



VedderPrice

Global Transportation Finance Newsletter

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Vedder Price PC. is affiliated with Vedder Price LLP, which operates in England and Wales, Vedder Price (CA), LLP, which operates in California, and Vedder Price Pte. Ltd., which operates in Singapore.



January 4, 1970 – October 8, 2022
 In Memory of Our Friend and Colleague
Jordan R. Labkon



Vedder Price Global Transportation Finance

Judicial Sale of Ships: The Beijing Convention

In June 2022, the United Nations Commission on International Trade Law (**UNCITRAL**) approved the final draft of the Convention on the Judicial Sale of Ships produced by UNCITRAL's Working Group VI and simultaneously recommended its adoption by the General Assembly of the United Nations at its upcoming 77th session to be held in New York, New York, beginning on September 13, 2022. UNCITRAL further recommended that the General Assembly authorize a signing ceremony to be held "as soon as practicable" in 2023 in Beijing, and that the Convention be thereafter known as the "Beijing Convention on the Judicial Sale of Ships" (the "**Convention**" or "**Beijing Convention**").¹

If adopted by the General Assembly, and ratified by the requisite number of UN member states, the Convention will introduce important legal protections for innocent purchasers of ships sold by judicial sale, while leaving unaffected the separate stakeholder interests of shipowners and creditors involved in the judicial sales process. This article will trace the background of judicial sales and the current unmet need for comity between nations with respect thereto. It also will discuss the protections envisioned by the Convention and how those protections might affect the judicial sale of ships in the United States.

A. Background on the Judicial Sale of Ships

The arrest and judicial sale of ships to foreclose upon preferred ship mortgage liens, maritime liens and maritime claims comprise a fundamental feature of admiralty and maritime law practice worldwide. In the United States, the procedure is largely informed by the Commercial Instruments and Maritime Liens Act ("**CIMLA**"),² the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions (the "**Supplemental Rules**"), the local admiralty rules of the federal district courts, and judicial precedent.³

In the United States, a preferred ship mortgage⁴ constitutes "a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel."⁵ Upon default of any term of the mortgage, the mortgagee may commence an action *in rem* against the vessel in a U.S. federal district court, regardless of whether the vessel is a U.S. documented vessel or a foreign flag vessel.⁶ When a vessel is sold by order of a district court in a civil action *in rem* brought to enforce a preferred mortgage lien or a maritime lien, "any claim in the vessel existing on the date of sale is terminated, including a possessory common law lien . . . , and the vessel is sold free of all those claims."⁷

Russia Sanctions Overview

The Global Transportation Finance team of Vedder Price has been at the forefront of updating our clients with the events affecting our industry as a result of the Ukraine-Russia war. We have included our latest update we recently shared with our friends and clients. If you have any questions on how the Russia sanctions may be affecting your company, do not hesitate to contact our Global Transportation Finance attorneys.

[OFAC Issues Preliminary Guidance on Safe Harbor for Maritime Services if Russian Oil is Sold at or Below Price Cap](#)

Past Updates:

[BIS Revokes AVS License Exception for Belarusian Air Carriers; Updates List of Aircraft Reexported to Russia and Belarus in Violation of Licensing Requirements](#)

[EU Releases Fifth Round of Russian Sanctions: Impacts for Aviation and Maritime](#)

[BIS Issues Administrative Orders Temporarily Denying Export Privileges of Three Russian Air Carriers](#)

[BIS Identification of Aircraft Reexported to Russia in Violation of Russia-Belarus Licensing Policy](#)

[Memorandum of Russia Sanctions for the Aviation and Maritime Industries](#)

[International Sanctions Widen as Ukraine Crisis Deepens](#)

Edward K. Gross co-authored the article "[Cloud 9...and 2A...and 12](#)" in the October issue of *Equipment Leasing & Finance*. In the article, he discusses the American Law Institute and the Uniform Laws Commission's approval of the project on the Uniform Commercial Code and Emerging Technologies and the most significant changes for equipment finance practitioners that will come out of it.

John F. Imhof Jr. recently published a chapter on ship finance in the [Marshall Islands in Lexology's Getting the Deal Through – Ship Finance 2022](#). In the latest volume of the series of annual reports that provide analysis in key areas of international ship finance law and policy, John writes about vessel registration, preferred vessel mortgages, mortgage transfers and enforcement, finance charters, maritime liens, non-vessel collateral, insolvency and much more.

The Supplemental Rules provide that an action may be brought against a vessel *in rem* “to enforce any maritime lien” or whenever a U.S. statute “provides for a maritime action *in rem*.”⁸ Whether the vessel is sold at judicial auction by interlocutory sale or final judgment sale, the U.S. Marshal typically conducts the sale pursuant to an order of the court having jurisdiction over the vessel.⁹ Upon completion of the auction, and in accordance with the terms of the order, the U.S. Marshal will issue a CG-1356 bill of sale to an otherwise qualified purchaser, whose winning bid is confirmed by the court.¹⁰

The judicial sale of a vessel in an *in rem* action brought in a U.S. district court effectively transfers title to the auctioned vessel to the buyer, free and clear of all pre-existing liens, mortgages and claims.

The process of transferring title and removing existing encumbrances through *in rem* procedures is relatively simple in the United States whenever U.S. documented vessels are involved. For example, where a judicial sale of a U.S. documented vessel occurs within or without the United States, the purchaser simply files with the U.S. Coast Guard’s National Vessel Documentation Center a certified copy of the relevant court order,¹¹ and that is sufficient to establish the passage of title. Similarly, pre-existing encumbrances against a U.S. documented vessel sold at judicial auction by a U.S. district court will be removed from the vessel’s official record upon the filing of an order issued by the court and certified by an official of the court “requiring the free and clear sale of the vessel,” together with a certified copy of the confirmation order.¹² Similar provisions can be found in the maritime laws of Liberia¹³ and the Marshall Islands,¹⁴ which are based upon U.S. law.

B. The Goldfish Decision

Reliance upon these principles is of critical importance to a successful judicial auction process by courts throughout the world, particularly in cross-border situations where the ship registry and auctioning court are in different jurisdictions. If potential purchasers are uncertain that the transfer of good and marketable title by the auctioning court will be accepted by courts in other port states, or that the vessel’s flag state will recognize the transfer of title for deletion purposes, then it seems inevitable that sale prices will soften or evaporate to reflect such uncertainties, to the detriment of all concerned.

In recent years, the international maritime community has witnessed several well-publicized cases in which the judicial sale of a vessel failed of its essential purpose, either because of challenges to the auctioning court’s ability to transfer title, the purchaser’s inability to delete the vessel from her flag state registry in order to reregister the ship in a different jurisdiction, or uncertainties regarding the survival of pre-existing liens and encumbrances against the ship.¹⁵ One such case, *Goldfish Shipping, S.A. v. HSH Nordbank AG*,¹⁶ was discussed at length by Frank Nolan in a 2011 issue of this newsletter.¹⁷

In *Goldfish Shipping*, a bank commenced an *in rem* admiralty action in the U.S. federal district court in Philadelphia to foreclose upon a preferred mortgage lien that it held against the defendant, a Turkish flag vessel named AHMET BEY. The vessel was arrested under traditional *in rem* process and later sold by the court following judgment pursuant to an order of sale. The purchaser of the vessel received a bill of sale from the U.S. Marshal in the usual form which, together with the sale order, effectively transferred title to the vessel free and clear of all pre-existing liens, claims and encumbrances as a matter of U.S. law.

The story did not end there.

The purchaser provisionally registered the vessel in Panama and began commercial operations as the new owner. Upon arrival of the ship in Spain, however, the former owner arrested her, claiming that it still owned the vessel because, under Turkish law, the vessel could not be sold by public auction outside of Turkey. To make matters more complicated, the vessel had not been deleted from the Turkish registry and could not be deleted unless the mortgagee first released its mortgage. However, the mortgagee (the arresting party in Philadelphia) would not release its mortgage on the grounds that doing so would compromise its deficiency claim against the former owner.

After freeing the ship from arrest in Spain, the new owner sailed her to Italy where the former owner re-arrested her. Although the new owner successfully freed the ship from arrest once

Edward K. Gross recently published “Anticipated Changes to Commercial Law Should Make It Easier to Do Deals Digitally” in the current issue of the *Equipment Leasing & Finance Foundation’s Journal of Equipment Lease Financing* (vol. 30, no. 2, Summer 2022). In the article, Eddie discusses the Uniform Commercial Code (UCC), the core commercial law that impacts how equipment financings and leases are structured, documented, enforced and traded in capital markets transactions across the 50 states, and amendments being made to it. The amendments, which could become effective as soon as 2025, cover certain fundamental equipment finance-related matters as well as a new set of commercial laws regarding digital assets and transactions.

Edward K. Gross recently co-authored “Leases” in the Fall 2022 edition of *The Business Lawyer*. The survey covers several 2021 cases involving disputes among parties to equipment leases or other personal property financings and cases involving third parties claiming to have related rights or interests. The courts in these cases considered many of the fundamental issues often raised by parties and others when litigating commercial enforcement, bankruptcy protections and other claimed rights, including the associated rights and interests and liability considerations relating to these leases and financings.

To read “Leases” in its entirety, download the PDF [here](#)

Honors & Awards



Vedder Price is Recognized in Multiple Deal of the Year Awards at Airline Economics Aviation 100 Asia-Pacific Awards 2022

We are pleased to announce that the firm played a key role in advising clients in three transactions that were recognized by Airline Economics at its annual “Aviation 100 Asia-Pacific Deals of the Year Awards,” which recognize the foremost aviation finance transactions in the Asia-Pacific region.

Vedder Price was recognized in the following categories:

Asia-Pacific Supported Finance Deal of the Year

Vedder Price represented BNP Paribas, Singapore, in connection with the AFIC-supported financing of two Boeing 737 MAX 9s for AerDragon on operating leases to Aeromexico. The Vedder Price team consisted of **Ji Woon Kim** and **Benavon Lee**.

again, it was facing the prospect of constant harassment and misconduct instigated by the former owner. Accordingly, the purchaser sued the mortgagee for failure to release its mortgage. The basis of the purchaser's claim was that although the judicial sale cleansed the vessel of pre-existing liens and encumbrances, it did not eliminate the owner's claim of ownership, a position that the court quickly rejected based upon its reading of CIMLA and judicial precedent. After various legal skirmishes in the district court in which the mortgagee prevailed, the case was heard by the federal appellate court, which also sided with the mortgagee.

C. The Beijing Convention

The Convention, consisting of 24 Articles and two corresponding annexes (Annex I and Annex II), "governs the international effects of a judicial sale of a ship that confers clean title on the purchaser."¹⁸ It is built around the aspirational premise that "adequate legal protection for purchasers may positively impact the price realized at judicial sales of ships, to the benefit of both shipowners and creditors, including lienholders and ship financiers."¹⁹ The goal of the Convention is the establishment of uniform rules "that promote the dissemination of information on prospective judicial sales to interested parties and give international effects to judicial sales of ships sold free and clear of any mortgage or *hypothèque* and of any charge."²⁰

Under the Convention, the expression "judicial sale" of a ship means any sale of a ship: "(i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty²¹ carried out under the supervision and with the approval of a court; and (ii) For which the proceeds of sale are made available to the creditors."²² In the United States, an admiralty sale *in rem* would clearly qualify as a "judicial sale" for purposes of the Convention. A private sale conducted without judicial intervention would not. Nor would a private sale conducted under supervision of a U.S. federal court, pursuant to the Judicial Sales Act,²³ if the proceeds of such private sale are not otherwise made available to creditors.

The Convention applies to the judicial sale of a ship only if: "(a) The judicial sale is conducted in a State Party; and (b) The ship is physically within the territory of the State of judicial sale at the time of that sale."²⁴ If the United States does not accede to the Convention by becoming a party, the Convention will not apply to judicial sales conducted within the United States. If the United States does accede to the Convention, the Convention will apply to admiralty sales *in rem*, but it is presently unclear whether it will apply to vessel sales approved by U.S. bankruptcy courts when the vessel is located without the United States at the time of sale.

As a general rule, the Convention respects the laws of the "State of judicial sale"²⁵ and expressly states that the judicial sale "shall be conducted in accordance with the law of the State of judicial sale."²⁶ However, as the key to the effective functioning of the Convention is the issuance of a "certificate of judicial sale" by the State of judicial sale, local laws must incorporate or allow for certain provisions and requirements of the Convention, including those dealing specifically with the notice of judicial sale. Under the Convention, a certificate of judicial sale may be issued only if the notice requirements set forth in the Convention are met. Those requirements cover much territory, including the persons to whom notice must be given (including address requirements), the contents of the notice, publication of the notice, transmission of the notice to the "repository,"²⁷ and translation(s) of the notice.²⁸

The laws of the United States governing the judicial sale of ships, as currently constituted, do not require the detailed notice requirements contemplated by the Convention. Under CIMLA, notice of a civil action to arrest a vessel must be given to the master of the vessel, the holder of any recorded notice of claim of lien against the vessel, and the mortgagee of the vessel.²⁹ However, there are no specific notice requirements with respect to the judicial sale of vessels, other than those contained in the local admiralty rules of the auctioning court (which vary as between such courts) and the specific requirements contained in the order of sale issued by such court.³⁰

As mentioned above, the key to the Convention is the so-called "certificate of judicial sale," which is issued to the purchaser of the vessel. This document must be issued by the court or other public authority that conducted the sale conferring clean title to the ship, following completion of the sale.³¹ The certificate must be substantially in the form of the template attached as Annex II to the Convention and must contain 11 different elements and averments, as set forth in the Convention.³² The State of judicial sale must transmit the certificate to the repository.³³ Subject to certain limited exceptions, discussed below, the certificate of judicial sale will constitute "sufficient evidence of the matters contained therein."³⁴

Asia-Pacific Editor's Deal of the Year

Vedder Price represented the Export-Import Bank of the United States (EXIM Bank) in connection with the EXIM Bank-supported refinancing facility for Korean Air Lines. The Vedder Price team consisted of **Jeffrey T. Veber, Ji Woon Kim, Justine L. Chilvers, Mie Miura and Benavon Lee**.

Asia-Pacific Lease Deal of the Year

Vedder Price represented Castlake on a sale and leaseback transaction of two Boeing 787-800 and two Boeing 787-900 aircraft with award-winning low cost carrier Scoot. The Vedder Price team consisted of **Bill Gibson, Greg Whillis and Benavon Lee**.



Vedder Price Distinguished in The Legal 500 UK 2023

The Legal 500 UK 2023 recognized Vedder Price's Global Transportation Finance London team as Top-Tier Firm/Tier 2 in Transport Finance and Leasing.

Gavin Hill and Neil Poland were recognized as Leading Individuals and **Dylan Potter** was recognized as a Next Generation Partner. In addition, **Gavin Hill, Neil Poland, Derek Watson, Dylan Potter, John Pearson and Natalie Chung** were Editorially Recommended.



Jeffrey T. Veber named the 2023 Lawyer of the Year in Equipment Finance Law

Vedder Price was recently recognized by *Best Lawyers*® in the 2023 edition of *The Best Lawyers in America*. The Global Transportation Finance team is proud to announce that **Jeffrey T. Veber** was named the 2023 Lawyer of the Year in Equipment Finance Law. Additionally, **John E. Bradley** was recognized in New York in the Admiralty and Maritime Law category, and **Edward K. Gross** was recognized in Equipment Finance Law in Washington, DC. We are also proud to announce that several of the team's associates were recognized in

The Convention's requirements regarding the certificate of judicial sale would substantially alter the process by which the judicial sale of ships is currently practiced in the United States. At present, the court having jurisdiction over the vessel being sold will issue an order of sale, containing the detailed requirements of the sale. The U.S. Marshal conducts the sale and issues a bill of sale to the successful purchaser. The sale is typically "confirmed" by the court that issued the order. There is no separate mandate requiring the court to issue a certificate in the detailed format contemplated by the Convention. Should the Convention eventually become law in the United States, the preparation of the certificate may be delegated to the U.S. Marshal.³⁵

The legal effect of the certificate of judicial sale lies at the heart of the problem that the drafters of the Convention aimed to correct. Under the Convention, a judicial sale for which a certificate of judicial sale has been issued will have "the effect in every other State Party of conferring clean title to the ship on the purchaser."³⁶ In other words, whenever a judicial sale of a ship is conducted in the State of judicial sale, and a proper certificate of judicial sale is issued by the court or other public authority that conducted the sale, the transfer of clean title to the purchaser will be recognized by every other State Party, without more, subject to certain limited exceptions.³⁷ In addition, if requested by the purchaser of the vessel, the registrar "or other competent authority of a State Party" must take certain actions upon presentation of the certificate of judicial sale, including the following:

- Deletion of "any mortgage or *hypothèque* and any registered charge attached to the ship that had been registered before completion of the judicial sale;"³⁸
- Deletion of the ship "from the register" and the issuance of a "certificate of deletion for the purpose of new registration;"³⁹
- Registration of the ship "in the name of the purchaser or subsequent purchaser;"⁴⁰
- Updating the register "with any other relevant particulars in the certificate of judicial sale;"⁴¹ and
- Deletion of the ship "from the bareboat charter register" and issuance of "a certificate of deletion," if applicable.⁴²

To prevent the type of abusive litigation that followed the judicial sale of the AHMET BEY, the Convention provides that if an application to arrest a vessel is made before a court in a State Party, on the basis of a claim "arising prior to a judicial sale of the ship," that application must be denied upon presentation of a certificate of judicial sale.⁴³ Similarly, if a ship is arrested by order of a court in a State party, on the basis of a claim "arising prior to a judicial sale of the ship," the court must order the release of the ship upon presentation of a certificate of judicial sale.⁴⁴

Lastly, the Convention contains an important savings clause which states that the Convention shall not preclude a State from "giving effect to a judicial sale of a ship conducted in another State under any other international agreement or under applicable law."⁴⁵ Moreover, despite its scope, the Convention will not interfere with local procedures for distributing the proceeds of judicial sale or establishing priorities thereto.⁴⁶ Nor will the Convention affect any "personal claim against a person who owned or had proprietary rights in the ship prior to the judicial sale."⁴⁷

D. Final Observations

The Secretary-General of the United Nations is designated as the depositary of the Convention.⁴⁸ Following its adoption by the General Assembly, the Convention will be open for signature by all States on a date in 2023 to be determined.⁴⁹ It will be subject to "ratification, acceptance or approval" by the signatory States and open to accession by all States that are not signatories.⁵⁰ The Convention will enter into force 180 days "after the deposit of the third instrument of ratification, acceptance, approval or accession."⁵¹

The impetus for the Convention is the achievement of comity and cooperation between nations with respect to the legal effects of the judicial sale of a ship conducted in another nation. In this regard, the purposes of the Convention are not dissimilar to those which motivated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958. Given its purposes and legal structure, it is widely expected that the General Assembly will adopt the Convention in early 2023 and that it will be open for signature shortly thereafter.

the "Ones to Watch" category. They include **Jillian S. Greenwald** (Banking and Finance Law and Transportation Law), **Brian D. Wendt** (Transportation Law) and **Nathan M. Telep** (Corporate Law).

Spear's Magazine Recognized Global Transportation Finance Attorneys

Edward K. Gross, Neil Poland and **David M. Hernandez** were recently recognized by *Spear's Magazine* as a part of its "**best aviation and yacht lawyers for high-net-worth individuals 2022 list**." The list includes only 27 attorneys, all of whom have experience with yachts and/or aviation and help their clients avoid pitfalls while fulfilling their obligations throughout the life cycle of these big-ticket items.



Vedder Price Global Transportation Business Aviation Practice and Attorneys Recognized in Chambers High Net Worth Rankings 2022

We are pleased to announce that our Business Aviation practice received recognition of Band 1 for the 7th consecutive year by *Chambers High Net Worth 2022*.

Chambers High Net Worth recognized **Edward K. Gross** as Band 1, **David M. Hernandez** as Band 1 and **Derek Watson** as Band 2 in Global-wide Private Aircraft.



Vedder Price Recognized in Chambers UK 2023

Our UK Global Transportation Finance team was ranked Band 2 in the Asset Finance: Aviation Finance UK-wide category. Additionally, *Chambers UK 2023* recognized **Gavin Hill** as Band 1, **Neil Poland** and **Derek Watson** as Band 3 and **Derek Watson** as Band 4.

Vedder Price Global Transportation Finance

In the United States, the President has the power to make international treaties with the advice and consent of the U.S. Senate, provided that two-thirds of the Senators present concur.⁵² Although the Biden Administration appears to support the Convention, it is presently unclear whether the Senate will consent to it. Nonetheless, the need for the certainty and predictability of result that the Convention aspires to deliver is obvious regardless of whether it is ratified by the United States. However, in the interest of uniformity, if the United States fails to ratify the Convention, consideration should at least be given to appropriate changes to domestic law, whether it be the Supplemental Rules, the CIMLA, or the rules and regulations of the U.S. Coast Guard, to bring judicial ship sale procedures in the United States in line with the notice provisions of the Convention.



John E. Bradley

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26th Annual Chi-Stat Reception

After a long hiatus, Vedder Price was delighted to sponsor once again the 26th Annual Chi-Stat Reception on June 8, 2022. Vedder Price and hosts Greg May, Valkyrie BTO Aviation; Stan Chmielewski, Aircastle Advisor LLC; Nick Popovich, Sage-Popovich, Inc; Dean Gerber, Valkyrie BTO Aviation; Tom Heimsoth, Willow Aviation Services; Gil West, Cruise LLC; Chris Cox, Blue Star Aviation and industry-leading professionals celebrated Chicago's commercial aviation presence and the comeback of a long-standing tradition in our industry.



Vedder Price Ranked by *U.S. News – Best Lawyers 2023*

U.S. News – Best Lawyers, a publication of *U.S. News & World Report*, has ranked Vedder Price and the Global Transportation Finance team. We achieved top-tier status in Equipment Finance Law and Tier 2 in Admiralty & Maritime Law. Additionally, on the Metropolitan level, we received Tier 1 status in Equipment Finance Law in New York City and Washington, DC and ranked Tier 2 in Admiralty & Maritime Law in New York City.



Vedder Price Distinguished in *The Legal 500 United States 2022*

The Legal 500 United States 2022 recognized Vedder Price's Global Transportation Finance team as Top-Tier Firm/Tier 1 in Transport: Aviation and Air Travel – Finance and Transport: Rail and Road – Finance. The group was also recognized as Tier 2 in Transport: Shipping – Finance.

Geoffrey R. Kass and **John T. Bycraft** were honored with the Hall of Fame distinction, which highlights individuals who have received constant praise from their clients for continued excellence for Transport: Aviation and Air Travel – Finance and Transport: Rail and Road – Finance respectively.

John E. Bradley (Transport: Shipping – Finance), **Michael E. Draz** (Transport: Rail and Road – Finance), **Raviv Surpin** (Transport: Aviation and Air Travel – Finance) and **Jeffrey T. Veber** (Transport: Aviation and Air Travel – Finance) were recognized as Leading Individuals.

Clay C. Thomas (Transport: Rail and Road – Finance) was recognized as a Next Generation Lawyer.

Legal 500 also recognized as a Rising Star **Justine L. Chilvers** (Transport: Aviation and Air Travel – Finance).

Editorially Recommended:

Adam R. Beringer
(Transport: Aviation and Air Travel – Finance)

John E. Bradley
(Transport: Shipping – Finance)

Put Option Agreements in Aviation Financing – Additional Considerations for Finance Parties

In the August 2021 edition of the Vedder Price Global Transportation Finance newsletter, the article “*Put Option Agreements In Aviation Financing*”, accessible [here](#), briefly summarized the origins and basic structure of the keepwell put option agreement commonly utilized by finance parties in aircraft financings involving a People’s Republic of China (the “**PRC**”) parent leasing company (the “**PRC Parent**”).

In transactions that utilize keepwell put option agreements, finance parties will typically focus on the financial and credit support undertakings provided by the PRC Parent under the keepwell put option agreement. After all, as addressed in our August 2021 article, the keepwell put option agreement is provided by the PRC Parent in lieu of a parent guarantee. In line with the focus on the PRC Parent’s role, it has become standard practice for finance parties to require sanctions and anti-money laundering undertakings from the PRC Parent in connection with such aircraft financings. However, certain risks associated with potential trade and export control restrictions and attributable to the structure of the keepwell put option arrangement can easily be overlooked by finance parties. This article highlights such risks and suggests a list of questions that the internal compliance and legal teams of finance parties may need to consider in relation to potential trade and export control restrictions when assessing the risks associated with a particular aircraft financing utilizing the keepwell put option arrangement.

In a typical aircraft financing involving a PRC Parent that utilizes a keepwell put option agreement, (i) the PRC Parent (which is considered to be “onshore” for purposes of this article) (A) forms a special purpose company (the “**SPC**”) outside of the PRC (which is considered to be “offshore” for purposes of this article) and (B) owns, directly or indirectly, the shares in the SPC; (ii) the finance parties (which are considered to be “offshore” for purposes of this article) make a loan to the SPC; (iii) the SPC leases the aircraft to an airline (the “**Leasing Arrangement**”); (iv) the SPC grants security over the aircraft and the lease agreement relating to the Leasing Arrangement in favor of the finance parties; and (v) the PRC Parent provides a keepwell put option agreement in favor of the finance parties to support the obligations of the SPC under the aircraft financing.

In the context of aircraft financing, the put option agreement is a keepwell arrangement which allows the security trustee on behalf of the finance parties to require the SPC, as borrower (the “**Borrower**”), to sell, and the onshore PRC Parent to purchase, the financed aircraft following a loan event of default (the “**Purchase Arrangement**”). Using the put option structure with the pretext of purchasing the aircraft, the PRC Parent has an ostensibly legitimate reason to transfer funds to the offshore Borrower, and such funds can in turn be used to satisfy outstanding loans owed under the aircraft financing. Under a purchase option structure, the PRC Parent provides the liquidity support and undertakings to support the offshore aircraft financing by entering into the put option agreement.

Finance parties consider many different aspects when assessing the risks associated with a particular aircraft financing, including, among other things, financial, credit and asset risks. In a particular aircraft financing utilizing the keepwell put option arrangement described above, an often overlooked structural risk exists due to the Leasing Arrangement and the Purchase Arrangement, as both instances may entail a transfer of the aircraft from one jurisdiction to another. Internal compliance and legal teams of finance parties would be prudent to consider trade regulations of the United States and other relevant jurisdictions designed to control the export of certain aircraft products and technologies to certain end users. There are potentially two tiers of transactions that could trigger export restrictions that merit consideration by internal compliance and legal teams: (i) the Leasing Arrangement (i.e., the leasing of the aircraft by the Borrower to the airline) and (ii) the Purchase Arrangement (i.e., the transfer of the aircraft from the SPC to the PRC Parent in the event the put option under the keepwell put option agreement is exercised).

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Joel R. Thielen
(Transport: Rail and Road – Finance)



Vedder Price Recognized in Chambers USA 2022

Chambers USA 2022 ranked the Global Transportation team Band 1 in the category of Transportation: Aviation: Finance, the guide’s highest honor, for the twelfth year in a row. It also ranked the team Band 2 in Transportation: Shipping/Maritime: Finance (Nationwide).

Chambers USA 2022 recognized **Jeffrey T. Veber** (Transportation: Aviation: Finance) as Band 1, **Geoffrey R. Kass** (Transportation: Aviation: Finance) as Band 2, **Adam R. Beringer** (Transportation: Aviation: Finance) as Band 3 and **John E. Bradley** (Transportation: Shipping/Maritime: Finance) as Band 3.

The United States trade regulations, for example, are designed to control the export of certain U.S. products and technologies to certain countries and end users, and also to block U.S. parties from engaging in transactions with sanctioned parties. Through export controls, the United States monitors the export of controlled items — components, technology and technical data — and restricts such export through licensing, where necessary. Sanctions can be used to block certain categories of transactions with certain entities. Further, the U.S. government has designated a list of entities as “military end users” that are subject to enhanced export controls. The United States has a policy of denying applications for licenses to export certain controlled products to military end users, including end users in the PRC.

The export of non-military aircraft is regulated by the Export Administration Regulations (“EAR”), 15 C.F.R. §§ 730 et seq. Aircraft are controlled items, which means the U.S. Commerce Department’s Bureau of Industry and Security (“BIS”) has enumerated restrictions on their export, including, in some instances, licensing requirements. Controlled products are categorized with an Export Control Classification Number (“ECCN”) classification on the Commerce Control List, where the specific licensing requirements and restrictions are listed by ECCN number. If an export license is required, then an application to BIS identifying the parties to the transaction, including the end user and end use, will need to be submitted.

In a typical aircraft financing utilizing the keepwell put option arrangement, it is not unusual (i) for the Borrower to lease a Boeing or Airbus model commercial passenger aircraft to an airline located or habitually based outside of the PRC (the “**Foreign Airline Jurisdiction**”) pursuant to a lease agreement and (ii) for the airline to use and operate the aircraft in the Foreign Airline Jurisdiction and/or internationally. While the facts and circumstances particular to each aircraft financing (e.g., the location of the Foreign Airline Jurisdiction, the identity of the airline, the Borrower’s jurisdiction of incorporation, the proper ECCN classification for the aircraft and leasing of new or used aircraft, among other things) would need to be considered, the SPC is unlikely to be considered the end user of the aircraft in this context initially (after all, it is the airline that uses and operates the aircraft). However, it may be important for internal compliance and legal teams to further consider whether or not the transaction would be permissible if the SPC were the end user. This is because the SPC could terminate the lease with the airline and take possession of the aircraft, thereby possibly becoming an end user itself. Put differently, even if the airline was a low-risk end user under initial assessment of the trade and export control regulations, there is a risk that the parties to this transaction could make a decision that would replace a lower-risk end user with a higher risk end user, in the case where the SPC is an entity subject to trade and export control regulations. Therefore, from a risk standpoint, finance parties should consider whether the SPC could be an end user or a military end user and whether or not trade and export control regulations would apply in this circumstance. As an end user or a military end user, export licenses may be required upon assessment of the relevant trade and export control regulations.

Although the aircraft financing is structured so that the airline will use and operate the aircraft under the Leasing Arrangement, the SPC itself owns and holds title to the aircraft. In the event the Purchase Arrangement occurs (i.e., the finance parties have exercised their put option under the keepwell put option agreement, thereby requiring the PRC Parent to purchase the aircraft from the SPC), the PRC Parent takes title to the aircraft and becomes its owner. From a risk standpoint, the finance parties should consider whether the PRC Parent could be deemed to be an end user or a military end user and, if so, whether trade and export control regulations would apply to the Purchase Arrangement and if export licenses may be required. For example, if trade and export control regulations do apply to the Purchase Arrangement and required licenses are not (or cannot be) procured by the PRC Parent, this raises the query whether the PRC Parent could or would be permitted to pay the purchase price under the keepwell put option agreement. This may materially impact the finance parties’ ability to fully utilize the liquidity and structural support offered by the keepwell put option arrangement.

Likewise, the finance parties would need to consider whether the Purchase Arrangement would trigger a transfer of the aircraft from one jurisdiction (e.g., the Foreign Airline Jurisdiction) to the PRC because that transfer may constitute a re-export subject to the EAR or other similar export control regulations. The potential export of the aircraft from one

November 17, 2022

John E. Bradley will moderate a panel at Marine Money’s 23rd annual November Ship Finance Forum. The panel, “Current State of the Intermodal Container Leasing Industry,” will discuss the container leasing market value over the past few years, and what is expected of it in the future. They will provide valuable insight into the supply and demand factors that drive this dynamic market as well as the financing, management and investment opportunities that the market offers.

November 7 – 9, 2022

Cameron A. Gee presented at the 9th Annual Airline Economics Growth Frontiers Asia Pacific Conference in Singapore. This conference brought together leaders in the aviation industry, from airlines to investors to aviation companies, to network and exchange ideas. Cameron spoke on Current Developments in Aircraft Pre-Delivery Payment Financing Transactions. Additionally, he also participated in the JOL & JOLCO panel.

October 31 – November 2, 2022

Edward K. Gross and **David M. Hernandez** presented at Corporate Jet Investor Miami 2022. Eddie moderated the “General Aviation Manufacturers Association” panel, and David moderated the “Always be closing” panel.

October 25, 2022

Michael E. Draz presented at the 2022 Ishka Aviation Investival: North America. Michael presented on the “INVESTOR PANEL: Aviation compared to other asset classes.” The panel discussed the risk to reward ratios for each asset class, if investors are looking to diversify their portfolios or move away from aviation, the current benefits of investing in aviation, and how long-term the money is in aviation.

<https://newyork2022.ishkaglobal.com/session/Play/4152>

October 9 – 11, 2022

Edward K. Gross participated in the 61st ELFA Annual Convention and was a featured speaker in the breakout session “Changes in Law Mean Business.” He discussed major changes to the UCC affecting equipment finance, the growing trend of state law regarding commercial finance disclosure requirements, federal section 1071 mandates and the growing use of internet data sensors on equipment.

jurisdiction to the PRC in the event the put option under the keepwell put option arrangement is exercised may constitute a re-export to the PRC that could require an export license under relevant trade and export control regulations. Similar to the above, whether or not licenses are required and whether such licenses may not (or cannot) be procured by the PRC Parent, may have a material impact on the finance parties' risk and credit assessment of the aircraft financing.

Therefore, to more fully assess the risks associated with an aircraft financing utilizing a keepwell put option structure, it may be useful for the internal compliance and legal teams of the finance parties to ask the following questions:

- Question #1:** Do the finance parties have any reason to believe that the ultimate end user of the aircraft will be the SPC or the PRC Parent?
- Question #2:** Do the finance parties have any reason to believe that the SPC or the PRC Parent could be considered a military end user?
- Question #3:** Do the finance parties have any reason to believe that an export license will be required?
- Question #4:** Do the finance parties have any reason to believe that the Purchase Arrangement would be considered an export thereby requiring enhanced trade and export control analysis?

While the list of questions above is by no means comprehensive, the internal compliance and legal teams of finance parties are encouraged to at least initially consider these questions in relation to potential trade and export control restrictions that may apply to their aircraft financings utilizing a keepwell put option arrangement. Whether a transaction would be subject to trade and export control regulations tends to be specific to the relevant facts and circumstances particular to that transaction. Therefore, this article is not intended as an in-depth analysis or assessment of trade and export control regulations that may be relevant to a particular aircraft financing keepwell put option arrangement, the SPC or the PRC Parent. However, this article highlights a structural risk often overlooked by finance parties that merits further consideration while assessing the overall risks associated with such aircraft financings.

Internal compliance and legal teams of finance parties are encouraged to consult a member of the Vedder Price Global Transportation Finance and International Trade & Compliance teams for advice regarding trade and export control regulations that may be particular to the facts and circumstances of their transactions.



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Ji Woon Kim participated in the Marine Money Week Asia conference in Singapore. He moderated the panel “Should banks just focus on credit risk and let the industry handle the energy transition?” and led the conversation about whether there is an argument for letting the industry determine the best way forward for energy transition and decarbonization while banks do what they do best and focus on credit risk from clients, collateral and cash flow.

Recording - <https://youtu.be/76-3IECV1IA>

John E. Bradley served as moderator for Capital Link’s 14th Annual New York Maritime Forum. The daylong program provides an interactive platform for investors, financiers, cargo owners and shipowners to discuss the latest developments in the global shipping, energy, commodity, financial and capital markets. John drew on his vast experience to moderate the panel “Global Commerce & Global Supply Chain Challenges.”

Recording - <https://youtu.be/YeYaeHb0F8>

Judicial Sale Of Ships: The Beijing Convention

1. United Nations Information Service Press Release, *UN Commission on International Trade Law concludes 55th Session in New York*, UNIS/L/333 (20 July 2022) (<https://unis.unvienna.org/unis/en/pressrels/2022/unis333.html>). Our former colleague, Francis X. Nolan III, served as a United States delegate and legal advisor to UNCITRAL's Working Group VI, and, before that, as a member of the Comité Maritime International ("CMI") Working Group on Judicial Sale of Ships that originally drafted what has become the Beijing Convention.
2. See 46 U.S.C. §§ 31301 – 31343.
3. Internationally, the courts of many maritime nations are guided by one or more of the major international conventions dealing with maritime liens and the arrest of ships. See International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926; International Convention Relating to the Arrest of Sea-Going Ships, Brussels (May 10, 1952); International Convention on Maritime Liens and Mortgages, 1993; and International Convention on Arrest of Ships, Geneva (March 12, 1999). The United States has not ratified any of these conventions.
4. Under U.S. law, a preferred mortgage "(A) means a mortgage that is a preferred mortgage under [46 U.S.C. § 31322] ...; and (B) also means ..., a mortgage, hypothecation, or similar charge that is established as a security on a foreign vessel if the mortgage, hypothecation, or similar charge was executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register at the port of registry of the vessel or at a central office." 46 U.S.C. § 31301(6).
5. *Id.* at § 31325(a).
6. *Id.* at § 31325(b)(1).
7. *Id.* at § 31326(a).
8. Supplemental Rule C(1)(a)-(b).
9. It is the "primary role and mission" of the Marshal to "obey, execute and enforce" orders of the U.S. district courts. 28 U.S.C. § 566(a).
10. See United States Marshals Service Policy Directives, Admiralty ¶ 11.3.Q (<https://www.usmarshals.gov/sites/default/files/media/document/united-states-marshals-service-policy-directives-service-of-process.pdf>) ("USM Policy Directives").
11. See 46 C.F.R. § 67.77(a) ("When title to a vessel has passed by court action, that passage must be established by copies of the relevant court order(s) certified by an official of the court.").
12. See 46 C.F.R. § 67.263(b). In the case of U.S. documented vessels sold at judicial auction by non-U.S. courts, encumbrances will be removed from the record upon the filing of a "copy of the order from a court of competent jurisdiction certified by an official of the court declaring title to the vessel to be free and clear, or declaring the encumbrance to be of no effect, or ordering the removal of the encumbrance from the record." *Id.* at 263(a).
13. See, e.g., Liberian Maritime Law (RLM-107) § 102 (07/2018).
14. See, e.g., Republic of the Marshall Islands Maritime Act 1990 (MI-107) § 304 (Rev. Oct/2016).
15. The CMI has curated many of these cases and decisions on its website.
16. See *Goldfish Shipping, S.A. v. HSH Nordbank AG*, No. 07-3518, 2008 U.S. Dist. LEXIS 93135 (E.D. Pa. Nov. 3, 2008), *motion to amend denied*, 623 F. Supp. 2d 635 (E.D. Pa. 2009), *affirmed*, 2010 U.S. App. LEXIS 8224 (3d Cir. Apr. 21, 2010).
17. See GTF Newsletter, *Reregistering Vessels After Foreclosure Sale* (October 2011) (<https://www.vedderprice.com/reregistering-vessels-after-foreclosure-sale-10-12-2011>).
18. Convention, Article 1 (*Purpose*).
19. Convention, Preamble.
20. *Id.*
21. According to UNCITRAL, a "private treaty sale" is one that ordinarily results from "arrangements normally between the mortgagee and the prospective purchaser that were approved by the court of judicial sale." See Report of the United Nations Commission on International Trade Law, Section IV.B, at ¶ 31 (Fifty-fifth session 2022).
22. Convention, Article 2(a) (*Definitions*).
23. 28 U.S.C. §§ 2001-2004.
24. Convention, Article 3(1) (*Scope of application*).
25. The expression "State of judicial sale" refers to "the State in which the judicial sale of a ship is conducted." Convention, Article 2(k) (*Definitions*).
26. Convention, Article 4(1) (*Notice of judicial sale*). Local law will also provide "procedures for challenging the judicial sale prior to its completion and determine the time of the sale for the purposes of ... [the] Convention." *Id.*
27. The "repository" is the Secretary-General of the International Maritime Organization "or an institution named by ... [UNCITRAL]." Convention, Article 11 at ¶ 1 (*Repository*).
28. See Convention, Article 4 (*Notice of judicial sale*) and Annex I thereto. The Convention is silent as to whether the State of judicial sale or the party causing the judicial sale of the vessel is responsible, in fact, for the fulfillment of the notice requirements. In circumstances where a certificate of judicial sale cannot be issued for some reason, principles of international comity (which are preserved under the Convention) may always be called upon to protect the interests of interested stakeholders.
29. 46 U.S.C. § 31325(d).
30. See USM Policy Directives ¶ 11.3.2.b, at 10.
31. Convention, Article 5 at ¶ 1 (*Certificate of judicial sale*).
32. *Id.* at ¶ 2.
33. *Id.* at ¶ 3.
34. *Id.* at ¶ 5.
35. As the Convention is considered for ratification by the United States, standing committees of the U.S. Maritime Law Association, such as the Marine Financing Committee and the Committee on Practice and Procedure, are expected to work collaboratively to devise and recommend conforming uniform protocols and requirements.
36. Convention, Article 6 (*International effects of a judicial sale*).
37. A judicial sale of a ship will not have international legal effect in a State Party (other than the State where the judicial sale was conducted) in circumstances where a court in the State Party "determines that the effect would be manifestly contrary to the public policy of that other State Party." Convention, Article 10 (*Circumstances in which judicial sale has no international effect*). This "public policy" approach is not dissimilar to the one taken in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See Article V, section 2(b) (<https://www.newyorkconvention.org/english>).
38. Convention, Article 7 at ¶ 1(a) (*Action by the registry*).
39. *Id.* at ¶ 1(b).
40. *Id.* at ¶ 1(c).
41. *Id.* at ¶ 1(d).
42. *Id.* at ¶ 2.
43. Convention, Article 8 at ¶ 1 (*No arrest of ship*).
44. *Id.* at ¶ 2. The courts of a State of judicial sale are vested with "exclusive jurisdiction" to hear any claim or application seeking to avoid the judicial sale. Convention, Article 9 (*Jurisdiction to avoid and suspend judicial sale*), ¶ 1.
45. Convention, Article 14 (*Other bases for giving international effect*).
46. Convention, Article 15 at ¶ 1(a) (*Matters not governed by this Convention*).
47. *Id.* at ¶ 1(b).
48. Convention, Article 16 (*Depositary*).
49. Convention, Article 1 at ¶ 1 (*Signature, ratification, acceptance, approval, accession*).
50. *Id.* at ¶¶ 2-3. All instruments of ratification, acceptance, approval or accession must be deposited with the depositary. *Id.* at ¶ 4.
51. Convention, Article 21 at ¶ 1 (*Entry into force*).
52. U.S. Constitution, Article II, Section 2.

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Global Transportation Finance

The Vedder Price Global Transportation Finance team is one of the largest, most experienced and best recognized transportation finance practices in the world. Our professionals serve a broad base of clients across all transportation sectors, including the aviation, aerospace, railroad, general equipment and marine industries, and are positioned to serve both U.S.-based and international clients who execute deals worldwide.

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