs 7 to 9 were as follows. Mr Peiron's figures did not give any particular specifications or configurations of the available aircraft. For example, some of them might only be configured to have one class of seats, which would be unacceptable for Qatar. But even if that was not the position, the contention that leased aircraft could be configured according to Qatar's wishes would sit uneasily with the point made in relation to specific performance that the parties'

relationship has broken down and they cannot together. At paragraph 9, he says that the expectations of quality would be diminished if it was leased. Customisation would still be required. There would still have to be liaison. But, finally, if it was done by way of a lease, it would have to accept the aircraft "as is" whereas with no further recourse.

59. As to those points, seat configurations obviously can be changed. That is one of the things that has to be done when deciding where the aircraft is to go. Had Qatar made enquiries it would no doubt have found out that seat configurations that have been ordered as at the present. It did not do so. Paragraph 8 has some force but that depends on the nature of the required co-operation and how difficult in reality it is to achieve (see my observations about that in the context of specific performance). As for paragraph 9, the fact that there would need to be technical inspections as before is hardly an obstacle, nor is customisation, nor is the necessary BFE liaison, which here, as I understand it, is essentially limited to the question of seats and overhead lockers. Fourth, if it is indeed correct that, as a lessee, Qatar has no right of recourse if the aircraft is defective in some way (not that there is any evidence about this, and there could have been evidence about this long before 6 April), all this seems to mean is that for Qatar, the aircraft should be manufactured according to its expectations. But notwithstanding the issues over the A350s, there is no evidence that it will not be, or that there will be more difficulty being supplied to a lessor than direct to Qatar.

60. So, in my view, the problems about leasing adverted to by Qatar, to the extent that it adduces evidence about it, are not serious ones, such that leasing is in principle not a temporary solution to the non-availability of A321s direct from Airbus as from Q4 2023. Since Qatar did not engage on the question of aircraft availability under leasing, I can and must proceed on the basis that there is an available leasing market out there which could supply A321s in the limited numbers that Qatar would need to plan for at this stage. I have no doubt that the cost of such leases, especially if on a short-term basis, would be more, perhaps much more, than would be the case had the AA321 contract proceeded, but that again is a question of money and nothing else.

61. All of the above is quite apart from the leasing market for the Boeing 737 MAXs. Again, Qatar has adduced no evidence about that. Any question of retraining pilots to be able to operate the Boeing 737 MAX is at most a question of money and, in any event, the principle of that has already been accepted because of the Boeing MOU. I should add that Qatar also says that the Boeing 737 MAX is not comparable because it can hold two fewer catering trolleys per flight and some additional crew training is needed to operate emergency slide. I regard these as *de minimis* and any extra costs simply sound in damages anyway. In my judgment, in reality Qatar is well able to source alternative aircraft

pro tem to make up for the shortfall in the A321s meant to be coming on stream from Q4 2023. I deal with the potential shortfall in replacement aircraft for the A321LR below.

62. The question of seat capacity is only of significance if it could be suggested that no replacement aircraft for the interim period, whether leased A321s or otherwise, would not be sufficient for Qatar's purposes. While it is correct that the stated maximum capacity of the A321 is 240 as compared to 210, 220, 230 for the MAX 8, 9 and 10s respectively, the evidence shows that Qatar would not use that single class maximum seating capacity configuration anyway. As specified in QTR10 for the A321LR, the specification is 144 economy and 16 business class seats, making 160 in total. That is similar to the existing configurations on the 320s, which is 140 to 170. It is not suggested that the replacement aircraft other than AA321 in the interim could not replicate that configuration, either exactly or substantially.

Analysis

63. Against all of those facts, I turn directly to the analysis of the question of adequate damages for Qatar. In my judgment, if (a) no injunction was granted now, and yet (b) Qatar succeeded in trial, damages for this interim period would clearly be an adequate remedy. An A321 aircraft or similar for the interim period could now be arranged for delivery in Q4 2023. The essence of the problem for Qatar here, in my judgment, is the additional cost. That all sounds in damages. I agree at least there is a theoretical problem in that Qatar may have difficulty in sourcing narrow bodied aircraft with the same range as the A321LR. However, the evidence about the realistic prospect of opening new routes is flawed and uncertain (see my observations above). Furthermore, even if it were not and one could say that, on any view, a number of destinations like Lyon could not be served by any narrow bodied replacement aircraft, the point in truth goes nowhere for the reasons that I set out below.

64. First, if specific performance was not granted after trial, then Qatar would be limited to damages anyway for the whole of its claim and the exercise of quantification in principle would be no different from this interim period than for the claim as a whole.

65. Second, if specific performance was granted, the likely consequence would be that the anticipated A321s from Airbus under the A321 Agreement would be delivered perhaps later than Q4 2023, although not as late as 2028 or anything like it for the reasons I have already given. As such, at its height, what this means is there would be a delay in Qatar opening certain limited new direct routes which could only be served by the A321LRs if they were to be served by a narrow bodied jet but, if

so, damages could be calculated for the incremental loss in profits lost which had been delayed, that is on the assumption that the routes were not served at all.

66. But, finally, if direct services to those destinations was so important to Qatar that it could not contemplate any delay at all, it could surely obtain a wide-bodied aircraft on the leasing market to cover those limited destinations instead. It may be very costly but, again, that sounds in damages.

67. There is one further point, although it was only raised by Qatar at the end of the hearing, which is this, that damages would not be adequate because of various limitation and exclusion of liability clauses in the Common Terms. The following terms are relevant: clause 11 is concerned about a non-excusable delay in delivery of any of the aircraft, the subject of the relevant agreement. It provides for a liquidated damages regime but also a contractual right to the buyer to terminate the underlying agreement if the delay exceeds five months, and then a similar right for the seller if the delay exceeds nine months.

68. Clause 12.5 excludes all implied terms in respect of merchantability or fitness and related matters, so that the recourse is limited to the express warranties given in the agreement. It says that there will be no liability also for loss of use, revenue or profit with respect to any aircraft, component, equipment, accessory, software, data or part thereof or for any other direct incidental or consequential damages. Thus, according to Qatar, a putative award of damages to compensate it for the lack of planned A321 deliveries from Airbus and the interim period is worth little or nothing, and Airbus has relied, it is said, on both provisions in relation to the A321 claim. In fact, as Airbus has expressly confirmed in its note on 8 April, it does not rely upon clause 12.5 at all in connection with the wrongful termination claim which constitutes the A321 proceedings.

69. Airbus does rely on clause 11 in two ways. First, directly to say that in effect, the A321 claim is really all about delay so that clause 11 governs. Second, and irrespective of that point, the entire clause 11 regime, including the right of the seller to terminate where there has been more than nine months delay, shows that the parties' own contractual regime provides for termination and not specific performance where the delivery system has in effect failed, even because of Airbus' fault. Hence, that is another reason why specific performance would never be appropriate, and the same would be true in relation to the interim injunction before me now.

70. As to the first of those points, as Qatar itself has contended, it is very hard to see how the delay regime constituted by clause 11 has any role at all in a case of wrongful termination. I agree with that contention as presently advised. Of course, any wrongful termination of a contract to reply supply

goods will entail in one sense a delay but that is only in the sense that the goods are not to be delivered now and indeed will never be delivered. In my view, albeit provisional at this stage, clause 11 is, therefore, inapposite to cover a wrongful termination claim or, at least at its highest, the risk that a court hereafter might determine that it was is extremely small, in my view. On the authorities, that is not sufficient to allow Qatar to rely upon Airbus' pleaded reliance on clause 11 in the A321 claim in that sense to show that damages would, therefore, be inadequate.

71. As to the second form of reliance, I have already taken the view that I cannot at this stage rule out specific performance as an eventual remedy and in so doing, I have considered this separate argument. Certainly on the question of the A321 claim, I do not see that the existence of the clause 11 regime without more is a serious pointer against either specific performance or an interim injunction at this stage. However, in the event it is academic. Having thus disposed negatively of those points, as it were, Qatar's separate objection to damages being an adequate remedy falls away.

72. Accordingly, and for all the reasons given above, I consider that damages plainly are an adequate remedy for Qatar dealing, as I do, with the period between now and the trial. That conclusion makes it unnecessary for me to consider whether, if damages were not an adequate remedy for Qatar, they would also not be an adequate remedy for Airbus on the contrary scenario. All I would say at this stage is it is not clear to me that they would not be. Either way, it is not necessary for me to consider the balance of convenience in the round any further.

73. I should add that it was suggested, albeit somewhat faintly by Mr Shepherd QC in argument, that if I was not disposed to make the injunction as sought in the application notice, an alternative could be the somewhat more attenuated form of injunction which I granted as holding relief pending this hearing. However, (a) this was not clearly articulated in advance as a real alternative, and (b) in any event, my conclusion on the adequacy of damages would have disposed of that claimed injunction also.

CONCLUSION

74. Accordingly, the application for the injunction must be dismissed.