VedderPrice

Global Transportation Finance Newsletter

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Drafters beware! No assignment clauses vs transfers by operation of law

In *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd*[1], the Court of Appeal found that the transfer of rights to an insurer by operation of Japanese law following the settlement of a claim by the insurer was not invalidated by a prohibition on assignment contained in a sale contract.

Background

On 6 March 2015, Dassault Aviation SA (**"DA"**) and Mitsui Bussan Aerospace Co. Ltd. (**"MBA"**) entered into a sale contract relating to two Falcon maritime surveillance aircraft and certain related supplies and services (the **"Sale Contract"**). The Sale Contract was governed by English law. MBA entered into a sale contract for these aircraft to be onward sold to the Japanese Coast Guard on the same date, which was governed by Japanese law (the **"Sub-Sale Contract"**).

The Sale Contract

Article 15 of the Sale Contract had the heading "Assignment-Transfer" (the **"No Assignment Clause"**) and provided that:

*"this Contract **shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party** and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party."*[2]

The Sale Contract required DA to deliver (i) the first aircraft; (ii) the second aircraft; and (iii) the spares by 31 March, 31 July and during the month of June 2018, respectively, and contained an arbitration clause providing for arbitration under ICC rules with London as the seat.

Japanese Insurance Law and the Policy

Article 25 of the Japanese Insurance Act (Act No. 56 of 2008) (the **"Japanese Insurance Act"**) provides the insured's claim to be transferred to the insurer following settlement of a claim by operation of law once it has made a payment to the insured[3].

This provision is effectively made automatic (unless unfavourable to an insured) by Article 26 of the Japanese Insurance Act, which states that contractual provisions that are incompatible with Article 25 shall be void[4].

MBA and Mitsui Sumitomo Insurance Co Ltd (**"MSI"**) entered into an insurance policy governed by Japanese law (the **"Policy"**) insuring MBA's liability for delay under the Sub-Sale Contract.

Arbitral decision

The aircraft were not delivered until April and May 2019 and the spares were not delivered until February 2020. The Japanese Coast Guard then claimed liquidated damages against MBA for late delivery under the Sub-Sale Contract. Accordingly, MBA claimed under the Policy and MSI accepted the claim and paid out the insurance proceeds to MSI.

In April 2021, MSI issued a request for arbitration against DA under the arbitration clause in the Sale Contract on the basis that MSI's rights under the Sale Contract had transferred to MSI by operation of Japanese law. In response, DA challenged the tribunal's jurisdiction arguing that the No Assignment Clause made any transfer of rights from MBA to MSI void. MSI argued that the No Assignment Clause (as a matter of construction under English law) did not apply to a transfer by operation of law.

The majority of the tribunal found in its partial award on jurisdiction that:

1. the No Assignment Clause did not apply to involuntary assignments and/or assignments by operation of law; and

2. under Japanese law, the transfer of rights from MBA to MSI occurred by operation of law pursuant to Article 25 of the Japanese Insurance Act.

DA then submitted a claim to set aside the tribunal's partial award under section 67 of the Arbitration Act 1996 which was heard by the High Court (Commercial Court) in November 2022.

NEWS

Welcome Hoyoon Nam

We are pleased to announce the addition of attorney **Hoyoon Nam** as a new Shareholder in the firm's New York and London offices, further strengthening our global presence. His experience will be instrumental in supporting our clients' complex financing needs and navigating the intricate legal landscapes of the maritime industry, particularly in the firm's expansion of the already robust maritime finance team that spans across the globe, including London, Singapore and New York.

Vedder Price Strengthens Global Transportation Finance Team with New Partner and Shareholder Appointments

We are delighted to announce two significant advancements within our Global Transportation Finance team, underscoring our commitment to excellence and our continued growth in this dynamic sector.

John Pearson, a seasoned Solicitor in our London office and a valued member of the Global Transportation Finance team, has been approved for admission as a Partner at Vedder Price LLP. In addition, we are proud to announce that **Simone Riley** has been elevated to Shareholder from Associate in our Los Angeles office, where she is a dedicated member of the Global Transportation Finance team. Please join us in congratulating John and Simone on their well-deserved promotions and in wishing them continued success in their new roles.

Commercial Court decision

In November 2022, Cockerill J considered DA's application in the Commercial Court.

DA's position was that the No Assignment Clause invalidated and rendered ineffective Article 25 of the Japanese Insurance Act on the basis that:

1. the No Assignment Clause was broadly worded and contained specific and express exceptions. The rationale behind the clause was based on the parties' concerns regarding confidentiality and therefore only wanting to work with persons known to and chosen by them; and
2. under the circumstances, including MBA's choice to purchase insurance which no one required and that MBA did not seek permission from DA, the transfer was a voluntary transfer by MBA rather than by operation of law.

Cockerill J allowed DA's challenge, finding in DA's favour on the two key issues:

1. **Authorities –** the case authorities did not establish a general rule regarding all transfers by way of operation of law and were therefore confined to their facts. However, Cockerill J did find the authorities drew a key distinction between involuntary/voluntary transfers and found that, with the multiple options open to MBA to avoid the transfer, the triggering of Article 25 of the Japanese Insurance Act was caused by voluntary acts by MBA.

2. **Interpretation of the No Assignment Clause –** Cockerill J saw this as a "more important"[5] issue and found that the wording of the No Assignment Clause was broad and pointed to a general application. She took into account the public policy issue that an English law subrogation would not have fallen foul of the No Assignment Clause but a transfer under the law of another jurisdiction did as well as considering the commercial context. Despite this, Cockerill J was most heavily convinced by the strict interpretation of the provision and that the transfer shouldn't be permissible simply because it arises in the context of insurance.

Court of Appeal Decision

In December 2023, Vos MR's judgment (supported by Coulson LJ and Phillips LJ) reversed the Commercial Court ruling and reinstated the tribunal's partial award.

Vos MR found that the wording in the No Assignment Clause was clear and there was no need to rely on the detailed process of interpretation despite agreeing with Cockerill J that the commercial context was important and noted that the Sale Contract (at Articles 23.1.5 and 25.3) envisaged the parties taking out insurance and that presumably it was envisaged that (notwithstanding their confidentiality obligations) parties would satisfy their disclosure obligations to their insurers. Vos MR concluded that it was "far from clear"[6] that the No Assignment Clause was intended to apply to transfers arising from insurance payouts regardless of the governing law of such insurance contracts.

Instead, the interpretation hinged on the wording "by any Party" in the No Assignment Clause and whether the transfer of MBA's claims against DA to MSI was ***by*** MBA, finding that the transfer was instead by an operation of law and occurred outside the voluntary control of MBA.

Next steps

This Court of Appeal judgment provides some useful considerations for parties when drafting "no assignment clauses" in contracts. The importance of clear and unambiguous drafting cannot be understated. Vos MR's judgment is based primarily on the "clear"[7] wording in the No Assignment Clause, with the judge explaining it was an "essential point"[8] that he did not think the words of the No Assignment Clause were "ambiguous or unclear"[9].

The Court of Appeal ultimately did not determine if an English law subrogation would have been caught by the No Assignment Clause.

This decision should be considered to have a narrow application where the judgment was based primarily on a clearly drafted "no assignment clause" which was not able to nullify a transfer strictly by an operation of law, which was in this case under the Japanese Insurance Act.

Steven Green
Associate
+1 44 (0) 20 3667 2855
sgreen@vedderprice.com

Vedder Price Announces 2024 2L Diversity & Inclusion Scholarships

Vedder Price is pleased to announce that Gregory Miller and Kierran Orr, second-year law students at Howard University School of Law and the University of Chicago Law School, respectively, have been named as recipients of the firm's 2024 2L Diversity & Inclusion Scholarships. Gregory will work primarily within the firm's Global Transportation Finance practice in the Chicago office. He received his undergraduate degree from the State University of New York at Plattsburgh where he made the Dean's List six times and was a member of Sigma Tau Delta English honor society and Omicron Delta Kappa honor society. Kierran will also work within the firm's Global Transportation Finance practice in the Chicago office. Kierran received his undergraduate degree *summa cum laude* from Arizona State University where he was awarded the ASU Seed Scholarship and the SUN Award. To learn more about the Vedder Price Diversity & Inclusion Scholarship Program, click here.

HONORS & AWARDS

Airline Economics

Vedder Price Recognized in *Airline Economics'* 100 Deals of the Year 2023 in Global Aviation.

The Global Transportation Finance team is proud to share its key involvement in two transactions listed on *Airline Economics'* 100 Deals of the Year 2023 in Global Aviation.

Bank Financing Deal of the Year

The firm was awarded Bank Financing Deal of the Year for advising SKY Leasing LLC. The transaction included raising a new $1.2 billion debt warehouse facility to support the company's latest aviation fund, SKY Fund VI. The fund is a continuation of SKY Leasing's investment program designed to help airlines modernize their fleets. The team advising SKY Leasing included Shareholders Raviv Surpin, Clay Thomas and Simone Riley of the Los Angeles office.

Mergers & Acquisitions Finance Deal of the Year

Vedder Price was also awarded for its representation in the Mergers & Acquisitions Finance Deal of the Year. The firm represented Class A Lenders – Mizuho Bank, Ltd. and Sumitomo Mitsui Banking Corporation in a $920 million acquisition financing facility for affiliates of PK AirFinance and Apollo Global Management. The majority of the secured

Maritime Cases to Watch: Second Circuit Decision in *American Cruise Lines v. United States,* No. 22-1029, 2024 U.S. App. LEXIS 6233 (2d Cir. Mar. 15, 2024)

On Friday, March 15, 2024, the United States Court of Appeals for the Second Circuit affirmed the 2022 decision of the United States Maritime Administration ("**MARAD**") that the charter (lease) of the 386-passenger U.S.-documented river cruise vessel VIKING MISSISSIPPI from her owner, River 1, LLC, a citizen of the United States ("**River 1**"), to her charterer (lessee), Viking USA LLC ("**Viking**"), a non-citizen, is a time charter permitted by the Shipping Act of 1916, 46 U.S.C. § 56101 *et seq.* (the "**Shipping Act**"), and MARAD's standing blanket approval of time charters at 46 C.F.R. § 221.13.

The pending case in *American Cruise Lines v. United States*[1] was the subject of an article, *Maritime Cases to Watch: American Cruise Lines v. United States, No. 22-1029 (2d Cir. Mar. 6, 2022),* that appeared in the July 2023 edition of this Newsletter. Please click here to read that article.

The Second Circuit's decision in *American Cruise Lines* was in response to a petition by American Cruise Lines, Inc. ("**ACL**"), a Viking competitor, requesting that the Second Circuit vacate (annul) or remand (require MARAD to reconsider) MARAD's decision on the grounds that the decision was "arbitrary and capricious, without evidence to support key findings, and contrary to law."[2] The core of ACL's argument is the distinction between a vessel time charter, in which the owner of the chartered vessel is in control of the vessel, and a bareboat charter, in which control rests with the charterer.[3] ACL argued that the Viking charter transfers too much control over VIKING MISSISSIPPI to her non-citizen charterer,[4] Viking, which would be typical of a bareboat charter not qualifying for the standing blanket approval at 46 C.F.R. § 221.13, and leaves insufficient control with her citizen owner, River 1, to qualify as a time charter and the standing blanket approval.

Had the Second Circuit decided to annul the decision, Viking, a non-citizen and wholly owned subsidiary of global river cruise giant Viking Cruises (Switzerland) AG,[5] would have been effectively prohibited from competing with ACL in the rapidly growing U.S. river cruise business using the arrangement between River 1, as owner, and Viking, as charterer.[6]

The decision is significant for the owners and non-citizen charters of U.S. documented vessels because of its interpretation of what constitutes impermissible non-citizen control of a U.S. documented vessel for the purposes of the Shipping Act and similar U.S. federal maritime statutes, including the Passenger Vessel Services Act and the Jones Act.

Non-Citizen Control of Vessels in U.S. Coastwise Trade

One of the purposes of the Shipping Act and U.S. coastwise laws such as the Passenger Vessel Services Act and the Jones Act is to ensure that vessels engaged in U.S. coastwise trade, including the transportation of passengers and merchandise between ports and points in the United States, always remain under the control of U.S. citizens so they may be available as a naval or military auxiliary for the national defense of the United States or national emergencies.[7]

The Passenger Vessel Services Act of 1886, as amended, provides that, with limited exceptions, "a vessel may not transport passengers between ports or places in the United States . . . unless the vessel . . . is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade"[8] and satisfies certain other requirements, including, in most cases, having been built in the United States.[9] For a corporation or a partnership, or by extension, a limited liability company like River 1 or Viking, to be a "citizen of the United States" for purposes of engaging in U.S. coastwise trade, including the transportation of passengers between ports or places in the United States, at least 75% of the controlling interests in the corporation, partnership or limited liability company must be owned by citizens of the United States.[10]

The citizenship of River 1 and Viking was never in dispute in *American Cruise Lines*. Rather, the dispute was whether the Viking charter transfers an impermissible amount of control of VIKING MISSISSIPPI from her owner, River 1, which ACL did not dispute is a citizen, to her charterer, Viking, which Viking conceded,[11] and none of the parties appeared to dispute, is not a citizen.

Section 9 of the Shipping Act of 1916, as amended, provides that, with certain exceptions, "a person may not, without the approval of the Secretary of Transportation [in this case acting through MARAD] sell, lease, charter, deliver, or in any other manner transfer, . . . to a person not a citizen of the United States, an interest

aviation loans within the portfolio were acquired from Standard Chartered Bank. Shareholders Jeffrey Veber and Clay Thomas, alongside Associate Alexandra Davidson, of the Global Transportation Finance team played a significant role in the success of the transaction. For more information on the award-winning deals, visit *Airline Economics,* here.

MARINE MONEY

Vedder Price Receives "Securitization Deal of the Year" Recognition from *Marine Money*

Vedder Price is pleased to announce it has been recognized by Marine Money in connection with its 2023 Ship Finance Deal of the Year Awards. The firm received "Securitization Deal of the Year" honors for its work as lead counsel to Maritime Partners, LLC, a private maritime leasing and finance company primarily focusing on vessels operating under the Jones Act, in connection with a term securitization transaction involving the Rule 144A issuance of $235.3 million of vessel notes secured by a portfolio of 316 United States-flagged, coastwise (Jones Act) qualified inland barges and towboats. The team advising Maritime Partners in the deal included John Imhof Jr. and Clay Thomas. The listing of Vedder Price's award recognition and those of all other winners can be found here.

Texas Super Lawyers RISING STARS

Vedder Price Attorneys Recognized in *Thomson Reuters* 2024 Texas Super Lawyers: Rising Stars

We are pleased to announced that Nathan Telep, an Associate in our Dallas office, has been recognized on *Thomson Reuters* 2024 Texas Super Lawyers Rising Stars list by *Super Lawyers Magazine*.

in or control of [a U.S.-] documented vessel owned by a citizen of the United States . . . ."[12] MARAD has granted standing blanket approval for time charters of U.S.-documented vessels from citizens to non-citizens,[13] but bareboat charters of vessels engaged in U.S. coastwise trade to non-citizens are excluded from the standing blanket approval[14] because, as was argued by ACL, a bareboat charter would in such cases transfer too much control of the chartered vessel from the citizen owner to the non-citizen charterer.[15]

Neither Arbitrary Nor Capricious

But to affirm MARAD's ruling, and deny ACL's petition to vacate or remand the ruling, the Second Circuit did not need to agree with MARAD's ruling, but needed only find that the ruling was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"[16] or in more simple terms, unreasonable. An agency's decision is arbitrary and capricious only if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[17]

Ignoring ACL's other claims, including that MARAD did not follow the proper procedure when giving the public notice of its proposed decision and an opportunity to comment on it, the Court was obligated to affirm the MARAD decision unless the Court found it to be, in effect, unreasonable.

The Second Circuit found against ACL on its other claims and affirmed MARAD's decision on the grounds that it was neither arbitrary, nor capricious, nor an abuse of discretion, nor otherwise not in accordance with the law. In her opinion for the Court, Judge Myrna Pérez wrote that, on the facts presented to the Court, the Court "cannot not say that MARAD's final decision was arbitrary and capricious. MARAD conducted a careful, fact-intensive analysis of the proposed agreement between River 1 and Viking and applied blackletter maritime law and analogous regulations to reach a reasonable conclusion: that the agreement constituted a time charter subject to the 46 C.F.R. § 221.13 standing blanket approval and that the [charter] would not result in an impermissible transfer of control to a foreign corporation."[18]

Consistent with a Time Charter

To reach this finding, the Second Circuit examined the distinctions between a bareboat charter and a time charter. "Under a time charter, the charter engages for a fixed period of time a vessel, which remains manned and navigated by the vessel owner, to carry cargo [or, in this case, passengers] wherever the charterer instructs. By contrast, the fundamental characteristic of a . . . bareboat charter is the shifting of the exclusive possession and control of the chartered vessel from the owner to the charterer during the charter period."[19]

A typical vessel time charter is in many respects like hailing a taxi or ordering a car service. The charterer (passenger) pays charter hire (fare) and instructs the vessel owner (driver) where to go, but the vessel owner (driver) operates and is at all times in control of the vessel (taxi). A typical vessel bareboat charter is more like a rental car agreement. The charterer (rental car customer) still pays charter hire (rent) to the owner of the vessel (rental car company), but the charterer (customer) is also responsible for operating and is in control of the vessel (rental car).

The Court noted that the Viking charter "does not grant Viking exclusive possession and control of the cruise ship in any way that blackletter maritime law recognizes as sufficient to create a bareboat charter. . . . River 1 is responsible for providing the crew for the ship, and River 1's 'vessel master' will oversee the ship's operations."[20] Although the charter gives Viking the ability to remove the vessel master (captain), Viking's ability to do so only in the context of unsatisfactory performance and River 1's right to name replacement masters are sufficient to establish that MARAD had not acted unreasonably in deciding that Viking's ability to remove the master does not result in an impermissible transfer of control to Viking.[21] The Court also noted that "River 1 bears primary responsibility for the ship's day-to-day maintenance and care,"[22] the vessel master's "power to decline any Viking request that she deems unreasonable or determines could create a safety risk,"[23] and "Viking's ability to set the itinerary"[24] as being consistent with the maritime law definition of a time charter.

No Improper Transfer of Control to a Non-Citizen

Turning to MARAD's own regulations, the Court noted that, "[a]lthough it has done so with respect to some other Jones Act provisions, MARAD has not promulgated regulations for evaluating whether a charter of a *passenger* vessel to a non-citizen represents an impermissible transfer of control,"[25] so for additional authority to support its decision, MARAD looked to regulations it had promulgated under the American Fisheries Act (the "**AFA**"), which imposes similar citizenship restrictions on the ownership and control of certain U.S.-flagged commercial fishing vessels.[26] These regulations set forth two kinds of indicia of the impermissible transfer of control of a of U.S.-flagged commercial fishing vessel: absolute or *per se* indicia, each of which by itself is deemed to be an impermissible transfer of control,[27] and contributing indicia, which in combination with other elements of non-citizen involvement, may be deemed to be impermis-

ishka

Vedder Price Recognized in *Ishka* 2023 Deal of the Year Award Winners

The firm held a key role in two transactions awarded in *Ishka's* 2023 Deals of the Year list, providing legal advisory in two of the largest client transactions recognized by the organization this year.

Best MEA Deal of the Year

Vedder Price represented Macquarie AirFinance in the transaction awarded Best MEA Deal of 2023 for the acquisition and financing of over 50 aircraft from ALAFCO Aviation Lease and Finance Company K.S.C.P. The team advising Macquarie AirFinance in the deal included Geoffrey Kass, Cameron Gee, Andrew Harris, Jonathan Edgelow, John Pearson, Joshua Alexander and Justine Chilvers.

Best Commercial Bank Deal of the Year

Vedder Price represented Aero Capital Solutions in the transaction awarded Best Commercial Bank Deal of 2023, a partial recourse term loan financing arranged by Deutsche Bank to finance 35 midlife aircraft owned by investment funds managed by Aero Capital Solutions. The transaction featured term loan-style financing terms for an initial identified pool of aircraft as well as warehouse-style financing terms for a blind pool of aircraft to be financed via a built-in accordion. The team advising Aero Capital Solutions included Adam Beringer, Mark Ditto, Jillian Greenwald, Jeffrey Landers II, Nathan Telep and Matthew Larvick.

The LEGAL 500

Vedder Price Singapore Distinguished by *The Legal 500 Asia Pacific* 2024

The Legal 500 Asia Pacific 2024 has recognized Vedder Price Singapore in Asset Finance: Foreign Firms. It was ranked in the practice group ranking: Singapore Asset Finance: Foreign Firms as **Tier 3** and Shareholders Ji Kim and Geoffrey Kass were **Editorially Recommended**.

sible control.[28] ACL argued that the Viking charter contains not only individual provisions that constitute separate absolute or *per se* impermissible transfers of control, but other provisions that taken together, also amount to an impermissible transfer of control.[29] As evidence of the absolute or *per se* impermissible transfer of control to Viking, ACL focused on the charter provisions requiring Viking to absorb certain operating costs and business risks,[30] and again on the charter provisions permitting Viking to remove the vessel master.[31] As additional evidence of impermissible control, ACL pointed to contributing indicia in a number of charter provisions,[32] including those requiring Viking to prepay charter hire that ACL argued enabled River 1 to advance funds for the construction of VIKING MISSISSIPPI.[33]

The Court was not persuaded by these arguments, finding MARAD's analysis of the *per se* and contributing indicia "reasonable and well supported,"[34] and noting that the Court "cannot say MARAD erred notwithstanding these arguments."[35] The Court found that "MARAD reasonably found that that the liability and operating costs were distributed between [River 1 and Viking] in a manner that did not vest Viking with an impermissible level of control,"[36] "River 1 retains the exclusive authority to appoint an independent substitute vessel manager"[37] even if Viking removes the vessel master, and MARAD had not relied on and was entitled not to apply[38] MARAD's own regulations in deciding that Viking's prepayment of charter hire did not constitute an impermissible transfer of control to Viking.

On the basis of these findings and its interpretation of the blackletter law distinctions between bareboat and time charters, the Court ruled that MARAD had not acted arbitrarily or capriciously in deciding that the Viking charter is a time charter, but in her opinion for the Court, Judge Pérez noted that the Court was not suggesting that, "as a matter of law, charter arrangements such as [the Viking charter] are *per se* legal under the Passenger Vessel Services Act of 1886, the Shipping Act of 1916, or other Jones Act provisions."[39] Instead, the Court "merely conclude[d] that, based on the record before it, MARAD did not act in an arbitrary and capricious manner in confirming that this particular arrangement constituted a valid time charter and was not an impermissible transfer of control of a vessel to a non-citizen."[40]

The Impact of American Cruise Lines on U.S. Coastwise Trade

The industry most obviously affected by MARAD's 2022 ruling and the subsequent decision of the United States Court of Appeals for the Second Circuit in *American Cruise Lines* is the U.S.-flag cruise industry. Viking is not the only cruise company owned and controlled by parent companies and investors that are not citizens of the United States, and it is almost certainly not the only non-citizen cruise company with an interest in the U.S.-flag cruise market. These non-citizen cruise companies will likely see the Second Circuit's decision in *American Cruise Lines* as creating an opportunity to expand their operations to the United States using charter arrangements similar to the one between River 1 and Viking.

The decision may also open other U.S. coastwise markets to competition from outside of the United States. The most likely competitors are non-citizen operators in specialized coastwise industries that, like the river cruise industry, are heavily dependent on or driven by brand recognition or expertise other than in vessel navigation. Offshore wind energy might be one such industry, although most of the vessels used in that industry will still need to be built in the United States, and be owned by and remain under the control of citizens of the United States. A significant barrier to entry to the construction of U.S. coastwise-eligible wind turbine installation vessels ("**WTIVs**"), in addition to the uncertain demand for these vessels, has been the limited number of U.S. shipyards with the ability to build these vessels and the very high cost of building these vessels in the United States. Non-citizen owners with years of accumulated experience and expertise in the operation of non-U.S.-flagged WTIVs and other offshore wind energy installation and maintenance vessels may now be able to charter similar U.S.-built vessels from U.S. owners and use that experience and expertise to take market share from U.S. operators.

It also remains to be seen whether MARAD will stick to its guns and decide that similar or more aggressive charter arrangements are time charters qualifying for its standing blanket approval at 46 C.F.R. § 221.13. MARAD might also use the opportunity to clarify what constitutes a permissible transfer of control of vessels engaged in Passenger Vessel Services Act, Jones Act and other coastwise trades by promulgating new regulations expanding on those already applicable to U.S.-flagged commercial fishing vessels.

The impact of *American Cruise Lines* may not yet be fully known, but will likely be felt across the U.S. coastwise shipping industry for years to come.

John Imhof Jr.
Shareholder
+1 (212) 407 6984
jimhof@vedderprice.com

Recent Speaking Engagements

April 18, 2024

Kevin MacLeod and **Conor Gaughan** spoke at the 2nd Annual Aircraft Financing and Investment Opportunities Roundtable, hosted by Aeropodium at the Vedder Price office in Miami, Florida. The event included the segment "Legal Issues" led by Kevin and Conor.

April 16, 2024

Ji Kim moderated the discussion "Charting Corporate Strategy in a Transforming World" at the 6th Annual Capital Link Singapore Maritime forum, hosted at the Fairmont Singapore. The panel discussed how the corporate strategy of the maritime sector has been impacted by regulatory, geopolitical and environmental factors.

March 20, 2024

Hoyoon Nam moderated the discussion panel on "The Evolving Landscape of Ship Finance" at the 18th Annual Capital Link International Shipping Forum. To listen to the full discussion on maritime finance matters with Hoyoon and his industry colleagues, visit the link.

March 14, 2024

Ji Kim presented at the Airline Economics Growth Frontiers Korea event in Seoul, South Korea. He moderated the panel "Commercial Aviation Banking & Finance" where he led a conversation about the industry amongst his peers.

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC

On February 21, 2024, the U.S. Supreme Court (the "**Court**") decided on *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC.*[1] The Court held that choice-of-law provisions in maritime contracts are presumptively enforceable under federal maritime law with limited exceptions that were not applicable in this particular case.

Raiders Retreat Realty Co., LLC ("**Raiders**"), a Pennsylvania limited liability company, insured a yacht for up to $550,000 with Great Lakes Insurance SE ("**Great Lakes**"), a German insurer headquartered in the United Kingdom.[2] The underlying insurance contract had a choice-of-law provision, selecting United States federal admiralty law and, where such federal admiralty law did not exist, New York law. In June 2019, the yacht ran aground in Florida. Raiders submitted a claim to Great Lakes, but Great Lakes denied coverage asserting that Raiders breached the insurance contract by failing to maintain the yacht's fire-suppression system.[3]

Great Lakes sued Raiders in the United States District Court for the Eastern District of Pennsylvania. Great Lakes asked the District Court for a declaratory judgment that Raider's negligence in upkeeping the yacht's fire-suppression system rendered the policy void. Raiders raised several counterclaims based on Pennsylvania law. The District Court dismissed those counterclaims, finding that the policy's choice-of-law provision required the application of New York law.[4]

Raiders argued that there is no established federal maritime rule governing the enforceability of choice-of-law provisions. Raiders claimed that the Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[5] precludes a uniform federal presumption of enforceability for choice-of-law provisions in maritime contracts, and that federal courts should assess choice-of-law provisions under state law.[6] The Court rejected this argument stating that *Wilburn Boat* did not involve a choice-of-law provision, but *Wilburn Boat* simply determined that state law applied as a gap-filler in the absence of a uniform federal maritime rule on a warranty issue in a marine insurance contract.[7]

The issue before the Court was whether choice-of-law provisions in maritime contracts are unenforceable if enforcement would conflict with "strong public policy" of the state whose law is displaced.[8] In order to answer this question, the Court quickly addressed the issue of whether there exists an established federal maritime rule regarding the enforceability of choice-of-law provisions in maritime contracts.[9] The Court determined that long-standing precedent[10] establishes a federal maritime rule that choice-of-law provisions in maritime contracts are presumptively enforceable and that the narrow exception to the presumption did not apply to the case before it. These narrow exceptions exist (i) when enforcing the choice-of-law provision would contravene a controlling federal statute or would conflict with an established federal maritime policy; or (ii) when parties have no reasonable basis for the chosen jurisdiction.[11]

Raiders wanted the Court to recognize an additional exception to the presumptive enforceability that the Court found lacked "historical roots."[12] Raiders asserted that the choice-of-law provision should not be enforced where the law of the designated state contravenes "strong public policy" of the state with the greatest interest in the dispute.[13] The Court found that this approach proposed by Raiders would result in disuniformity and uncertainty.[14] The Court also disagreed with Raiders's argument that the choice-of-law provision was unenforceable under the Court's ruling in *The Bremen v. Zapata Off-Shore Co.*,[15] which held that under federal admiralty law, a forum-selection provision should be held unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought" referring to conflicts between federal maritime law and a foreign country's law.[16] The Court found that *Bremen* did control, but Raiders's interpretation of *Bremen* was incorrect. *Bremen* was referring to "the possibility of a conflict between federal maritime law and a foreign country's law,"[17] and state law was not relevant to the *Bremen* decision.

A choice of law provision identifying the law that will apply in adjudicating claims brought under the contract is not given much attention until there is a dispute but it can have a material impact on how a contract is interpreted and enforced, especially where the parties to a contract are from different jurisdictions. *Great Lakes v. Raiders* solidifies the maritime rule that choice-of-law provisions in maritime contracts are presumptively valid and enforceable. The Court's decision compels courts to prioritize uniformity of law[18] over state sovereignty in cases where federal maritime laws and rules are well-established.

March 13, 2024

John Pearson recently moderated a discussion at the Ishka: Aviation Finance event, "ESG: Evolution, Implementation & Disclosure." Visit the link below to hear from John and his industry colleagues.

March 12, 2024

Bill Gibson served as moderator of the discussion panel "Deal or No Deal: Traditional vs. Alternative Lenders" hosted by Ishka: Aviation Finance at the "Investing in Aviation: Europe" event. To listen to the full discussion on the aviation finance industry, visit the link below.

February 16, 2024

David Hernandez spoke at the 11th USCAS US Corporate Aviation Summit. David led a panel discussion entitled "Purchase and Sale of Corporate Aircraft: Planning, Executing and Challenges for 2024." Vedder Price serves as a Platinum Sponsor of the event and hosted the event at our Miami office.

February 5 – 7, 2024

Edward Gross spoke at the Corporate Jet Investor (CJI) London 2024 conference. Eddie moderated the session "It's all about the money – jet finance 2024" where he led the conversation on how higher interest rates will affect borrowers.

February 1, 2024

John Pearson played a leading role in the Airline Economics conference focused on Sustainable Aviation Fuel and Carbon Finance in Dublin. John was not only a key organizer of this groundbreaking event but also a distinguished panel moderator and conference co-host. As a key organizer, he worked tirelessly to ensure that this event stood out as a crucial platform for discussions on sustainable aviation practices and innovative carbon finance solutions.

DEAL SPOTLIGHT

01

Vedder Price Represents Windstar Cruises in Significant Cruise Ship Transaction

Vedder Price is pleased to announce it recently represented Windstar Cruises in connection with its purchase of two new all-suite Star Class ships. This marks a significant acquisition for Windstar, a leader in the small ship luxury cruising sector.

Shareholder Hoyoon Nam led the firm's efforts in the transaction, along with law clerk Erin Gormley in the New York office and Partner Dylan Potter and Solicitor Niovi Antoniou in the London office, showcasing the firm's jurisdictional reach and expert capabilities in the broader maritime space.

02

Vedder Price is pleased to announce it acted as U.S. legal counsel to Hafnia Limited in connection with its successful secondary listing on the New York Stock Exchange (NYSE).

With a market capitalization of approximately $4 billion, Hafnia Limited has been listed on the Oslo Stock Exchange since April 2020. Hafnia Limited decided to add a secondary listing on the NYSE to achieve a number of objectives including: (i) broadening its investor base, (ii) enhancing the company's access to international capital markets, (iii) providing new investors with increased access to Hafnia's commercial performance and proven track record of shareholder returns and (iv) generating increased value for its shareholders through additional trading liquidity. Shareholder Anthony Renzi led the team that also included Shareholder John T. Blatchford and Associates Juliette M. Todd and Sam Esclavon.

03

Vedder Price Represents Crestone Air Partners in Significant Aircraft Portfolio Acquisition

Vedder Price is pleased to announce it represented Crestone Air Partners, a full-service aviation asset management platform, in the acquisition of 11 Boeing 757-300 aircraft. This transaction was funded with equity from Crestone and Atalaya Capital Management, an existing joint venture partner since 2021. The Vedder Price legal team included Shareholder Mark J. Ditto and Associates Daniel M. Cunix and Kevin M. Maedomari.

04

Vedder Price Represents Macquarie AirFinance in ALAFCO Portfolio Acquisition

Vedder Price is pleased to announce that it represents Macquarie AirFinance in connection with the acquisition of an additional portfolio of 23 aircraft from ALAFCO Aviation Lease and Finance Company K.S.C.P. This is in addition to representing Macquarie AirFinance in relation to its existing agreement with ALAFCO to purchase 52 aircraft, taking the total number of aircraft that Macquarie AirFinance intends to acquire from ALAFCO to 75. This additional portfolio is currently leased to 10 airlines located in nine countries. It consists of predominantly new technology commercial passenger aircraft and will help expedite Macquarie AirFinance's fleet transition to newer technology through the addition of more fuel-efficient models to lower the average carbon emissions intensity of its overall fleet. Completion of the transaction is expected in Q2 2024. The Vedder Price legal team on the transaction includes Shareholders Geoffrey R. Kass, Cameron A. Gee and Justine L. Chilvers, Partner John R. Pearson and Solicitor Joshua Alexander. This deal won Best MEA Deal of the Year award in ISHKA's 2023 Deal of the Year Award.

05

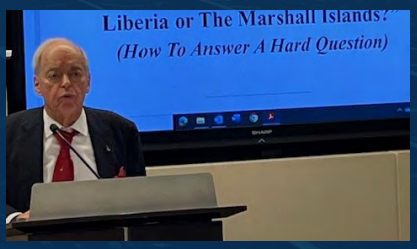
Vedder Price Represents JetSMART in SLB with New Lessor

Vedder Price represented JetSMART, a South American ultra low-cost carrier, in connection with the delivery of its first A320neo from German Operating Aircraft Leasing (GOAL). As part of this transaction, three additional A320neo and two A321neo will be delivered during 2024 and 2025. The Vedder Price legal team consisted of Neil Poland in London and also included solicitors Esha Nath, Joshua Alexander and Sarah Yeow.

EVENT HIGHLIGHTS

Global Registry Insights: A Conversation with Clay Maitland

Vedder Price received exclusive insights from the operator of the Marshall Islands Ship and Corporate Registry this past February in New York. In an enlightening exchange, Clay Maitland of International Registries, Inc., the esteemed operator behind the Marshall Islands Ship and Corporate Registry, shared his perspectives with the Vedder Price New York office. The discussion delved into the intricacies and future direction of open registries and what it means for international maritime law and global commerce.



Endnotes

Drafters beware! No assignment clauses vs transfers by operation of law

1. *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2024] EWCA Civ 5.
2. Emphasis added.
3. Article 25, Japanese Insurance Act (Act No. 56 of 2008).
4. Article 26, Japanese Insurance Act (Act No. 56 of 2008).
5. *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2022] EWHC 3287 (Comm), 121, 65.
6. *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2024] EWCA Civ 5, 11.
7. Ibid, 28.
8. Ibid, 11.
9. Ibid.

Maritime Cases to Watch: Second Circuit Decision in *American Cruise Lines v. United States,* No. 22-1029, 2024 U.S. App. LEXIS 6233 (2d Cir. Mar. 15, 2024)

1. *Am. Cruise Lines v. United States*, No. 22-1029, 2024 U.S. App. LEXIS 6233 (2d Cir. Mar. 15, 2024).
2. Brief for Petitioner (Redacted) at 3, Am. *Cruise Lines v. United States*, 2024 U.S. App. LEXIS 6233, No. 22-1029 (2d Cir. Mar. 15, 2022).
3. *See* Brief for Petitioner (Redacted) at 25–26, and Redacted Brief for Respondents at 13–16, *Am. Cruise Lines v. United States*, No. 22-1029 (2d Cir. Mar. 15, 2024).
4. *See* Brief for Petitioner (Redacted) at 25.
5. *See* Brief for Intervenor Viking USA LLC in Support of Respondents (Redacted), *Disclosure Statement, Am. Cruise Lines v. United States*, No. 22-1029 (2d Cir. Mar. 15, 2024).
6. *See Am. Cruise Lines*, 2024 U.S. App. LEXIS 6233, at *4–5.
7. *See*, *e.g.*, 46 U.S.C. App. § 861, Purpose and Policy of the United States, which provides that the main purpose of the Merchant Marine Act of 1920 (the Jones Act) is to develop and encourage the maintenance of "a merchant marine . . . sufficient to carry the greater portion of [U.S.] commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States."
8. 46 U.S.C. § 55103(a)(1).
9. *See id*. §§ 55103(a)(2), 12103(a) and 12112(a).
10. *See id.* § 50501(a)–(d).
11. *See* Brief for Intervenor Viking USA LLC in Support of Respondents (Redacted) at 1, *Am. Cruise Lines v. United States*, No. 22-1029 (2d Cir. Mar. 15, 2024).
12. 46 U.S.C. § 56101(a)(1)(A)(i); *see also* 46 C.F.R. § 221.11(a)(1).
13. *See* 46 C.F.R. § 221.13(a)(1).
14. *See id.* § 221.13(a)(1)(iii).
15. *See* Brief for Petitioner (Redacted) at 1–9, *Am. Cruise Lines v. United States*, No. 22-1029 (2d Cir. Mar. 15, 2024) (citing 55 Fed. Reg. 14040, 14046 (Apr. 13, 1990)).
16. *See* Am. *Cruise Lines v. United States*, No. 22-1029, 2024 U.S. App. LEXIS 6233, at *5 (2d Cir. Mar. 15, 2024) (quoting *Alzokari v. Pompeo*, 973 F.3d 65, 70 (2d. Cir. 2020)).
17. *Id.* at *5–6 (quoting Alzokari, 973 F.3d at 70).
18. *Id*. at *7–8.
19. *Id*. at *8 (quoting *Nissho-Iwai Co. v. M/T Stolt Lion*, 617 F.2d 907, 914 (2d Cir. 1980), and *Blanco v. United States*, 775 F.2d 53, 57–58 (2d Cir. 1985); citations and internal quotation marks omitted).
20. *Id*. at *9.
21. *See id*. at *10.
22. *Id*. at *10.
23. *Id*.
24. *Id*. at *11.
25. *Id*.
26. *See* American Fisheries Act of 1998, 46 U.S.C. § 12113 *et seq*.
27. *See* 46 C.F.R. § 356.11(a).
28. *See id*. § 356.11(b).
29. *See* Brief for Petitioner (Redacted) at 12–13, *Am. Cruise Lines v. United States*, No. 22-1029 (2d Cir. Mar. 15, 2024).
30. *See id.* at 12 (quoting 46 C.F.R. § 356.11(a)(8), which lists a non-citizen "absorb[ing] all of the costs and normal business risks associated with the ownership and operation of" a vessel as an absolute indication of the impermissible transfer of control of the vessel to the non-citizen).
31. *See id.* (quoting 46 C.F.R. § 356.11(a)(3), which lists a non-citizen's "right to direct the . . . operation, or manning" of a vessel as an absolute indication of the impermissible transfer of control of the vessel to the non-citizen).
32. *See id.* (quoting 46 C.F.R. §§ 356.11(b)(2), (5)–(7)).
33. *See id.* at 12 – 13 (referencing both a non-citizen providing the start-up capital for an owner on less than an arm's-length basis as described in 46 C.F.R. § 356.11(b)(6), and similar non-citizen advances described in another MARAD AFA regulation at 46 C.F.R. § 356.45(a), as indicia of impermissible control).
34. *Am. Cruise Lines v. United States*, No. 22-1029, 2024 U.S. App. LEXIS 6233, at *12 (2d Cir. Mar. 15, 2024).
35. *Id*. at *13.
36. *Id*. (in response to ACL's argument relating to operating costs and business risks).
37. *Id*. at *14 (in response to ACL's argument relating to Viking's ability to remove the vessel master).
38. *See id.* (referencing the deference the Court is obliged to give MARAD in the reasonable interpretation of MARAD's own regulations).
39. *Id*. at *17.
40. *Id*. at *17–18. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 601 U.S. 65, 144 S. Ct. 637 (2024).

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC

1. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 47 F.4th 225 (3d Cir. 2022), *cert. granted in part sub nom. Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 143 S. Ct. 999, 215 L. Ed. 2d 137 (2023), and *rev'd*, 601 U.S. 65, 144 S. Ct. 637 (2024).
2. *Id*.
3. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 521 F. Supp. 3d 580 (E.D. Pa. 2021), *vacated and remanded*, 47 F.4th 225 (3d Cir. 2022), *rev'd*, 144 S. Ct. 637 (2024).
4. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).
5. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 601 U.S. 65, 144 S. Ct. 637 (2024).
6. *Id*.
7. *Id*.
8. *Id*.
9. *See Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 458 (1889); *See also,* The Kensington, 183 U.S. 263, 269 (1902). Courts of Appeals have held that choice-of-provisions in maritime contracts are presumptively enforceable under federal maritime law. *See Great Lakes Ins. SE v. Wave Cruiser* LLC, 36 F. 4th 1346, 1353–54 (11th Cir. 2022); *Great Lakes Reins.(UK) PLC v. Durham Auctions, Inc.*, 585 F. 3d 236, 242–43 (5th Cir. 2009); *Triton Marine Fuels Ltd., S. A. v. M/V Pacific Chukotka,* 575 F. 3d 409, 413 (4th Cir. 2009); *Chan v. Soc'y Expeditions, Inc*., 123 F. 3d 1287, 1296–97 (9th Cir. 1997); *Milanovich v. Costa Crociere, S.p.A.*, 954 F. 2d 763, 768 (D.C. Cir. 1992).
10. *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 144 S. Ct. 637, 646 (2024).
11. *Id*. at 647.
12. *Id*.
13. *Id*.
14. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).
15. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 601 U.S. 65, 144 S. Ct. 637, 647 (2024) (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. at 15).
16. *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, LLC, 601 U.S. 65, 144 S. Ct. 637, 647 (2024).
17. The uniform federal "presumption of enforceability for choice-of-law provisions in maritime contracts facilitates maritime commerce by reducing uncertainty and lowering costs for maritime actors." Id. at 643.

Global Transportation Finance Team

Chicago

Shareholders

John Bycraft ..... +1 (312) 609 7580
Mark Ditto ..... +1 (312) 609 7643
Michael Draz ..... +1 (312) 609 7822
Geoffrey Kass, Chair ..... +1 (312) 609 7553
James Kilner ..... +1 (312) 609 7516
Theresa Peyton ..... +1 (312) 609 7612
Joel Thielen ..... +1 (312) 609 7785

Counsel

Daniel Barlin ..... +1 (312) 609 7669

Associates

Daniel Cunix ..... +1 (312) 609 7628
Ciara Davenport ..... +1 (312) 609 7554
Conor Gaughan ..... +1 (312) 609 7620
Jillian Greenwald ..... +1 (312) 609 7633
Jeffrey Landers II ..... +1 (312) 609 7664
Kevin Maedomari ..... +1 (312) 609 7732
Anne Marshall, Ph.D. ..... +1 (312) 609 7796
John Munyon ..... +1 (312) 609 7645
Christine Nie ..... +1 (312) 609 7577
Brian Wendt ..... +1 (312) 609 7663

Dallas

Shareholders

Adam Beringer ..... +1 (312) 609 7625

Associates

Troy Guglielmo ..... +1 (469) 895 4777
Caleb Ohrn ..... +1 (469) 895 4787
Muhammad Sohail ..... +1 (469) 895 4773
Nathan Telep ..... +1 (469) 895 4827

London

Partners

Bill Gibson ..... +44 (0)20 3667 2940
Gavin Hill ..... +44 (0)20 3667 2910
John Pearson ..... +44 (0)20 3667 2915
Neil Poland ..... +44 (0)20 3667 2947
Dylan Potter ..... +44 (0)20 3667 2918
Derek Watson ..... +44 (0)20 3667 2920

Solicitors

Joshua Alexander ..... +44 (0)20 3667 2850
Niovi Antoniou ..... +44 (0)20 3667 2927
Fraser Atkins ..... +44 (0)20 3667 2943
Natalie Chung ..... +44 (0)20 3667 2916
Jack Goold ..... +44 (0)20 3667 2934
Steven Green ..... +44 (0)20 3667 2855
Esha Nath ..... +44 (0)20 3667 2935
Andrew Rabet ..... +44 (0)20 3667 2931
Sarah Yeow ..... +44 (0)20 3667 2917

Los Angeles

Shareholders

Simone Riley ..... +1 (424) 204 7757
Raviv Surpin ..... +1 (424) 204 7744
Clay Thomas ..... +1 (424) 204 7768

Counsel

Ayn Moldave ..... +1 (424) 204 7790

Associates

Gabriela Demos ..... +1 (424) 204 7710
Cody McDavis ..... +1 (424) 204 7737
Sophia Sahagún ..... +1 (424) 204 7738
Adam Winkel ..... +1 (424) 204 7778

New York

Shareholders

Justine Chilvers ..... +1 (212) 407 7757
Cameron Gee ..... +1 (212) 407 6929
John Imhof Jr. ..... +1 (212) 407 6984
Kevin MacLeod ..... +1 (212) 407 7776
Hoyoon Nam ..... +1 (212) 407 6990
Christopher Setteducati ..... +1 (212) 407 6924
Jeffrey Veber ..... +1 (212) 407 7728

Counsel

Amy Berns ..... +1 (212) 407 6942

Associates

Brendan Catalano ..... +1 (212) 407 7793
Alexandra Davidson ..... +1 (212) 407 7646
John Geager ..... +1 (212) 407 7642
Megan Hardy ..... +1 (212) 407 7748
Kayla Mistretta ..... +1 (212) 407 7772

Singapore

Shareholder

Ji Woon Kim ..... +65 6206 1310

Associates

Benavon Lee ..... +65 6206 1335
Mie Miura ..... +65 6206 1318
Kris Podkonski ..... +65 6206 1319
Greg Whillis ..... +65 6206 1316

Washington, DC

Shareholders

Edward Gross ..... +1 (202) 312 3330
David Hernandez ..... +1 (202) 312 3340

Associates

Noah Brown ..... +1 (202) 312 3331
Sandy Chen ..... +1 (202) 312 3012
Francisco Koishi Ishino ..... +1 (202) 312 3326

VedderPrice

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.