

TYPES NOT MAPPED YET October 13, 2016 | TTR not mapped yet | Marjorie F. Krumholz

Developments in aircraft and marine finance for 2016

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As is the case with other transportation assets, the legal considerations for aircraft and vessel finance providers (FPs) include an amalgam of state, federal and international laws. Summarized below are some of the more noteworthy recent legal developments.

Aircraft Finance

FAA Accepts Digital Signatures. Effective April 1, 2016, the Federal Aviation Administration (FAA) Registry began accepting printed duplicates of electronic documents displaying legible digital signatures as meeting the signature requirements of Parts 47 and 49. These documents include an application for aircraft registration Form 8050-1 (the online version, available on the FAA website), aircraft bill of sale AC Form 8050-2, security documents, conditional sale contracts, leases and other filing documents. What constitutes the “minimum components” (including samples) of an acceptable digital signature are identified in a related FAA Change Bulletin. However, much of the digital signature software, including the samples in the Bulletin, include the date on which the electronic signature was applied to the document, and it might also reference the location of the electronic signatory. Having a conflict between the signature date and closing date could create commercial, tax, regulatory and liability/insurance concerns. There are also a number of other practical issues that still remain unresolved.

FP NOTE: Eliminating the requirement for “blue ink” signatures should add some efficiencies to the closing process after these issues are ultimately sorted out among the Oklahoma City Bar, title companies and the FAA Registry.

EPA Addresses Greenhouse Gas—CAO Pending. On July 25, 2016, the Environmental Protection Agency (EPA) issued a long-expected finding that aircraft greenhouse gas (GHG) emissions endanger health and the environment. This finding represents the EPA's initial step in regulating aviation GHG emissions, to be followed in the coming months by issuance of an aviation GHG standard and regulations for aircraft operated in U.S. territory and airspace. The regulations are likely to cover all aircraft types. However, it remains to be seen how the forthcoming EPA regulations will compare with the international aircraft carbon dioxide emissions standard determined earlier this year by the International Civil Aviation Organization (ICAO). The ICAO standard is expected to be presented, along with the framework for a global market-based emissions trading and reduction mechanism, for approval at the ICAO's upcoming general assembly in late September 2016. It is also unclear whether (or how) compliance between U.S. and international standards will dovetail.

FP NOTE: These national and international standards could have an impact on operational, asset value and liability considerations.

FP Safe Harbor—Limited Progress. The “Safe Harbor” Advocacy Legislation proposal (i.e., amending 49 U.S.C. §44112) was included in the version of the FAA authorization passed by the Senate but was not included in a related House bill. On July 15, 2016, the House and Senate passed a different FAA bill that is basically an extension of current policy with a few safety-related provisions attached, effective until September 30, 2017. As a result of that extension, proponents of the Safe Harbor provision will need to restart efforts in 2017 to attempt to get the provision through Congress before September 30 next year.

FP NOTE: Lessors and other passive interest holders remain vulnerable to certain liability risks attributable to perceived gaps in this statute.

UAS Operation/Certification. On June 21, 2016, the FAA released the long-awaited final text of Part 107 of the Code of Federal Regulations (CFR) concerning the Operation and Certification of Small Unmanned Aircraft Systems (UAS or, more commonly, “drones”). Part 107, which became effective August 29, is intended to allow and govern routine, restricted commercial use within visual line-of-sight of small drones weighing less than 55 pounds. The FAA reauthorization bill (referenced herein) also addressed UAS-related matters and is contemplating further rulemaking and agency action.

FP NOTE: Although the referenced regulations and law may ultimately facilitate the commercial use of these assets, there is still great uncertainty regarding the practical aspects of operating UAS for commercial purposes in compliance with these requirements. FPs must consider the related uncertainties, including potential liability and collateral value and lien priority considerations.

Vessel Finance

Capetown Protocol for Vessels. UNIDROIT has raised again the possibility of a Protocol of the Cape Town Convention for the perfection of security interests in ships. To date, there are three protocols – for aircraft, rolling stock and space assets – and UNIDROIT is currently working on a fourth protocol for mining, agricultural and construction equipment. Although the original discussions surrounding the adoption of the Cape Town Convention included ships, they were dropped due to the existence of international maritime organizations that established international rules governing ships and because of concerns that a protocol would conflict with a newly drafted international convention on maritime liens and mortgages. While UNIDROIT has assigned a low priority to a feasibility study for this protocol, ships are not off the table.

The maritime community, including the Comité Maritime International (CMI), the international organization of national maritime law associations, has long resisted the adoption of a protocol for ships as an unnecessary intrusion into long-standing internationally recognized methods of perfecting security interests in ships. UNIDROIT’s renewed interest, however, prompted the CMI to establish a working group to study ship financing practices around the world. The question of whether a protocol would be beneficial to the ship financing community has been brought into greater focus in the past year because of a case in Brazil in which the court did not recognize a ship mortgage on a Liberian flagged vessel. Among the reasons the court gave for its decision was that Liberia was not a party to the international convention on ship mortgages adopted by Brazil.

While the case is still under appeal, the lower court’s decision sent shock waves through the ship financing community. The case calls into question whether a lender secured by a U.S.-flagged vessel could enforce remedies in Brazil since the United States is also not a party to the international convention.

Definition of Vessel. What objects are considered “vessels” under maritime law is still an open question. U.S. law provides that a “vessel” includes “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” The U.S. Supreme Court attempted to create an objective definition of a “vessel,” most recently in *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). The CMI has also formed a working group to study the definition of “vessel” to determine if a uniform definition could be developed. For the time being, providers of ship financing to such objects as offshore production platforms that are registered as vessels should continue to perfect their security interests using all available methods.

Inspection of Towing Vessels. The major regulatory development in 2016 was the adoption by the Coast Guard of regulations requiring the inspection of towing vessels. The regulations apply to all U.S.-flagged towing vessels (with limited exceptions) and go into effect for existing vessels on July 20, 2018. Financing sources for towing vessels should become familiar with these regulations and, if applicable, understand how their customers are meeting the requirements.

Margie Krumholz is a Partner at Thompson Coburn LLP. Edward K. Gross is a Shareholder at Vedder Price P.C. Both are co-chairs of the Air, Rail, Marine Subcommittee of the ELFA Legal Committee. Special thanks to Jordan Labkon, Shareholder at Vedder Price P.C., for his contributions to the EPA/greenhouse gas summary.

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Marjorie F. Krumholz