Global Transportation Finance Newsletter

December 2019

In This Issue

Apollo Settles Alleged Sanctions Violations: Aircraft Lessors Pay Attention

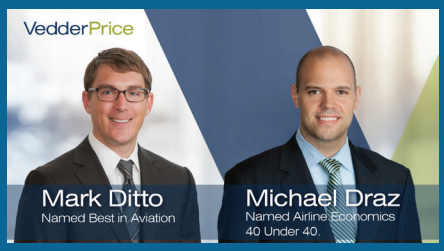
The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury has broad delegated authority to administer and enforce the sanctions laws and related sanctions programs of the United States. As a key component of its enforcement authority, OFAC may investigate "apparent violations" of sanctions laws and assess civil monetary penalties against violators pursuant to five statutes, including the Trading with the Enemy Act and the International Emergency Economic Powers Act.[1]

An "apparent violation" involves "conduct that constitutes an actual or possible violation of U.S. economic sanctions laws."[2] An OFAC investigation of an "apparent violation" may lead to one or more administrative actions, including a "no action" determination, a request for additional information, the issuance of a cautionary letter or finding of violation, the imposition of a civil monetary penalty and, in extreme cases, a criminal referral.[3] Investigations of apparent violations by OFAC often lead to negotiated settlements where a final determination is not made as to whether a sanctions violation has actually occurred.[4]

Upon the conclusion of a proceeding that "results in the imposition of a civil penalty or an informal settlement" against or with an entity (as opposed to an individual), OFAC is required to make certain basic information available to the public.[5] In addition, OFAC may release on a "case-by-case" basis "additional information" concerning the penalty proceeding,[6] and it often does. Such additional information will sometimes include informal compliance guidance, cautionary reminders and best practices recommendations. Such information is routinely consumed by corporate compliance officers seeking fresh insight on ever-evolving compliance and enforcement trends, particularly in the context of proceedings relating to industries with which they are involved.

On November 7, 2019, OFAC released enforcement information that has caught the attention of the aircraft leasing community, particularly U.S. aircraft lessors and their owned or controlled Irish lessor subsidiaries.[7] The matter involved a settlement by Apollo Aviation Group, LLC[8]of its potential civil liability for apparent violations of OFAC's Sudanese Sanctions Regulations (SSR) that existed in 2014–5.[9] Although the amount of the settlement was relatively modest, the enforcement activity by OFAC in the proceeding has attracted scrutiny by aircraft lessors because, for the first time in recent memory, a U.S. aircraft lessor has paid a civil penalty to OFAC for alleged sanctions violations.

Team News



Mark J. Ditto Named Best in Aviation

Vedder Price is pleased to announce that Global Transportation Finance Shareholder Mark J. Ditto has been named "Best in Aviation" by *Euromoney Legal Media Group* for the second consecutive year at their Americas Rising Star Awards.

The Awards celebrate rising star attorneys under the age of 40 across a number of practice areas based on their work over the previous 12 months.

Michael E. Draz Named *Airline Economics* 40 under 40

Michael E. Draz, Vedder Price Shareholder and member of the Global Transportation Finance team, was recently named in *Airline Economics* "40 Under 40" list which recognizes the most talented individuals in the commercial aviation industry.

The 2019 list is comprised of young talent across all sectors of the industry, including bankers, lawyers, airline executives and others.

At the time of the apparent violations, Apollo was a U.S. aircraft lessor which became involved in two engine leasing transactions that came back to haunt it.

In the first transaction, Apollo leased two jet engines to a UAE lessee which subleased them to a Ukrainian airline with which it was apparently affiliated. The sublessee, in turn, installed both engines on an aircraft that it "wet leased"[10] to Sudan Airways, which was on OFAC's List of Specially Designated Nationals and Blocked Persons within the meaning of the "Government of Sudan." Sudan Airways used the engines on flights to and from Sudan for approximately four months before they were returned to Apollo when the lease ended. Meanwhile, in a separate transaction, Apollo leased a third jet engine to the same UAE lessee, which subleased the engine to the same Ukrainian airline, which installed the engine on an aircraft that it also wet leased to Sudan Airways. Sudan Airways used the third engine on flights to and from Sudan until such time as Apollo discovered how it was being used and demanded that the engine be removed from the aircraft.

Both leases between Apollo and its UAE lessee contained restrictive covenants "prohibiting the lessee from maintaining, operating, flying, or transferring the engines to any countries subject to United States or United Nations sanctions."[11] Thus, by allowing the engines to be installed by its sublessee on aircraft that were eventually wetleased to Sudan Airways, and flown to and from Sudan during the country's embargo, the lessee presumably breached the operating restrictions and covenants imposed by Apollo in the leases. Moreover, once Apollo learned that the first two engines had been used, and the third engine was being used, for the benefit of Sudan Airways, it demanded that the third engine be removed from the aircraft that the sub-lessee had wet-leased to Sudan Airways, and this was done.[12]

One might reasonably conclude from these facts that Apollo acted like a good corporate citizen. So what did Apollo do wrong from a sanctions compliance standpoint?

OFAC stated that Apollo may have violated section 538.201 of the SSR, which at the time "prohibited U.S. persons from dealing in any property or interests in property of the Government of Sudan,"13 as well as section 538.205 of the SSR, which at the time "prohibited the exportation or re-exportation, directly or indirectly, of goods, technology or services, from the United States or by U.S. persons to Sudan."[14]

What are the takeaways and possible lessons to be drawn by aircraft lessors from this settlement based upon these alleged violations and the facts upon which they were based?

First, according to OFAC, Apollo did not "ensure" that the engines "were utilized in a manner that complied with OFAC's regulations," notwithstanding lease language that effectively required its lessee to comply.[15] OFAC is clearly suggesting here that aircraft lessors have a duty to require sanctions compliance by their lessees. And, in view of the fact that many sanctions programs are enforced on a strict liability basis, OFAC's comment that Apollo failed to "ensure" compliance by its lessee and sublessees makes sense. Apollo was not in a position to avoid civil liability by hiding behind the well-drafted language of its two leases. If a sanctions violation occurred for which Apollo was strictly liable, the mere fact that its lessee's breach of the lease was the proximate cause of the violation would not provide a safe harbor.

As an example of Apollo's alleged failure to "ensure" legal compliance, OFAC observed that Apollo did not obtain "U.S. law export compliance certificates from lessees and sublessees,"[16] a comment which is somewhat puzzling. To our knowledge, there is nothing in the law requiring a lessor to obtain export compliance certificates, at least not in circumstances where an export or re-export license is not otherwise required in connection with the underlying lease transaction. Moreover, as a practical matter, it would be difficult, at best, for an aircraft lessor to force the direct delivery of certificates from a sublessee or sub-sub-lessee with whom it lacks privity of

Honors & Awards

RANKED IN Chambers UK 2020

Chambers UK 2020 Asset Finance Aviation – UK Wide ranked Vedder Price **Band 2**. Gavin Hill and Neil Poland are ranked **Band 2**, Dylan Potter and Derek Watson are ranked **Band 4** and Alexander Losy is recognized as an **Associate to Watch**.

Best Lawyers BEST LAW FIRMS U.S.News & WORLD REPORT 2020

U.S. News – Best Lawyers, a publication of *U.S. News & World Report* distinguished Vedder Price as **"Law Firm of the Year"** for Equipment Finance in its annual **"Best Law Firms"** rankings. In addition, Vedder Price achieved 18 National Rankings and 23 Metro Rankings. The Global Transportation Finance team is especially pleased with the recognition of our Maritime, Equipment Finance and Banking practice areas.

National Tier 1

- Admirality & Maritime Law
- Equipment Finance Law

Metropolitan Tier 1

- New York
  - Admirality & Maritime Law
  - Equipment Finance Law
- Washington, D.C.
  - Equipment Finance Law

contract. In view of the foregoing, one assumes that OFAC was looking for Apollo to install procedures by which its lessee would self-report on a regular basis its own compliance (and compliance by downstream sublessees) with applicable export control laws and the relevant sanctions restrictions contained in the lease.

Second, OFAC found that Apollo "did not periodically monitor or otherwise verify its lessee's and sublessee's adherence to the lease provisions requiring compliance with U.S. sanctions laws during the life of the lease."[17] In this regard, OFAC observed that Apollo never learned how and where its engines were being used until after the first two engines were returned following lease expiration and a post-lease review of engine records, including "specific information regarding their use and destinations," actually conducted.

In view of the foregoing, OFAC stressed the importance of "companies operating in high-risk industries to implement effective, thorough and on-going, risk-based compliance measures, *especially when engaging in transactions concerning the aviation industry*."[18] OFAC also reminded aircraft and engine lessors of its July 23, 2019, advisory warning of deceptive practices "employed by Iran with respect to aviation matters."[19] While the advisory focused on Iran, OFAC noted that "participants in the civil aviation industry should be aware that other jurisdictions subject to OFAC sanctions may engage in similar deception practices."[20] Thus, according to OFAC, companies operating internationally should implement Know Your Customer screening procedures and *"compliance measures that extend beyond the point-of-sale and function throughout the entire business of lease period."*[21]

As a matter of best practices, aircraft lessors should implement risk-based sanctions compliance measures throughout the entirety of a lease period, and most do. Continuous KYC screening by lessors of their lessees and sublessees is a common compliance practice. Periodic reporting by lessees as to the use and destination of leased aircraft and engines appears to be a practice encouraged by OFAC.[22] Lessors can also make it a regular internal practice to spot check the movement of their leased aircraft through such web-based platforms as *Flight Tracker and Flight Aware*. If implemented by lessors, such practices may enable early detection of nascent sanctions risks and violations by their lessees and sublessees.

Finally, OFAC reminded lessors that they "can mitigate sanctions risk by conducting risk assessments and exercising caution when doing business with entities that are affiliated with, *or known to transact business with*, OFAC-sanctioned persons or jurisdictions, or that otherwise pose high risks due to their joint ventures, affiliates, subsidiaries, customers, suppliers, geographic location, or the products and services they offer." Such risk assessment is an integral part of the risk-based sanctions compliance program routinely encouraged by OFAC, as outlined in its *Framework for OFAC Compliance Commitments* on May 2, 2019.[23] For aircraft and engine lessors, conducting pre-lease due diligence on the ownership and control of prospective lessees and sublessees, as well as the business they conduct, the markets they serve, the equipment they use and the aviation partners with whom they engage, are key to identifying and understanding the sanctions risks that a prospective business opportunity presents.

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Honors & Awards

TOP RANKED Chambers ASIA PACIFIC 2020

Vedder Price Recognized in ***Chambers Asia-Pacific 2020.***

We are pleased to announce that our Singapore Global Transportation Finance team was ranked as a Recognised Practitioner and our Singapore Partner Bill Gibson was ranked Band 4 by Chambers Asia-Pacific 2020.

Thought Leadership

Pedro F. Eraso authored "A Risk Avoidance Primer for Cross-Border Aircraft Investors and Lessors in Latin America" which was recently published on the website of the Aviation Law Committee of the Legal Practice Division of the International Bar Association. Mr. Eraso's article outlines how potential financiers and lessors of aircraft assets in the Latin American region should consider the protections available to them, due to the area's tendency to favor debtor's rights.

Comerica Leasing Corp vs. Bombardier

History of Residual Value Guarantees

In the late 1990s and early 2000s, manufacturers like Bombardier and Embraer increasingly began offering residual value guarantees (RVGs) to airlines and investors, typically structured on long-term leveraged lease transactions.[1] In these RVGs, the manufacturer would guarantee that an aircraft would have a minimum guaranteed value at the expiration of the lease term. If the aircraft did not meet such guaranteed value at the expiration of the lease term, the manufacturer agreed to pay the difference between the guaranteed value and the actual post-lease value. Now, as these original leases have begun to expire, manufacturers have been experiencing high levels of potential liabilities. As of June 30, 2019, Bombardier's maximum exposure for its RVGs was $185 million.[2]

Comerica Leasing Corporation v. Bombardier Inc.

In a recent case, *Comerica Leasing Corp. v. Bombardier Inc.*,[3] Bombardier moved to dismiss Comerica's claim for payment under the residual value guarantee of four aircraft, arguing that Comerica did not satisfy its condition precedent of having the lessee return the aircraft to Comerica.[4] As discussed below, Bombardier prevailed in its motion to dismiss,[5] demonstrating the importance of strict compliance with conditions precedent to payment for beneficiaries of RVGs.

Background of the Case

In this case, Comerica entered into leveraged lease transactions with Bombardier in which Comerica acquired four commercial aircraft.[6] The transactions for each aircraft involved three separate agreements among several parties: a "Participation Agreement," a "Lease Agreement" and a "Residual Agreement."[7] Comerica entered into the Participation Agreement whereby Comerica financed and acquired each aircraft from Bombardier through a trust.[8] Comerica then leased the aircraft to Atlantic Southeast Airlines (and, later, ExpressJet Airlines, as successor in interest to Atlantic Southeast Airlines).[9] Comerica and Bombardier also entered into a Residual Agreement for each aircraft pursuant to which Bombardier guaranteed each aircraft's minimal residual value at the end of the lease and agreed to pay the difference if the actual post-lease value was less than guaranteed.[10]

The Residual Agreement provided that if "the Return Date has occurred, then within ninety (90) days after the earlier of" two contractually stated events, Comerica could demand payment from Bombardier under the Residual Agreement.[11] The Residual Agreement then defined the "Return Date" as the date following the expiration of the lease term on which the lessee returns the aircraft to the lessor.[12] In 2015, the lease term for each aircraft expired and Comerica sent Bombardier a written demand for each aircraft's Payment Amount.[13] Bombardier has not fulfilled any of Comerica's demands for payment.[14]

In early 2016, Comerica filed its initial complaint for breach of contract and Bombardier moved to dismiss, asserting that Comerica had not satisfied the conditions precedent to Bombardier's payment obligation under the Residual Agreement.[15] The court granted Bombardier's motion to dismiss with leave to amend,[16] stating that ExpressJet's return of the aircraft was a condition precedent for Comerica's right to demand payment of the Payment Amount from Bombardier under the Residual Agreement.[17] In August 2017, Comerica filed an amended complaint and Bombardier again moved to dismiss.[18]

Recent Speaking Engagements

September 12, 2019 – September 14, 2019
ABA Aircraft Financing Subcommittee Meeting, Washington, DC

Kevin A. MacLeod, Head of the New York Capital Markets group, presented as part of the American Bar Association's Commercial Finance: Aircraft Financing Subcommittee at the 2019 ABA Business Law Section Annual Meeting. His presentation addressed recent updates in aviation capital markets.

September 23, 2019 – September 24, 2019
Revolution.Aero 2019, San Francisco, CA

Edward K. Gross and David M. Hernandez presented at the Revolution.Aero Conference.

Mr. Gross moderated the panel "How do you forecast a market that does not yet exist?" Where he and industry experts discussed market forecasting methods and challenges.

Mr. Hernandez participated in the panel "Why certification is just one hurdle: Operating innovative aircraft," where he and other panelists discussed how regulators can keep up with new aircraft and business models.

September 24, 2019 – September 25, 2019
Marine Money Asia 2019, Singapore

Ji Woon Kim participated in the 18th Annual Marine Money Week Asia Conference where he moderated the session, "Raising fresh finance on the world's capital markets, M&A and the new Goliaths of the next decade."

October 16, 2019 – October 18, 2019
Airline Economics Growth Frontiers, New York, NY

Kevin A. MacLeod, Head of New York Capital Markets group, spoke on the panel entitled "The aviation ABS and the future of aviation securitizations" where he discussed current trends in the aviation ABS market and the outlook for its growth and development.

Bombardier argued that Comerica had not alleged in its complaint that ExpressJet complied with the provision in the Participation Agreement which required ExpressJet to return the aircraft to Comerica at an "airport in the continental United States on [ExpressJet's] route system selected by [Comerica] where [ExpressJet] has a major maintenance base for the aircraft."[19] Further, Bombardier argued that Comerica did not allege in its complaint that it followed the other return requirements under the Participation Agreement, such as requiring ExpressJet to deliver to Comerica the "transfer documentation"[20] or assigning to Comerica the remaining rights ExpressJet had in the aircraft. [21]

In response to Bombardier's arguments, Comerica asserted that ExpressJet had returned each aircraft by taking the aircraft out of service and making each aircraft available to Comerica at an airport in Georgia.[22] However, the court agreed with Bombardier and granted its motion to dismiss.[23] The court stated that ExpressJet making the aircraft available to Comerica at a specific location is not the same as returning the aircraft under the requirements of the Participation Agreement.[24] Therefore, Comerica did not plead sufficient facts that it had satisfied its condition precedent under the Residual Agreement to give rise to Bombardier's payment obligations.[25]

Conclusion

Though it is unclear from the record why Comerica did not take return of the four aircraft from ExpressJet, the result of this case once again underscores the importance of strict compliance with conditions precedent for beneficiaries of RVGs. The subjective nature of some conditions precedent to payment obligations under RVGs, which commonly include return conditions and timing deadlines, mean it is crucial for beneficiaries of RVGs to ensure careful compliance with these conditions and to involve the applicable manufacturer in the return process to avoid losing the benefit of its bargain.

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Recent Speaking Engagements

November 4, 2019 – November 6, 2019
Airline Economics Growth Frontiers, Hong Kong, China

Cameron A. Gee presented at the Airline Economics Growth Frontiers Hong Kong 2019 Conference.
Mr. Gee spoke on Current Developments in Aircraft Pre-Delivery Payment Financing Transactions.

November 12, 2019 – November 15, 2019
Corporate Jet Investor (CJI), Miami, FL

Edward K. Gross, David M. Hernandez, Mark J. Ditto, and Melissa W. Kopit presented at the Corporate Jet Investor (CJI) annual conference.

Mr. Gross moderated the panel, "How Aircraft Financiers View Their Assets?" and discussed how financiers can manage the new depreciation rule and what actions are putting buyers off.

Mr. Hernandez moderated a panel on "Simplifying Operations and Registrations," where he and his co-presenters discussed why operations and registrations become complicated and if increased regulations actually leads to safer outcomes.

Mr. Ditto participated in the panel, "Selling Business aviation to the Capital Markets," where he and his co-panelists covered the biggest structural hurdles to selling business aviation to capital markets, how large the market can get and how long a typical transaction take.

Mr. Gross and Ms. Kopit co-moderated the session, "Legal Considerations For Aircraft Debt And Lease Finance," which covered the basic elements of structuring loan and lease agreements, personal and corporate guarantees, and analyzed more complex structures as they relate to debt finance.

Letters of Credit: A Refresher

Letters of credit are often issued in aircraft leasing transactions as an alternative to the provision of a cash security deposit and, less frequently, the obligation to pay maintenance reserves in cash. In an airline bankruptcy scenario, it is important to understand the differences that exist between different forms of letters of credit, and some of the challenges that may arise for an enforcing lessor or financier.

Letters of credit are widely accepted in aviation finance transactions, particularly where issued by a bank or other financial institution that may have a significantly better credit rating than the underlying applicant airline. There is a risk, with cash security deposits and payments of cash maintenance reserves, that local insolvency rules may recharacterize such payments as part of an airline's insolvency estate (though leases are drafted to avoid this).[1] As the proceeds of a letter of credit are paid by the issuing institution pursuant to an independent contract between the issuing bank and the beneficiary lessor or financier, the risk of recharacterization of such proceeds as being part of the airline's insolvency estate is accordingly reduced.

Letters of Credit Generally

Fundamentally, a letter of credit is a written obligation issued by a bank or other financial institution to a specified beneficiary, on an applicant's behalf, pursuant to which the issuing bank is obliged to make a payment, in immediately available funds, to the beneficiary against the presentation of specified documents or a written demand.

A letter of credit forms a separate, stand-alone contract between the issuing bank and the beneficiary, and broadly there are two main categories of letters of credit: commercial and standby.

A commercial letter of credit acts as a payment mechanism, which is put in place to safeguard payment of the purchase price by a buyer of goods or services to a seller of goods or services, whereas a standby letter of credit operates in much the same way as a security deposit, performance bond or demand guarantee – it provides collateral support for particular financial obligations owed by one party to another under an underlying contract, such as an airline's obligation to make maintenance payments under an aircraft lease agreement. In any event, both categories of letter of credit are triggered by a contingent event (e.g., a default in the underlying obligation), create a primary obligation on the issuing bank and are a form of documentary credit.

Trade Rules: UCP 600 v ISP98

Most letters of credit are issued subject to the International Chamber of Commerce's (**the ICC**) Uniform Customs and Practice for Documentary Credits (currently in its sixth edition) (**the UCP 600**) or the ICC's International Standby Practices (**the ISP98**). As a matter of law, the applicant and the beneficiary have the freedom to decide which set of rules to incorporate and it is important that the incorporation is expressly stated in the letter of credit, including which particular parts of the selected body of rules should be modified or excluded from application.

There are many similarities between UCP 600 and ISP98, including the inclusion of rules relating to presentation and examination of credits. While the UCP 600 does not distinguish between standby and commercial letters of credit, the ISP98 was introduced to provide more detail and clarification around the rules relating to standby letters of credit. For example, while article 36 of

Deal Corner

Vedder Price Advised SKY Leasing in Strategic Partnership and Closing of $300 Million Aviation Asset Investment Fund

Vedder Price is pleased to announce that a multidisciplinary team of Global Transportation Finance and Investment Services attorneys advised SKY Leasing, a full-service aviation asset manager, in its strategic partnership with M&G Investments (M&G) to launch a $300 million aviation asset investment fund, with M&G investing operating capital into SKY Leasing in conjunction with the launch. The fund is expected to provide approximately $1 billion of capital to invest in new and current generation aircraft.

Vedder Price Counseled Stonebriar Commercial Finance on $685 Million ABS Issuance

Vedder Price is pleased to announce that its Global Transportation Finance team, led by Shareholders Mark J. Ditto and Marc L. Klyman, represented Stonebriar Commercial Finance (Stonebriar), a leading independent large-ticket commercial finance company, in its sixth commercial equipment asset-backed securitization (ABS), SCFET 2019-2, a $685 million ABS issuance with top tranches rated AAA.

Vedder Price Represented ITE Management as Anchor Equity Investor in Thunderbolt III ABS

Vedder Price is pleased to announce that a team of Global Transportation Finance attorneys led by Jeffrey T. Veber and Michael E. Draz advised ITE Management as the anchor equity investor in Air Lease Corporation's Thunderbolt III aircraft asset-backed securitization.

UCP 600 addresses *force majeure* events, it allows the issuing bank to disregard any letters of credit that expired during the interruption of the issuing bank's business due to a *force majeure* event. This clearly puts the beneficiary in an unfavorable position through no fault of its own. ISP98 Rule 3.14, on the other hand, provides for an automatic extension of thirty calendar days in the same situation, thereby protecting the beneficiary's right to access the collateral support provided by a standby letter of credit during a *force majeure* event.

It should be noted that both sets of rules are not all-encompassing. Parties will often have to refer to standard banking practices of the issuing institution and the governing law of the letter of credit to fully understand the requirements of the letter of credit.

Time for Enforcement

Generally, a letter of credit will contain detailed steps to be taken by the beneficiary upon enforcement. Beneficiaries are oftentimes required to present the original letter of credit, together with a demand for payment under the letter of credit (often in the form of a drawing certificate) at the issuing bank, and may be required to provide evidence of the beneficiary's corporate authority to issue the demand.[2]

Typically, the issuing bank then has a maximum of five banking days in which to determine whether the presentation of documents complies with the terms of the letter of credit. If the issuing bank decides the presentation is compliant with the letter of credit, the issuing bank must immediately pay the sum due to avoid being in breach of its obligation to pay the beneficiary (it is not entitled to wait until the end of the fifth banking day). Should a beneficiary be able to prove the issuing bank caused undue delay in providing the sum due, the issuing bank would be liable for damages including interest on the sum due.

Enforcement Issues

As mentioned above, a beneficiary oftentimes needs to present the original letter of credit to the issuing bank in an enforcement scenario. Although a beneficiary will usually require the applicant to deliver the original letter of credit to it for safekeeping during the relevant period, the beneficiary would be prudent to also consider the location in which the original is held to circumvent any avoidable delay in an enforcement scenario when arranging for the original letter of credit to be presented to the required branch or office of the issuing bank for drawings under that letter of credit.

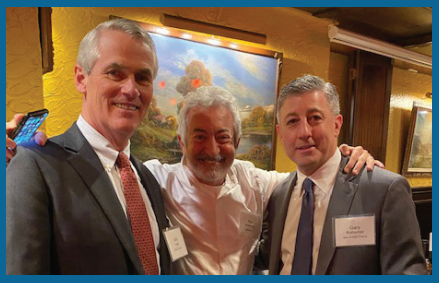
Issuing banks often require beneficiaries to follow the exact instructions contained in the letter of credit, to avoid liability for any fraud that may come to light after a drawing under the letter of credit is made. This can pose problems if the instructions are not clear from the outset or impose conditions that are difficult for a beneficiary to comply with. For example, letters of credit that require signatures to be authenticated with a "banker's confirmation of signature" leave open the question as to who a "banker" is for confirmation purposes and what degree of authentication that bank is required to undertake.

Issues may also occur in relation to the practicality of attending the issuing bank's offices to demand the payment in the letter of credit. Many issuing banks do not have counter services and often the documents are presented to a member of the trade finance team that may not be familiar with the UCP 600 or ISP98 rules governing the demand for payment. In some scenarios, particularly if the presentation requirements of a letter of credit are unclear, multiple visits may be

Event Highlights

GTF Holiday Dinner

On December 3, 2019, our Global Transportation Finance team hosted our aviation finance clients at our annual holiday dinner in New York City. Many clients and friends attended the event along with attorneys from our offices around the country. Thank you to all who joined!



required by the beneficiary's representative before the issuing bank accepts the presentation of documents and its window of consideration of the documents begins.

A standby letter of credit will typically be issued by the issuing bank for a term no longer than one calendar year, after which time the letter of credit will need to be renewed (though many auto-renew prior to the otherwise scheduled expiry). Care should be taken with letters of credit that expire on a specific date or at a specific time to ensure that coverage by the next letter of credit commences immediately at or prior to expiration of the existing letter of credit.[3] It should be noted that this may be a point of contention, as the applicant airline will be obligated to finance the issuing bank for that extra day/hour and bear the risk that during such time the beneficiary may submit demands to the issuing bank under both letters of credit.

Finally, it is significant to note that the relationship between the issuing bank and the applicant is usually stronger than the relationship between the issuing bank and the beneficiary. Absent a direct relationship between the issuing bank and the beneficiary, undue friction may occur in the enforcement process if the applicant disagrees with the beneficiary's demand for payment. It is also possible, in cases of the applicant's insolvency, that the issuing bank may concurrently be in the process of managing its exposure to the applicant's insolvency at the same time a beneficiary makes a payment demand under a letter of credit. It is important to note a letter of credit is an independent contract between the issuing bank and the beneficiary and these matters should not influence the issuing bank's decision to delay or deny payment under a letter of credit.

For further information or advice on enforcing letters of credit, please contact your Vedder Price attorney.

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Endnotes

Apollo Settles Alleged Sanctions Violations: Aircraft Lessors Pay Attention

1 *See* U.S. Department of the Treasury, Office of Foreign Assets Control, *Inflation Adjustment of Civil Monetary Penalties, Final Rule*, 84 Fed. Reg. 27714, 27715 (June 14, 2019).

2 31 C.F.R. Part 501, Appendix A, Section I.A.

3 31 C.F.R. Part 501, Appendix A, Section II.

4 31 C.F.R. Part 501, Appendix A, Section V.C.

5 31 C.F.R. §501.805(d)(1). Such information includes "(A) [t]he name and address of the entity involved, (B) [t]he sanctions program involved, (C) A brief description of the violation or alleged violation, (D) [a] clear indication whether the proceeding resulted in an informal settlement or in the imposition of a penalty, (E) [a]n indication whether the entity voluntarily disclosed the violation or alleged violation to OFAC, and (F) [t]he amount of the penalty imposed or the amount of the agreed settlement." *Id.* OFAC communicates all such information through its website. 31 C.F.R. § 501.805(d)(2).

6 31 C.F.R. § 501.805(d)(4).

7 See OFAC Resource Center, Settlement Agreement between the *U.S. Department of the Treasury's Office of Foreign Assets Control and Apollo Aviation Group, LLC* (Nov. 7, 2019) (https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20191107_33.aspx) (the Settlement Announcement).

8 In December 2018, Apollo was acquired by The Carlyle Group and currently operates as Carlyle Aviation Partners Ltd. According to the Settlement Announcement, neither The Carlyle Group nor its affiliated funds were involved in the apparent violations at issue. *See id. at 1 n.1.*

9 *See* 31 C.F.R. Part 538, *Sudanese Sanctions Regulations* (7-1-15 Edition). Note that most sanctions with respect to Sudan were effectively revoked by general license as of October 2, 2017, thereby authorizing transactions previously prohibited by the SSR during the time period of the apparent violations by Apollo. However, as is true when most sanctions programs are lifted, the general license issued in the SSR program did not "affect past, present of future OFAC enforcements or actions related to any apparent violations of the SSR relating to activities that occurred prior to the date of the general license." Settlement Announcement at 1 n.2. *See also* OFAC FAQ 532 (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#sudan_whole).

10 A "wet lease" is "an aviation leasing arrangement whereby the lessor operates the aircraft on behalf of the lessee, with the lessor typically providing the crew, maintenance and insurance, as well as the aircraft itself." *See* Settlement Announcement at 1 n.3.

11 *Id.* at 1.

12 Unfortunately, Apollo did not learn that the first two engines were used in violation of lease restrictions until they were returned following lease expiration and it conducted a post-lease review of the relevant engine records.

13 The alleged application of section 538.201 to Apollo in the circumstances confirms the broad interpretive meaning that OFAC often ascribes to terms such as "interest," "property," "property interest" and "dealings," which appear in many sanctions programs.

14 The alleged application of section 538.205 to Apollo in the circumstances suggests that a U.S. lessor of aircraft and jet engines may be tagged with the "re-export" of such goods and related services from one foreign country to another, notwithstanding the existence of a contractual daisy-chain of lessees, sub-lessees, and/or wetlessees that actually direct and control such flight decisions. In the context of U.S. export control laws, the Export Administration Regulations (EAR) define the term "re-export" to include the "actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country, including the sending or taking of an item to or from such countries in any manner." 15 C.F.R. § 734.14(a)(1). Thus, for export control purposes, the flight of an aircraft subject to the EAR from one foreign county to another foreign country constitutes a "re-export" of the aircraft to that country.

15 Settlement Announcement at 1.

16 *Id.*

17 *Id.,* at 1–2.

18 *Id.* at 3. (emphasis added).

19 *Id. See* OFAC, *Iran-Related Civil Aviation Industry Advisory* (July 23, 2019) *(https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190723.aspx)*

20 *Id.*

21 *Id.* (emphasis added).

22 In Apollo, OFAC reacted favorably to certain steps alleged to have been taken by Apollo to minimize the risk of the recurrence of similar conduct, including the implementation of procedures by which Apollo began "obtaining U.S. law export compliance certificates from lessees and sublessees." *Id.*

23 *See https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf.*

Comerica Leasing Corporation v. Bombardier Inc.

1 Bryson Monteleone, *Residual Value Guarantees*, AIRLINE ECONOMICS, Jan./Feb. 2014, at 2.

2 Bombardier Inc., Third Quarterly Report, at 95 (Oct. 31, 2019)

3 *Comerica Leasing Corp v. Bombardier Inc.*, U.S. District Court, Southern District of New York, No. 16-00614.

4 *Id.* at *1.

5 *Id.* at *18.

6 *Id.* at *1.

7 *Id.*

8 *Id.*

9 *Id.* at *2.

10 *Id.* at *3.

11 *Id.*

12 *Id.*

13 *Id.* at *4.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at *5.

18 *Id.*

19 *Id.* at *13.

20 *Id.*

21 *Id.* at *14.

22 *Id.* at *7.

23 *Id.* at *14.

24 *Id.*

25 *Id.*

Letters of Credit: A Refresher

1 An example provision: The Security Deposit and any interest accrued on it shall be Lessor's absolute and unconditional property. Lessor shall not have to keep the Security Deposit in any particular fund or bank account, and Lessor may commingle such amounts with Lessor's general and other funds, and may use such amounts in any way that Lessor chooses, including by creating a Security Interest over such funds in favour of a Financier. Lessor shall not hold the Security Deposit as agent of or on trust for Lessee or in any similar fiduciary capacity.

2 This demand is not typically stated in the letter of credit itself but may be required pursuant to the practice and/or banking requirements of the issuing institution.

3 To avoid such untenable situations, the beneficiary should ensure the underlying contract is carefully drafted to provide for an event of default or to allow the beneficiary to make a payment demand under the existing letter of credit if such letter of credit is not renewed by 30 days prior to its expiry.

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Global Transportation Finance

The Vedder Price Global Transportation Finance team is one of the largest, most experienced and best recognized transportation finance practices in the world. Our professionals serve a broad base of clients across all transportation sectors, including the aviation, aerospace, railroad and marine industries, and are positioned to serve both U.S.-based and international clients who execute deals worldwide.