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Come Hell, High Water or Pandemic – COVID-19 Will Not Frustrate an Aircraft Lease Agreement

In *Salam Air SAOC v Latam Airlines Group SA,*[1] the English Commercial Court (i) dismissed the application of Salam Air SAOC (**Salam Air**) for an injunction against Latam Airlines Group SA (**Latam**) seeking to restrain Latam from making a demand for payment under three letters of credit issued in its favour and (ii) rejected Salam Air's argument that the underlying aircraft leases had been frustrated as a result of the COVID-19 pandemic.

Facts of case

In 2017, Salam Air accepted delivery of three aircraft from Latam which were leased to it pursuant to English law governed operating lease agreements and which Salam Air intended to operate from Muscat International Airport in Oman. The aircraft lease agreements each had a term of six years and contained customary dry lease provisions, most relevant in the present context a "hell or high water" obligation to pay rent.

As security for performance of its obligations pursuant to the aircraft lease agreements, Salam Air provided Latam with three letters of credit (instead of cash security deposits) which Latam was entitled to draw under without notice following the occurrence of an event of default. Shortly after Latam filed for Chapter 11 bankruptcy protection in May 2020, Latam gave notice of termination of the aircraft lease agreements and Salam Air redelivered the aircraft in June 2020. At the time of redelivery, Salam Air was three months in arrears with lease rental payments.

In September 2020, Salam Air applied to the High Court seeking an injunction to prevent Latam from making a demand under the letters of credit and applying the proceeds against the outstanding rent payments, arguing that the aircraft leases had been frustrated following the issuance of regulations by the Public Authority for Civil Aviation in Oman (**PACA**) which prohibited nearly all flights to and from Oman airports as a consequence of the COVID-19 pandemic, and that Salam Air had therefore been relieved of its contractual obligations under the aircraft lease agreements, including its obligation to make rent payments.

Injunction

The judge first considered whether it would be appropriate to interfere with the operation of the letters of credit by injuncting beneficiary Latam from making a demand for payment under the letters of credit. Reminding the court of the "*cardinal principle of English commercial law that the court will only intervene by injunctive relief in the operation of irrevocable letters of credit and similar instruments (such as performance bonds) in exceptional circumstances,*"[2] the judge held that Salam Air was not entitled to the injunction.

VedderPrice

Vedder News

Vedder Price is pleased to announce the opening of a new office in Dallas, Texas. The expansion into Texas continues the strategic growth of the firm into strong, growing markets that require the firm's existing skill sets and help support its current client base.

Leading the new office will be Finance & Transactions Shareholder William A. Kummerer, a member of our Board of Directors and former Corporate Practice Area Leader. Mr. Kummerer, who has been with the firm since 2005, will serve as Managing Shareholder and will be responsible for managing the strategic growth of the office. He will join Shareholder Aaron S. Turner, who began with Vedder Price in Dallas on January 15th. "The Dallas market is one of the most vibrant metro-areas in the country, and expanding our reach to Texas has been part of our long-term strategic plan," said Michael A. Nemeroff, President and CEO of Vedder Price. "We are confident that this expansion into Dallas will enhance the ability to serve our clients, and we expect this to continue for years to come given the growing prevalence of the Dallas area and Texas generally for businesses."

"This is an exciting time for the firm and our finance and transactions practice as we expand our capabilities into Texas," said Mr. Kummerer. "Dallas serves as a hub for technology, real estate, manufacturing and other key industries in which we have clients. I look forward to working with Aaron and my future Dallas colleagues in developing our Texas presence and serving our clients with the best-in-class customer service they are accustomed to receiving from Vedder."

As far as injunctions against credit providers – those issuing letters of credit or similar instruments – are concerned, it is well-established in case law that such injunctions can only be granted where (i) the validity of the letter of credit is impeached or (ii) a demand under the letter of credit would be fraudulent.[3] This is known as the "enhanced merits test." Salam Air contended that this test did not apply to the present circumstances given it was seeking an injunction restraining the beneficiary from making a demand for payment rather than an injunction restraining the credit provider from making payment.

The judge dismissed Salam Air's argument and noted that in his view there was "*a very powerful case that an anti-beneficiary injunction should have to meet the same enhanced merits test as an injunction against the credit-provider.*"[4] The enhanced merits test had been established as a consequence of the decision to treat letter of credits and similar instruments as equivalent to cash – "*a consideration which weighs as much in favour of its application to injunctions against the beneficiary which (if granted) would make the instrument very inferior to cash, as to injunctions against the credit provider preventing payment*."[5]

Frustration

Secondly, the judge considered Salam Air's contention that the aircraft leases had been frustrated as a result of the COVID-19 pandemic, relieving Salam Air of its obligation to make rent payments pursuant to the aircraft lease agreements. The judge noted that this would require Salam Air to establish "*a **strong** case rather than merely an arguable case*" [emphasis added].[6]

The English law doctrine of frustration applies where, as a result of external circumstances, performance of the contract in accordance with its literal terms would be so "*radically different*"[7] from what the parties contemplated when entering into the contract that it would be "*unjust to insist on compliance with those literal terms,*"[8] taking into account factors such as the terms of the contract, its context, the parties' knowledge, expectations, assumptions and contemplations as at the time the contract was concluded and the nature of the supervening event.

Salam Air argued that the test for frustration was met given it was unable to operate the aircraft from Oman due to the regulations issued by PACA. Salam Air also claimed that it would not have any use for the aircraft in the foreseeable future given the collapse in air passenger demand as a consequence of the COVID-19 pandemic and the expected slow recovery even once PACA's regulations had been lifted.

The judge disagreed and described a six-year "hell or high water" lease agreement as a "*challenging context in which to establish frustration.*"[9] The terms of the aircraft lease agreements demonstrated a clear allocation of risk between the lessor and the lessee: while the lessor took on very limited obligations beyond its covenant of quiet enjoyment, the lessee assumed all of the commercial risks and rewards of operating the aircraft, agreeing for instance that its obligation to pay rent was "*absolute and unconditional irrespective of any contingency whatsoever*" including, without limitation, "*the ineligibility of the aircraft for particular use or trade*" and would continue even if an aircraft became a total loss or was requisitioned and that it would "*bear the full risk of any … occurrence of whatever kind which shall deprive … the operator of the Aircraft for the time being, of the use, possession or enjoyment thereof.*"

In the view of the court, these provisions were "*fundamentally inconsistent*"[10] with the suggestion that the aircraft lease agreements had been frustrated on the basis of Salam Air's inability to operate the aircraft from Oman – this was a risk that was inherent in the commercial operation of the aircraft and had been assumed by Salam Air when it entered into the aircraft lease agreements.

The court also rejected Salam Air's argument that there was frustration of purpose – even if Salam Air had communicated the specific purpose for which it intended to lease the aircraft (i.e., operation from, in and to Oman) to Latam, this was not sufficient to cause Salam Air's purpose to become a purpose that Latam shared and, accordingly, the foundation of the aircraft lease agreements.

The court concluded that Salam Air's frustration case was "*far too weak to justify the step of interfering with the operation of the [standby letters of credit] which Salam Air agreed to provide as an alternative to paying a cash deposit, and which were commercially and legally intended to be equivalent to cash*."[11]

Conclusion

This case demonstrates the reluctance of the English courts to interfere with the performance of letters of credit and similar instruments which are intended to be equivalent to cash and emphasises the importance which is attached to those instruments in facilitating commercial transactions.

Team News

Vedder Price created a Task Force to assist clients impacted by the indictment involving Aircraft Guaranty Corporation (AGC) and Wright Brothers Aircraft Title, Inc. (WBAT) filed by the United States Attorney's Office for the Eastern District of Texas on February 24, 2021. AGC's website provides that it "controls over one billion in aircraft value. With over 2,000 aircraft registered in more than 160 different countries." AGC has nearly 1,500 aircraft in trusts in the United States, and WBAT is a full-service title and escrow company. Both companies are owned by Debbie Mercer-Erwin and are located in Oklahoma City. The Task Force is led by David M. Hernandez, a Shareholder in Vedder Price's Washington, DC office.

Thought Leadership

Vedder Price Partner **Bill Gibson** recently published "Transitioning out of LIBOR—what is the impact for aviation finance?" in *LexisPSL*. The article highlighted the challenges accompanied with the transition away from LIBOR including, switching to overnight SONIA, alternative rates for aviation finance transactions and the impact on lease documentation.

The court's decision that the effects of the COVID-19 pandemic – regardless of the severity by which a lessee's business is impacted – are not sufficient to frustrate an aircraft lease agreement and relieve the lessee of its contractual obligations pursuant to the aircraft lease agreement will give much-welcomed comfort to aircraft lessors and financiers.

However, in coming to its decision the court placed strong emphasis on (i) the nature of the lease agreement (a dry rather than a wet lease), (ii) the duration of the lease term and (iii) the lessee's "hell or high water" agreement to pay rent. These emphases leave some room for speculation as to whether the court would have reached the same judgment in the context of a short wet lease agreement pursuant to which the lessee only assumes very limited obligations.

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Honors & Awards

Vedder Price Recognized in *Chambers Global 2021*

Chambers Global ranked the Vedder Price Global Transportation Finance team in **Band 2** in the category of Asset Finance (Global).

Chambers Global recognizes Gavin Hill and Ronald Scheinberg as **Band 2**, Jeffrey T. Veber as **Band 3** and Geoffrey R. Kass as **Band 4** in the category of Asset Finance (Global).

INDIA BUSINESS LAW JOURNAL

India Business Law Journal Recognizes Vedder Price with "Deal of the Year" Award

India Business Law Journal named the Insolvency of Jet Airways in its "Deals of the Year 2020" list. The annual report celebrates the landmark India-related deals of the year, praising the financiers, businesses and law firms behind them. Vedder Price represented EXIM Bank, who made it possible for Jet Airways to acquire title to six Boeing 777 aircraft. Jeffrey T. Veber, Vice Chair of the firm's Executive Committee, member of the firm's Board of Directors and Global Transportation Finance Shareholder, led the team of attorneys at Vedder Price.

Significant Updates on LIBOR Transition

A series of important events in March have signaled the definitive end of LIBOR and will provide more economic certainty to market participants and minimize the market impact of transition. They also provide a reminder to, and increase pressure on, market participants to actively transition their financial instruments and commercial agreements that reference LIBOR to risk-free rates.

IBA and FCA Announce Dates for LIBOR Cessation

On March 5, 2021, ICE Benchmark Administration Limited (**IBA**), the administrator for LIBOR, announced that it will permanently cease to publish LIBOR immediately after the following dates (the Cessation Dates):

- December 31, 2021 for all EUR LIBOR, CHF LIBOR, JPY LIBOR, GPB LIBOR settings and the one-week and two-month USD LIBOR settings; and
- June 30, 2023 for the overnight, one-month, three-month, six-month and twelve-month USD LIBOR settings.

The UK's Financial Conduct Authority (**FCA**), IBA's regulator, promptly confirmed the IBA's feedback statement in its own separate announcement on the same date. The FCA also indicated that it will consult with the IBA regarding the continued publication of the following "synthetic" and non-representative versions of the:

- one-month, three-month and six-month GPB LIBOR settings for a "further period";
- one-month, three-month and six-month JPY LIBOR settings for one additional year; and
- one-month, three-month and six-month USD LIBOR settings for a "further period."

Any such synthetic LIBOR settings would be intended for use primarily to allow legacy LIBOR transactions utilizing these currencies to mature. The FCA announcement made clear that these synthetic LIBOR settings will "no longer be representative of the underlying market and economic reality" after the respective Cessation Dates and included an express acknowledgement that fallback provisions contained in contracts that reference the affected LIBOR settings would be triggered, as further detailed below.

Loan Agreements Incorporating ARRC Fallback Terms

For loan agreements that incorporate the Alternative Reference Rates Committee (**ARRC**) fallback terms (**ARRC Fallback Terms**), the ARRC has confirmed that the announcements by the IBA and FCA constitute a "Benchmark Transition Event" for all USD LIBOR settings. This signals the commencement of the replacement process but does *not*, however, trigger an immediate transition to the replacement rate. In particular, the effect of the announcements depends on whether the applicable loan agreements have adopted the "hardwired" approach or the "amendment" approach. In the case of both approaches, the IBA and FCA announcements may trigger a requirement that agents notify borrowers of the occurrence of a trigger event, but no change would actually occur until the parties agree to amend the loan agreements. Under the hardwired approach, while there may be notice requirements by an agent/sole lender related to the occurrence of the Benchmark Transition Event under the loan agreement, the occurrence of a Benchmark Transition Event does not require an immediate transition under (**ARRC)** Fallback Terms. Instead, the transition to (**SOFR)** will automatically occur upon the Cessation Dates of the relevant LIBOR settings. Under the amendment approach, the Benchmark Transition Event trigger may require notice of the event by an agent/sole lender and would allow for the amendment process to begin. However, such an amendment could not take effect until the 90-day window (or the number of days to which parties have agreed) commencing on April 1, 2023. It should be noted that, under either approach, the loan agreements may include "early opt in" terms that would permit the agents and the borrowers to elect an earlier transition. In any case, the credit spread adjustment for each relevant LIBOR setting will be the credit spread adjustment as calculated on March 5, 2021, and published on Bloomberg.[1]

Derivatives Incorporating ISDA Fallback Terms

Following the FCA announcement, the International Swaps and Derivatives Association (**ISDA**) stated that the announcement constitutes an "Index Cessation Event" under the ISDA 2020 IBOR Fallbacks

Recent Speaking Engagements

February 2-4, 2021

Edward K. Gross and David M. Hernandez Presented at Corporate Jet Investor: London 2021 Virtual Conference

Shareholders Edward K. Gross and David M. Hernandez presented at the Corporate Jet Investor (CJI) conference on February 2 – 4, 2021 as part of the virtual London event. Mr. Gross moderated the panel discussion, "Protecting Your Portfolio." The panel outlined what banks need to do in good times as well as when problems arise. Mr. Hernandez participated in the session "Developments in U.S. Registration." He and his co-panelists reviewed the last quarter as it pertains to U.S. registrations and what foreign owners can expect.

March 2 – 3, 2021

John F. Imhof Jr. Moderated Panel at Capital Link International Shipping Forum Digital Conference

Global Transportation Finance Shareholder John F. Imhof Jr. moderated a panel on Bank Finance and Shipping at the 15th Annual Capital Link International Shipping Forum. For the second year in a row, the forum was held as a digital conference on March 2 and 3, 2021.

April 14, 2021

Michael J. Edelman and Ji Woon Kim to Present at Airline Economics Growth Frontiers Korea

Vedder Price Shareholders Michael J. Edelman and Ji Woon Kim to present at the Airline Economics Growth Frontiers Korea digital event on April 14, 2021. Mr. Edelman will moderate the session "Distressed Assets/ Distressed Asset Values" and Mr. Kim will moderate the panel "High Yield Mid-Age Aircraft Lease and Technical Risks vs. New Aircraft Investment."

Protocol and Supplement (**ISDA Fallback Terms**), which in turn triggers a "Spread Adjustment Fixing Date" under the Bloomberg IBOR Fallback Rate Adjustments Rule Book for all LIBOR settings on March 5, 2021. An Index Cessation Event does *not* mean that the new fallback rates will immediately apply to derivatives transactions that incorporate ISDA Fallback Terms, but rather, the fallback rates will begin to apply on the applicable "Index Cessation Effective Dates," which are:

- the first London Banking Day on or after January 1, 2022 for all EUR LIBOR, CHF LIBOR, JPY LIBOR, GPB LIBOR settings and the one-week and two-month USD LIBOR settings; and
- the first London Banking Day on or after July 1, 2023 for the overnight, one-month, three-month, six-month and twelve-month USD LIBOR settings.

Note that the Index Cessation Effective Date for the one-week and two-month settings of USD LIBOR is different than the date on which such settings will permanently cease to be published (i.e., January 1, 2022). For these two settings only, linear interpolation based on the longer and shorter tenors (which will continue to be published before July 1, 2023) will be used to determine those settings from January 1, 2022 through June 30, 2023. Once linear interpolation is no longer possible for those settings (i.e., commencing on July 1, 2023), an Index Cessation Effective Date will be deemed to have occurred with respect to those settings.

It should also be noted that loan agreements that incorporate the ARRC Fallback Terms do *not* provide for such linear interpolation for the one-week and two-month USD LIBOR settings for the period beginning January 1, 2022 through June 30, 2023; instead, loan agreements that provide one-week or two-month USD LIBOR options only will transition to the new fallback rates (i.e., the "Benchmark Replacement") immediately after December 31, 2021. As a result, this is an area of potential divergence between these loans and the associated derivatives, as a loan agreement that references one-week or two-month USD LIBOR settings that has transitioned to a Benchmark Replacement may have a rate that is different from the interpolated rate referenced in its associated derivatives until the new fallback rates apply on July 1, 2023.

The IBA announcement can be found here.

The FCA announcement can be found here.

The ISDA announcement can be found here.

New York State Legislature Passes LIBOR Legislation

On March 24, 2021, the State of New York approved legislation that will be crucial in minimizing legal uncertainty and adverse economic impacts associated with LIBOR transition, providing greater certainty to market participants as the financial system continues its move away from LIBOR.

Many financial instruments referencing LIBOR do not envision a permanent or indefinite cessation of LIBOR. Certain "tough legacy" instruments either do not have fallback terms and conditions that adequately address a permanent LIBOR cessation or have terms and conditions that could dramatically alter the economics of contract terms if LIBOR is permanently discontinued. Although existing contracts may be amended, such an amendment process might be challenging, if not impossible, for certain products. Senate Bill 297B/Assembly Bill 164B addresses those legacy contracts that mature after the mid-2023 cessation date of LIBOR that lack effective fallbacks. Because New York law governs many of the financial products and agreements referencing LIBOR, the new legislation will provide legal clarity for these instruments and will reduce the burden on New York courts, as legal uncertainty surrounding the transition likely would have prompted disputes.

The impact on loan agreements is minimal – the key benefit being the elimination of any bank polling requirement that might apply if LIBOR is unavailable. However, for loan agreements where the borrower has an option to elect one-week or two-month USD LIBOR, the legislation clarifies that LIBOR for purposes of that agreement is unaffected and the remaining interest elections would continue to be available through June 2023.

Notably, the legislation will:

- prohibit a party from refusing to perform its contractual obligations or declaring a breach of contract as a result of LIBOR discontinuance or the use of the legislation's recommended benchmark replacement;

Deal Corner

Vedder Price Advises Arena Aviation Capital in Strategic Partnership to Launch $1.5 Billion Aircraft Leasing Platform KLA Aviation Finance

Vedder Price represented Arena Aviation Capital, a full-service aircraft investment management company, in its strategic partnership with Kennedy Lewis Investment Management, a leading opportunistic credit manager, in the launch of KLA Aviation Finance a, $1.5 billion aircraft leasing platform. Global Transportation Finance Shareholder Jordan R. Labkon and Shareholder and Vice Chairman of the Finance & Transactions group Joseph H. Kye led the Vedder Price team, which also included Associate Daniel M. Cunix.

Vedder Price Advises Aero Capital Solutions in Its acquisition of 20 A320 Family Aircraft from easyJet through Sale-and-Leaseback

Vedder Price represented Aero Capital Solutions, Inc., a mid-life aircraft leasing platform, in the acquisition of 20 A320 family aircraft from easyJet Airline Company Limited on a sale-and-leaseback basis. The transactions were completed in two tranches during 2020. The Vedder Price team was led by Adam R. Beringer and also included Rebecca M. Rigney and Courtney E. Schoneberger.

Vedder Price Advises Stonebriar Commercial Finance on $966 Million ABS Offering

Vedder Price represented Stonebriar Commercial Finance, a leading independent large-ticket commercial finance company, in an offering of $966 million of asset-backed securities (ABS), SCFET 2021-1. The Vedder Price team was led by Shareholders Geoffrey R. Kass, Kevin A. MacLeod and Mark J. Ditto, and included Tax Shareholder Matthew P. Larvick and Global Transportation Finance Associates Brian D. Wendt and Robert A. Sikorski.

- establish that the recommended benchmark replacement is a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR; and
- provide a safe harbor from litigation for the use of the recommended benchmark replacement.

Importantly, however, the legislation will not override existing contract language that specifies a non-LIBOR based rate as a fallback to LIBOR (e.g., the Prime rate).

As noted above, the issue of tough legacy contracts is one facing, and being tackled, by many LIBOR currency jurisdictions. The European Commission recently adopted amendments to the Benchmark Regulation to implement its legislative solution which are now effective. Furthermore, the FCA will be consulting on its proposed expanded powers under the Benchmark Regulation this quarter – which LIBOR currency settings may continue on a synthetic, non-representative basis and for which contracts use of those rates would be permitted is of keen interest.

Senate Bill S297 can be found here.

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Arbitration: The One-Stop Shop For All Your Dispute Needs

In *Helice Leasing S.A.S. v PT Garuda Indonesia (Persero) Tbk*[1], the English Commercial Court recently decided that the claimant aircraft leasing company (**Helice**) must arbitrate its claim against airline PT Garuda Indonesia (Persero) Tbk (**Garuda**) for more than US$5,150,000 in unpaid lease rent under the rules of the London Court of International Arbitration (the **LCIA**) instead of being able to proceed by court action. The court upheld the parties' arbitration agreement pursuant to the terms of the lease agreement despite conflicting references in the lease agreement which referenced the lessor having the option to "*proceed by appropriate court action*" following the occurrence of an Event of Default[2] and endorsed the "one-stop shop" principle set out by the House of Lords in *Fiona Trust & Holding Corp v Privalov*[3] – the parties to a contract are likely to have intended any disputes arising out of that contract to be decided in the same forum.

Facts of case

The underlying proceedings concerned a claim for unpaid lease rent in respect of a Boeing 737-800 aircraft which had been brought by Helice against Garuda following Garuda's consistent failure to make monthly rent payments when due between January and October 2020, resulting in a total outstanding amount of over US$5,150,000 plus interest.

Garuda responded to Helice's claim by applying to the English High Court to:

1. set aside service of the claim form on the basis that it was not validly served on Garuda's place of business in the UK at the time;

2. stay proceedings in favour of arbitration as it was brought in breach of the parties' arbitration agreement pursuant to the lease agreement; and

3. stay proceedings on the basis that Indonesia is the most appropriate forum to hear the dispute.

This article will briefly consider points 1 and 3 before focusing on point 2 in more detail.

Service of the claim form

The claim form was served in mid-July 2020 on Garuda's address in Hammersmith, London, which was Garuda's place of business in the UK at that time according to information on the Companies House website. In its application to set aside service, Garuda stated that from 1 February 2020, its place of business in the UK has been an address in Hounslow but due to the COVID-19 pandemic it did not file the address change with Companies House until the beginning of July 2020, resulting in its updated address not appearing on the Companies House website before August 2020.

Deciding (i) that there could be no doubt that the contents of the claim form had been communicated to Garuda given it had acknowledged service of the claim form and (ii) that the risk of delay in an address change being published on the Companies House website should be borne by the company rather than the public as the public must be able to rely on the information published on the Companies House website as a matter of public record, the judge held that the claim form had been validly served.

Forum non conveniens

On the *forum non conveniens* application, the court concluded that Garuda had failed to discharge its burden of proof to show that Indonesia was clearly or distinctly the more appropriate forum, a high burden for Garuda to prove, dismissing factors such as the state of registration, habitual base and current location of the aircraft in Indonesia as irrelevant and instead pointing to the following:

1. Garuda has a place of business in the UK, whereas Helice does not have a place of business in Indonesia;

2. the lease agreement and other operative documents are in English and governed by English law;

3. both parties are able to communicate in English whereas no one representing Helice can speak Bahasa; and

4. the English courts are able to resolve disputes notwithstanding any further lockdowns given their ability to operate remotely whereas no evidence has been adduced as to the operation of the Indonesian courts during the pandemic.

Arbitration vs court proceedings

Finally, Garuda argued that the court proceedings should be stayed and the matter referred to arbitration on the basis of clause 15.2 of the lease agreement pursuant to which the parties had agreed that:

"*any dispute arising out of or in connection with this Lease Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration.*"

Helice resisted the application and referred to clause 13.2 of the lease agreement which provided that following the occurrence of an Event of Default:

"*Lessor may at its option (and without prejudice to any of its other rights under this Lease Agreement or that may arise by operation of Applicable Law), at any time thereafter… proceed by appropriate court action or actions to enforce performance of this Lease Agreement or to recover damages for the breach of this Lease Agreement*."

Helice contended that this provision constituted a carve-out to the arbitration agreement and intended to provide the lessor with additional rights given that they were granted "without prejudice" and that the references to "court" and "action" were indicative of court litigation not arbitration.

Albeit accepting that clause 13.2 of the lease agreement was "not happily worded,"[4] the judge dismissed Helice's arguments and granted the stay of proceedings, finding that the parties objectively intended to refer any dispute to arbitration:

"[…] *in clause 13.2, they were intending to confirm that in the case of an Event of Default, [Helice] would have all of the rights set out in that clause, which included proceeding to arbitration to enforce performance of the lease or to recover damages, and that would not prevent it from seeking the other items of relief listed in clause 13.2.*"[5]

The judge also noted that if the parties had intended for clause 13.2 to constitute a carve-out to clause 15.2 in giving the lessor the right to, at its option, take certain disputes to court, one would have expected for clause 15.2 to have been made subject to clause 13.2, particularly where the carve-out was so extensive and would have applied to any Event of Default.

The court noted that to give the contract a "business common sense construction"[6] the reference to "court action" in clause 13.2 must reasonably have been intended by the parties to mean action before the LCIA and stated that support for its interpretation could also be found in Garuda's representation pursuant to the lease agreement that the lessee's submission "*to the non-exclusive jurisdiction of the courts as set out in section 15.2 [is] valid and binding*" given that the court identified in clause 15.2 was the LCIA.

Further, the judge noted that Helice's interpretation of clause 13.2 was "*likely a recipe for confusion, cost and delay*"[7] were certain disputes relating to the lease agreement to be resolved by way of arbitration and others to be decided in court and also contrary to the "one-stop shop" construction of jurisdiction clauses established by the House of Lords in *Fiona Trust & Holding Corp v Privalov.*[8]

Lastly, the court considered the issue of whether there actually was a dispute capable of being referred to arbitration given that Garuda had never put forward any defence to the claim for unpaid lease rent and admitted in correspondence with Helice that monies were due and owing by it. Applying previous authorities, the judge concluded that Garuda's failure to pay the outstanding amount was sufficient for the matter to constitute a dispute.

Conclusion

The decision is a good example of contract interpretation under English law and illustrates that the court's paramount consideration will always be the objective intention of the parties, looking at both the language of a provision and also the commercial context in which it was drafted.

The case also upholds the "one-stop shop" principle set out by the House of Lords in *Fiona Trust & Holding Corp v Privalov*[9] which provides that the construction of a jurisdiction clause should be based on the presumption that the parties are likely to have intended any dispute arising out of their contractual relationship to be decided in the same forum and illustrates the court's inclination for promoting one-stop adjudication in order to avoid unnecessary delay, costs and procedural complexities.

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Silent but Deadly: Congress Passes Wind on the OCS

The Jones Act[1] and the Passenger Vessel Services Act[2] have been work horses of U.S. cabotage laws and policies for over 100 years. These laws, which restrict the coastwise transportation of merchandise and passengers, respectively, work alongside related cabotage laws dealing with towing,[3] dredging[4] and salvage.[5] Taken together, they present overlapping statutory restrictions on entry to the U.S. coastwise trades which effectively create a "coastwise monopoly" for domestic shipping interests and crews.[6] With limited exceptions, vessel operations contemplated by these laws may be conducted solely through the employment of coastwise-qualified vessels, i.e., vessels that are built in the United States, owned and crewed by U.S. citizens, and documented under U.S. law bearing a coastwise endorsement.[7]

The coastwise laws apply to "points in the territorial sea, which is defined as the belt three nautical miles seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline."[8] In 1953, federal laws and, by extension, the coastwise laws, were extended to the outer Continental Shelf ("**OCS**")[9] through section 4(a)(1) of the Outer Continental Shelf Lands Act (the "**OCSLA**") which, as previously amended and until recently, read as follows:

> "The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."[10]

Based upon the wording of the OCSLA, it was clear from the outset that coastwise laws would extend to the OCS in connection with the exploration, development or production of mineral resources.[11] Less clear was whether the development or production of non-mineral resources, such as wind energy, came within the original jurisdictional purview of the OCSLA. Given the year in which the OCSLA was first enacted, and even prior amendments to section 4(a)(1) in 1978,[12] it seems evident that they were not; indeed, the first offshore wind projects did not appear in Europe until the early 1990s.

Wind energy is not a "resource" derived from the subsoil or seabed of the OCS, and no one would seriously contend that wind is a "mineral" in any sense of the word. Thus, while the OCSLA clearly extended the coastwise laws to the OCS in connection with oil, gas and related resource projects, the corresponding question as to the applicability of the coastwise laws to "non-mineral energy resources" associated with offshore wind projects on the OCS was unclear and left unresolved for over 65 years. However, given the slow development of offshore wind energy in the United States, debate on the subject was mostly academic[13] since there were few offshore wind projects in actual construction to which these baroque issues could be practically applied.

The uncertainty was finally put to rest on January 1, 2021, when the United States Senate followed in the path of the House of Representatives in voting to enact into law the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.[14] Tucked into the 1,480-page bill was a provision by which Congress, with quiet precision, further amended section 4(a)(1) to now read as follows:

> "(A) The Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State, to – (i) the subsoil and seabed of the outer Continental Shelf; (ii) the artificial islands on the outer Continental Shelf; (iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources; or (iv) any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources."[15]

Section 4(a)(1) of the OCSLA now clearly and specifically provides that the laws of the United States apply to installations and devices permanently or temporarily attached to the seabed of the OCS for the purpose of exploring for, developing, producing and transmitting non-mineral energy resources, such as offshore wind power, as well as exploring for, developing, producing and transporting other "resources," including offshore oil and gas. As discussed above, the prior text of this section contemplated only that United States laws would apply to installations and devices involving oil, gas and other mineral resources, and this had confounded developers and operators seeking guidance on the laws applicable to the development and maintenance of offshore wind power projects on the OCS.

The legal significance of this statutory clarification is the extension of the coastwise laws to the construction, servicing and eventual decommissioning of offshore wind towers and related infrastructure, such as wind tower foundations and offshore electrical service platforms. However, since the precise application of those laws may differ as between the territorial sea and the OCS, the exact coordinates of the installation will be significant.[16] That said, the panoply of letter rulings by U.S. Customs and Border Protection ("**CBP**") relating to the application of the coastwise laws to projects involving gas, oil and other resource extractions wholly with the OCS will become of interest to the developers of offshore wind projects. A few historical points in this regard:

- CBP has determined that a vessel which is anchored to the seabed of the OCS for purposes of resource exploration,

development or production, is considered to be a "point" within the United States for purposes of the Jones Act while it is so anchored. The same is true with respect to mobile rigs, drilling platforms, artificial islands and similar structures.[17] Therefore, any other vessel transporting merchandise or passengers between the United States mainland or any other United States coastwise point and such vessel (or similar structure) while it is considered to be a coastwise point on the OCS must be coastwise qualified.[18]

- CBP has determined that a vessel that is working on the OCS will not be subject to the Jones Act and other U.S. coastwise laws, regardless of whether it is permanently or temporarily attached to the seabed, if it has some purpose other than the exploration, development or extraction of resources. For example, a barge which is laying pipeline on the OCS seabed is not technically involved in OCS activities and, therefore, is not considered a coastwise point and does not have to be coastwise qualified.[19] This means that support vessels transporting personnel or equipment to the barge from other U.S. points would not have to be coastwise qualified.[20]

- The classification of installations and devices which are drilled into the OCS seabed is of jurisdictional relevance. For example, CBP has considered OCS wells to be coastwise points for purposes of the Jones Act and other coastwise laws. Thus, the transportation of a drill rig from one U.S. point to an OCS well is regarded as a coastwise movement, requiring the use of a coastwise qualified vessel. Once a well is permanently abandoned in accordance with U.S. law, it is no longer a coastwise point.[21] However, CBP has ruled that a platform which is over an OCS well that has been permanently abandoned itself remains a coastwise point so long as it is touching the OCS.[22] These interpretations will have crossover relevance to the construction and eventual decommissioning of wind turbines.

Since the passage of the amendments to Section 4(a) of the OCSLA, CBP has had an opportunity to address specific factual scenarios relating to the proposed transportation and unlading of "scour protection" materials to wind turbine generator foundations on the OCS.[23] CBP's modified letter ruling stands out for two reasons. First, as a jurisdictional proposition, CBP recognizes the sharp differences between the territorial sea and the OCS:

> "To determine if the proposed transportation occurs between coastwise points, we need to examine the points at which the subject scour protection material will be laden and unladen. CBP treats the seabed of the territorial sea differently from that of the OCS because of the narrower jurisdiction provided by the OCSLA. Within the territorial sea, U.S. sovereignty is unlimited. A country's sovereignty beyond its territorial sea and over the OCS is more constrained, however, and in this situation is measured by the acts of Congress extending jurisdiction for specified purposes. In its application of the Jones Act, CBP interprets the OCSLA to provide CBP jurisdiction where there is an installation or device attached to the seabed serving a purpose as articulated in the OCSLA – the exploration for, or development, production, transmission, or transportation of resources."[24]

Second, the ruling request presented seven different factual scenarios involving the transportation and installation of scour materials to an offshore wind project located on the OCS. Those scenarios involved a proposed assortment of coastwise qualified and non-coastwise qualified scour vessels, bulk carriers, barges and tugs, and U.S. and non-U.S load ports. CBP's letter ruling illustrates the idiosyncratic nature of the coastwise laws, as applied on the OCS, and the obvious project inefficiencies created by the mixing and matching of various marine assets in order to satisfy the strict requirements of the coastwise laws.

For example, as stated by CBP, the transportation of scour material to a "pristine" location on the OCS seabed by a non-coastwise qualified vessel would not violate the Jones Act because a coastwise point on the OCS is not pre-established. However, once the first layer of scour material is placed on the seabed, it becomes "attached" to the seabed, thereby creating a coastwise point on the OCS. Accordingly, the subsequent transportation of scour material to each scour protection area must be conducted by a coastwise qualified vessel. On the other hand, the lading of the same scour protection material onto a non-coastwise qualified vessel in Canada and transporting it directly to the OCS site, where the same vessel would install it, would not violate the Jones Act as the movement avoids the transportation of merchandise between United States coastwise points.

In December 2020, the General Accounting Office released a report to certain Congressional committees charged with transportation, infrastructure and energy issues.[25] As indicated in the report, only one offshore wind project had been completed in the United States through September 2020, with a small demonstration project nearing completion. Other projects are in the pipeline with 16 commercial leases having been awarded to date by the Bureau of Energy Management for projects in federal waters; Wind power associated with these leases is estimated to have over 21 gigawatts of potential capacity.

The GAO report observes that offshore wind projects typically have four main phases – pre-construction, construction, operations and maintenance and decommissioning – with each phase having specific vessel requirements. The array of vessels that may be required include survey vessels, foundation installation vessels, scour protection vessels, cable-laying vessels, wind-turbine installation vessels, feeder vessels, crew vessels and service vessels. Assembling these vessels will necessarily depend on availability, project competition, contracting commitments and the inevitable strictures of U.S. coastwise laws. These concerns will present major challenges for project developers in the years ahead.

With an administration keen on "doubling offshore wind by 2030 while ensuring robust protection for [United States] land, waters, and biodiversity and creating good jobs,"[26] demand for offshore wind power and other offshore renewable energy sources is set to increase in the coming years.[27] Now, with the confirmed application of the coastwise laws to the construction and maintenance of offshore wind power installations, participants in the offshore wind industry can expand operations with certainty and this will lead to an even greater demand for coastwise qualified vessels needed to transport, install and maintain United States offshore wind power installations.

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Endnotes

Come hell, high water or pandemic – COVID-19 will not frustrate an aircraft lease agreement

1. [2020] EWHC 2414 (Comm).
2. Para. 23, *Salam Air SAOC v Latam Airlines Grp. SA* [2020] EWHC 2414 (Comm).
3. *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 WKR 392, 393.
4. Para. 41, *Salam Air SAOC v Latam Airlines Grp. SA* [2020] EWHC 2414 (Comm).
5. Para. 41, *supra*.
6. Para. 44, *supra*.
7. *Edwinton Commercial Corp. v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] 1 CLC 876, [111]-[112] (per Rix LJ).
8. *Nat'l Carriers v Panalpina* [1981] AC 675, 707 (per Lord Simon).
9. Para. 48, *Salam Air SAOC v Latam Airlines Grp. SA* [2020] EWHC 2414 (Comm).
10. Para. 51, *supra*.
11. Para. 56, *supra*.

Significant Updates on LIBOR Transition

1. The authors note the publication of the ARRC Supplemental Recommendation of Hardwired Fallback Language for Business Loans on March 25, 2021, which do not substantively change the analysis set forth herein.

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1. [2021] EWHC 99 (Comm).
2. Non-payment of lease rent constituted an Event of Default under the lease agreement between Helice Leasing S.A.S. and PT Garuda Indonesia (Persero) Tbk.
3. [2007] UKHL 40.
4. Paras. 65 and 72, *Helice Leasing S.A.S. v PT Garuda Indonesia (Persero) Tbk* [2021] EWHC 99 (Comm).
5. Para. 82, *supra*.
6. Para. 69, *supra*.
7. Para. 75, *supra*.
8. [2007] UKHL 40.
9. [2007] UKHL 40.

Silent but Deadly: Congress Passes Wind on the OCS

1. 46 U.S.C. §55102.
2. 46 U.S.C. §55103.
3. 46 U.S.C. §55111.
4. 46 U.S.C. §55109(a).
5. 46 U.S.C. §80104.
6. CBP Letter Ruling HQ 116630 (Mar. 27, 2007).
7. *See e.g.* 19 C.F.R. §4.80; *see also* U.S. Customs and Border Protection Informed Compliance Bulletin, Publication No. 1279-1020, *The Jones Act* at 16-17 (Sept. 2020).
8. CBP Letter Ruling HQ (Apr. 7, 1997). The term "territorial sea" means "the waters 12 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline." 33 C.F.R. §2.22(a)(1). The term "internal waters" means "the waters shoreward of the territorial sea baseline." 33 C.F.R. §2.24. The term "territorial sea baseline" means "the line defining the shoreward extent of the territorial sea of the United States" drawn according to principles recognized by the United States in certain international conventions. 33. C.F.R. §2.20.
9. The OCS consists of the "submerged lands lying seaward and outside of the area of lands beneath the navigable waters … [as set forth in the OCSLA], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. §1331(a).
10. 43 U.S.C. §1333(a)(1).
11. Under the structure of the OCSLA, the term "exploration" means "the process of searching for minerals." 43 U.S.C. §1331(k). The term "development" means "those activities which take place following the discovery of minerals in paying quantities." 43 U.S.C. §1331(l). The term "production" means "those activities which take place after the successful completion of any means for the removal of minerals." 43 U.S.C. §1331(m). The term "minerals" includes "oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from 'public lands' …." 43 U.S.C. §1331(q). Following the logic of these various definitions, the term "OCS activity" is separately defined to mean "any offshore activity associated with exploration for, or development or production of, the minerals of the [OCS]." 33 C.F.R. §140.10.
12. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. 95-372, Sec. 203(a) (1978).
13. *See e.g.* C. Papavizas & G. Morrissey III, *Does the Jones Act Apply to Alternative Energy Projects?*, 34 Tul. Mar. L. J. 377 (2010).
14. National Defense Authorization Act for Fiscal Year 2021, Pub.L. 116-283, tit. XCV, Sec. 9503 (2021).
15. *Id.*
16. *See e.g.* CBP Letter Ruling HQ H309672 (July 15, 2020), *revoked by* CBP Letter Ruling HQ H312773 (Aug. 3, 2020).
17. A warehouse vessel anchored over the OCS which is used to supply drilling rigs on the OCS also takes on the legal characteristics of a coastwise point. CBP Letter Ruling HQ 114347 (Sept. 18, 1998).
18. CBP Letter Ruling HQ 109849 (Nov. 18, 1988). By contrast, a vessel that is "dynamically positioned" and not moored is **not** considered a coastwise point because the vessel is not attached to the OCS. Customs Letter Ruling HQ 115531 (Dec. 3, 2001). This means that a non-coastwise qualified vessel could transport merchandise and passengers between a U.S. port and a "dynamically positioned" vessel without violating the Jones Act because the latter vessel is not a coastwise point. This also means that a non-coastwise qualified vessel that is dynamically positioned over the OCS may carry merchandise to an installation site (in this case, concrete pads) and install that merchandise on the seabed. *Id.; see also* CBP Letter Ruling HQ 114586 (Jan. 21, 1999) ("A vessel which is not attached to the outer Continental Shelf and not within U.S. territorial waters is not considered a coastwise point for purposes of the coastwise laws.").
19. CBP Letter Ruling HQ 111126 (Aug. 16, 1990); CBP Letter Ruling HQ 109708 (Oct. 19, 1988).
20. It should be emphasized, however, that if this same barge were laying pipeline within the U.S. territorial sea, it would be considered a coastwise point which means that all supply vessels to that barge would have to be coastwise qualified to the extent that they were carrying supplies from another U.S. point.
21. CBP Letter Ruling HQ 113113 (June 28, 1994).
22. CBP Letter Ruling HQ 109516 (June 15, 1988). In this ruling, the issue was whether a foreign flag barge could transport a platform which was over a permanently abandoned OCS well to another well on the OCS. Although the platform's legs were severed, CBP determined that it was still a coastwise point because it was still resting on the OCS seabed. Accordingly, the transportation of the platform from one coastwise point to another was a Jones Act movement requiring a U.S. coastwise qualified vessel.
23. CBP Letter Ruling HQ H309186 (Jan. 27, 2021), *modified by* CBP Letter Ruling HQ H317289 (Mar. 25, 2021).
24. *Id*.
25. General Accounting Office Report to Congressional Committees, *Offshore Wind Energy – Planned Projects May Lead to Construction of New Vessels in the U.S., but Industry Has Made Few Decisions amid Uncertainties*, GAO-21-153 (Dec. 2020).
26. Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021).
27. *See* White House Briefing Room, *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 2021) (https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/).

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