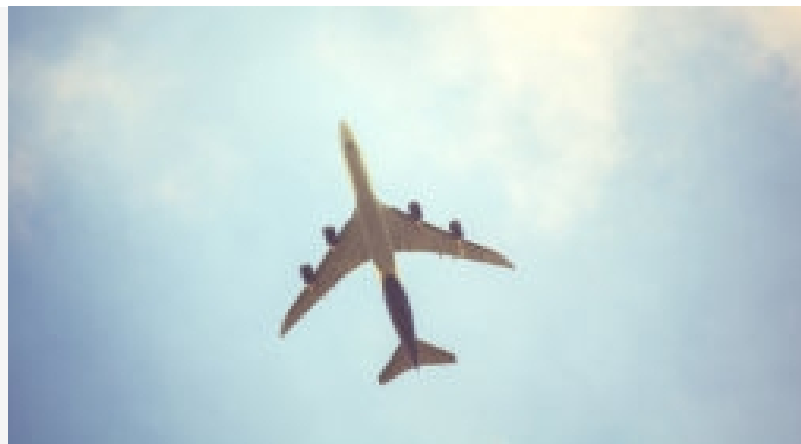


FIXING DRAFTS: A CAUTIONARY MESSAGE ON DRAFTING JURISDICTION PROVISIONS

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On 20 January 2021, the High Court of England and Wales handed down its decision in *Helice Leasing S.A.S. v PT Garuda Indonesia (Persero) TBK*¹ in which it rejected the aircraft lessor's hybrid interpretation of the jurisdiction provisions of the lease. The case highlights the difficulties which the drafting of jurisdiction provisions in aircraft leasing documents may raise for lessors in attempting to enforce their rights under such documents.

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BACKGROUND AND ISSUES

The dispute concerned an Aircraft Operating Lease Novation and Amendment Agreement dated 8 January 2016 (the "Lease") under which Helice Leasing S.A.S. had become the lessor and PT Garuda Indonesia (Persero) TBK had become the lessee of a Boeing 737-800 aircraft.

The lessor commenced proceedings against the lessee before the High Court claiming over US\$5.15m plus interest, and an indemnity, and alleging Events of Default on the basis that the lessee had failed to pay any of the monthly rent or additional rent from January 2020 to October 2020.

As at the date of the judgment, the lessee had not identified any defence to the lessor's claims. Indeed, the lessee had impliedly acknowledged the debt in correspondence and had paid just over US\$585,000 toward the amounts outstanding.

However, the lease contained contradictory jurisdiction provisions. Clause 15.2(a) provided that any dispute must be referred to the London Court of International Arbitration (LCIA). Clause 13.2 provided that "*if an Event of Default occurs and is continuing, the Lessor may at its option ... 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*". The lessee therefore applied for a stay of the High Court proceedings pursuant to s. 9 of the Arbitration Act 1996 on the grounds that the parties had agreed that any dispute must be arbitrated.

The lessor contended that clause 13.2 provided an exception to clause 15.2(a) in circumstances where an Event of Default had occurred and was continuing. In those circumstances, the lessor argued, it had the option to litigate in court rather than to commence arbitral proceedings.

CONSTRUCTION OF THE JURISDICTION PROVISIONS IN THE LEASE

"The High Court's reasoning serves as a reminder of the importance of drafting such provisions carefully in order to set out clear and certain rights to minimise the risk of time-consuming and costly proceedings in the wrong forum."

The High Court observed that "[o]n any view clause 13.2 is not happily worded". The error seems to have arisen out of a novation in which the governing law was changed from New York to English, but not all connected provisions were updated. The High Court found that the lessor's interpretation of clause 13.2 would invite many difficulties, not least that clause 13.2 only applied "if an Event of Default occurs" but if there was a dispute as to whether there had been an Event of Default, that question remained subject to arbitration. The High Court also found that the lessor's interpretation ran entirely contrary to the 'one-stop shop' construction of such arbitration clauses advocated by the House of Lords in *Fiona Trust v Privalov*². The High Court found that the parties had agreed to arbitrate any dispute, that the lessor's claims were in dispute (if only because the lessee had not paid sums alleged as due) and that clause 13.2 did not give the lessor the option to choose to litigate its claims in court.

The High Court found against the lessor and granted a stay of the proceedings in favour of arbitration. In doing so, the High Court added that "whilst not as quick as court proceedings, it is nonetheless possible nowadays for a party to an LCIA arbitration to obtain an expedited constitution under the LCIA Rules [...] and a relatively speedy award".

COMMENT

The High Court's reasoning in *Helice Leasing* as to the proper interpretation of the jurisdiction provisions of the Lease serves as a reminder of the importance of drafting such provisions carefully in order to set out clear and certain rights to minimise the risk of time-consuming and costly proceedings in the wrong forum.

[1] [2021] EWHC 99 (Comm)

[2] [2007] UKHL 40

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