Global Transportation Finance Newsletter

August 2015

In This Issue

GTF Team Expands to Los Angeles with Addition of Raviv Surpin

Raviv Surpin, formerly the Vice President and Corporate Counsel of International Lease Finance Corporation/AerCap, joined the firm as a Shareholder on the Global Transportation Finance team in our Los Angeles office. Raviv has significant experience counseling operating lessors, borrowers, finance companies, manufacturers and investors in all manner of aircraft finance transactions, including portfolio securitizations and warehouse financings involving substantial commercial aircraft portfolios, cross-border operating lease transactions, and numerous multi-jurisdictional aircraft portfolio acquisition and disposition transactions, restructuring and commercial lending.

GTF Women Host "Women in Transportation" Reception

In May, the Global Transportation Finance team hosted the second annual "Women in Transportation" wine tasting event at Corkbuzz in New York City. The event was attended by many of our clients and friends in the aviation, aerospace, railroad and marine industries, as well as female attorneys from our New York, Chicago, San Francisco and Washington DC offices.

GTF Shipping Team ABS Transaction Nominated for *Lloyd's List* Deal of the Year

Global Transportation Finance team members represented Credit Suisse, as sole structuring agent, in the Seaco $230 million container lease securitization. The deal was nominated in the "Deal of the Year" category for the 2015 *Lloyd's List* Global Awards, which will be presented on October 1, 2015 at the National Maritime Museum in London.

GTF Aviation Team Transactions Win *Airfinance Journal* Deal of the Year Awards

Global Transportation Finance team aviation finance lawyers participated in two transactions that were awarded "Deal of the Year" by the *Airfinance Journal*. In the "China Deal of the Year," Vedder Price represented the Export-Import Bank of the United States in an ICBC financial leasing prefunded bond issuance. In the "PDP Deal of the Year," Vedder Price represented Hong Kong Aviation Capital in the SriLankan Airlines/HK Aviation Capital PDP financing.

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Recent Accolades

In 2015, *Legal 500 US* ranked Vedder Price Tier 1 in Finance - Asset Finance and Leasing, noting "Vedder Price undoubtedly has the largest and broadest asset finance practice in the market."

Chambers Global 2015 ranked Vedder Price in both Band 2 Aviation Finance and Rail Finance noting "Excellent… finance practice that earns plaudits for its strong transatlantic capabilities." In addition, four Global Transportation team partners achieved national rankings: Dean Gerber – Band 1; Ronald Scheinberg – Band 2; Gavin Hill – Band 3; Jeffrey Veber – Band 4.

Euromoney Legal Media Group's Expert Guides recognized 12 Vedder Price shareholders and partners among the top aviation lawyers in the world. In addition, Michael E. Draz and Christopher A. Setteducati, associates on the Global Transportation Finance team, were recognized as "rising stars."

U.S. Department of Transportation and Transport Canada Issue New Regulations Intended to Improve Tank Car Safety

In response to the soaring volume of crude oil moving by rail, the Lac-Mégantic tragedy, and several other high-profile derailments, the Pipeline and Hazardous Material Safety Administration and the Federal Railroad Administration issued their final rule (the New Rule) on May 1, 2015 designed to improve the safety of transportation of certain flammable liquid shipments by rail. The New Rule, titled "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for HHFTs," amends the existing hazardous materials regulations (HMRs) by mandating enhanced safety features for tank cars transporting flammable liquids and designating new operational protocols for High-Hazard Flammable Trains (HHFTs)[1] utilizing the U.S. rail network. The New Rule went into effect on July 7, 2015, although several groups are challenging its implementation in court.

Transport Canada (TC) issued similar regulations for tank cars transporting flammable liquids in Canada, but the content and the time frame for implementing the regulations, particularly with respect to the new tank car standards, are not identical to the New Rule analogue. A summary comparison of the differences in the time frames for implementation follows at the end of this article. Although this article primarily addresses the New Rule, references to the analogous Canadian regulation are also cited, as applicable.

Heightened Tank Car Standards

Under the New Rule, existing U.S. Department of Transportation (DOT) Specification 111[2] tank cars (including tank cars built to the CPC-1232 industry standard) are prohibited from transporting Class 3 flammable liquids in Packing Group I, II or III for use in HHFT service unless retrofitted to DOT Specification 117R or 117P standards.[3] Retrofits must be completed in accordance with DOT and TC (if used in Canada) imposed retrofit schedules.[4] Tank cars constructed after October 1, 2015 must meet the enhanced DOT Specification 117 design or performance criteria for use in HHFT service. The enhanced design features include: a wall thickness of at least 9/16 inch, a tank head puncture resistance system, a thermal protection system covered with a metal jacket, and a reclosing pressure relief device.[5]

Enhanced Braking and Speed Restrictions[6]

In addition to enhanced tank car safety standards, the New Rule requires all HHFTs operating at speeds exceeding 30 mph to immediately have a functioning two-way end-of-train (EOT) or distributive power (DP) braking system.[7] HHFTs are limited to a maximum speed of 50 mph, and further limited to 40 mph while traveling within high-threat urban areas, unless all tank cars in the HHFT meet the enhanced tank car standards. By January 1, 2021, High Hazard Flammable Unit Trains (HHFUTs)[8] transporting one or more cars with a Packing Group I material at speeds exceeding 30 mph must be equipped with electronically controlled pneumatic (ECP) brakes. All other HHFUTs operating at speeds exceeding 30 mph must have ECP brakes installed by May 1, 2023.[9]

Improved Sampling/Testing Regime

Under existing DOT and TC regulations, shippers of hazardous materials must classify and describe the hazardous materials they offer for transportation.[10] Based on this classification, the shipper selects the appropriate packaging group and applies the relevant packing label. The New Rule requires shippers of unrefined petroleum products to implement a sampling and testing program to improve the classification process.[11] Each sampling and testing program must satisfy the following requirements (among others):

- materials must be sampled prior to their initial offering for transportation and again at any time that changes may affect the properties of the material;
- sampling methods must ensure that a representative sample is collected and must include quality control measures;
- testing methods should enable proper classification of the material under the HMRs and identify properties of the mixture relevant to packaging requirements; and
- the program should include criteria for its modification as well as duplicate sampling methods

or equivalent measures for quality assurance. After the shipper has properly classified the material, selected the appropriate packaging and applied the relevant packing label, it must certify that the material meets the requirements of the HMRs.[12]

Once the sampling and testing program is developed, it must be documented in writing and retained for as long as the program remains in effect, or a minimum of one year. The program must be reviewed at least annually and revised and/or updated as circumstances require. Program documentation must be accessible by authorized DOT officials upon request at a reasonable time and location.[13]

Routing and Notice Requirements

Routing

The existing HMRs require rail carriers transporting certain explosives, poisonous materials or radioactive substances to compile annual data on shipments of those materials. The data is used to analyze safety and security risks along the routes where those materials are transported. Rail carriers must then assess alternative routing options and select the route posing the least overall safety and security risk.[14] The New Rule adds HHFTs to the list of categories requiring enhanced analysis in route selection.[15]

Notice

On May 7, 2014, the DOT issued an emergency order (the Emergency Order) requiring railroads transporting one million gallons or more of Bakken crude on a single train to notify the State Emergency Response Commission (SERC) in each state where the train operated. Several months later, the DOT proposed regulations that, in essence, would have made permanent the requirements of the Emergency Order. Many commentators thought the one million gallon threshold was too lenient and that the new rule should cover all flammable liquids, not just Bakken shale-sourced crude oil. As a result, the DOT scrapped its proposed rule and replaced it with one that utilizes the existing regulatory framework. Under this framework, rail carriers are required to provide a railroad point of contact to specified state, local and tribal officials for information related to the movement of hazardous materials through their jurisdictions.[16] Despite the New Rule, the Emergency Order remains in full force and effect until further notice from the DOT.[17]

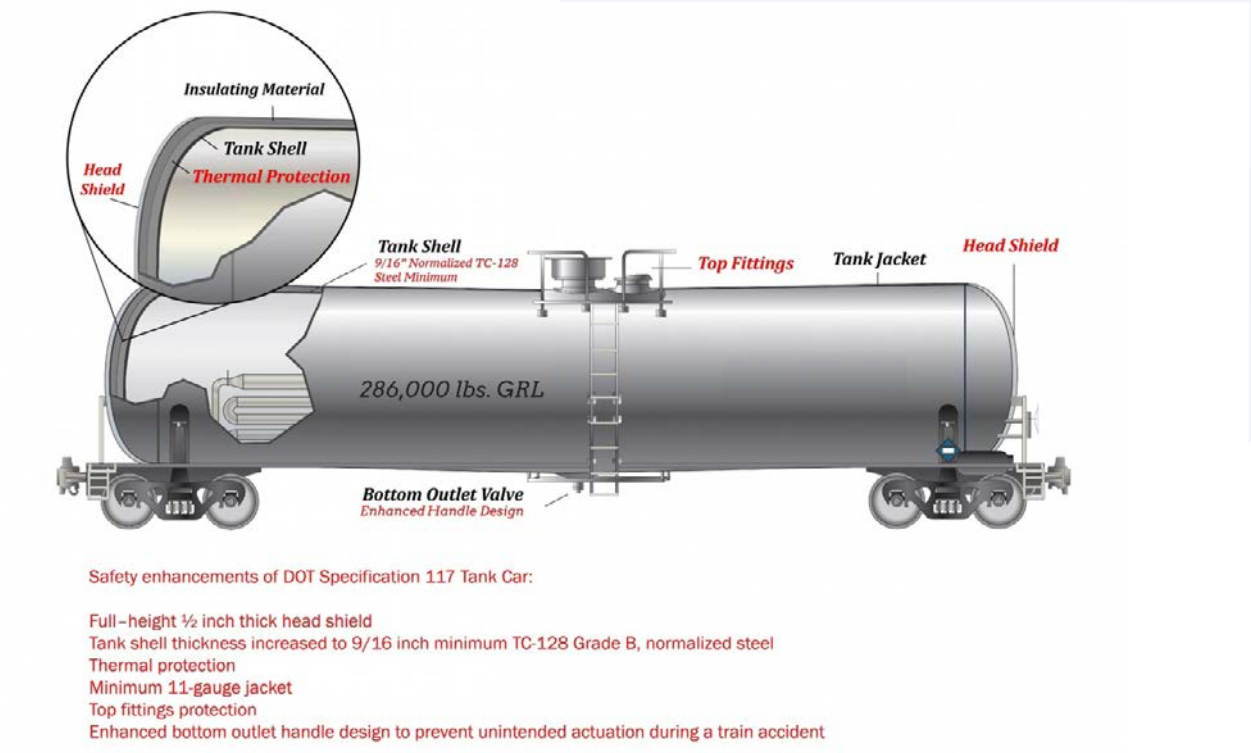
The following chart compares the U.S. and Canadian time frames for retrofitting tank cars transporting flammable liquids in those countries.[18]

Timeline for the Retrofit of Affected Tank Cars for Use in North American HHFTs

Tank Car Type/Service	U.S. Retrofit Deadline	Tank Car Type/Service	TC Retrofit Deadline
Non Jacketed DOT-111 tank cars in PG I service	(January 1, 2017) January 1, 2018	Non Jacketed DOT-111 tank cars in Crude Oil service	May 1, 2017
Jacketed DOT-111 tank cars in PG I service	March 1, 2018	Jacketed DOT-111 tank cars in Crude Oil service	March 1, 2018
Non Jacketed CPC-1232 tank cars in PG I service	April 1, 2020	Non Jacketed CPC-1232 tank cars in Crude Oil service	April 1, 2020
Non Jacketed DOT-111 tank cars in PG II service	May 1, 2023	Non Jacketed DOT-111 tank cars in Ethanol service	May 1, 2023
Jacketed DOT-111 tank cars in PG II service	May 1, 2023	Jacketed DOT-111 tank cars in Ethanol service	May 1, 2023
Non Jacketed CPC-1232 tank cars in PG II service	July 1, 2023	Non Jacketed CPC-1232 tank cars in Ethanol service	July 1, 2023
Jacketed CPC-1232 tank cars in PG I and PG II service and all remaining tank cars carrying PG III materials in an HHFT (pressure relief valve and valve handles)	May 1, 2025	Jacketed CPC-1232 tank cars in Crude and Ethanol service and all remaining tank cars carrying PG III materials (pressure relief valve and valve handles)	May 1, 2025

Affected Entities and Requirements[19]	
Adopted Requirement	**Affected Entity**
Enhanced Standards for Both New and Existing Tank Cars Used in HHFTs • New tank cars constructed after October 1, 2015 are required to meet enhanced DOT Specification 117 design or performance criteria. • Existing tank cars must be retrofitted in accordance with the DOT-prescribed retrofit design or performance standard. • Retrofits must be completed based on a prescriptive retrofit schedule; a retrofit reporting requirement is triggered if initial milestone is not achieved.	Tank Car Manufacturers, Tank Car Owners, Shippers/Offerors and Rail Carriers
More Accurate Classification of Unrefined Petroleum-Based Products Develop and carry out sampling and testing program for all unrefined petroleum-based products, such as crude oil, to address: (1) Frequency of sampling and testing that accounts for any appreciable variability of the material; (2) Sampling prior to the initial offering of the material for transportation and when changes occur that may affect the properties of the material; (3) Sampling methods that ensure a representative sample of the entire mixture, as offered, is collected; (4) Testing methods that enable classification of the material under the HMR; (5) Quality control measures for sample frequencies; (6) Duplicate samples or equivalent measures for quality assurance; (7) Criteria for modifying the sampling and testing program; and (8) Testing or other appropriate methods used to identify properties of the mixture relevant to packaging requirements. • Certify that program is in place, document the testing and sampling program outcomes, and make information available to DOT personnel upon request.	Offerors/Shippers of Unrefined Petroleum-Based Products
Rail Routing - Risk Assessment • Perform a routing analysis that considers, at a minimum, 27 safety and security factors and select a route based on its findings. These planning requirements are prescribed in 49 CFR § 172.820. **Rail Routing - Notification** • Ensure that railroads notify state and/or regional fusion centers and state, local and tribal officials who contact a railroad to discuss routing decisions are provided appropriate contact information for the railroad in order to request information related to the routing of hazardous materials through their jurisdictions. This replaces the proposed requirements to notify state Emergency Response Commissions (SERCs) or other appropriate state-delegated entity about the operation of these trains through their states.	Rail Carriers, Emergency Responders
Reduced Operating Speeds • Restrict all HHFTs to 50 mph in all areas. • Require HHFTs that contain any tank cars not meeting the enhanced tank car standards required by this rule operate at a 40 mph speed restriction in high-threat urban areas.	Rail Carriers
Enhanced Braking • Require HHFTs to have in place a functioning two-way end-of-train (EOT) device or a distributed power (DP) braking system. • Require trains meeting the definition of a “high-hazard flammable unit train” (HHFUT) be operated with an electronically controlled pneumatic (ECP) braking system by January 1, 2021 when transporting one or more tank cars loaded with a Packing Group I flammable liquid. • Require trains meeting the definition of an HHFUT be operated with an ECP braking system by May 1, 2023 when transporting one or more tank cars loaded with a Packing Group II or III flammable liquid.	Rail Carriers

DOT 117 Specification Car



Safety enhancements of DOT Specification 117 Tank Car:

Full-height ½ inch thick head shield
Tank shell thickness increased to 9/16 inch minimum TC-128 Grade B, normalized steel
Thermal protection
Minimum 11-gauge jacket
Top fittings protection
Enhanced bottom outlet handle design to prevent unintended actuation during a train accident

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[1] An HHFT is "a single train transporting 20 or more loaded tank cars of a Class 3 flammable liquid in a continuous block or a single train carrying 35 or more loaded tank cars of a Class 3 flammable liquid throughout the train." 49 CFR § 171.8.

[2] As defined in the HMRs and *Transportation of Dangerous Goods Regulations*.

[3] 49 CFR §§ 173.241(a), 173.242(a), 173.243(a); *Transportation of Dangerous Goods Regulations,* SOR/2015-100, §§ 5.14, 5.15.

[4] As mentioned above, the U.S. and Canadian implementation timetables are not identical.

[5] 49 CFR § 179.202(4)-(8); *Transportation of Dangerous Goods Regulations*, SOR/2015-100, § 5.15.9.

[6] Transport Canada has indicated that it will issue new braking regulations in a future rule.

[7] 49 CFR § 174.310(3).

[8] Defined in 49 CFR § 171.8 as "a single train transporting 70 or more loaded tank cars containing Class 3 flammable liquid."

[9] 49 CFR § 179.202-10(a), (b).

[10] 49 CFR § 173.22a(a); *Transportation of Dangerous Goods Regulations*, SOR/2015-100, §§ 2.2, 3.1.

[11] 49 CFR § 173.41(a); *Transportation of Dangerous Goods Regulations*, SOR/2015-100, § 2.2.1.

[12] 49 CFR § 173.41(b); *Transportation of Dangerous Goods Regulations*, SOR/2015-100, § 3.6.1.

[13] 49 CFR § 173.41(c), (d); *Transportation of Dangerous Goods Regulations,* SOR/2015-100, § 2.2.1.

[14] 49 CFR § 172.820(b), (c), (e); *Railway Safety Management System Regulations, 2015*, SOR/2015-26, §§ 13, 15.

[15] 49 CFR § 172.820(a)(4).

[16] 49 CFR § 172.820(g); *Transportation of Dangerous Goods Regulations*, SOR/2015-100, § 7.2.

[17] "PHMSA Notice regarding Emergency Response Notifications for Shipments of Petroleum Crude Oil by Rail" dated May 28, 2015 available at http://phmsa.dot.gov/hazmat/phmsa-notice-regarding-emergency-response-notifications-for-shipments-of-petroleum-crude-oil-by-rail.

[18] Source:"Rule Summary: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains." Department of Transportation, 01 May 2015, available at http://www.tra nsportation.gov/mission/safety/rail-rule-summary.

[19] Source: "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains." pp. 10-11, 01 May 2015, available at http://www.transportation.gov/sites/dot.gov/files/docs/final-rule-flammable-liquids-by-rail_0.pdf.

UK Ratifies Cape Town Convention and Aircraft Protocol—Effective November 1, 2015

On 26 March 2015 The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the **Regulations**) were laid before the UK Parliament, marking the commencement of the final administrative steps to ratify the Convention on International Interests in Mobile Equipment (the **Convention**) and the Protocol thereto on Matters Specific to Aircraft Equipment (the **Protocol**) in the United Kingdom.

The Convention and Protocol will, in accordance with Article XXVIII of the Protocol, enter into force in the UK on 1 November 2015 being the first day of the month following the expiration of three months after the date of the deposit of the instrument of ratification with UNIDROIT. The instrument was deposited with UNIDROIT on 27 July 2015 by the Justice and Home Affairs Counsellor at the British Embassy in Rome.

Following last year's consultation, the Department of Business, Innovation and Skills (**BIS**) published its response to the consultation and the draft regulations at the beginning of March. The draft regulations were the subject of only minor amendments to clarify that the *lex situs* provisions of regulation 6(3) of the Regulations applied in relation to contracts of sale as well as international interests. (See *Lex Situs* below.)

Key Points

Alternative A

The UK has decided to adopt the Alternative A insolvency regime with a 60-day waiting period—this is consistent with other countries and is the standard emerging for the ASU's qualifying declarations required to obtain a discount on the premium charged by Export Credit Agency-backed financing. As noted in Another Hurdle Cleared on the Path to Ratification—The UK and the Cape Town Convention and Aircraft Protocol,[1] the discount for UK airlines is normally restricted due to the unwritten "Home Country Rule", though there have been exceptions to this Rule[2] and it remains to be seen if the UK will be included on the OECD's list for the discount, which requires compliance with many of the qualifying declarations.

The ability to make certain of the declarations, though not necessarily all of those affecting the UK's inclusion in the OECD's list, is restricted due to the UK's membership of the European Union. (See footnote 3 below and EU Implications on Cape Town Convention Implementation in the UK.)[3]

Even if the OECD discount is not available, the adoption of Alternative A should lead to a more favourable view of the UK by financiers which may additionally lead to more favourable rates on financings that do not have Export Credit Agency backing.

The consultation posed the question on the necessity of adopting Alternative A, given the UK's relatively robust insolvency regime. However, the UK Government considers that aircraft may be considered to be "unique assets."

> Aircraft objects regularly cross borders and a creditor cannot be sure in which jurisdiction an aircraft object will be located should an insolvency event occur and therefore how easy or difficult it will be to recover that object.[4]

Accordingly, and noting the economic benefits that may be obtained by the aviation industry, the Regulations provide for the adoption of Alternative A.[5]

The Mortgage Register and IDERAs

The UK Civil Aviation Authority (the CAA) will continue to operate the UK National Register of Aircraft Mortgages, and pre-existing interests will retain their priority without any requirement to make retroactive registrations on the International Registry. Regulation 22 provides for the implementation of irrevocable de-registration and export request authorisations (IDERAs) and that the CAA is the registry authority in relation to the use by a creditor of an IDERA. In this regard, the Air Navigation Order 2009 was amended to give the CAA power to de-register an aircraft pursuant to a properly presented IDERA. The CAA may refuse to export an aircraft on safety grounds.[6]

Relief but not speedy relief

The Regulations also permit self-help remedies without leave of court but did not provide for "speedy" relief through the courts as contemplated by Article 13 of the Convention; however, the Regulations provided that the "relief" afforded by that Article would be available to creditors. According to the Response, many stakeholders had suggested that "speedy" should be defined:

> [I]n respect of the remedies specified in (i) article 13(1)(a)-(c) of the Convention inclusive, as the number of working

days which are not more than ten (10) calendar days, and (ii) article 13(1)(d)-(e) of the Convention, inclusive, as the number of working days which are not more than thirty (30) calendar days.[7]

The UK Government felt that providing for "speedy" relief was unnecessary particularly as they were "not aware of any evidence that the courts are slow in providing interim relief to creditors whilst a claim is being considered."[8]

Non-consensual rights

Those non-consensual rights which currently have priority over a mortgage-type interest under English law will continue to have priority following ratification, without any requirement for registration on the International Registry.

Statutory detention rights, including those arising for unpaid airport charges, unpaid air navigation charges and unpaid amounts relating to the European Union Emissions Trading Scheme, will all be retained. Many stakeholders, including the Aviation Working Group, presented arguments to BIS that the opportunity should be taken to end the availability of the "fleet-wide" lien for unpaid charges, which is at odds with most other Member States of the EU.

Eurocontrol's submission that "effective detention powers ensure that the level playing field between operators is sustained and that good operators do not subsidise bad ones" may be valid but the Response does not address the fact that the playing field is not level when it comes to the detention powers available across the Member States. For aircraft owners and financiers, the fleet-wide lien is a real risk arising in relation to operations of the underlying assets to and from the UK. The opportunity to bring the detention powers in line with other Member States has been missed.

Lex Situs

Regulation 6(3) of the Regulations clarifies that, where an international interest is validly created (or where a contract of sale is validly created)[9] in accordance with the conditions set out in the Convention and the Protocol, no reference need be made as to whether it has been validly created or transferred pursuant to the common law *lex situs* rule.

This effectively ends the concerns arising from *Blue Sky*[10] in relation to the valid creation of mortgage interests or valid transfer of title in relation to aircraft objects that are covered by the Convention and the Protocol but in relation to English law mortgages granted, or bills of sale executed, by debtors that are not located in Contracting States or in relation to aircraft objects that are not registered in Contracting States questions of validity will still arise.

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1 This article can be found in the April 2014 *Vedder Price Global Transportation Finance Newsletter*.

2 British Airways obtained Euler Hermes' (the German ECA) support for its JOLCO transaction for an Airbus A380 in September 2013. Additionally, the Rule does not apply to, amongst others, Embraer or Bombardier aircraft.

3 This article can be found in the April 2014 *Vedder Price Global Transportation Finance Newsletter*.

4 Ratification of the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Response to Consultation on Options on Implementation (March 2015) (the Response).

5 As the UK is a member of the European Union, the UK is unable to make a declaration in relation to Article XI of the Protocol which relates to the selection of Alternative A, as its rules governing insolvency are subject to Council Regulation (EC) No. 1346/2000 of 20 May 2000 on insolvency proceedings. The UK was, however, able to amend its domestic insolvency laws to bring them in line with Alternative A. The Regulations achieve this by repeating Alternative A and stating that its provisions apply to aircraft objects, amending the relevant provisions of the Insolvency Act 1986 (regulation 37 of the Regulations).

6 There is some debate as to whether aviation authorities are able to refuse permission to de-register an aircraft on the grounds of safety. In "*De-registration and Export Remedies under the Cape Town Convention*" (Gerber and Walton, *Cape Town Convention Journal*, November 2014), the authors have explored this in more detail but note that the *Official Commentary to the Cape Town Convention* (Goode, 3rd edn UNIDROIT 2013) states that the safety laws and regulations "will normally be applicable only to export and physical delivery, not to de-registration" (emphasis added by Gerber and Walton).

7 Paragraph 42 of the Response.

8 Paragraph 44 of the Response.

9 Regulation 38 of the Regulations.

10 *Blue Sky & Others v. Mahan Air* [2009] EWHC (Comm), [2010] EWHC 631 (Comm).

Sanctions Regimes and Shipping Finance

The United States, the European Union and the United Nations have a long-standing practice of imposing sanctions to achieve diplomatic/political objectives. This is evidenced by the sanctions imposed against Cuba, North Korea, Sudan, Syria, Egypt, Libya, Iran, Russia and Ukraine, among others. However, over the last decade and, in particular during the last five years, the United States has increasingly made international economic sanctions regimes a centerpiece of its foreign policy arsenal, whilst the EU has used them as a tool to promote the objectives of the Common Foreign and Security Policy. Both U.S. and EU sanctions regimes are consistently subject to frequent amendments and expansions such as those against Syria and Iran and introductions of more recent regimes such as those against Russia and Ukraine.

Sanctions are of particular relevance to the shipping industry. Not only does shipping's close affiliation with the energy sector expose it to a variety of oil, petroleum and gas trade prohibitions, the industry has also been the direct target of specific sanctions imposed by both the United States and the EU.[1] Furthermore, because of the international nature of the shipping industry, shipping transactions will often be subject to multiple sanctions regimes. For example, a shipowner incorporated in one jurisdiction may be based and operate out of another; its lending banks will often be based in other jurisdictions; its vessel insurers in yet other jurisdictions; and its vessels will trade worldwide with charterers, sub-charterers and shippers similarly based around the globe, trading different cargoes and sailing diverse routes. In an international transaction such as this, a diligent shipowner will often face the complicated task of complying with overlapping (but not necessarily identical) sanctions regimes imposed by multiple jurisdictions, some of which may purport to have extraterritorial effect.[2]

A breach of an applicable sanctions regime by the owner or his charterers can have wide-ranging consequences, and not only for the shipowner. The lending banks and insurers may by extension be caught up in the breach for (directly or indirectly) facilitating or financing the breach. As a consequence, most insurance policies will now contain exclusions and/or sanctions cancellation clauses voiding the policy if there is a sanctions-related breach. Lending banks have sought to protect themselves by conducting extended know-your-customer due diligence exercises on the owner/group entities participating in the project that they are financing and by introducing specific sanction wording into their loan agreements.

Due Diligence Checks

Lending banks perform know-your-customer due diligence checks that primarily involve confirming that entities participating in a financing (as well as their directors, officers and beneficial owners) are not on publicly available sanctions lists. Below is a brief summary of certain of these lists as well as a link to their URLs.

- **EU Consolidated List:** A list published by the European Union Credit Sector Federations of individuals and companies that are subject to EU Common Foreign and Security Policy-related sanctions. http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm
- **UK Consolidated List:** A list published by Her Majesty's Treasury of the United Kingdom of individuals and companies that are subject to international sanctions in effect in the UK. https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets
- **OFAC Specially Designated Nationals List:** A list published by the Office of Foreign Asset Control of the United States Department of Treasury (OFAC) of individuals and companies that are owned or controlled by, or acting on behalf of, targeted countries, as well as groups and entities, including terrorists and drug traffickers, designated under programs that are not country specific. http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx
- **OFAC Foreign Sanctions Evaders List:** A list published by OFAC of foreign individuals and companies that have violated U.S. sanctions on Syria and Iran, as well as foreign individuals and companies that have facilitated deceptive transactions on behalf of persons or companies subject to U.S. sanctions. http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/fse_list.aspx
- **BIS Denied Persons List:** A list published by the Bureau of Industry and Security of the United States Department of Commerce (BIS) of individuals and

companies that have been denied export privileges. http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/denied-persons-list

- **BIS Entity List:** A list published by BIS of individuals and companies that are prohibited from receiving items subject to U.S. export regulations unless the exporter secures a license. http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list (click on Supplement 4 to Part 744)
- **BIS Unverified List:** A list published by BIS of individuals and companies that are ineligible to receive items subject to U.S. export regulations by means of license exceptions. http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/unverified-list (click on Supplement 6 to Part 744)

Sanctions Clauses

Historically, banks and other financiers have sought to protect themselves from sanctions exposure by including provisions in their loan documentation that (i) require the borrower to continue to comply with all applicable laws and regulations and (ii) trigger a mandatory prepayment if the making of the loan by the lender becomes illegal as a result of a change of law. Financiers have increasingly viewed these standard provisions as insufficient in dealing with their sanctions-related concerns, which include the following:

- ensuring that neither the borrower nor any of its beneficial owners is a prohibited or designated person or acting on behalf of a prohibited or designated person;
- ensuring that the borrower (and, by extension, any person to whom it may charter the vessel), complies with sanctions that are applicable to it and its business;
- ensuring that the borrower's business will not result in the financier violating any sanctions regime applicable to the financier; and
- ensuring that the financing itself is not otherwise facilitating or being utilised for the benefit of a sanctioned activity.

Financiers' concerns have been heightened in this regard as a result of recent well-publicized instances where heavy fines were imposed against financial institutions for sanctions-related violations,[3] as well as the spectre of being unable to access the U.S. banking system (a penalty imposed by the U.S. sanctions regimes).

As a result of the evolving nature of sanctions regimes and these heightened concerns, financiers have started to adopt a more thorough documentary approach to protect themselves against sanctions-related risks in an effort to ensure that they have an effective mechanism in the documentation to exit a transaction if any of these concerns results in sanctions exposure. In syndicated financing transactions, these concerns can be heavily compounded as a result of the impact of varying sanctions regimes applicable to the syndicate banks. These varying regimes when coupled with each individual banks' internal policy requirements, which are often more stringent and restrictive than the requirements of the relevant sanctions, add a layer of complexity to the negotiation of loan documentation. From a borrower's perspective, this often results in being subject to contractual prohibitions that go beyond prohibitions imposed by law on the borrower.

Due to the transitional nature of sanctions and the competing concerns of the parties to ship financing transactions, it has not yet been possible to generate a set of standard sanctions provisions that alleviate the concerns of financiers and give shipowners sufficient comfort that they may carry out their intended business without having to devote resources to monitor compliance with sanctions regimes that, absent the financing, would not apply to the shipowner. While "one size fits all" sanctions provisions may never be feasible, in general, the considerations in reaching the documentary standard for any given ship financing transaction are largely the same:

- which jurisdictions are relevant to the transaction? The jurisdictions of the bank(s), the borrower, the charterer, any sub-charterer;
- the ownership structure of the ship;
- the voyage route(s) of the ship (if known);
- the currency of the loan (in broad terms, any U.S. dollar transactions passing through the U.S. banking system may be at risk of being frozen if they can be traced to Specifically Designated Nationals under the applicable U.S. legislation[4]);
- the type of vessel being financed (there are specific sanctions restrictions for certain types of ships, e.g., oil and petrochemical tankers operated in connection with Iranian energy products, or cruise ships visiting Crimea); and

- what are the chartering and sub-chartering arrangements? The financier's approach in negotiating sanctions covenants may be affected to the extent there are specific covenants in the shipowner's chartering arrangements that alleviate some of its concerns.

Shipowners and financiers should consider these factors in determining the sanctions regimes and corresponding restrictions and prohibitions applicable to a transaction, thereby facilitating the negotiation and drafting of workable bespoke sanctions provisions.

Screening Technology

Certain maritime tracking, monitoring and security software service providers have recently developed and introduced new services that attempt to address the challenges posed by sanctions regimes. Broadly speaking, these service providers offer technology that automatically checks global sanctions lists to screen vessels for compliance, revealing a ship's and its associates' current and past exposure to sanctions risks. Financiers have begun to take advantage of these services to run sanctions checks both prior to entering into, and during the pendency of, a transaction. Certain financiers have begun to incorporate screening technology requirements into their loan documentation that require checks either periodically or on the financier's demand throughout the term of the loan. From a shipowner's perspective, accommodating a financier's request to build screening technology requirements into the loan documentation may provide additional negotiating strength to more narrowly tailor the sanctions' covenants and representations.

Conclusion

International sanctions will continue to play a formidable role in the international political landscape. As mentioned, new sanctions regimes are frequently added, existing regimes are amended and others are eased or even lifted. Examples include (i) the recent relaxation of the U.S. embargo against Cuba, (ii) the possible lifting of sanctions against Iran if a deal on Iran's nuclear capabilities can be reached and (iii) the recent extension of the EU's sanctions against Russia for another year. As a consequence of the dynamic nature of sanctions legislation and its variable application, the negotiation of sanctions clauses in shipping transactions will likely remain an exercise conducted on a bespoke basis taking into account the factual matrix relevant to the transaction, where the lenders endeavor to balance their concerns and requirements with the commercial interests of the shipowner/borrower to, as far and freely as possible, undertake its intended legitimate business.

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1 Both the United States and the EU have imposed industry-specific sanctions against Iran. The EU, for example, has imposed EU Regulation 267/2012 (as amended), which prohibits the making available of vessels designed for the transport or storage of oil and petrochemical products to an Iranian person and also the provision, directly or indirectly, of financing or financial assistance, including financial derivatives, as well as insurance and re-insurance related to the import, purchase or transport of crude oil and petroleum products of Iranian origin or that have been imported from Iran.

2 The United States has increasingly sought to subject their sanctions regimes to extra-territorial effect. To the contrary, the EU has rejected such extra-territorial effect of non-EU sanctions (Council Regulation (EC) No. 2271/96).

3 In March of this year, Commerzbank AG was fined US$1.45bn for violating sanctions against Iran and Sudan. In May, BNP Paribas S.A. was fined US$8.9bn for violating sanctions against Sudan, Cuba and Iran.

4 See OFAC Regulations for the Financial Community, January 2012, Department of Treasury.

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