ALERT MEMORANDUM

The *Gol* Court Revisits Permissible Lockup Agreements

April 29, 2024

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

Lisa Schweitzer
+1 212 225 2629
lschweitzer@cgsh.com

Sara Watson
+1 212 225 2616
sawatson@cgsh.com

A recent decision from the United States Bankruptcy Court for the Southern District of New York *in re Gol Linhas Aéreas Inteligentes S.A.* held that certain lockup provisions between debtors and lessor counterparties were unenforceable. In doing so, the Court provided general guidance on the parameters for permissible lockup provisions going forward, where the counterparty's awareness of plan terms, ability to have an "out" from the plan support provision, and level of sophistication were all relevant factors in considering the permissibility of such agreements. The decision provides a roadmap for debtors and creditors who may consider entering into similar agreements regarding best practices in the structure and disclosures associated with these agreements.

While the *GOL* Court did not per se prohibit creditor lockup agreements, its establishment of a framework for lockup provisions under the Bankruptcy Code necessitates that debtors pay careful attention to the timing of future lockup agreements, as well as their ability to provide clear evidence that the parties to such lockups had a meaningful choice when it came to their decision to enter into such lockups.

A. Case Background

On January 25, 2024, GOL Linhas Aéreas Inteligentes S.A. and certain affiliates ("GOL" or the "Debtors") filed Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of New York (the "Court"). As of yet, they have not filed their Chapter 11 plan of reorganization (the "Plan") or a disclosure statement.

Pursuant to the terms of GOL's debtor-in-possession financing, the company had to enter into lease modification agreements with at least sixty-five of their aircraft by April 24, 2024, and with at least ninety by May 24, 2024, and they are currently in the process of negotiating such agreements.[1] On March 28, 2023 and April 1, 2024, GOL filed motions with the Court seeking approval of certain stipulations or agreements that they had entered into with four aircraft lessor counterparties (the "Stipulations"), all of which included similar provisions that the various counterparties would support a Plan later filed by GOL (the "Lockup Provisions").[2]

The Lockup Provisions themselves provided that the counterparties would vote to accept GOL's Plan, and vote against any other party's plan, so long as 1) the terms of the Plan were consistent with the terms of the Stipulation, 2) the Plan provided for the vesting of certain documents, including the underlying leases, in the reorganized company, 3) the Plan provided for the exculpation of the counterparty, and 4) there were no outstanding events of default under the lease. The Lockup Provisions also contained certain financial requirements with respect to liquidity and projected leverage ratio that GOL had to meet as of the effective date of the Plan.[3]

Both the Official Committee of Unsecured Creditors (the "Committee") and the United States Trustee ("UST") filed objections to the Lockup Provisions. The Court denied the Committee's request for discovery of documents and witnesses in connection with the Lockup Provisions, but permitted the Committee to cross-examine GOL's declarant in support of the filed Stipulations.[4]

B. The Court's Decision

The Court held a hearing on the motions to approve the Stipulations on April 10, 2024, at which the Court approved the economic terms of the Stipulations, but sustained the objections to the Lockup Provisions, holding that they were unenforceable and ordering them severed from the Stipulations.[5]

In its decision, the Court first examined other cases featuring so-called "plan support provisions," or lockup agreements that would bind a creditor to support the debtor's plan.

The Court summarized the case law by noting that lockups were not *per se* improper, but asserting that courts look to two key factors in deciding whether approve a lockup agreement: 1) whether there is sufficient information available about the plan that creditors were committing to vote for, and 2) whether creditors had meaningful choice to willingly agree during the negotiation phase, or to rescind later based on new information.[6]

1. Survey of Approaches

The Court first described two cases in which plan support provisions were not allowed: *In re NII Holdings*, a Delaware bankruptcy case in which the court announced a "bright line" rule of not approving any post-petition plan support agreements, regardless of circumstance,[7] and *In re SAS*, a New York bankruptcy case in which Judge Wiles disallowed a plan support provision that would obligate the counterparty to vote for *any* plan the debtors might

[1] In *re GOL Linhas Aéreas Inteligentes S.A., Memorandum Opinion Approving Settlements But Striking the Lockup Provisions from Stipulations with Lessors*, Case No. 24-10118 (MG) (Bankr. S.D.N.Y. Apr. 22, 2024) (the "Opinion").
[2] *Id.* at 4.
[3] *Id.* at 5.
[4] *Id.* at 3.
[5] *Id.* at 4.
[6] *Id.*
[7] Oct. 22, 2002 Hr'g Tr., *In re NII Holdings*, Case No. 14-10979 (Bankr. D. Del. 2002).

propose.[8] In its analysis, the Court highlighted the "nuanced approach" of the *SAS* court, and observed that in that case, the lockups lacked any information about plan terms, as well as any meaningful "outs" under which the counterparty could exit the agreement if objections later arose.

The Court then surveyed two cases in which plan support agreements were allowed. In *In re Kellogg Square*, a Minnesota case, the debtor provided the counterparty with the first draft of the disclosure statement during negotiations. The court also read an "out" into the lockup provision, which remained executory until the ballot was cast, thereby giving the counterparty the right to reject the agreement and cast a dissenting ballot.[9] In *In re Grupo Aeroméxico*, Judge Chapman of the New York bankruptcy court approved a lockup provision over the objection of the committee, reasoning that the parties were sophisticated, that the court had already approved several similar agreements without objection, and that not all settlements contained the lockup provision, which indicated that no coercion was present in the decision to enter into the lockup agreements.[10] The disclosure statement also had been on file for over a month before the agreements containing the lockups were approved.

The Court reasoned that in both of those cases, the creditor had access to meaningful information from either a draft or an as-filed disclosure statement. Further, in one case counterparties had an "out" from the agreement and in the other, there was evidence that the parties had meaningful choice in whether to accede to a lockup provision.

2. Application to GOL

Applying its own two factor test based on the noted cases, the Court reasoned that the GOL Lockup Provisions were more similar to the former two cases, rather than the latter two and therefore could not be approved.

The Court found that the Lockup Provision "contain[ed] neither (1) adequate (or any) information about the plan terms, nor (2) any evidence of meaningful choice."[11] First, because the Chapter 11 cases were still "in their infancy," GOL was several months away from filing a disclosure statement, similarly to *SAS* and in contrast to *Aeroméxico* or *Kellogg Square*.[12] The Court specifically declined "to opine on the exact amount of information or stage of a case at which a plan support provision becomes permissible," but held that "the lack of any adequate information about plan terms clearly runs head-on into the purpose and goals of section 1125(b)."[13]

Additionally, the Lockup Provisions mandated that counterparties vote for *any* Plan that GOL proposed, with no meaningful outs.[14] The financial requirements were to be measured as of the effective date of the Plan, after parties had already voted on the Plan, and the Court reasoned that "there is a crucial difference between agreeing that settlement terms must be included in any plan, and agreeing to vote for any plan that includes the settlement terms."[15] The latter requires creditors to vote for even plans to which they may have legitimate objections.[16]

Furthermore, beyond its implications for the counterparties to such provisions, the Lockup Provisions "risk[ed] disenfranchising the voices and votes of smaller creditors," at an early stage in the case, because GOL would lose all incentive to engage in negotiations with smaller creditors after locking up a sufficient number of votes.[17] Therefore, the Court reasoned that "[t]he Lockup Provision thus undoes the Bankruptcy Code's careful allocations of creditor rights and ultimately constitutes an improper

[8] Sept. 28, 2022 Hr'g Tr. at 10:5–9, *In re SAS*, Case No. 22-10925 (Bankr. S.D.N.Y. 2022).
[9] *In re Kellogg Square P'ship*, 160 B.R. 336, 338–39 (Bankr. D. Minn. 1993).
[10] See Nov. 16, 2021 Hr'g. Tr., *In re Grupo Aeroméxico, S.A.B.* de C.V., et al., Case No. 20-11563 (Bankr. S.D.N.Y. 2021).
[11] Opinion at 21.
[12] *Id.* at 23.
[13] *Id.*
[14] *Id.* at 24.
[15] *Id.*
[16] *Id.* at 25.
[17] *Id.* at 21.

solicitation in violation of section 1125(b)."[18] Finally, the Court reasoned that while creditor sophistication was a highly relevant factor in assessing plan support provisions, it was not dispositive because sophisticated counterparties were still entitled to the protection of 1125 of the Bankruptcy Code.[19]

Though the Court approved the economic terms of the Stipulations, which had generated no objections, it sustained the objections to the Lockup Provisions, and ordered them severed from the Stipulations.[20]

C. Implications for Future Lockup Provisions

The *GOL* Court's decision on lockup agreements consolidates and distills recent case law into two distinct factors: the amount of plan information available pre-lockup to counterparties, and the presence of evidence of either a meaningful choice to agree to the lockup or otherwise availability of an "out" from the lockup provision. Debtor entities seeking to shore up plan support through lockup agreements should therefore wait to execute such agreements until later in the case when a disclosure statement has been filed in draft or final form or otherwise plan financial terms are included in the lockup agreement itself. Debtors also should refrain from insisting on lockup provisions in all agreements with counterparties or, as was the case in *GOL*, with a specified category of counterparties that it is negotiating with (in the case of *GOL*, its aircraft lessors) divorced from discussion of plan terms – offering such agreements even to counterparties that do not pledge to support the plan will serve as evidence of "meaningful choice" to a bankruptcy court. Finally, contracting with sophisticated counterparties, though not dispositive, will be a helpful consideration in whether the parties knowingly entered into an economic decision with respect to a lockup provision.

***

The recent *GOL* decision creates a concise framework for evaluating lockup provisions under the Bankruptcy Code. Such a framework may lead to additional debtors proposing lockup agreements as a result of the additional guidance regarding their enforceability, but it likewise provides defined guardrails with respect to lockup agreements, of which any debtor entities should be mindful.

…

CLEARY GOTTLIEB

[18] *Id.* at 22.
[19] *Id.* at 25
[20] *Id.* at 22.