Global Transportation Finance Newsletter

September 2019

In This Issue

Economic duress: will English law assist a party who enters into a contract as a result of a lawful threat of causing economic harm?

It is clear that English law permits a party to avoid a contract on the grounds of economic duress but there is some uncertainty as to the circumstance in which a contract may be avoided for economic duress. Requiring particular clarification are cases involving lawful act duress—will English law provide protection where a contract results from a threat of a lawful act (or omission) to cause economic harm? This question was considered by the Court of Appeal in *Times Travel (UK) Limited v Pakistan International Airlines Corporation*.[1]

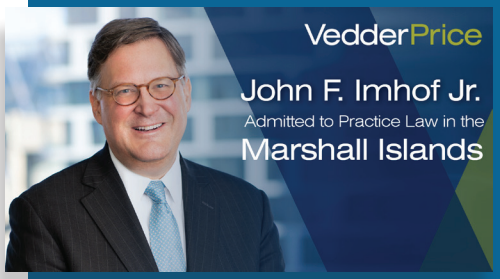
Background

At the applicable time, in 2008, Pakistan International Airlines Corporation (**PIAC**) was the principal provider of direct flights between the UK and Pakistan. Times Travel (UK) Limited (**Times Travel**) operated a business to sell flight tickets, with its almost exclusive focus being on flights to Pakistan from the UK. Times Travel's principal source of revenue, therefore, was from the commission it made from selling tickets to PIAC customers.

From the beginning of the relationship, there were disputes between Times Travel (and other PIAC-appointed travel agents) with PIAC about PIAC's failure to pay a not insubstantial amount of commission that PIAC owed to Times Travel pursuant to the original commission arrangements.

In 2012, as the dispute continued, PIAC served a notice on Times Travel to terminate the existing agency arrangements and also reduced its fortnightly allocation of tickets from 300 to 60. This reduction on the number of available tickets, would have "*had a major impact on Times Travel's business and, if*

Team news



Vedder Price is pleased to announce that Global Transportation Finance Shareholder **John F. Imhof Jr.** has been admitted to practice law in the Republic of the Marshall Islands ("RMI").

The RMI is home to one of the world's largest ship registries, by gross tonnage. A growing number of business entities formed in the RMI are used as vehicles for shipping and non-shipping activities.

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continued for much longer, would have put it out of business."[2] This action by PIAC was not in breach of the original commission arrangements.

It was in this context that PIAC required Times Travel to enter into new commission arrangements for the sale of its flight tickets, arrangements that also "*released PIAC from all such claims arising under the arrangements in force prior to the making of the [new commission arrangements]*."[3]

Given the hardship that Times Travel would suffer if it did not enter into the new arrangements with PIAC, Times Travel felt compelled to agree to the terms, including the waiver of the existing claims for unpaid commission.

In 2014, Times Travel brought proceedings to recover the commission which it claimed was due under the earlier arrangements, arguing that the new arrangements which had been entered into, including the waiver, were the result of economic duress and that it should therefore be entitled to avoid the new arrangements.

The first instance judge agreed with Times Travel and found that this hardship, and the economic leverage that PIAC held over Times Travel, constituted economic duress:

- there was illegitimate pressure applied to Times Travel;
- that pressure was a significant cause in inducing Times Travel to enter into the applicable contract; and
- the practical effect of the pressure is that there was a compulsion or, or a lack of practical choice for, Times Travel.[4]

PIAC appealed the decision of the first instance judge, on the grounds that the pressure it applied was not illegitimate.

Court of Appeal

On appeal, the court found that PIAC's actions did not amount to economic duress.

First, the court determined that the pressure was not illegitimate in the sense that it was unlawful: PIAC had not acted unlawfully in pressuring Times Travel to enter into the new arrangements—to do so was not a breach of contract, a tort or any other actionable wrong.

Accordingly, it would be necessary to consider if a lawful act or a threat of a lawful act could amount to economic duress. Here it had to be established that there was bad faith on the part of the pressuring party as *"the doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result which the person exercising pressure believes in good faith it is entitled, and that is so, whether or not, objectively speaking, it has reasonable grounds for that belief."*[5]

The judgment appears to draw a distinction between bad faith and the lack of good faith, defining a lack of good faith as *"a clear criterion involving conduct which all can*

Honors & Awards

Legal 500 US 2019 recognized Vedder Price as a **Tier 1** firm in **Transport: Aviation** and **Air Travel–Finance**. Jeffrey T. Veber and Geoffrey R. Kass are recognized as **Leading Lawyers**. Robert J. Hankes is recognized as a **Next Generation Lawyer**. In addition, Adam R. Beringer, John T. Bycraft, Mark J. Ditto, Michael E. Draz, Cameron A. Gee, Robert J. Hankes, Geoffrey R. Kass, Christopher A. Setteducati, Raviv Surpin, Clay C. Thomas and Jeffrey T. Veber are all recommended.

Legal 500 US 2019 recognized Vedder Price as a **Tier 1** firm in **Transport: Rail and Road–Finance.** John T. Bycraft and Michael E. Draz are recognized as **Leading Lawyers**. Clay C. Thomas is recognized as a **Next Generation Lawyer**. In addition, John T. Bycraft, Michael E. Draz, Cameron A. Gee, Geoffrey R. Kass, Joel R. Thielen, Clay C. Thomas and Jeffrey T. Veber are all recommended.

Legal 500 US 2019 recognized Vedder Price as a **Tier 2** firm in **Transport: Shipping–Finance**. Francis X. Nolan, III is recognized as **Leading Lawyer.** In addition, John E. Bradley, Geoffrey R. Kass, John F. Imhof Jr., Marc L. Klyman and Francis X. Nolan, III are all recommended.

agree is unacceptable and which is a fact capable of proof, often as it happens by reference to the lack of any reasonable grounds for the belief."[6] The court referred to the judgment of the lower court judge who had accepted that Times Travel had not established bad faith on the part of PIAC and held that, in the absence of bad faith, a lack of reasonable grounds was insufficient to engage the doctrine of duress where the pressure involved the commission or threat of lawful act.

Accordingly, Time Travel's claim for economic duress failed.

Monopolies

The court also noted that it did not want to use the doctrine of economic duress as a means of controlling the lawful use of monopoly power (as PIAC had here), noting that the court in CTN Cash and Carry[7] had said *"The control of monopolies is, however a matter of Parliament. Moreover, the common law does not recognize the doctrine of inequality of bargaining power in commercial dealings…The fact that the defendants were in a monopoly position cannot therefore by itself convert what is not otherwise duress into duress."*

Conclusion

The court's decision reinforces the fundamental importance of ensuring contractual clarity and certainty as a matter of English law—if parties make an agreement, the courts will seldom intervene to undo that agreement and will certainly not do so where no party can be said to have acted unlawfully or lawfully but out of bad faith.

For companies operating in the aviation market, where there may be an unequal power dynamic—for example on certain flight routes or with respect to the availability of specialist maintenance facilities—parties will not be able to look to economic duress to undo a lop-sided bargain unless there is some unlawful action or provable bad faith on the part of the holder of the position of increased power.

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Honors & Awards

TOP RANKED Chambers HNW 2019

Chambers High Net Worth ranked Vedder Price **Band 1** in Private Aircraft (Global-wide). Edward K. Gross and Derek Watson are ranked **Band 1** and David M. Hernandez is ranked **Band 2**.

ishka

Vedder Price's Global Transportation Finance team received the **"Most Innovative Deal of 2018"** award at Ishka's Aviation Finance Festival in Dublin in June for its innovative work on a $575.4 million ABS.

The Vedder Price team acted as counsel to ITE Management as the anchor equity investor in Air Lease Corporation's Thunderbolt II ABS. The ABS was backed by a portfolio of 18 narrowbody and widebody jet aircraft on lease to 16 lessees based in 15 countries. The deal included a traditional capital markets offering of two series of fixed rate notes and an innovative equity structure that is more tradeable than the traditional E notes in an aircraft ABS.

A Bird on the Ground Is Worth One in the Sky: Lessons from *ALC v. Far Eastern Air Transport Corp.*

On May 22, 2019, the U.S. District Court for the Central District of California decided *Air Lease Corporation; ALC B378 41345, LLC; and ALC B378 37772 v. Far Eastern Air Transport Corp*. The case was based on an allegation that Far Eastern, a Taiwanese airline, was in breach of contract for refusing to accept delivery of two Boeing 737-800 aircraft that it contracted to lease from ALC. The court ordered Far Eastern to pay ALC more than $23 million in damages plus prejudgment interest for refusing to honor the leases. In its findings, the court addressed two interesting issues related to the aircraft leasing market: (1) the materiality of an aircraft being placed into storage prior to delivery under a lease as it relates to the lessee's obligation to accept delivery of the aircraft and (2) the obligation of a nonbreaching lessor to remarket an aircraft to mitigate damages in the event that a lessee refuses to accept delivery.

Background

The parties began to discuss a two aircraft leasing deal in February 2015 when Far Eastern contacted ALC to inquire about the availability of its Boeing 737-800 fleet. The negotiation process lasted for a six-month period from June through December 2015 and was ordinary by each party's account at trial. ALC and Far Eastern traded comments and met in person from time to time to discuss terms, and by December they had executed leases for both aircraft. One of the aircraft that would be leased to Far Eastern, MSN 37772, was on lease to Air Berlin during the negotiations, a fact known by Far Eastern. As part of its corporate strategy to switch to Airbus aircraft, Air Berlin opted to exercise an early termination option under its lease and return the aircraft to ALC in July 2016, at which time it would be delivered to Far Eastern under the new lease.

The deal between Far Eastern and ALC started to unravel in May 2016 when Far Eastern notified ALC that it was rescinding the lease of MSN 37772 because it learned that the aircraft was grounded by Air Berlin since November 2015 and placed in storage. Prior to sending the notice, Far Eastern had only once asked ALC about the operational status of the aircraft. At the time, the aircraft was still being flown by Air Berlin and ALC responded in the affirmative. Throughout the remainder of the six-month negotiation period, Far Eastern never again raised any question as to the flight status of the aircraft.

Notwithstanding ALC's contention that Far Eastern had no legal right to rescind or terminate the lease, ALC agreed to mutually terminate it on the condition that (1) the parties enter into a termination agreement for the MSN 37772 lease and

Recent Speaking Engagements

June 12–13, 2019
Corporate Jet Investor Asia 2019 Conference, Singapore

Shareholder David M. Hernandez presented **Sanctions 101** in which he discussed the different approaches that countries take in regards to aviation sanctions, what to do if a client ends up on the list and if your client breaches sanctions.

June 17, 2019
32nd Annual Marine Money Week, New York

Shareholder John F. Imhof Jr. interviewed James Thomas, Managing Director of Ithaca Marine, in the session entitled **Stranger than Fiction…Let's Meet a Real, Live "Shipping Man"**.

July 2–3, 2019
Corporate Jet Investor's (CJI) Aircraft Transaction Masterclass 2019, UK

Shareholder Edward K. Gross presented **Legal Considerations for Aircraft Debt and Lease Finance**. The session 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.

Shareholder Derek Watson presented **Mitigating Risks: Using Tripartite Agreements**, which addressed key issues for negotiation, the importance of relationships with managers, and enforcing the tri-partite agreement using a case study.

Shareholder David Hernandez was a panelist for the **Key Legal Aspects of the Sales Process** session which addressed key legal aspects of the sales process, the most important elements of the LOI, long form versus short form, negotiating the deposit and escrow, the aircraft sale and purchase agreement, and getting deals to completion. Mr. Hernandez also presented a case study on **War Gaming A Hostile Repossession**, which identified potential risks in repossessing an aircraft, managing risks, and highlight the importance of planning. and how it impacts the maritime industry.

agree to release one another from any claims or liabilities relating to the lease and (2) Far Eastern fully perform its obligations under the lease of the second aircraft, MSN 41345. Far Eastern rejected ALC's offer and refused to enter into a lease termination, claiming that it had suffered millions of dollars' worth of damage as a result of the collapse of the MSN 37772 Lease. Far Eastern then refused delivery of MSN 41345, and ALC was forced to remarket the aircraft. Two months later, the aircraft were both leased to SpiceJet. ALC brought this case against Far Eastern for breach of contract for refusing to perform under both leases.

The Materiality of Storing an Aircraft Prior to Lease Delivery

At trial, Far Eastern offered four excuses for its nonperformance of the MSN 37772 lease, three of which were dismissed on summary judgment. The only argument that survived was Far Eastern's claim that it was excused from performing its obligations under the lease due to ALC's negligent misrepresentation of the operational status of the aircraft. Far Eastern argued that ALC misrepresented the status of the aircraft when, in August 2015, ALC confirmed that it was flying but then subsequently failed to notify Far Eastern when the aircraft was placed into storage. In order for Far Eastern to prevail on its claim, the court required proof of the following three elements: (1) misrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with the intent to induce another's reliance on the fact misrepresented; (2) ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and (3) resulting damage.

The court held that Far Eastern's claim for negligent misrepresentation failed to satisfy a number of requisite elements. The parties did not dispute that aircraft was in fact flying in August 2015 when ALC made the representation as its operational status, and so the court found that ALC did not misrepresent a past or existing fact. In addition, the lease with Air Berlin did not require that notice be sent to ALC when the aircraft was placed into storage, and so the court found that ALC did not know, nor should it have known, that Air Berlin stored the aircraft.

The most interesting reason the court gave for dismissing the negligent misrepresentation claim, however, was the finding that ALC's representation as to the operational status of the aircraft did not concern a material fact. According to the court, "[a] misrepresentation is judged to be" material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."[1] Further, a matter is material if "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."[2]

In order to determine whether ALC's alleged misrepresentation would be material to a "reasonable man" under the *Engalla* test set out above, the court considered

Francis X. Nolan, III and **John F. Imhof Jr.** Contribute Chapter on the Marshall Islands to ***Getting the Deal Through—Ship Finance 2019*.**

Global Transportation Finance Shareholders Francis X. Nolan, III and John F. Imhof Jr. were recently published in *Getting the Deal Through* for their Q&A, Marshall Islands. In the latest volume of their series of annual reports that provide international analysis in key areas of law and policy, Mr. Nolan and Mr. Imhof discuss legal ownership and registration of vessels, public registry searches, ship mortgages and other liens over vessels, tax considerations for vessel owners under Marshall Islands law and much more.

To read Mr. Nolan's and Mr. Imhof's section on the Marshall Islands in PDF format, please download the attachment below.

Reproduced with permission from Law Business Research Ltd., *Getting the Deal Through: Ship Finance 2019* (published in July 2019; contributing editor: Lawrence Rutkowski, Seward & Kissel LLP). For further information please visit gettingthedealthrough.com.

Download Attachment—2019 Marshall Islands

the testimony of the expert witnesses called to testify to the effects of storage on an aircraft. After weighing the testimony of the experts, the court sided with ALC and its expert writing that "air carriers around the world routinely store aircraft" and "storage under an approved program does not impact airworthiness, maintenance condition, or value of an aircraft." Based on the court's finding that "ALC's representation did not concern a material fact," it appears that the court's position is that, absent a contractual obligation with regard to storage or operation, a reasonable lessee will not attach importance to the fact that an aircraft is properly stored prior to taking delivery under a lease.

While the *Engalla* test is objective and based on a "reasonable man" standard, the rule in *Kwikset* required that the court determine if ALC knew or had reason to know that Far Eastern would regard the storage of the aircraft as important in determining whether or not to lease the aircraft. The undisputed testimony at trial was that not only did Far Eastern only inquire once as to the operational status of the aircraft during the negotiation period, but it was also pursuing leases for six other aircraft that it knew to be off lease and in storage. Considering Far Eastern's actions, the court determined that ALC did not know, nor did it have reason to know, that Far Eastern would consider storage a material fact.

The subjectivity of the *Kwikset* test makes it difficult to apply the court's findings in this case to a different set of facts. However, the court's position with respect to the objective *Engalla* test, and its statements regarding aircraft storage generally, imply that, absent a contractual obligation regarding storage and operation, the court does not consider the fact that an aircraft is stored prior to delivery under a lease to be an acceptable reason for a lessee to refuse delivery. Of course the facts of each individual case, including whether or not the aircraft was properly stored and how active the lessee was in monitoring the operational status of the aircraft during lease negotiations, will be taken into consideration by the court. However, the court was clear in its position that storage of an aircraft should not be material to a reasonable lessee given that storage is commonplace in the airline industry and proper storage does not negatively affect aircraft values, conditions or airworthiness.

Lessor ReMarketing Obligations

After Far Eastern refused delivery of the second aircraft on May 24, 2016, ALC immediately began its remarketing efforts and reached out to 12 to 15 airlines within a short period of time. By mid-July, ALC entered into leases with SpiceJet for the aircraft, each of which were for lower rent rates and shorter lease terms than the Far Eastern leases.

Under California law, when one party breaches a contract, the other party is entitled to damages sufficient to make that party "whole" so that it is in the same position as if the breach had not occurred. The court, therefore, determined the amount

Thought Leadership

Attorneys **Edward K. Gross** and **Melissa W. Kopit** recently co-authored a column on leasing law in ***Equipment Leasing and Finance*** magazine.

In the article, "New or Not-So-New Things to Know", Mr. Gross and Ms. Kopit discuss emerging legal issues related to air finance that may be relevant to lenders and lessors. The air finance issue summary is included in the referenced article together with summaries from other contributors regarding rail and marine assets, for the purpose of making lenders, lessors and other investors aware of certain existing and evolving laws, regulations, cases and trends related to transportation assets.

The article includes a summary by Mr. Gross and Ms. Kopit of the implications to the air finance market participants of certain recent cases and legislative developments, and an explanation of railroad reporting marks and updates to marine transportation regulations by the other contributors.

Deal Corner

Vedder Price Counsels Stonebriar Commercial Finance on $1 Billion Revolving Credit Facility

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) in extending and amending certain terms of its existing $1.0 billion revolving credit facility (the Facility).

The Facility will provide funding for Stonebriar's portfolio of commercial equipment loans and leases for each of its business platforms, including rail, aviation, marine transportation, energy, real estate and manufacturing. The Facility will provide $1 billion of committed, revolving financing to Stonebriar through 2023.

of ALC's damages by calculating the difference in value between the Far Eastern leases and the SpiceJet leases.

California law also requires, however, that the prevailing party mitigate damages or the award to the prevailing party will be discounted. Far Eastern raised this issue with the court and argued that ALC failed to properly mitigate because it rushed into the SpiceJet leases and did not consider a number of alternative leasing scenarios. Therefore, Far Eastern claimed, ALC received a below-market deal and the damages should have been mitigated to reflect the fact that ALC could have made a better deal.

The court disagreed with Far Eastern and awarded ALC the full amount of the difference in values between the Far Eastern leases and the SpiceJet leases, equal to $14.6 million for the MSN 41345 leases and $6.6 million for the MSN 37772 leases. Despite the considerable discrepancy in the values of the leases, the court was unconvinced that ALC did not reasonably mitigate damages. The court relied on testimony from ALC stating that SpiceJet was able to secure lower lease rates in part because the aircraft were already customized to Far Eastern's specifications, and SpiceJet was acquiring the aircraft towards the end of the peak summer season in India. ALC further testified that there was a sense of urgency to place the aircraft on lease, and SpiceJet was interested in the aircraft as a package deal. Finally, as noted above, ALC testified to the fact that it approached up to 15 different airlines in order to find a new lessee.

Based on ALC's testimony, the court held that ALC reasonably mitigated its damages. The court found that ALC moved to re-lease the aircraft as soon as possible after Far Eastern's breach; that ALC sought to re-lease the aircraft on the best terms it could obtain; that ALC re-leased the aircraft in an amount of time that was as good as or better than industry standard for re-leasing; and that ALC obtained the best possible lease terms it was able to obtain.

In determining whether a lessor has properly mitigated damages when remarketing an aircraft as a result of a contract breach, it seems that the court will not place much importance on the terms of the deal that the lessor is able to obtain, even if the deal is at a substantial discount from the one that was breached. As long as the lessor moves quickly to remarket and accepts the best deal it's offered considering the circumstances, the obligation to mitigate damages will be satisfied.

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Event Highlights

Vedder Price Sponsored the 25th Annual Chi-Stat Reception on June 5, 2019 at Chicago's Crystal Gardens at Navy Pier

Vedder Price and Hosts Michael Stern, Stern Consulting Group; Stan Chmielewski, Aircastle Advisor; Chris Cox, Blue Star Aviation; Tom Heimsoth, Willow Aviation Services; Greg May, Delta Air Lines; Nick Popovich, Sage-Popovich; and over 1,000 industry leading professionals celebrated Chicago's commercial aviation presence.

Footnotes

Economic duress: will English law assist a party who enters into a contract as a result of a lawful threat of causing economic harm?

1 [2019] EWCA (Civ) **828**.

2 Para. 13, *supra*.

3 Para. 17, *supra*.

4 Para. 29, *supra*.

5 Para. 105, *supra*.

6 Para. 106, *supra*.

7 *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All ER **714**.

A Bird on the Ground Is Worth One in the Sky: Lessons from *ALC v. Far Eastern Air Transport Corp.*

1 *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 977, 938 P.2d 903 (1997).

2 *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 333, 246 P.3d 877 (2011) (quoting Restatement (Second) of Torts § 538(2)(b)).

Event Highlights

1st Annual Women in Aviation High Tea

Prior to attending our 25th annual Chi-Stat reception, the women of Vedder Price's Global Transportation Finance team hosted an afternoon of tea and great company. Thanks to all who joined us at the inaugural Women in Aviation High Tea and we look forward to future GTF women's events!

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VedderPrice

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.