Global Transportation Finance Newsletter

December 2020

In This Issue

A Simple Introduction to ISDA's IBOR Fallbacks Supplement and Protocol

On October 23, 2020, the International Swaps and Derivatives Association, Inc. ("**ISDA**") launched its much anticipated IBOR Fallbacks Supplement to the 2006 ISDA Definitions (the "**Supplement**") and the ISDA 2020 IBOR Fallbacks Protocol (the "**Protocol**") to address the expected cessation of LIBOR and several other interbank offered rates ("**IBORs**") at the end of 2021. This marks a major milestone in the effort by regulators and industry groups to facilitate the transition of LIBOR-based derivatives to alternative benchmark rates. It is expected that adoption of the Protocol by the market will be widespread. The Supplement and Protocol will become effective on January 25, 2021 (the "**Effective Date**"), although the Protocol is open for adherence today (and free of charge until the Effective Date). While this bulletin is not a detailed analysis of LIBOR cessation and alternative benchmark rates, it is intended to give you an overview of these helpful developments in order to assist those who may be thinking about—or are already in the midst of—forming a strategy to address their portfolio of derivatives transactions.

The Supplement

The vast majority of the world's derivatives transactions are documented under standardized master agreements and definitions published by ISDA, notably the 2006 ISDA Definitions, as well as certain prior – but less common iterations of the definition booklets published by ISDA that are still in use[1] (together, the "ISDA Definitions"). These ISDA Definitions contain the floating rate option definitions for LIBOR and other IBORs. The rate option definitions do contain fallback provisions, but they were only intended to address short-term disruptions to the publication of LIBOR and other IBORs. With the permanent end of IBORs in sight, these current fallback provisions would appear to be inadequate to ensure a smooth transition to alternative benchmark rates. The Supplement resolves this dilemma by amending those rate option definitions – primarily – by introducing certain objective and observable trigger events for each IBOR and the alternative benchmark rate that such IBOR will "fall back" to. By issuing the Supplement, ISDA has paved the way forward for all new transactions entered into after the Effective Date. In other words, all derivatives transactions entered into on or after the Effective Date of the Supplement will contain the terms and conditions that will guide the transition away from LIBOR and other IBORs when the time comes.

The Protocol

What about existing transactions? This is what the Protocol was designed to address. The Protocol allows parties to derivatives transactions to bilaterally amend their existing transactions to incorporate the terms and conditions that are contained in the Supplement. Adherents to the Protocol will agree that derivative transactions that they have entered into with other adherents prior to the Effective Date of the Supplement will incorporate the terms of the Supplement regardless of when the transactions were entered into. The Protocol will cover the universe of ISDA-based documentation[2] as well as many non ISDA-based agreements[3] that are linked to the ISDA Definitions or otherwise reference an IBOR. In a sense, the Protocol paves the way *backwards* for all existing transactions entered into prior to the Effective Date.

Seems like a lot to take in? An easy way to think about this is to use the Effective Date as a dividing line. On January 25, 2021, all derivatives trades placed *from that point forward* will incorporate the terms of the Supplement. Derivatives trades entered into *prior to that date* – if amended through the Protocol – will also incorporate the terms of the Supplement. These overlapping devices are intended to align, creating a standardized and fully synchronized benchmark replacement mechanism across all (existing and new) derivatives transactions.

Vedder Cares

10 YEARS AIRLINK SUPPORTING COMMUNITIES IN CRISIS

As we near the end of this challenging year and look at what 2021 has in store for us, we should not forget that 2020 has revealed our resilience. We have faced many obstacles in the last nine months, and we are confident we will get through 2021 with the same spirit and hope that defines us and our industry. In a year filled with challenges, we're very grateful for your support, and we thank you for sticking with us. We couldn't have done it without you.

With that in mind, the Vedder Price Global Transportation Finance team will make a donation to Airlink. Airlink is a nonprofit organization working with 50+ aviation and logistics partners to transport relief workers and emergency supplies for reputable non-governmental organizations (NGOs) responding to rapid-onset disasters and other humanitarian crises worldwide. This year, Airlink unveiled its Aviation C.A.R.E.S. (Coordinated Air Response for Emergency Supplies) Initiative that aims to provide free and low-cost airlift for PPE and other medical supplies and disaster aid. To learn more, visit airlinkflight.org or donate directly here.

From the Vedder Price family to yours, sending warm wishes this holiday season and health in 2021.

Do I need to adhere?

It should be noted that there is no legal or regulatory requirement to adhere to the Protocol. ISDA has provided various forms of bilateral agreements and other slot-in template provisions for parties to use. These forms allow two parties to agree to incorporate the terms of the Protocol, either verbatim or subject to modifications agreed to between the parties. While parties have the option to bilaterally amend their transactions – and there are certainly circumstances where it is practical to do so – the Protocol provides parties with an efficient solution where a party has multiple counterparties. In addition, regulators have strongly encouraged regulated financial institutions and market participants to adhere to the Protocol[4]. Accordingly, it should be expected that swap dealers will, in turn, prompt their counterparties to adhere. Regulators in the U.S. and the EU have also provided comfort that amendments to existing transactions for purposes of replacing the benchmark fallbacks will not trigger any additional requirements, such as margin requirements, under their respective swap regulatory regimes.

Other considerations

LIBOR is the world's most widely used benchmark and is pervasive throughout the global financial system. It is the benchmark for over US $350 trillion in financial contracts worldwide, and so a transition strategy should give consideration to all sources of exposure. Many use interest rate derivatives to hedge the floating rate of interest under a credit facility or loan. These market participants should consider if and how the floating interest rate under that instrument will be adjusted and how such adjustment will compare to adjustments to any associated derivative transaction made bilaterally or through the Protocol. It may be appropriate to document matching fallback terms and triggers across both instruments at the same time in order to ensure that such instruments transition in the same way. Moreover, if the loan instrument requires consent from an administrative agent or lenders to amend such interest rate derivative, market participants should ensure that appropriate consents are obtained prior to amending the derivative transaction or adhering to the Protocol.

Where there is a loan-level hedging program or a "back-to-back" structure in place, it may be advisable to take a hybrid approach to address your derivatives portfolio. For example, regional and/or community banks that utilize these programs may want to use bilateral agreements to address any customer-facing derivatives while utilizing the Protocol for their offsetting dealer-side derivatives transactions. The bilateral approach is likely to be particularly helpful in circumstances where a lender may have negotiated a customized fallback rate or rate adjustment mechanism in their agreements. In addition, because the Protocol also amends a wide range of non-ISDA based agreements, bilaterally amending derivatives transactions will enable parties to narrow the scope of the Supplement to exclude these other agreements where it is desirable or appropriate.

While many transition challenges remain, the Supplement and Protocol represent a significant step forward for the derivatives market in terms of LIBOR cessation. If you have not already started forming a plan to address this monumental event, now is the time. Vedder Price attorneys have been actively engaging with clients and others to assist with all aspects of the LIBOR transition, including providing advice with respect to the Protocol and Supplement, as well as advice on other operational and legal issues that may arise with respect to the discontinuation of LIBOR and the transition to alternative benchmark rates.

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For more on this topic check out the recent webinar presented by Vedder Price attorneys Bill Gibson, Juan M. Arciniegas and James Kilner titled "Navigating the End of LIBOR: An update for the aircraft financing and leasing industry". The team provided an overview of how LIBOR transition is being addressed in the cash and derivatives markets in light of these fast-approaching deadlines. Click here to access the webinar recording.

Team News

Daniel L. Spivey Named to *National Black Lawyers* Top 40 Under 40 in California

Daniel L. Spivey, a member of the firm's Global Transportation Finance team and Finance & Transactions group, was recently named to the *National Black Lawyers* –Top 40 Under 40 list in California. The National Black Lawyers is a professional honorary organization composed of the Top 40 Under 40 Lawyers who represent individuals and businesses in the American legal system. Mr. Spivey has shown that he exemplifies superior qualifications, leadership skills, and performance in his areas of legal practice.

Honors & Awards

Vedder Price Recognized in *Chambers Asia-Pacific 2021*

The Singapore Global Transportation Finance team was ranked **Band 4** by ***Chambers Asia-Pacific in 2021*** for the Aviation Finance practice in Singapore. Partner Bill Gibson ranked as **Band 4** and Shareholder Ji Woon Kim as **Up-and-Coming** in the region.

Differences Across the Pond: When Choice of Law Matters

Although certain readers' eyes glaze over "boilerplate" choice of law provisions, the choice of law and the enforcement of choice of law for an aircraft lessor may have substantive economic consequences. For example, under U.S. commercial law, a lease with a nominal purchase option could be characterized as a "non-true lease," the commercial law equivalent of a secured acquisition financing. The implications for the lessor of that characterization when a lessee declares bankruptcy are significant and mostly adverse. However, as discussed in a recent California Bankruptcy Court memorandum of decision (the "**Memorandum**")[1], a conflicts of law determination by the court allowed an aircraft lessor in that case to avoid a recharacterization of its leasing transaction due to its choice of English law and the court's application of English law in its decision.

The Lease Financings

Zetta Jet USA, Inc. ("**Zetta USA**") was an aircraft charter operator based in the United States, providing charter flight availability for both domestic and international travel. Zetta Jet PTE, Ltd. ("**Zetta Singapore**") and Zetta USA (the "**Debtors**") filed Chapter 11 petitions in a U.S. Bankruptcy Court in California, and the cases were ultimately converted to Chapter 7.

Prior to filing its Chapter 11 petitions, the Debtors entered into purchase and lease financing transactions (the "**Leases**") involving four Bombardier Global 6000 Aircraft (the "**Aircraft**") with CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company ("**CAVIC**") and Bombardier Aerospace Corporation ("**Bombardier**"). The transactions contemplated CAVIC's purchase and lease of the Aircraft to the Debtors, including by making progress payment advances (the "**PDP Advances**") to cover the Debtors' progress payment obligations to Bombardier under the aircraft purchase agreement during the completion and pending delivery of the Aircraft. Upon delivery of the Aircraft by Bombardier and CAVIC's payment of the balance of the purchase price to Bombardier, the Debtors agreed to accept each of the Aircraft under the related Leases, and pay the rent and other amounts without abatement for the entire term of each of the Leases.

The economic terms of the Leases, including the scheduled rent, any prepayment amount and the lease term, were calculated so as to repay CAVIC for its entire investment in the related Aircraft. Specifically, the rent and other amounts, if paid as and when due under the Leases, would result in CAVIC's being repaid, in full, the PDP Advances as well as the balance of the purchase price, together with interest at an agreed rate. Accordingly, although the transactions were documented as "leases," the economics were essentially the same as what might be expected if the transactions were documented as secured loan financings. Only three of the four Leases involved Aircraft that had actually been delivered and accepted under those Leases.

The Trustee's Characterization Claims

The Chapter 7 bankruptcy trustee (the "**Trustee**") filed a complaint in the bankruptcy case against CAVIC and Bombardier (the "**Complaint**") seeking, among other things, a declaratory judgment that the Leases were financings, and not true leases. CAVIC filed a motion (the "**Motion**") to dismiss certain counts of the Complaint, and the Trustee filed an opposition to that Motion (the "**Opposition**"). After considering the arguments by CAVIC and the Trustee, the court dismissed the referenced counts of the Complaint with leave to amend, for the reasons discussed below.

The Related Issues

In order to rule on the Motion and Opposition, the court had to consider, analyze and reach conclusions regarding the following issues: "1) what choice of law rules apply; 2) based on the applicable choice of law rules, which law applies; 3) whether the Trustee can be bound by a choice of law provision; and 4) what the recharacterization requirements are under the applicable law."[2]

Choice of Law Rules

The Trustee argued that California's version of the Uniform Commercial Code ("**UCC**"), specifically, UCC § 1-301, was the appropriate choice of law rule for this matter, and that contractual choice of law provisions may be disregarded when considering issues arising under Article 9 of the UCC.[3] CAVIC disagreed and argued that Article 9 of the UCC is not a choice of law provision, and that instead the court should look to controlling Ninth Circuit precedent[4]. CAVIC cited a number of Ninth Circuit and related cases as support for its argument that federal common law choice of law rules apply in Ninth Circuit bankruptcy cases,[5] and that federal common law applies § 187 of the Restatement (Second) of Conflict of Laws (the "**Restatement**") to determine the enforceability of contractual choice of law provisions.[6]

Vedder Price Recognized in *Chambers UK 2021*

The UK Global Transportation Finance team was ranked Band 2 in the Asset Finance: Aviation Finance UK-Wide category. Additionally, ***Chambers UK 2021*** recognized Gavin Hill as **Band 1,** Neil Poland as **Band 2** and Derek Watson and Dylan Potter as **Band 4**.

Vedder Price Recognized in *2021 U.S. News – Best Law Firms* Rankings

U.S. News – Best Lawyers, a publication of *U.S. News & World Report*, has recognized Vedder Price as a top-tier firm for two practices – Admiralty & Maritime Law and Equipment Finance Law – in its annual "Best Law Firms" rankings.

Thought Leadership

Shareholder **Edward K. Gross** and Associate **Melissa W. Kopit** recently co-authored the leasing law column in *ELFA's Equipment Leasing & Finance magazine*. The article, *"Air, Rail and Marine Legal Update,"* outlines a controversial new rule authorizing the use of certain rail assets, bankruptcy restructuring considerations for vessel financiers, and regulatory and case law developments that should be of interest to aircraft financing providers.

The court agreed with CAVIC's argument and in accordance with Ninth Circuit precedent, applied Restatement § 187. In particular, the court noted that under Restatement § 187, the parties' choice of law "will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue," and that "parties may agree to apply the law of a forum to decide all questions regarding the construction and performance of an agreement, but not questions regarding capacity to contract, or 'other contract-formation issues'."[7] If parties wish to choose the law to govern contract formation issues, the parties would need to show, if that choice is challenged, a reasonable relationship to the state chosen.

Surprisingly, the Memorandum did not address the applicability of the Convention on International Interests in Mobile Equipment (the "**CTC**") and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (the "**Cape Town Protocol**", and together with the CTC, the "**Cape Town Treaty**"). Both the United States and the United Kingdom have adopted and implemented the Cape Town Treaty, and in their respective declarations specifically consented to the applicable of Article VIII of the Cape Town Protocol. Article VIII expressly allows contractual choice of law by the parties to agreements covered by the Cape Town Treaty, including agreements purporting to constitute leases, however characterized. Perhaps, if the court had considered and applied Article VIII when determining whether to uphold the governing law provisions in the Leases, it might have expedited its analysis because the support for such provisions in the Cape Town Treaty would have preempted any contrary statutory or common law considerations raised by the parties in their pleadings.

Based on the Applicable Choice of Law Rule, Which Law Applies?

The court noted that "it is undisputed that the parties selected English law to govern" the pertinent transaction documents, and that "the parties who executed the relevant documents were sophisticated and well-represented; there are no allegations that any party lacked the capacity to contract or that a binding contract was not formed."[8] Applying Restatement § 187, the court determined that English law, which was agreed to by the parties, must be applied because the contract formation or validity was not in dispute.

Although the Trustee cited an opinion by a Pennsylvania bankruptcy court as support for his argument that UCC §§ 1301, 9301 and 1203 displace extraterritorial contractual choice of law clauses regarding recharacterization of a lease under UCC Article 9, the court did not find that case to be persuasive.[9] The court distinguished that opinion from the circumstances of this case noting that the parties in that case agreed that Pennsylvania choice of law rules governed, but "the relevant documents in this case contain no indication of which choice of law rules govern, and the applicable choice of law rule is the Restatement (Second), which requires application of English law."[10]

Do Choice of Law Provisions Apply to the Trustee?

The Trustee argued that the choice of English law by the parties to the Leases should not apply as to the characterization of the transactions as either leases or secured transactions because the Trustee was a third-party representative of all creditors and "contractual choice of law provisions are not binding on third parties or otherwise capable of effecting the reclassification of security agreements into leases".[11] The court considered a number of decisions by other bankruptcy courts that had to determine whether contractual choice of law clauses should prevail over the interests of a debtor's creditors.[12] However, the court relied on *In re Zukerkorn*, 484 B.R. 182 (B.A.P. 9th Cir. 2012) and deemed the Trustee's argument unpersuasive because in *Zukerkorn*, the court applied the Restatement's choice of law rules despite the fact that the parties' choice of law affected the debtor's third-party creditors represented by a chapter 7 trustee.[13] The court distinguished the other cases because two of them were decided under the choice of law rules of other states, and unlike the present case, the other involved an allegedly fraudulent agreement.[14] A court in another state may reach a different conclusion based on its state's precedent with respect to cases regarding non-aircraft assets, but ultimately the Cape Town Treaty should still preempt any contrary state law with respect to CTC aircraft assets.

Recharacterization Requirements under English Law

After addressing the choice of law issues, the court was then left to decide whether under English law the Leases should be recharacterized as security agreements. In its analysis of the English law approach to recharacterization, the court cited *HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 700 F. Supp. 2d 681 (D.N.J. 2010), which considered the distinction between English and U.S. law regarding ownership of leased property. The court provided a detailed analyses of the distinction under English law between a sale and a lease or a "hire purchase" (i.e., a lease with an end-of-term purchase option).[15] Under a hire purchase agreement, the lessor retains ownership of the goods unless and until the lessee exercises its purchase option.[16]

Citing *HFGL*, the court notes that "[t]he laws of England and the United States 'diverge on whether an owner retains title and ownership in property that is the subject of a hire purchase agreement'."[17] The court explained the differences between the English "formal" approach, and the "functional" approach

Shareholders **Mark J. Ditto** and **David M. Hernandez** recently published comprehensive guides in the *U.S. Region of Mondaq Comparative Guides: Aviation Finance & Aviation Regulation*. The guides covered a wide variety of topics within the aviation industry, including operating leases, aircraft sale and purchase, security and more.

Shareholders **Edward K. Gross** and **David M. Hernandez** contributed to *Essex Aviation Group, Inc's* blog post on aircraft lease agreements. The article explains aircraft lease agreements and the differences in leasing structures, as well as the process for drafting or renegotiating an aircraft lease agreement and what a lessee should know before closing a deal.

Shareholder **Edward K. Gross** co-authored *"Leases"* in the Fall 2020 edition of *The Business Lawyer*. The article covered several 2019 equipment finance cases relating to true leases or a security interest, a lessor's damages remedies, vicarious liability of a lessor, issues relating to forum selection clauses, the rights of assignees of interests under a lease, and issues surrounding certainty of payment, such as hell-or-high-water clauses.

Recent Speaking Engagements

October 14, 2020

Capital Link New York Digital Forum

Shareholder **John F. Imhof** presented at the Capital Link New York Digital Forum, a two-day digital interactive platform for a variety of industry experts to discuss the global shipping, finance and capital markets. Mr. Imhof moderated the Jones Act Round Table Discussion.

under the UCC, when determining characterization of transactions documented as leases. The court cited to a well-recognized treatise regarding pertinent English law which provides that the established English law approach "sharply distinguishes the grant of security from the retention of title under conditional sale, hire-purchase and leasing agreements, on the basis that the buyer, hirer or lessee has merely a possessory interest, subject to which the seller, owner or lessor continues to enjoy absolute ownership by virtue of the agreement between the parties".[18] By contrast, recharacterization in the United States under the UCC is a fact-based inquiry analyzing, among other things, the economics of the transaction.[19]

In its conclusion, the court noted that the pleadings submitted by the Trustee included descriptions of the Leases containing an end-of-term purchase option, and that "[u]nder English law, a hire purchase agreement is viewed as a lease with an option to purchase at the end of the term."[20] Based on those undisputed facts, the court concluded that "the transactions at issue were hire purchase agreements and it is undisputed that options to purchase the Four Aircraft were not exercised."[21] Accordingly, the court found that "the transactions are leases under English law and cannot be recharacterized as urged by the Trustee."[22]

Takeaways

Governing law provisions aren't always enforceable. A court determining the enforceability of a governing law provision is likely to consider whether honoring that contractual choice of law agreed to between the contracting parties could have an adverse effect on third parties, especially in the context of a bankruptcy or other action involving the rights of creditors or similar claimants. When drafting cross-border finance and lease documents, consider whether there might be essential issues that are unlikely to be decided by the contractually stipulated governing law, and whether there might be any applicable treaties, documentation or other transactional strategy to address the related risk. By way of example, parties could agree that matters involving conflicts of law should be decided by a law that might recognize the enforceability of the governing law choice.

Courts asked to consider most commercial law issues pertaining to installment sales, leases and other financings involving personalty are likely to reach the same conclusions irrespective as to whether the court applies U.S. commercial law (including the UCC) or English commercial law. However, there is an important distinction between how U.S. law and English law view title, and its implications to the respective rights and obligations of the purported owner and the counterparty, as well as to interested third parties.

Parties in cross-border transactions should be aware of the governing law agreed to by parties to an asset financing might not be recognized by a court asked to consider issues that are essential to the parties achieving the benefits of their respective bargains. Accounting for this risk is especially important in cross-border transactions involving multiple legal regimes, as the laws may differ among them, including as to substantial issues at the heart of whether the parties will be able to achieve their bargained for benefits.

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October 22, 2020

Ishka World Tour 2020

Shareholder and Head of New York Capital Markets Group **Kevin A. MacLeod** was a featured speaker at the Ishka World Tour 2020: Virtual Aviation Finance Networking Series. Mr. MacLeod presented the panel discussion titled, "Under What Conditions Will the Aircraft ABS Market Re-Open for New Transactions?" He and his co-panelists discussed how to structure new deals and attract investors, and compared new ABS deals to the rise in private placements.

October 27, 2020

ELFA 2020 Business Live

Shareholder **Edward K. Gross** and Associate **Erich P. Dylus** presented at the ELFA 2020 Business Live Event. Mr. Gross, along with a panel of subject matter experts, co-lead a discussion titled, "What's New in the Law." This examined recent case law and regulatory developments set to impact the industry, as well as COVID-19 related developments, force majeure clauses and MAC clauses. Mr. Dylus co-lead a discussion titled "Emerging Technology: Hype vs. Reality," where he reviewed many recent technology developments and discussed how these advancements added value to the equipment finance industry as well as other markets. The presentation was later featured in an article for *Monitor Daily.*

November 17, 2020

Corporate Jet Investor Americas 2020

Shareholders **Edward K. Gross** and **David M. Hernandez** presented at Corporate Jet Investor Americas 2020 Virtual Conference. Mr. Gross moderated the panel "US Aircraft Registry – Top 10 things you need to know now." Mr. Hernandez joined co-panelists in the discussion "Illegal Charter – and how to stay out of jail."

CIGA and the Cape Town Convention: Insolvency and Aviation

The United Kingdom's Corporate Insolvency and Governance Act 2020 ("**CIGA**") shifted the focus of the United Kingdom's insolvency regime from administration and liquidation to rescue and recovery and introduced a number of interesting new features that apply to companies experiencing financial difficulties. This article considers how certain of these features fit into the insolvency regime of the Cape Town Convention.[1]

Of primary interest, CIGA permits a company experiencing financial difficulties to propose an arrangement or compromise with its creditors (a "**Restructuring Plan**").[2] This is a court-sanctioned scheme that could result in revised debt terms being imposed on each class of creditors, including any dissenting class, if the applicable requirements are satisfied (the so-called "cross-class cram-down").[3]

Article XI(10) of the Aircraft Protocol to the Cape Town Convention, as implemented in the UK Regulations, provides that "*no obligations of the debtor under the agreement may be modified without the consent of the creditor.*" This is a protection for creditors against cram-down mechanisms in the context of insolvency proceedings – there is no such protection for solvent proceedings. It is therefore important to consider whether a Restructuring Plan is an "insolvency proceeding" for the purposes of the Cape Town Convention, which will be discussed in further detail below.

Three other notable features of CIGA

Firstly, CIGA introduced a moratorium (for an initial period of twenty business days, which may be extended with specific conditions), granting a payment holiday for some debts (including lease rentals) and protection from creditors. The moratorium could conflict with the sixty day waiting period for aircraft objects that are the subject of an international interest as set out in the UK Regulations,[4] but CIGA amends the UK Regulations so that the protections from creditors cannot extend beyond the sixty day waiting period set out in the UK Regulations.[5]

Secondly, CIGA permits a company subject to the moratorium, which is in possession of certain leased assets, to dispose of those assets as if it were owner of those assets (subject to safeguards in favor of the lessor). A company may also dispose of certain assets that are the subject of fixed security. However, CIGA amends the UK Regulations to provide that the provisions about disposal of assets do not apply to aircraft objects that are registered international interests.[6]

Thirdly, CIGA may prevent a lessor from terminating its lease with a company that commences insolvency proceedings. However, CIGA clarifies that this does not apply in relation to leases that are registered international interests.[7] Instead, Regulation 18 of the UK Regulations permits parties to agree on what events constitute defaults, which may include insolvency events – consequently, an insolvency event will still trigger the lessor's right to terminate the applicable lease and repossess the relevant aircraft object(s).

Is a Restructuring Plan an "insolvency proceeding"?

The Cape Town Convention defines "insolvency proceedings" as "*bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation*."[8] Pursuant to Article 5 of the Cape Town Convention,[9] the classification of proceedings must be determined in accordance with the principles of the Cape Town Convention and in interpreting the Cape Town Convention it is useful to consider the Official Commentary to the Cape Town Convention[10] which says, at paragraph 3.118:

> *"the proceedings must have as their purpose reorganisation or liquidation in insolvency. The winding up, reorganisation or dissolution of a solvent company falls outside the scope of Article XI. However, whether the debtor is in fact insolvent is irrelevant."*

It is clear that this means the purpose of the proceedings is key, and classification of the proceedings must be on a case-by-case basis rather than exclusively by reference to the broad type of proceedings.

However, the Cape Town Convention does not define "insolvency," and the question arises how far forward a view should be taken on the likelihood of a debtor becoming insolvent when determining when a company is entering into arrangements "in an insolvency context."

Under English law, as confirmed in *Bucci v Carman (Liquidator of Casa Estates (UK) Ltd),*[11] the test requires that it is proven to the satisfaction of the Court, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, that the company cannot reasonably be expected to meet those liabilities. This means that a company may be deemed to be insolvent even if it is currently able to meet its debts as they fall due.

As noted above, CIGA provides that a Restructuring Plan may only be entered into when "*the company*

Deal Corner

Vedder Price Represents Thora Capital, LLC in the Sale-Leaseback of Three EMS Helicopters with Apollo MedFlight

Vedder Price counseled Thora Capital, LLC as they advised an investor group with respect to the consummation of a helicopter acquisition and leaseback involving three Airbus EC135s in emergency medical services (EMS) configuration. Global Transportation Finance Shareholder **Edward K. Gross** led the team from Vedder Price that also included **Melissa W. Kopit, Jonathan M. Rauch** and **Rebecca M. Rigney**.

Vedder Price Advises Stonebriar Commercial Finance in Private Placement of $90 Million of Unsecured Notes

Vedder Price represented Stonebriar Commercial Finance, a leading independent large-ticket commercial finance company, in connection with its private placement of $90 million of the senior unsecured notes maturing in 2025 and 2027. **Kevin A. MacLeod**, Shareholder and Head of the New York Capital Markets Group, led the team from Vedder Price along with Global Transportation Finance Shareholder, **Geoffrey R. Kass**.

Vedder Price Advises Allegiant Travel Company on Private Offering of $150 Million of Secured Notes

Vedder Price advised Allegiant Travel Company, an integrated travel company with an airline at its heart, in connection with its Rule 144A/ Regulation S offering of $150 million of 8.500% Senior Secured Notes due 2024. **Kevin A. MacLeod**, Shareholder and Head of the New York Capital Markets Group, led the Vedder Price team, which also included Global Transportation Finance Shareholder **Ronald Scheinberg**, Capital Markets Shareholder **John T. Blatchford**, Tax Shareholder **Andrew Falevich** and Associates **Amir Heyat** and **Jeremy M. Tudin**.

has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern."

Combining the CIGA test and the *Bucci v Carman* test to create a test to determine whether Article XI would not apply in the context of a Restructuring Plan:

> "*The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern but, on looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it can reasonably be expected to meet those liabilities.*"

The annotation to the Official Commentary

To provide additional clarification, on 16 June 2020, the Cape Town Convention Academic Project published an annotation to the Official Commentary that says arrangements fall within Article XI where they are:

> "*(a) formulated in an insolvency context,* ***or by reason of actual or anticipated financial difficulties of the debtor company,***[12] *and*
>
> *(b) collective in that they are concluded on behalf of creditors generally or such classes of creditor as collectively represent a substantial part of the indebtedness.*"

The annotation was issued as CIGA passed through the UK's Parliament, receiving Royal Assent on 26 June 2020 – the clear intention of the Academic Project is that Restructuring Plans are arrangements in relation to which creditors of aircraft objects with registered international interest can receive the protections of Article XI.

A slim prospect

Given the nature of the basic requirements for a Restructuring Plan – necessarily involving financial difficulties and ability to carry on business as a going concern – it is perhaps difficult to imagine the set of circumstances that would cause the "insolvency proceeding" requirement of Article XI not to be satisfied; and cause Cape Town creditors to be potentially subject to cross-class cram-down.

The annotation to the Official Commentary clearly seeks to extend the protections of Article XI to situations that do not fall solely within the insolvency context, an intervention that will be welcomed by Cape Town creditors but in the absence of any related judicial determination, drawing on the Official Commentary and the annotation to it, the position of Cape Town creditors in the context of any Restructuring Plan remains uncertain.

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Endnotes

A Simple Introduction to ISDA's IBOR Fallbacks Supplement and Protocol

1. The 1991 ISDA Definitions (as amended by the 1998 Supplement), the 1998 ISDA Euro Definitions, and the 2000 ISDA Definitions.
2. See the "Definitions" section of the Protocol starting on page 12.
3. See the "Annex" section of the Protocol starting on page 23.
4. https://www.fsb.org/2020/10/fsb-encourages-broad-and-timely-adherence-to-the-isda-ibor-fallbacks-protocol/

Differences Across the Pond: When Choice of Law Matters

1. *King v. CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company (In re Zeta Jet USA, Inc.)*, Ch. 7 Case No. 17-bk-21386-SK, Adv. No. 19-ap-01147-SK, slip op. (Bankr. C.D. Cal. October 15, 2020).
2. *Id.* at 13.
3. *Id.* at 10.
4. *Id.* at 12-13.
5. *Id*. at 12 (citing *Mandalay Resort Grp. v. Miller*, 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003)).
6. *Id.* at 12 (citing *In re CMR Mortg. Fund, LLC*, 416 B.R. 720, 728 (Bankr. N.D. Cal. 2009)).
7. *Id.* at 14 (citing *CMR Mortg. Fund*, 416 B.R. at 729 (citing Restatement (Second) of Conflict of Laws § 187 cmts. c, d)).
8. *Id.* at 15 (citing *CMR Mortg. Fund*, 416 B.R. at 729).
9. Id. at 15 (citing *In re Eagle Enters., Inc.,* 223 B.R. 290 (Bankr. E.D. Pa. 1998)).
10. *Id.* at 15.
11. *Id.* at 15 (citing Opposition at 24-25 (citing *In re Eagle Enters., Inc.*, 223 B.R. 290 (Bankr. E.D. Pa. 1998); *Carlson v. Tandy Comput. Leasing*, 803 F.2d 391 (8th Cir. 1986); and *In re Morse Tool, Inc.,* 108 B.R. 384 (Bankr. D. Mass. 1989)).
12. *Id.* at 16 (citing *In re Eagle Enters., Inc.,* 223 B.R. 290 (Bankr. E.D. Pa. 1998) (the Pennsylvania UCC only allowed contracting parties to choose the law applicable to *their* relationship, but not to bind a Chapter 7 trustee representing creditors)). *Id* at 16 (citing *Carlson v. Tandy Comput. Leasing,* 803 F.2d 391 (8th Cir. 1986) (under the Missouri UCC, contracting parties may generally agree that the contract would be governed by the law of a particular state, but not when the rights of third parties are at stake, as was the circumstance in that case)). *Id* at 16 (citing *In re Morse Tool, Inc.,* 108 B.R. 384 (Bankr. D. Mass. 1989) (The court applied the Restatement (Second) of Conflict of Laws choice of law analysis and did not uphold a Connecticut choice of law clause in this adversary proceeding involving a fraudulent conveyance claim.)).
13. *Id.* at 18.
14. *Id.*
15. *Id.* at 19 (citing *HFGL; Hire Purchase, and Black's Law Dictionary* (11th ed. 2019) (defining "hire purchase" as the British terminology for an "installment plan")).
16. *Id.* at 19 (citing *HFGL*, 700 F. Supp. 2d at 688).
17. *Id.*
18. *Id.* at 19 (citing *Goode and Gullifer on Legal Problems of Credit and Security* (6th Ed.), London, Sweet & Maxwell, at ¶ 1-04).
19. *Id.* at 19 (citing *HFGL*, 700 F. Supp. 2d at 688).
20. *Id.* at 20.
21. *Id.*
22. *Id.* at 20 (citing *HFGL*, 700 F.Supp.2d at 688 (noting that under English law a lessor retains ownership of goods unless a hire purchase agreement option to purchase is exercised)). The court's footnote commentary also noted that: "The Trustee's contention, that under the Federal Aviation Administration Regulations (FARs), the Debtors are treated as the true 'owners' of the Four Aircraft and the Financed Leases are considered 'contracts of conditional sales' rather than true leases, is unavailing. Opposition at 26 (citing 14 C.F.R. § 47.5(b) and (d); Complaint ¶¶ 71, 74, 87, 90). The Trustee asserts only that the FARs govern the operation and registration of aircraft in the United States, not recharacterization or financing. And the FARs define "owner" to include "a buyer in possession . . . or a lessee of an aircraft under a contract of conditional sale. . ." 14 C.F.R. § 47.5(d) (emphasis added)." *Id* at 20, FN 17.

CIGA and the Cape Town Convention: Insolvency and Aviation

1. As implemented in the United Kingdom pursuant to the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (**the UK Regulations**).
2. Sometimes called the "Superscheme."
3. The restructuring can be imposed on a dissenting class of creditors if seventy-five per cent. of the creditors (by value) in *any* class agree to the restructuring plan and (a) none of the members of the dissenting class would be any worse off under the restructuring compared with the "relevant alternative," being the most likely outcome in the absence of the restructuring (i.e. insolvency) and (b) the arrangement is approved by seventy-five per cent. in value of a class of creditors who would receive a payment or have genuine interest in the company, if the "relevant alternative" were to occur.
4. The UK has effectively implemented "Alternative A" in its national law - the UK could not *elect* to incorporate "Alternative A" into its national law at the time of ratification of the Cape Town Convention as insolvency matters are a competence of the European Union, but was able to amend its national law so that it matched the provisions of "Alternative A."
5. Paragraph 55(4)(12A)(c) of Schedule 3 to CIGA.
6. Paragraph 55(4)(12A)(d) of Schedule 3 to CIGA.
7. Paragraph 55(4)(12A)(c) of Schedule 3 to CIGA.
8. Regulation 5 of the UK Regulations.
9. Article 5(1): In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

   Article 5(2): Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.
10. Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment by Professor Sir Roy Goode.
11. [2014] EWCA Civ 383.
12. Emphasis added – the formulation of the annotation should be directly compared with the requirements for entering into a Restructuring Plan, noted above.

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