Global Transportation Finance Newsletter

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Can Airlines Seek Relief under EETC Financing?

Due to the ongoing COVID-19 pandemic and the resulting economic malaise, lenders and investors are seeing a flood of requests from borrowers and issuers for relief on debt service payments. For private financings where there is generally a small syndicate of participants or group of investors, such requests are often obliged, for any number of reasons, including concern that a borrower or issuer will purposely default. Holders of publicly traded securities, on the other hand, have historically been immune to such requests.

Enhanced equipment trust certificates (**EETCs**, pronounced "double-E-T-C"), which are publicly traded airline-issued and aircraft-secured debt securities, are likewise generally immune to such requests. Lawyers in the Vedder Price Global Transportation Finance Team, nevertheless, have been fielding questions from clients about the likelihood of airline issuers seeking debt relief, including forbearances, on their EETCs, whether in or outside of bankruptcy proceedings. We have been counseling our clients that it is nearly impossible for airline issuers of EETCs to obtain debt relief from the holders of the EETC securities. We explain the rationale for that conclusion in this Article.

I. EETC Background

By way of background, EETCs are a type of debt security issued by individual airlines to finance portions of their fleet of aircraft. The securities that are sold to the investors are pass through trust certificates (**PTCs**), which represent beneficial interests in pass through trusts that hold promissory notes issued by an airline issuer and relating to a particular aircraft. To secure the airline issuer's obligations under those promissory notes, the issuing airline grants security interests in the related aircraft as collateral. The promissory notes issued by the airline issuer for each aircraft are issued in tranches, representing senior and subordinated secured positions in the aircraft collateral. Accordingly, all promissory notes that are issued on a senior basis will be placed into one particular pass through trust, and one or more series of promissory notes issued on a subordinated basis will be placed in a different pass through trust for each series. Thus the investors will hold, through their PTCs, interests in a pool of secured aircraft promissory notes in respect of either senior or subordinated securities. The airline issuer, in turn, will use the proceeds of the PTC offering to finance the aircraft in its fleet.

Historically, airlines issuing EETCs have typically been U.S. airlines. The EETCs' success is keyed to the fact that aircraft financings by U.S. airlines have had the benefit of Section 1110 of the U.S. Bankruptcy Code (Section 1110). In a nutshell, Section 1110 requires a U.S. airline that has been subject to a Chapter 11 bankruptcy either to agree to perform its aircraft-secured financings (and cure any past defaults) or return the financed aircraft to its financier, in each case within 60 days of its bankruptcy filing. The critical feature of this Section is that it overrides the bankruptcy stay that would otherwise be applicable to the airline's creditors, enabling the aircraft's financiers to get their collateral back on a timely basis (or to restore their financings to a performing status). We should mention that there is a third option under Section 1110 for the bankrupt airline and its aircraft financier, which is for them to agree that the airline may keep the aircraft subject to amended terms of the financing agreement. This would occur if the financier does not want to take its aircraft back (the usage of this option is commonly known as the Section 1110(b) option).

Team News

Francis X. Nolan, III receives meritorious Public Service Award from the U.S. Coast Guard for Outstanding Contributions as President of The Maritime Law Association of the United States.

Read more here.

Ronald Scheinberg discusses Federal Relief for the Aviation Industry in *Law360*'s article, "Airlines Wary Of Giving Up Equity For Gov't COVID-19 Funds," including the Coronavirus Aid, Relief and Economic Security (CARES) Act and how U.S. airlines are approaching the federal relief.

Read more here.

With the advent of the Cape Town Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment (the Cape Town Convention), which offers the Section 1110-equivalent Alternative A for aircraft registered or debtors situated in countries participating in the Cape Town Convention and electing Alternative A, non-U.S. airlines have also utilized EETCs. Some non-U.S. airlines based in jurisdictions that are not signatories to the Cape Town Convention but that have particularly favorable creditors' rights as a matter of law have also been able to utilize the EETC product.

II. EETC Enhancements

As reflected in its name, the first "E" in EETC is the word "Enhanced." What makes these PTCs *enhanced* over an ordinary equipment trust certificate is that they have the following features:

A. Tranching. The PTCs and promissory notes are tranched, providing improved loan-to-value (**LTV**) ratios for more senior tranches and subordination rights against the more junior tranches. With respect to an aircraft being financed, the airline issuer will issue one promissory note for each tranche, to be held by or on behalf of a pass through trust, which holds all the promissory notes of the same tranche under the EETC financing.

B. Cross-Default. If the issuer defaults on its obligations under any of the promissory notes, it will be deemed to have defaulted under all of the promissory notes, permitting the exercise of the remedies provided in each promissory note across the entire EETC financed fleet. This a very powerful tool for EETC investors insofar as it does not allow the airline issuer to cherry-pick among the financed aircraft – it is an all-or-nothing approach. So, the airline issuer is faced with a stark choice: either it cures the defaults on all related promissory notes secured by each of the EETC aircraft or it may be obligated to return to the subordination agent all of the EETC aircraft (which may constitute a material portion of its fleet or a core operational portion of its fleet and/or in which the airline may have built up an equity position).

C. Cross-Collateralization. In addition to the grant of security in a particular aircraft to secure the promissory notes related to that aircraft, a security interest is also granted in all the aircraft that secure the other promissory notes. If an aircraft is sold, any net proceeds from that sale in excess of the debt related to that aircraft will be available to cover any shortfall with respect to the other outstanding promissory notes.

D. Cross-Subordination. Related to the cross-collateralization, in furtherance of the enhancements provided for more senior promissory notes, more senior tranches of notes enjoy priority in payment ahead of more junior tranches when a remedy is exercised against any aircraft regardless of the promissory note under which the shortfall has occurred.

E. Section 1110/Cape Town Convention Protection. A key factor in the enhanced aspect of a EETC, and why its use has been, for the most part, limited to U.S. airlines, is that secured creditors of U.S. airlines can benefit from the provisions of Section 1110 of the U.S. Bankruptcy Code, which allow them to repossess the aircraft collateral during a Chapter 11 proceeding if the airline does not cure its defaults (other than the bankruptcy filing) and certain other conditions are satisfied. These rights (as well as comparable rights under the Cape Town Convention) provide greater certainty to EETC investors as to the ability to repossess the financed aircraft (or be given assurances of continued performance of the airline's obligations under the related promissory notes) if an airline files for bankruptcy.

F. Liquidity Facility. Liquidity Facility. As an additional means to enhance the credit ratings of a EETC, a liquidity facility is put in place for one or more classes of the PTCs and sized to provide for timely payments of interest on the PTCs for up to 18 months (or sometimes a longer period in the case of certain airlines based in non-U.S. jurisdictions). Each liquidity facility allows the related pass through trust to continue to make timely interest payments for the relevant period of time in a variety of scenarios, including if the airline issuer were to stop making debt service payments. The 18-month period (or other relevant time frame) is the time period that the rating agencies that rate EETCs have determined is the maximum amount of time it should take to repossess the aircraft, given the certainties of Section 1110 or the Cape Town Convention (or other applicable law), as the case may be. In this regard it is worth noting that EETCs are rated on the basis of the ability of the EETC to pay current payment of interest and ultimate repayment of principal at legal maturity. The "current payment of interest" is supported by the issuer's ability to pay the same, or the liquidity facility provider in lieu of the issuer, and the "ultimate repayment of principal" is supported by the issuer's ability to pay the same, or, absent issuer wherewithal, the ability to repossess and liquidate the aircraft collateral within the applicable repossession period (18 months or otherwise).

Ronald Scheinberg was recently quoted in *Airfinance Journal's* article, "The Return of US Ex-Im," where he discussed the recent restoration of the Export-Import Bank of the United States (Ex-Im Bank) and its relevance in today's economy.

Read more here.

Thought Leadership

Edward K. Gross and **Melissa W. Kopit** co-authored "Recent Developments in the Transportation Leasing and Finance Industry in the U.S." in the *World Leasing Yearbook 2020,* which highlighted recent trends, legislation and developments in the U.S. transportation equipment leasing and finance industry. The article also focused on issues pertaining to commercial law and aircraft and vessel finance.

III. EETC Documentation

The terms and conditions of EETCs are quite standardized across the market (that is, from airline to airline) and, as to any single airline issuer, will usually be nearly uniform across its EETC-financed fleet. EETC contracts can be thought of in two groups. One group consists of the aircraft financing documents, which typically include a Note Purchase Agreement, a Participation Agreement, an Indenture and Security Agreement for each aircraft (an Indenture) and the promissory notes. The other group consists of the documents associated with the PTCs or trust-level documents, which include an Underwriting Agreement, a Pass Through Trust Agreement, Trust Supplements (which create the trusts for each tranche of PTC), PTCs, Revolving Credit Agreements (liquidity facilities), Intercreditor Agreements and, for pre-funded facilities, Deposit Agreement(s) and Escrow Agreement(s). For purposes of this discussion, we will focus on the Indenture, the Pass Through Trust Agreement and the Intercreditor Agreement.

The Indenture

It is under an Indenture that the airline issuer incurs the debt evidenced by promissory notes, covenants to pay interest on and principal of the promissory notes and grants a security interest in an aircraft subject to the EETC to the loan trustee acting for the PTC holders. The payment obligations of the airline issuer under an Indenture may only be amended or modified with the consent of each affected promissory noteholder. Each promissory note issued under an Indenture is issued to and in the name of the subordination agent acting for the related pass through trustee. Tracing through the chain of beneficial ownership of the PTCs, each holder of a beneficial interest in the PTCs would need to consent to the amendment of payment obligations in order for such an amendment to become effective, as further discussed below.

The Pass Through Trust Agreement

The Pass Through Trust Agreement (together with the Trust Supplements) creates a number of rights in favor of the PTC holders as well as provides for the administration of the PTCs. Of note, the PTC holders have a right to receive periodic distributions of payments from the trust property (which includes payments received on the promissory notes), which payment cannot be impaired or affected without the consent of *each* of the affected PTC holders.

With respect to the particulars of the identity of the holders of the PTCs, the issuance mechanism largely shields their identities from the airline issuer. Pursuant to the Pass Through Trust Agreement, the PTCs are not issued as physical or "definitive" certificates but rather as book-entry certificates deposited with a clearing agency, typically Depository Trust Company (**DTC**). The pass through trustee will register the PTCs issued under the pass through trust in the name of Cede & Co. (DTC's nominee). Thereafter, only a DTC participant having an account with the DTC may hold a beneficial interest in a PTC, receiving a credit on DTC's records. A DTC participant's position in the securities may represent a combination of beneficial interests for its own account or for the account of one or more of its customers. With respect to the purchase and sale of a PTC, DTC only records the identity of the DTC participants to whose accounts the PTCs are credited, and DTC has no knowledge of the actual purchasers of beneficial interests in the PTC. The DTC participants are solely responsible for keeping account of their holdings on behalf of their customers. It is not possible for a pass through trustee to determine the identities of the beneficial interest holders. Although the pass through trustee can request a DTC position listing that will provide a snapshot as to which DTC participants hold beneficial interests in the PTCs as of a particular date and time, the DTC position listing will not reveal the identities of the ultimate beneficial interest holders. Additionally, as with all securities sold in the capital markets, the actual investors of any particular EETC issuance may change from day to day as a result of secondary trading in the securities.

The Intercreditor Agreement

Intercreditor Agreements utilized in EETCs provide, among other functions, the payment waterfalls for distributions and, most pertinent to the present discussion, the control of remedies in the case of a default by the airline issuer. In the case of a default by the airline issuer, it is a majority of the holders of the PTCs of the most senior class who dictate the exercise of remedies.

IV. Why It Is Difficult to Amend EETC Documentation

Taking into consideration the requirements to amend an Indenture under both the Indenture and the Pass Through Trust Agreement, as well as the difficulty of identifying the holders of the PTCs, let us now walk through the necessary steps to amend an airline issuer's payment obligations under an Indenture (this could occur in the context of a workout or Section 1110(b) option) or a request for a forbearance:

1. The airline issuer would request the loan trustee to agree to such an amendment.
2. The loan trustee would then notify the subordination agent, which is the registered holder of the promissory notes, acting as agent for the affected class of PTC holders.

Jordan R. Labkon co-authored "CORSIA Creates Compliance Complexities for Aviation Financiers" in *Airline Economics Global Aviation Finance & Leasing Guide 2020.* The article discussed the International Civil Aviation Organization's plan to control aviation carbon dioxide emissions, referred to as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).

Adam R. Beringer, **Michael J. Edelman**, **Matthew P. Larvick** and **Melissa W. Kopit** co-authored a chapter in the *International Comparative Legal Guide: Aviation Finance & Leasing*. The chapter covered common issues encountered in aviation finance and leasing in the United States and provided answers on a number of questions pertaining to aviation finance-related matters, including taxation, registration and environmental liabilities.

3. The pass through trustee of the applicable class would then notify Cede & Co., the registered holder of the PTCs of the relevant class.
4. Cede & Co./DTC would then transmit the amendment request to the DTC participants holding beneficial interests in the PTCs of the relevant class.
5. Each DTC participant would then transmit the amendment request to each person that holds a beneficial interest in the PTCs of the relevant class that are beneficially owned by that DTC participant.
6. Ultimately, then, the pass through trustee of the relevant class would have to obtain consent from *each* PTC holder of that class. The notice to the PTC holders asking for the debt relief proves to be quite a difficult feat because, as previously mentioned, the pass through trustee's only point of contact is DTC and DTC only maintains records of its participants, not the actual PTC holders. Further, even if it were possible to identify every beneficial interest holder in the PTCs of the relevant class, given the nature of secondary trading in DTC securities, the PTC holders of today might not be the PTC holders of tomorrow, and it would be extremely unlikely that each PTC holder would give consent at one time. Finally, the lack of a mechanism to identify PTC holders means that it is necessarily impossible to find a counterparty with whom to negotiate; one would expect that an amendment of debt service payment terms of a EETC would not be a one-way arrangement – the airline issuer would have to give something back in return. Without being able to identify the holders, the airline issuer would be stabbing in the dark with concessions as it proceeds with its request.

We should also note that airline issuers seeking debt relief might also seek a forbearance agreement from the PTC holders of its EETC – that is, an agreement from the investors not to exercise remedies against the aircraft collateral or the airline issuer for a prescribed period.[1] As noted above, the Intercreditor Agreement provides that, generally speaking, a simple majority of the most senior class of EETC investors controls the exercise of remedies, so it is this majority that could conceivably agree to a forbearance. While a smaller group for this purpose is required (i.e., a simple majority of the most senior class), given the reasons identified above, the difficulty in soliciting such a consent would be significant.

The lack of visibility of PTC holders for the airline issuer seeking an amendment or forbearance in a EETC context further complicates the process for seeking such an amendment or forbearance in contrast to what would happen in a private deal. This is because when an airline seeking debt relief goes out to its creditors seeking concessions, it typically follows up with phone calls and in-person meetings with the creditors to explain why its request is appropriate and reasonable, and seeks to pressure the creditors with cajoling rhetoric and personal pleas. Accordingly, this lack of visibility presents a structural impediment in obtaining debt relief.

V. Reasons Why EETC Investors Would Not Grant Relief to Airlines

Even if an airline issuer can identify all affected PTC holders (to effect an amendment to the payment terms) or the holders of a majority of the most senior class (to effect a forbearance), there is little incentive for any PTC holder to grant its consent. The following reasons create such disincentives:

1. The lower LTV ratios and the over-collateralization, which are enhancement features of EETCs, create a disincentive for the holders of the most senior tranche (who control the EETC remedies) to agree to any concessions. At issuance of a EETC, the LTV ratio for the most junior tranche might range from 70% to 80% and the most senior, around 40% to 60%, based on appraised base values. Even with a significant deterioration of aircraft values, this most senior class should be able to achieve 100% recovery in any liquidation of the aircraft collateral. The overcollateralization of this class of investor (which may be enhanced by secondary market purchases of PTCs at discount) has the effect of making them complacent – happy to ride out the affected airline's troubles because their exposures would be covered in any aircraft collateral liquidation.
2. The time when an airline EETC issuer is most likely to seek concessions from its PTC holders is when that airline is facing financial difficulties. At such times, in the face of a threat of a default by that airline, our experience has been that credit ratings on that airline's EETCs get downgraded and many of the original PTC holders trade out from their positions at a discount to hedge funds and other "vulture" investors. These new investors, by virtue of their discounted purchases, have improved LTV ratios and thus are likely to be more content with their collateral position.
3. These hedge funds and other investors are oftentimes viewed as very difficult counterparties from which to obtain concessions.

Honors & Awards

Vedder Price Recognized in ***Chambers USA 2020.***

***Chambers USA Transportation*: Aviation: Finance (Nationwide)** ranked Vedder Price **Band 1**. Ronald Scheinberg and Jeffrey T. Veber ranked **Band 1**, Geoffrey R. Kass ranked **Band 2** and Adam R. Beringer ranked **Band 3**.

***Chambers USA Transportation*: Shipping/Maritime: Finance (Nationwide)** ranked Vedder Price **Band 2**. Francis X. Nolan, III ranked **Band 2** and John E. Bradley ranked **Band 3**.

Vedder Price Recognized in ***Chambers Global 2020.***

The rankings for 2020 feature a new distinction, "Asset: Finance," which was formed through the merging of the "Rail: Finance" and "Aviation: Finance" categories.

Chambers Global Asset: Finance ranked Vedder Price Band 2. Gavin Hill and Ronald Scheinberg ranked **Band 2,** Jeffery T. Veber ranked **Band 3** and Geoffrey R. Kass ranked **Band 4**.

Chambers Global Shipping: Finance Francis X. Nolan, III. ranked **Band 3**.

VI. Reasons Why Airlines Might Not Voluntarily Default on EETC Payments

As previously mentioned, airlines primarily use EETCs to finance their core fleet, often with dozens of aircraft included in a single EETC financing. Because the aircraft in a EETC financing are cross-defaulted and cross-collateralized, if an airline issuer defaults under any of the promissory notes for any tranche, the subordination agent is permitted to exercise remedies under all the promissory notes related to *all* of the aircraft financed with that particular EETC transaction. Such an ability to effectively ground and repossess a chunk of the airline's fleet could significantly adversely affect that airline issuer's ability to operate its business. Further, insofar as the obligations of the promissory notes issued by the airline are direct recourse obligations of that airline, a failed debt service payment by the airline would enable the subordination agent to sue for payment on the defaulted notes, which could result in an attachment on the airline's valuable cash resources or force the airline into bankruptcy.[2] The risk for that airline related to remedial action and repossession is heightened by the secured party's rights under Section 1110 of the U.S. Bankruptcy Code or the Cape Town Convention, as applicable.

Finally, even if an airline went into bankruptcy and was of the mindset to substantially reduce its fleet, the airline may be reluctant to voluntarily default under a EETC issuance because it may not want to impair the EETC product for its own future use. EETCs are a very attractive form of financing to airlines. Airlines enjoy pricing advantages on the senior-most tranches of a EETC because of their investment grade credit rating, thanks to the structural enhancements previously discussed. Also, given the capacity of the capital markets into which EETCs are issued, airlines can finance in a single financing upwards of $1.5 billion of aircraft debt, which can cover dozens of aircraft and a wide range of aircraft types, saving the airline's treasury staff the trouble of going out to large numbers of financial institutions to finance a significant number of aircraft, such as a year's-worth of new aircraft deliveries. Since the product was developed in 1994, over $100 billion of EETC securities have been issued. A bankrupt airline might be cautious to take any action that could diminish that source of capital by harming the market reputation of EETCs (and therefore potentially diminishing investor appetite) or rating agency views of the product.

VII. Conclusion

Having set forth how difficult it may be for an airline to amend payment provisions under EETC documentation or obtain forbearance relief, as well as the considerations that might affect investor incentives to give consent, one can now see why, despite this unprecedented occasion with material threat of bankruptcy for many airlines, an airline would not seek relief under a EETC by seeking to modify the payment terms or seeking a forbearance, unlike in a private debt context. Even if an airline files for bankruptcy, that airline would have multiple reasons compelling it to continue to perform under its EETCs.

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Airline Economics
GROWTH FRONTIERS

Vedder Price is pleased to announce that the firm played a key role advising clients in three "Aviation 100 Global Leaders Awards 2020" presented at the gala dinner held during the *Airline Economics Growth Frontiers Dublin 2020 on January 20.*

Vedder Price was recognized in the following categories:

Asia-Pacific Editor's Deal of the Year

Vedder Price represented Meritz Securities and Korean E-note investors in Aviation Capital Group's second ABS, the $477 million MACH 2019-1 asset backed securitization. The Vedder Price team was led by Geoffrey R. Kass and Ji Woon Kim.

Lease Deal of the Year

Vedder Price represented Castlelake, L.P., in a sale leaseback transaction with Air Asia and the related $597.87 million secured term loan. The Vedder Price team was led by Geoffrey R. Kass and Bill Gibson (acquisition and leasing) and Adam R. Beringer and James Kilner (financing).

Editor's Deal of the Year for Innovation

Vedder Price represented Virgin Atlantic Airways in its ACG-supported financing for one Airbus A350-1000. The Vedder Price team was led by Neil Poland.

Wallis Trading v Air Tanzania: The Importance of Standard Lessee Representations and Warranties

Aircraft leases typically include standard representations and warranties regarding: (i) the power and authority of the lessee to enter into the agreement and the transactions contemplated by the agreement; (ii) the agreement constituting the lessee's legal and binding obligations; (iii) the agreement not conflicting with any applicable laws; and (iv) all authorisations, consents and registrations required in connection with the agreement being obtained or in effect.

The recent case of *Wallis Trading Inc v Air Tanzania Company Ltd & Anor*[1] in the High Court of England and Wales demonstrates the utility and importance of these standard representations and warranties, including as an estoppel against the defendants' claim that a lease was void and unenforceable as a result of alleged breaches of foreign public procurement legislation and lack of authority. The case also demonstrates the benefit of choosing English law as the governing law of a contract, particularly between international parties, who may be concerned about how local law may act to interfere with a contract's enforceability.

Facts

A Liberian company that acquired and leased aircraft, Wallis Trading Inc. (**Wallis**), sought over $30 million in unpaid sums from the defendants, Air Tanzania Company (**Air Tanzania**) and the Government of the United Republic of Tanzania (the **Government of Tanzania**, together with Air Tanzania, the **Defendants**), arising out of the lease of an Airbus A320 aircraft (the **Aircraft**) by Wallis to Air Tanzania.

Wallis had leased the Aircraft to Air Tanzania pursuant to an English law-governed lease agreement entered into in November 2007 (the **Lease**). The Government of Tanzania had guaranteed the obligations of Air Tanzania under the Lease pursuant to a Tanzanian-law governed guarantee (the **Guarantee**). Before entering into the Lease, the board of directors of Air Tanzania and the Attorney General of the Tanzania had approved the entry into the Lease provided that certain terms deemed unacceptable be renegotiated and Air Tanzania's board of directors delegated authority to Air Tanzania's managing director to sign the Lease. The managing director managed to renegotiate some of these terms, but not all, and subsequently signed the Lease. Both the Lease and the Guarantee contained standard representations and warranties relating to power and authority, legal and valid effect, non-conflict and authorisations.

Following a number of payment defaults by Air Tanzania, Wallis accepted early redelivery of the Aircraft and the termination of the Lease in October 2011. Wallis and the Defendants entered into a settlement agreement in October 2013 (the **Settlement Agreement**) with respect to the unpaid sums owed to Wallis. Following this, the Defendants made six payments to Wallis in 2013 and 2014, then stopped paying. Wallis issued proceedings against the Defendants in April 2017 for the outstanding amount.

The Claim

Wallis' primary case was that the Defendants were liable for the unpaid sums pursuant to the Settlement Agreement. Alternatively, Wallis claimed damages for breach of the Lease or the Guarantee.

The Defendants put forward a number of defences to Wallis' claim:[2]

Alleged invalidity of lease due to non-compliance with Tanzanian law

The Defendants contended that they were not liable to pay the unpaid sums to Wallis principally on the basis that the Lease was invalid and "null and void" because Air Tanzania had failed to comply with Tanzanian public procurement legislation, so the Lease had been entered into in breach of such legislation and, as such, Air Tanzania had no power to enter into the Lease.

Alleged unenforceability of lease due to illegality

The Defendants further argued that the non-compliance with the Tanzanian public procurement legislation rendered the Lease unenforceable on the basis of the English law principle that English courts will not enforce an obligation which requires a party to a contract to do something unlawful under the law of the country where the contract will be performed.

Recent Speaking Engagements

February 3-4, 2020

Corporate Jet Investor 2020, London

Edward K. Gross and **David M. Hernandez** presented at the Corporate Jet Investor (CJI) conference on February 3 and 4 in London. Mr. Hernandez participated in the session, "Letter to America: Speeding Up Exports," where he discussed how to manage FAA/EASA issues and ways to speed up de-registrations and registrations. Mr. Gross participated in the session, "Money, Money, Money: Managing the Assets Behind Loans." He and his co-panelists addressed questions affecting residual values, competing with cash and negative interest rates and what experts believe the next downturn will look like.

February 20, 2020

11th Annual Capital Link Greek Shipping Forum, Athens

Dylan Potter presented at the 11th Annual Capital Link Greek Shipping Forum on February 20. Mr. Potter moderated the "Chinese Leasing Panel" where he and his panelists discussed the growth of the Chinese leasing market and the future for Chinese leasing houses.

February 25, 2020

Helicopter Investor London, London

Edward K. Gross presented at the Helicopter Investor London conference on February 25 and 26 in London. Mr. Gross moderated the session, "Returning to Lender: Managing Lease and Loan Returns," where he and his panelists discussed the main "pain points" in lease/loan returns, the differences between planned and unplanned returns and cover strategies that, when implemented, can make the return process less painful.

Alleged lack of authority

Air Tanzania also claimed that its managing director lacked authority to sign the Lease on the basis that: (i) they had failed to renegotiate the provisions of the Lease deemed unacceptable; (ii) they had failed to comply with Tanzanian public procurement law; and (iii) they had breached their fiduciary duty to act in good faith.

Alleged unenforceability of guarantee

The Defendants also contended that the Guarantee was unenforceable on the grounds that its issuance violated Tanzanian public procurement legislation. Alternatively, the Defendants argued that as there was no primary enforceable obligation under the Lease, the Guarantee was unenforceable.

Alleged unenforceability of settlement agreement[3]

Lastly, the Defendants argued that the Settlement Agreement was also unenforceable because the Lease and Guarantee were unenforceable or illegal (for each of the reasons outlined above) and that the Settlement Agreement was illegal under Tanzanian law.

Decision

Lease's invalidity due to non-compliance with Tanzanian law

The judge found that, as the Lease was expressly governed by English law, by virtue of Article 8 of the Rome Convention (as scheduled to the Contracts (Applicable Law) Act 1991), "*the existence and validity of a contract is to be determined by the law which would govern the contract under the Convention if the contract were valid.*"[4] – accordingly, as the Tanzanian public procurement legislation does not form part of English law, non-compliance with such legislation did not, as a matter of English law, render the Lease invalid, null or void.

Applying the decisions of the Court of Appeal in *Peekay Intermark v Australia and New Zealand Banking Group*[5] and *First Towers Trustees Ltd v CDS*[6]*,* the judge also found that Air Tanzania was contractually estopped from advancing arguments based on the invalidity of the Lease by reason of non-compliance with the Tanzanian public procurement legislation on the basis that Air Tanzania had represented and warranted in the Lease that the Lease was a legal, valid and binding obligation on it, that the entry into and performance of the Lease did not conflict with any laws binding on it and that all authorisations, consents, registrations and notifications in connection with the entry, validity and enforceability of the Lease had been obtained or effected.[7]

Lease's unenforceability due to illegality

The judge dismissed the Defendants' argument that performance of Air Tanzania's obligations under the Lease were unlawful in Tanzania on the basis that the amounts payable under the Lease were to be made to Wallis' bank account maintained in Switzerland, not in Tanzania. The Defendants did not suggest that payment to Wallis was illegal under the laws of Switzerland. The judge also found that, in any event, the Defendants had failed to show that any performance under the Lease was unlawful under Tanzanian law, even if its entry did not comply with Tanzanian public procurement legislation.

Invalidity due to lack of authority
Non-fulfilment of conditions imposed by Air Tanzania's board of directors

The judge held that, as Wallis was not aware of the conditions imposed by Air Tanzania's board of directors on its managing director signing the Lease, the managing director had ostensible authority to do so. Applying English law principles (which the judge found applied in Tanzania too), the judge found that the managing director must be regarded as being held out by Air Tanzania has having authority to sign the Lease on its behalf. Air Tanzania's managing director would usually have authority to enter into commercial transactions such as aircraft leases for Air Tanzania. The judge also found that, even if Air Tanzania's managing director did not have ostensible authority to sign the Lease, Air Tanzania had ratified the Lease by, among other things, taking delivery of the Aircraft and operating it, and subsequently acknowledging its liability for arrears of rent when the Aircraft was redelivered to Wallis.

Failure to comply with Tanzanian public procurement legislation

Regarding Air Tanzania's argument that its managing director lacked authority to enter the Lease on the grounds that the Tanzanian public procurement legislation had not been complied with, the judge considered that Air Tanzania was again contractually estopped from advancing this argument by reason of the representations and warranties contained in the Lease.

February 27, 2020

Marine Money German Ship Finance Forum, Hamburg

John F. Imhof Jr. presented at the 19th Annual Marine Money German Ship Finance Forum. Mr. Imhof interviewed Andreas Povlsen, Founder of Breakwater Capital and Managing Director of Hayfin Capital Management, in the session, "The Future of 'Alternative' Capital for Shipping."

March 3, 2020

Strafford Webinar on Structuring and Equipment Financing

Global Transportation Finance Shareholder **Edward K. Gross** presented at the Strafford live CLE webinar, "Structuring Equipment Financing: Lease Accounting Rules, Bundling Services and Software, UCC and Bankruptcy Treatment." The panel examined several important new developments in equipment financing.

March 11, 2020

28th Biennial Tulane Admiralty Law Institute (ALI), New Orleans

Francis X. Nolan, III, presented "The Evolution of 'Vessel' Status in U.S. Domestic and International Law" at the 28th Biennial Tulane Admiralty Law Institute on March 11, 2020.

March 30, 2020

Capital Link International Shipping Forum Digital Conference

John F. Imhof Jr. moderated a panel on private equity, restructuring, M&A and industry consolidation as it relates to the shipping industry at the 14th Annual Capital Link International Shipping Forum. Mr. Imhof's session touched on recent and possible future trends for private equity investment in shipping.

Breach of fiduciary duties

The judge found that the Defendants had not established that Air Tanzania's managing director had acted dishonestly or otherwise than in good faith, or that they had thought they were acting otherwise than in the best interest of Air Tanzania when they signed the Lease.

The judge found this was evidenced by: (a) the terms and structure of the Lease being based on a previous lease Air Tanzania had entered into, (b) the draft Lease being provided to a number of other people within Air Tanzania's management team and (c) documents showing that the managing director had been attempting to further the interests of Air Tanzania in difficult circumstances owing to the lack of A320 aircraft in the market and Air Tanzania's weak financial position and reputation.[8]

Guarantee's unenforceability

The judge found that, similarly to Air Tanzania, the Government of Tanzania was contractually estopped from relying on the argument that the Guarantee was unenforceable due to non-compliance with Tanzanian law by reason of the standard representation and warranties relating to power and authority, legal and valid effect and non-conflict contained in the Lease. It should be noted that, while the relevant law of contractual estoppel here was Tanzanian law, the judge found that no evidence was proffered that Tanzanian law was any different from English law in this regard. For this reason, and by reason of the Lease being valid and giving rise to enforceable obligations against Air Tanzania (for the reasons discussed above), the judge concluded that the Guarantee was enforceable against the Government of Tanzania.

Settlement agreement's unenforceability

The judge considered that the Defendants' argument that the Settlement Agreement was unenforceable owing to the Lease and Guarantee being unenforceable or illegal (for the reasons advanced by the Defendants) was no answer to Wallis' case.

For the above reasons, the judge found for Wallis.

Conclusion

The case is a good demonstration of the doctrine of contractual estoppel and shows the importance of including standard representations and warranties regarding power, authority and validity in aircraft leases. The decision of the court also illustrates one of the benefits of choosing English law to govern aircraft lease transactions, particularly when this involves international parties. Arguments as to the validity of these agreements based on non-compliance with local laws or legislations would not, generally, cause an English-law governed lease agreement to be invalid.

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April 28, 2020

Aviation Week Network Webinar

Bill Gibson participated in the webinar, "Assessing the Challenges of Lease Returns." The webinar assessed the current market landscape as airlines adjust to the challenges presented by the Coronavirus pandemic, and addressed the prospect of a plethora of aircraft and engine lease returns.

Deal Corner

Vedder Price Represented Thora Capital, LLC in $100m Helicopter Portfolio Investment

Vedder Price represented Thora Capital, LLC in its portfolio investment with helicopter lessor LCI Helicopters (UK) Limited. The portfolio includes nine helicopters worth more than $100m. LCI will be servicer for six Leonardo AW139s and three Airbus H130 helicopters. Global Transportation Finance Shareholder Edward K. Gross, Partner Neil Poland and European Head of Private Equity and Corporate Andrew Harris led the team from Vedder Price. A number of associates provided significant support for this transaction, including Melissa W. Kopit, Erich P. Dylus and Jonathan M. Rauch and Jon Edgelow and Gerry Kelly.

Vedder Price Represented Zephyrus Aviation Capital in $350 Milliion Warehouse Finance Facility

A team of Global Transportation Finance attorneys, comprised of Adam R. Beringer, Daniel M. Cunix and Jillian S. Greenwald, represented Zephyrus Aviation Capital in relation to its closing of a $350 million warehouse finance facility.

Guaranty Enforcement in a Time of Rent Deferrals and Other Economic Accommodations

Due to the ongoing COVID-19 pandemic, lessees and lessors across many industries are attempting to ease economic tensions by agreeing to certain accommodations in respect of lessees' obligations. In the aviation industry, this is commonly taking the form of rent deferrals granted to the airlines by their lessors. Such modifications alter the obligations of the primary transaction parties—the airline and the lessor—but they may also affect the obligations of any third-party obligors involved, such as a guarantor. This article explores the implications of modifying underlying transaction documentation on the enforceability of a guaranty under New York law, including the nature of guaranteed obligations, the importance of material modifications to such obligations, the effect of a guarantor's consent to these modifications and the implications for creditors.

I. Nature and Modification of Guaranteed Obligations

A guaranty is a contractual relationship evidencing a secondary and contingent obligation, wherein the rights and obligations of the parties depend upon the performance by a third party under another contractual relationship.[1] As a general rule, a guaranty is to be interpreted in the strictest manner, and any material alteration of the guarantor's obligations without the guarantor's consent will discharge the guarantor.[2] Notably, if the principal obligor alters the guarantor's undertaking to cover a different obligation by modifying the underlying transaction documents that are the subject of the guaranteed obligations without the guarantor's consent, then the guarantor will be discharged of its obligation under the guaranty.[3] Williston on Contracts summarizes the general rule as follows: "[i]f the terms of the agreement between the creditor and the principal are varied, thereby changing the rights and duties of the principal, a [guarantor] who has contracted to answer only for the performance of the original contract will be discharged from liability for the principal's failure to perform the altered contract."[4] However, a guarantor may consent to the material modification of the underlying obligations in which case the guarantor will remain fully liable for the modified obligations.[5] Such consent is commonly contained in a provision of the guaranty contract itself, but may be evidenced independently as well.[6]

In order to discharge a guarantor from its obligations under a guaranty contract, a modification to the primary obligations must be material. A mere indulgence toward the principal obligor under the primary transaction documents will not discharge a guarantor from its obligations under the related guaranty contract.[7] Accordingly, when attempting to enforce a guaranty in the event that the primary transaction documents have been modified, creditors commonly assert either (i) that the modification to the primary obligations was immaterial in respect of the guaranteed obligations or (ii) that the guarantor consented to such modification.

II. Materiality of a Modification

In determining whether a modification to a guaranteed primary obligation is material, courts analyze whether the modification places the altered primary transactions outside of the original contract such that the primary obligation is no longer the one upon which the guarantor agreed to be bound.[8] Generally, courts will look to see if the modification injures the guarantor, increases the guarantor's risk, or otherwise exposes the guarantor to greater liability.[9] Further, in its discussion of the materiality of a modification to a primary obligation, the Restatement (Third) of Suretyship and Guaranty distinguishes[10] between extensions of time for performance and other modifications.[11] The Restatement provides that, where a creditor grants an extension of time for performance of the primary obligations, "to the extent that the [guarantor] has not performed its duties pursuant to the [guaranty], it is discharged from those duties to the extent that the extension would otherwise cause the [guarantor] a loss."[12]

This principle is demonstrated in *Becker v. Faber*, where the guarantor of a loan secured by a real estate mortgage contended that the terms of the mortgage were modified without its knowledge or consent, and it was therefore discharged from its obligations under the guaranty contract.[13] The loan in question had a term of three years, with interest payable every six months. While the principal was not paid on the maturity date, interest was paid every six months through the maturity date.[14] Despite no written agreement to extend the time of payment, the mortgagor continued to pay, and the mortgagee continued to accept, interest every six months for six years beyond the original maturity date of the loan.[15] The court held that these concessions made by the mortgagee did not serve to discharge the guarantor from its obligations.[16] In its analysis, the court distinguished between the "leniency" shown by the mortgagee in the case at hand, and a situation in which a creditor and debtor agree to preclude the creditor from enforcing for a period of time:

> "Leniency shown to a debtor in default and delay permitted by the creditor without change in the time when payment of the debt might be *demanded*, does not, however, constitute an extension of the time for payment. That requires a binding contract which precludes the creditor from enforcing

Vedder Price Advised SKY Leasing in $600 Million Warehouse Facility

Vedder Price represented SKY Leasing, LLC in its closing of a $600 million warehouse debt financing facility for Sky Fund I Irish Ltd. Global Transportation Finance attorneys Raviv Surpin, Clay C. Thomas and Brian A. White led the team from Vedder Price.

Vedder Price Represented Standard Chartered Bank in $850 Million Aircraft Financing Deal with Qatar Airways

A team of Global Transportation Finance attorneys, led by London Partner Neil Poland represented Standard Chartered on its US$850 million secured financing with Qatar Airways in respect of seven Boeing 787-9 aircraft.

Vedder Price Advised Aero Capital Solutions in $413 Million Fund Raise and Related Aircraft Acquisitions.

Vedder Price represented Aero Capital Solutions, Inc. (ACS) in its second aviation fund raise with total aggregate equity commitments of $413 million. A team of lawyers from Vedder Price's Private Fund Formation group, Tax group and Global Transportation Finance team worked with ACS on this transaction. The Vedder Price team was led by Adam R. Beringer and Joseph M. Mannon and included Mark J. Ditto, Matthew P. Larvick, Cody J. Vitello, Justine L. Chilvers, Jillian S. Greenwald and Pedro F. Eraso.

payment according to the terms of the original contract and confers upon the debtor the right to withhold payment after the original debt has become due."[17]

The court in *Becker* noted that, in respect of the latter situation outlined above, "[t]he doctrine that extension of time for payment of the principal debt even for a few days discharges the surety, has been established by a long line of decisions."[18] This scenario is comparable to that of a rent deferral or other similar economic accommodation in the context of an aircraft lease or related loan. The purpose of these agreements is to assure the lessee or debtor, as the case may be, that the creditor will not enforce at least a portion of its rights for an agreed period of time under the original agreement. The court in *Becker* insinuates that, in such a scenario, a guarantor that does not consent to such an agreement would be discharged from its obligations if the effect of the deferral is to legally alter the original primary obligation such that only the new obligation is enforceable.[19]

The Restatement (Third) of Suretyship and Guaranty further explains that if an extension of time for performance of the underlying obligations increases the risk of loss to the guarantor, the guarantor is discharged of all liability under the guaranty contract.[20] Such an increase in risk commonly occurs when the principal obligor becomes insolvent during the extended term of the principal obligations, and due to the inability of the guarantor to enforce its rights against the principal obligor on the originally agreed-upon date, the guarantor has suffered a loss.[21] The majority of cases hold that any extension of time beyond that originally provided for in the underlying primary documentation completely discharges the secondary obligation, as that extension inherently materially changes the obligations of the guarantor.[22]

Similarly, to the extent it causes additional risk or would otherwise cause the guarantor a loss, a modification of the underlying obligations other than an extension of time for performance, such as an increase in the amount due to the creditor, fully discharges the guarantor from its obligations absent the guarantor's consent or ratification.[23] In *Flexi-Van Leasing, Inc. v. Isaias*, for example, the court held that the underlying lease obligations were materially modified and thus the guarantor was discharged.[24] Flexi-Van Leasing, Inc., a lessor of marine chassis equipment, brought suit against a guarantor, who had an ownership stake in the lessee entity, to enforce guaranteed obligations of the lessee under a lease covering a number of chassis.[25] At the lessee's request, but without the consent of the guarantor, the guaranteed lease had been consolidated with several other leases after the guaranty was executed.[26] In doing so, the daily rental charges were reduced, the time of payment of the principal sum was lengthened, liquidated damages provisions were included, and the number of chassis subject to the lease was increased from 25 to 28.[27] While the court noted that the decreased rent might be considered a mere "indulgence," as discussed in *Becker* above, when taken together with the other modifications made to the lease, including the extension of time and the increase in the number of chassis subject to the lease, these modifications were sufficient to discharge the guarantor from its obligations.[28]

The court in *Flexi-Van Leasing* also highlighted the fact that other guaranties recently entered into by the same parties contained provisions granting advanced consent to modification of the underlying leases, while the guaranty in question was notably missing such provisions.[29] The analysis in *Flexi-Van Leasing* underscores the importance of obtaining a guarantor's consent to modification of the relevant primary obligations.[30]

III. Guarantor's Consent to Modification

The general rule calling for the discharge of a guarantor's obligations under a guaranty upon modification of the primary guaranteed obligations does not apply where the guarantor has consented to the modification or otherwise waived its rights.[31] A common implementation of granting such consent is in the guaranty contract itself.[32] Courts consistently hold that provisions in guaranty contracts contemplating and consenting to potential extensions of the primary obligations are valid, and that liability under such extensions can be enforceable against the guarantor.[33] *In CrossLand Federal Savings Bank by FDIC*, the District Court for the Eastern District of New York held that "[a]ny changes or modifications that fall within [the consent provision of the Guaranty] cannot release the guarantors from their obligations under the Guaranty because the guarantors consented to such alterations when they executed the Guaranty."[34] If a guaranty contains a consent provision, the court's analysis will turn on whether the consent provision covers the modification.[35] Such analysis is conducted in accordance with standard contract interpretation analysis.[36]

This principle is illustrated in *Lo-Ho LLC v. Batista*.[37] In that case, a commercial landlord brought suit for breach of lease against tenant and guarantor.[38] The guaranty in respect of the lessee's obligations provided, in relevant part, that the guarantor was guaranteeing "the full performance and observance of all the agreements to be performed and observed by the Tenant in the attached Lease,"[39] and that it would "remain and continue in full force and effect as to any renewal, change or extension of the Lease."[40] The court's analysis turned on whether a modification of the original lease could be categorized as a "renewal, change or extension" of the original lease, or if such modification should be considered a new lease, and thus not within the scope of the guarantor's consent.[41]

The lessee and the lessor agreed, one month after the initial lease term had expired, to enter into a subsequent lease agreement.[42] The subsequent lease purported to extend the initial lease for an additional five-year term;

GTF Life @Home

From our team to yours, we hope you are keeping safe and healthy. We want to thank you for your continued support and know that we remain at your service 24/7 during the challenging times our industry faces. In the meantime, below is a small window into our daily lives from our temporary offices around the world.

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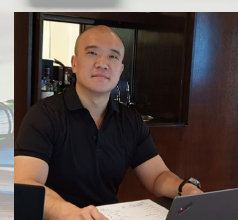
Jeff Veber
New York

Eddie Gross
Washington, DC

Derek Watson
London

Raviv Surpin
Los Angeles



Ji Kim
Singapore

However the subsequent lease provided that the rent increased by $200 annually, tax installments were to be paid on a monthly basis, and certain renovations were to be undertaken by the lessee.[43] The lessor argued that the subsequent lease should be considered an extension of the original lease because the subsequent lease purported on its face to be an extension of the original lease, many of the terms were substantially the same as the original lease, and the lessee remained in possession of the property throughout the period between the lease terms.[44] Therefore, the lessor argued that the terms of the advance consent clause in the guaranty were broad enough to apply to the subsequent lease, and the guarantor should be held liable for the lessee's default.[45] The court, however, disagreed, noting that, "[w]here a guaranty obligates a guarantor as to any 'renewal, change or extension of the lease,' upon the expiration of the lease, the guaranty lapses and can no longer bind defendant."[46] Here, the original lease term expired one month prior to the execution of the second lease, at which point the guarantor was discharged from its liability.[47]

Having found that the consent clause did not apply to the second lease, the court turned its analysis to whether the underlying obligations were modified absent the guarantor's consent.[48] The court held that "[t]he increased rent would have substantially and impermissibly changed the guarantor's obligations under the original agreement and thus, impermissibly increased defendant's risk without his consent. Hence, the second lease did not obligate the guarantor."[49] As demonstrated by this case, it is important for a creditor and debtor to determine whether a guaranty's advance consent clause is sufficiently broad to cover any proposed modifications to the underlying obligations.

A guarantor may also impliedly consent to modification of the primary obligations through its actions and course of dealings, although this method of consent is uncommon and difficult to assert in court.[50] This concept is demonstrated in *Excelsior Capital, LLC v. Superior Broadcasting Co., Inc.*[51] In this case, a lender issued five loans to the borrower, each of which was evidenced by a promissory note and three of which were guaranteed by a majority owner of the borrower.[52] The guarantor subsequently, in his capacity as owner of the borrower but not in his capacity as guarantor, requested an extension of the maturity date on the guaranteed notes, to which the lender agreed.[53] When the lender moved to enforce the guaranties, the guarantor argued that these extensions had discharged his obligations because as the guaranties did not contain advance consent clauses and he had not otherwise consented to the extensions in his capacity as guarantor.[54] The Appellate Division disagreed, and upheld the jury's finding that the guarantor had impliedly consented to the modification of the underlying obligations, through his actions and course of dealing with the lender.[55]

Although the guarantor was held liable in *Excelsior Capital*, this type of implied consent to modification of the underlying obligations is rarely found and highly fact-specific.[56] As such, a creditor is better protected if it ensures that a broad advance consent provision is included in a guaranty, thereby providing express consent to modification of the underlying documents.

In the unlikely event that a primary obligation is modified without the guarantor's consent and the guarantor is not discharged by the modification, the guarantor may perform its secondary obligations as though either (i) the secondary obligation is correspondingly modified or (ii) there had been no modification to the primary obligation.[59] This may arise in a scenario similar to *Becker v. Faber*, discussed above, where the performance of the principal obligations was partially remitted without the parties formalizing an agreement regarding the forbearance of enforcement.[60]

Alternatively, if a guarantor is discharged due to a material modification of the underlying obligations without its consent, the guarantor will be fully discharged and cannot be held liable even for the unmodified guaranteed obligation.[61] A guarantor will be held liable, however, for liability for an installment of a contract that has accrued prior to the modifications that discharged the guarantor from future liability.[62] Therefore, if an airline and its lessor agree to a rent deferral without the consent of the airline's guarantor, the guarantor may be held liable for any past due rent payments or other obligations as of the date of the deferral agreement, but may be fully discharged from any future obligations in respect of that lease agreement.

IV. Considerations for Lessors and other Creditors

In the current climate, creditors and primary obligors are seeking to make economic accommodations in order to maintain relationships and avoid further economic strain in the coming months.[57] In doing so, the parties must be aware of the impact such modifications may have on any related secondary obligations, such as guaranties. Lessors and other creditors should review existing guaranty contracts to determine the extent of the guaranteed obligations. If the guaranteed obligations are being modified, the creditors should then determine whether the guaranty itself consents to, or otherwise contemplates, such modifications. If the guaranty contains a consent provision, and the proposed modifications are covered by that provision, the guaranty will be enforceable to the full extent of the modified contract.[58] If, however, the guaranty does not contain a consent provision, or the consent provision does not contemplate the modifications currently being proposed, the creditors should obtain the guarantor's express consent to such modification in order to ensure that the modified obligation remains covered by the guaranty.

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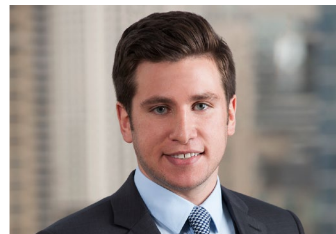

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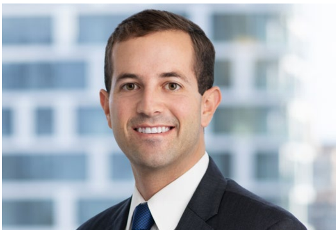

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Can Airlines Seek Relief under EETC Financing?

[1] This might occur if the airline wants to include its EETCs in a general cash preservation program, and is seeking to defer payment on account of the EETC for a finite period during which it is seeking to ride out whatever economic dislocation has occurred.

[2] An airline in this position might be desperately seeking to avoid bankruptcy.

Wallis Trading v Air Tanzania: The Importance of Standard Lessee Representations and Warranties

[1] [2020] EWHC 339 (Comm).

[2] The contentions highlighted in this article do not represent each of the defences advanced by the Defendants, but are the principal matters discussed in the case. For the avoidance of doubt, each of those other defences failed.

[3] The Defendants advanced other arguments as to why the Settlement was Agreement unenforceable, but these are not discussed in this article.

[4] Paragraph 76, *Wallis Trading Inc v Air Tanzania Company Ltd & Anor* [2020] EWHC 339 (Comm).

[5] [2006] EWCA Civ 386.

[6] [2018] EWCA Civ 1396.

[7] The judge also found that, in any case, any non-compliance with the Tanzanian public procurement legislation unlikely rendered the Lease invalid or unenforceable as a matter of Tanzanian law.

[8] The judge added that a breach by the managing director of their fiduciary duties in entering into the Lease would not, in itself, have rendered the Lease void whether as a matter of English or Tanzanian law.

Guaranty Enforcement Notwithstanding Modification of the Underlying Transaction Documentation

[1.] Frank W. Daykin, *Guarantor Distinguished from Surety*, 1 W. Res. L. Rev. 75, 75 (1949).

[2.] *White Rose Food v. Saleh*, 99 N.Y.2d 589, 591 (2003).

[3.] *Bier Pension Plan Trust v. Estate of Schneierson*, 74 N.Y.2d 312, 315 (1989) (holding that a guarantor's obligation cannot be altered without its consent; if the original note is modified without its consent, a guarantor is relieved of its obligation).

[4.] Section 61:32. Effect of alteration of principal contract, generally, 23 Williston on Contracts § 61:32 (4th ed.).

[5.] *CrossLand Federal Sav. Bank by F.D.I.C. v. A. Suna & Co., Inc.*, 935 F. Supp. 184 (E.D.N.Y. 1996).

[6.] *Compagnie Financiere de CIC et de L'union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Incorporated*, 188 F.3d 31, 35 (2d Cir. 1999) (citing *Indianapolis Morris Plan Corp. v. Karlen*, 28 N.Y.2d 30 (1971)) ("Consent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge.").

[7.] *Becker v. Faber*, 280 N.Y. 146, 150 (1939).

[8.] *Banco Portugues do Atlantico v. Asland, S.A.*, 745 F. Supp. 962, 969-70 (S.D.N.Y. 1990) ("[D]eviations by the principal debtor and the creditor from the terms of the guaranteed contract, which have the effect of altering the surety's obligation, place the altered transactions "outside" the original contract, thereby discharging the surety.").

[9.] *Mount Vernon City School Dist. v. Nova Cas. Co.*, 968 N.E.2d 439 (Ct. App. N.Y. 2012).

[10.] Although it purports to distinguish between extensions of time and other modifications, the analysis of the effect of each on secondary obligations remains substantially similar.

[11.] Restatement (Third) of Suretyship and Guar. § 41 (Am. Law Inst. 1996).

[12.] *Id.* at § 40.

[13.] 280 N.Y. 146, 147-48 (1939).

[14.] *Id.* at 148.

[15.] *Id.*

[16.] *Id.* at 152.

[17.] *Id.* at 151.

[18.] *Id.*

[19.] *Id.*

[20.] Restatement (Third) of Suretyship and Guar. § 40 (Am. Law Inst. 1996).

[21.] *Id.* at cmt. e.

[22.] *Id.* at Rep.'s Note.

[23.] Restatement (Third) of Suretyship and Guar. § 41.

[24.] 23 F. Supp. 2d 419, 425 (S.D.N.Y. 1998).

[25.] *Id.* at 421.

[26.] *Id.* at 421-22.

[27.] *Id.* at 425.

[28.] *Id.* (citing *Becker v. Faber*, 280 N.Y. 146, 150 (1939)).

[29.] *Id.* ("Notably, the guaranties signed by defendant in 1984, and his brother in 1979, expressly stated that they 'shall remain and continue in full force and effect upon any renewal, modification or extension of the leases.' However, Flexi-Van removed the language regarding modifications from the 1987 guaranty.").

[30.] *Id.*

[31.] *CrossLand Federal Sav. Bank by F.D.I.C. v. A. Suna & Co., Inc.*, 935 F. Supp. 184 (E.D.N.Y. 1996).

[32.] *See, e.g.*, *id.* at 200.

[33.] *See, e.g.*, *id.*

[34.] *Id.* at 200.

[35.] *Id.*

[36.] *Id.*

[37.] 62 A.D.3d 558 (N.Y. App. Div. 2009).

[38.] *Id.*

[39.] *Id.* at 560.

[40.] *Id.*

[41.] *Id.*

[42.] *Id.*

[43.] *Id.* at 559.

[44.] *Id.*

[45.] *Id.*

[46.] *Id.* at 561 (citing *Elite Gold, Inc. v. TT Jewelry Outlet Corp.*, 31 A.D.3d 338, 340 (N.Y. App. Div. 2006)).

[47.] *Id.* ("[T]he usual rule is that the guarant[y] lapses at the end of a lease term, or where a change is made that increases the guarantor's risk … There is no legal support or authority for making an exception to the "usual rule" in this case.").

[48.] *Id.*

[49.] *Id.* (internal citations omitted).

[50.] *See, e.g.*, *U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co.*, 369 F.3d 34 (2d Cir. 2004) (holding that Guarantor impliedly assented to extension of guaranteed obligations to co-obligee on underlying contract by naming them as a defendant in action seeking relief from guaranteed obligations); *Excelsior Capital, LLC v. Superior Broadcasting Co., Inc.*, 82 A.D.3d 696 (N.Y. App. Div. 2011).

[51.] 82 A.D.3d 696 (N.Y. App. Div. 2011).

[52.] *Id.* at 697.

[53.] *Id.*

[54.] *Id.* at 698.

[55.] *Id.* at 699.

[56.] *Id.*; *cf. U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co.*, 369 F.3d 34 (2d Cir. 2004) (holding that Guarantor impliedly assented to extension of guaranteed obligations to co-obligee on underlying contract by naming them as a defendant in action seeking relief from guaranteed obligations).

[57.] Claire Bushey, *Aircraft Lessors Cheered by US Airline Bailout*, Fin. Times, March 30, 2020.

[58.] Restatement (Third) of Suretyship and Guar. § 40, 41.

[59.] *Id.*

[60.] 280 N.Y. 146, 147-48 (1939).

[61.] *See, e.g.*, *Banco Portugues do Atlantico v. Asland, S.A.*, 745 F. Supp. 962 (S.D.N.Y. 1990).

[62.] *U.S. v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 512 (1915); *Kingsbury v. Westfall*, 61 N.Y. 356 (1875); *Hawley v. United States Fidelity & Guaranty Co.*, 100 A.D. 12 (N.Y.S. 4th Dep't 1904), aff'd, 76 N.E. 1096 (1906).

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